No. 02-35691

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

BLAINE COUNTY, MONTANA,

Defendants-Appellants

and

JOSEPH F. MCCONNELL, et al.,

Defendant-Intervenors

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose the Appellants' request for argument.

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. 1345 and 42 U.S.C. 1973j(f). Blaine County filed timely notices of appeal of the district court's March 21, 2002, and June 17, 2002, orders. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

ISSUES PRESENTED

1. Whether §2 of the Voting Rights Act, 42 U.S.C. 1973, is appropriate enforcement legislation.

2. Whether the County's at-large method of electing commissioners violates §2 of the Voting Rights Act.

3. Whether the district court properly admitted the United States' experts' testimony.

STATEMENT OF THE CASE

A. *Proceedings Below*

1. On November 16, 1999, the United States sued Blaine County, Montana, *et al.*, alleging that the at-large method of electing the County's Board of Commissioners resulted in American Indian citizens having less opportunity than white citizens to participate in the political process and to elect representatives of their choice in violation of §§2 and 12(d) of the Voting Rights Act, 42 U.S.C. 1973 and 1973j(d) (R.1).[1] The United States sought declaratory and injunctive relief (R.1).

2. On February 28, 2001, eight American Indian residents and voters of Blaine County moved to intervene (R.26). The district court denied intervention, stating that proposed intervenors would not be foreclosed from seeking intervention post-judgment (R.51). This Court affirmed the denial of intervention (R.120).

3. On January 31, 2001, the County moved for summary judgment, arguing that §2 of the Voting Rights Act was unconstitutional (R.23). The County's motion

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[1] "R.__" refers to the record number of the items listed in the district court's docket sheet. "Br. __" refers to pages in the County's brief. "RE.__" refers to pages of the record excerpts filed with the County's brief. "USRE.__" refers to pages of the United States' record excerpts.

was denied (R.56). *United States* v. *Blaine County*, 157 F. Supp. 2d 1145 (D. Mont. 2001).

4. A bench trial was held between October 9 and 18, 2001 (R.73-81). During the trial, the County objected to the testimony of the United States' three expert witnesses. Dr. Theodore Arrington testified for the United States about political cohesion and racial polarization in voting (RE.158). The County conceded that Arrington was "well qualified" but objected to his methodologies and data (RE.158). At the end of Arrington's testimony, the United States moved to admit U.S. Exhibits 1-21. The district court stated:

> THE COURT: We have had, of course, various objections. I think that [Arrington] has testified foundationally to all of the Exhibits 1 through 2[1] * * *. [O]ther than the objections that have already been asserted, any foundational objection, Mr. Detamore?
>
> MR. DETAMORE: No foundational objection with regard to any exhibits that have been offered.
>
> THE COURT: * * * Then I will reserve ruling on receiving them until I have a chance to review the full argument. * * *

(RE.217). The United States responded to the County's objections in its post-trial briefing (R.71 at 85-87, 92-97).

The County objected to the admission of testimony and report of Dr. Frederick Hoxie on the history of official discrimination against American Indians (RE.295). The County did not object to Hoxie's qualifications (RE.295), but did object to the admission of evidence on the history of discrimination (RE.295). The district court overruled the objection, permitted Hoxie to testify (RE.296), and

admitted exhibits containing various state statutes and enactments (RE.298-300, 1642-1684). The district court overruled other subsequent objections (RE.299-300, 303-305, 310-311, 316). The United States also responded to these objections in its post-trial brief (R.71 at 61-69).

The County objected to Dr. Daniel McCool's report on the political participation of American Indians (RE.344-345). At the end of trial, the County restated its objection and the district court instructed the County to address its objections in its post-trial briefing (RE.1278).

5. On March 21, 2002, the district court declared that the County's at-large election method for commissioners violated §2 of the Act, enjoined the County from its future use, and ordered the submission of a remedial plan (R.100, 101).

The County's remedial proposal divided the County into three districts and gave each district one commissioner (see R.109). Each commissioner serves a six year term with staggered elections; District 1 has a majority American Indian voting age population (87.19%), and elected a commissioner in 2002, and Districts 2 and 3 have majority white voting age populations and will elect commissioners in 2004 and 2006 respectively (*ibid.*). The district court adopted the plan on June 17, 2002, and the County does not challenge that portion of the district's order.

6. On April 2, 2002, proposed intervenors, American Indian residents, again moved to intervene (R.102, 103), and the district court granted intervention for purposes of the remedy phase of the trial (R.106, 114).

7. On September 20, 2002, Delores Plummage, an American Indian, won the Democratic primary for a seat on the County Commission representing the new District 1, and advanced to the November general election unopposed. Plummage took office on January 1, 2003.[2]

B. *District Court's August 1, 2001 Decision Rejecting The County's Argument That §2 Is Unconstitutional*

The district court held that §2 of the Voting Rights Act is a "valid exercise [] of congressional authority," *Blaine County*, 157 F. Supp. 2d at 1150, finding that §2 was congruent to the harm Congress sought to remedy. "When adopting the [Act], Congress had before it an extensive record of voting discrimination against minorities," including "ample evidence that American Indians have historically been the subject of discrimination." *Id*. at 1152. The district court also held that §2 is "proportional to the harm" as it "does not require that districts be drawn so that minorities are guaranteed representation," but "merely requires that they be given an equal chance at electing minority representatives only after they have shown that discriminatory results are present as a result of suspect voting procedures." *Ibid.*

C. *Facts*

1. *Geography And Population*

Blaine County, Montana, is 4,638 square miles and has a population of 7,009 persons, with 52.6% white and 45.4% American Indian (U.S. Exhs. 27, 28;

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[2] See www.discoveringmontana.com/maco/Counties/BLAINE.htm.

RE.1564). The voting age population of 4,722 persons is 59.4% white and 38.8% American Indian (U.S. Exhs. 27, 28; RE.159).

The Fort Belknap Reservation, located in the southeast quadrant of the county (RE.1564), was created in 1888 as a permanent home for the Assiniboine and Gros Ventre Tribes (USRE.209; Tr. 14-15). The Reservation has a population of 1,262 persons (95.64% American Indian) and a voting age population of 735 persons (93.9% American Indian).

Chinook, the county seat and largest city, has a population of 1,386 persons, with 91.3% white and 6.3% American Indian. Chinook's voting age population is 92% white and 6.04% American Indian. Harlem, north of the Fort Belknap Reservation and about 21 miles east of Chinook (RE.1564), has a total population of 848 persons (52.6% white and 42.6% American Indian), and a voting population 59.3% white and 36.9% American Indian.

2. *County Government*

The Blaine County Board of Commissioners consists of three members who run from residency districts but are elected at-large (R.1 at 2). The six-year terms are staggered; one commissioner is elected every two years.

Prior to this lawsuit, no American Indian had ever served on the Board of Commissioners (RE.728). While the County has maintained an at-large system, Montana law permits local governments to change the method for electing county commissioners (Mont. Code Ann. §§7-3-171 to 7-3-193 (2002); RE.721-722), and requires counties to institute a charter study every ten years as to the local form of

government (Mont. Const. §9, Convention notes; RE.713-714).

3. *Evidence Of Compactness, Political Cohesion, And Bloc Voting In Blaine County*

The district court heard evidence from U.S. expert Dr. Theodore Arrington and County expert Dr. Ronald Weber as to the preconditions set out in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986).

a. *Compactness*

Both experts agreed that the American Indian population in Blaine County is sufficiently large and geographically compact to form a district in which American Indians constitute a population or voting age population majority (USRE.81; RE.1307-1309).

b. *American Indian Voting Cohesion And Racial Polarization*

1. *Testimony Of U.S. Expert Dr. Theodore Arrington*

Arrington testified that cohesive voting exists where 67% or more of a racial minority group votes for the same candidate or for candidates of its racial group over white candidates (RE.160-161; USRE.17-18). Arrington examined 14 County Commission elections conducted between 1982 and 1998 and found that American Indian voters voted cohesively for the same candidates in 100% of these elections (USRE.1A, 1B, 23, 36).[3] Arrington also analyzed American Indian voting patterns

[3] Both Arrington and Weber utilized ecological retrogression and homogenous precinct analyses in assessing voting patterns. Ecological retrogression analysis "compares, graphically and statistically, the votes for minority candidates in each precinct with the racial composition of that precinct." Grofman, Handley & Niemi, *Minority Representation and the Quest for Voting*

in 19 elections for Harlem School Board involving American Indian and white candidates, and found that American Indian voters were cohesive in 100% of these elections as well (RE.169, 205, 212; USRE. 37-40). Arrington testified that the voting patterns of American Indian voters in these elections "reinforce" his observation that American Indians vote cohesively, and "that Indians overwhelmingly appear to prefer to be represented by an Indian" (RE.169; see also RE.205, 212).[4]

Arrington testified that the two sets of elections that are most important to examine for purposes of assessing racial polarization are a) seven County-wide elections involving American Indian candidates – two Democratic primary elections for County Commission and five exogenous County-wide elections; and b) five County Commission Democratic primary elections (both American Indian versus white and white versus white candidate contests) (U.S. Exh. 1; RE.162, 165-168, 169).[5] Less important elections are County Commission general elections,

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Equality (Cambridge Univ. Press 1992) at 84-93 (see also USRE.12-13; RE.176; U.S. Exhs. 11, 12). Homogenous precinct analysis looks at racially homogeneous precincts, determines "the actual percentages of the votes cast for the candidates in the homogenous precincts," and "provide[s] a check on the ecological regression estimates" (USRE.14-15). The two methods are not intended to produce the same figures, but instead confirm the regression estimates (USRE.15).

[4] The source of data for Dr. Arrington's analyses came from County voter registration lists (RE.179-180, 188).

[5] Arrington testified that 19 exogenous Harlem School Board elections are also relevant to vote dilution because they involved American Indian and white candidates for office, and shed light on the cohesion of American Indian voting patterns in the County (RE.163, 205). For example, this election data revealed that

because these races involved only white candidates, and American Indian and white voters voted overwhelmingly for Democratic party candidates in these elections (U.S. Exh. 1; RE.163-164). Exogenous general elections involving only white candidates are less important for the same reason (U.S. Exh. 1; RE.164).

Arrington analyzed two County Commission elections involving American Indian and white candidates (RE.162). In 1986, American Indian Christine Main ran against seven white candidates in the Democratic primary and received 75% of American Indian votes but only 1% of white votes and came in last (USRE.41; RE.165-166). In 1990, American Indian Wesley Main ran against two white candidates in the Democratic primary. Main received 98% of American Indian votes but only 4% of the white vote and came in last (USRE.42; RE.165-166).

Arrington examined five exogenous elections involving American Indian and white candidates (RE. 162). In 1992, American Indian Loren Stiffarm ran against one white candidate in the Democratic primary for state representative and received 94% of the American Indian vote, but lost when his opponent received 83% of the white vote (USRE.43; RE.167). In 1994, American Indian Bert

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American Indian voters in Fort Belknap voted cohesively for the same candidates in each of the 19 elections, while voters in Harlem (with a majority white voting age population (p. 6, *supra*)), consistently preferred other candidates (USRE.37-40; RE.212). Arrington testified that Harlem School Board elections are more probative than, for example, presidential or gubernatorial elections that exclusively involved white candidates, because the school board elections further reveal American Indian and white voter preferences between American Indian and white candidates (RE.169, 214).

Corcoran ran against one white candidate in the Democratic primary for state representative and received 93% of the American Indian vote, but lost when his opponent received 83% of the white vote (USRE.44; RE.167). In 1998, American Indian Timothy Rosette ran against two white candidates in the Democratic primary for state representative and received 84% of the American Indian vote, but lost because 96% of white voters voted for one of the two white candidates (USRE.45; RE.167).

In 1996, American Indian Bill Yellowtail won against three white candidates in the Democratic primary for the United States House of Representatives after receiving 79% of the American Indian vote and 50% of the white vote; he won the general election against the Republican candidate with 98% of the American Indian vote and 32% of the white vote (USRE.46-47; RE.167).

Arrington examined three races involving only white candidates in Democratic primary races for County Commission (RE.163), and found that between 87% and 100% of American Indian voters voted for the same candidate. Despite these high levels of support, the American Indian-preferred candidate lost in two races.[6]

Arrington concluded that of the seven County-wide elections where

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[6] In 1994, 100% of American Indian voters voted for Shawn Nelson, who lost to Arthur Kleinjan, who received 75% of white votes (USRE.48). In 1996, 87% of American Indian voters voted for Vic Miller, who won after also receiving 37% of white votes (USRE.49). In 1998, 89% of American Indian voters voted for Curtis Moxley, who lost to Don Swenson, who received 71% of the white vote (USRE.50).

American Indian candidates competed against white candidates – elections most probative of racially polarized voting – the American-Indian candidate was defeated in five (or 71%) of these elections (USRE,1A, 1B; RE.162, 164-167, 169). Arrington also concluded that in five county commission primary elections – also probative of polarized voting in this case – the American Indian preferred candidate was defeated in four (or 80%) of these elections (USRE.1A, 1B; RE.162, 169).[7] Based on his analysis of County elections, Arrington concluded that American Indian voters in the County are always cohesive, prefer American Indian candidates over white candidates (USRE.28; RE.201), and that white voters usually vote as a bloc against American Indian-preferred candidates (USRE.28-29). Arrington concluded that American Indian candidates are not successful because of white voters' racial bloc voting (USRE.29; RE.168-169, 201, 212).

2. *Testimony Of County's Expert Dr. Ronald Weber*

The County's expert, Dr. Ronald Weber, testified that cohesion exists where at least 60% of voters in a racial group support a candidate (RE.235, 1326). Weber also testified that whether American Indians vote cohesively depends on their turnout (RE.231), and that vote dilution analysis requires a finding of cohesive voting at this 60% benchmark by *both* minority *and* nonminority groups in support of *different* candidates (RE.234-235; 1325-1326). In Weber's evaluation of these

[7] Two of the five elections in this second set of County Commission primary elections analyzed by Arrington are included in the first set of County-wide elections involving American Indian and white candidates (RE.164-165).

elections he gave equal weight to contested and uncontested elections, and the same weight to white candidate-only elections as to races involving minority candidates (RE.245). Weber acknowledged that Democratic primary elections are highly probative of polarized voting and that Democrats dominate County politics (RE.280-281).

Using census data (RE.220), Weber evaluated 16 County Commission primary and general elections (eight contested and eight uncontested), held between 1986 and 2000 (RE.1327-1328), and reported that American Indian voters voted cohesively in 100% of these County Commission elections (RE.1327-1329). Weber asserted, however, that these elections were not racially polarized because in the eight contested elections white voters did not vote cohesively at his 60% benchmark (RE.1327-1328).

Weber also evaluated 134 exogenous elections for county, state and national offices from 1986 to 2000, including 65 elections for county office, 39 elections for state office, and 30 elections for national office (RE.1328, 1334-1342, 1355-1358, 1368-1371). Weber reported that American Indian voters were cohesive in 127, or 95%, of these exogenous elections (RE.1383). Weber reported, based on the prerequisites for polarization that he employed in his analysis (pp. 11-12, *supra)* – which the district court ultimately rejected – that 24, or 17.9%, of these exogenous elections were racially polarized (RE.1385).

4. *History Of Indian And White Relations In Montana And Blaine County*

United States expert Dr. Frederick Hoxie testified about the historical relationship between state and County officials and American Indians, and laws that facilitated discrimination against American Indians (USRE.129-194; RE.293). He reported that the Gros Ventre and Assiniboine people of the modern Fort Belknap Reservation are descendents of Native Americans indigenous to the Northern Plains region (USRE.131). The discovery of gold in Montana marked a period of rapid settlement into the state, creating conflicts with resident tribes (USRE.138 & n.25). White territorial residents urged destruction of the tribes (USRE.139), leading to a number of territorial proclamations and statutes that discriminated against Native Americans, including laws limiting jury service to white male citizens and taxpayers, and prohibiting the creation of an election precinct within an Indian reservation[8] (RE.298-299). An 1887 agreement between the Indians and the United States opened the region to white settlement in an effort by white residents to reduce Indian land-holdings (USRE.143; RE.300). Dr. Hoxie testified that the Fort Belknap Agency was established permanently in 1874 (RE.300).

Dr. Hoxie reported that after Montana became a state in 1889, a number of statutes were passed reflecting white residents' desire to separate themselves from the Indians (USRE.145). In 1897, the State Attorney General ruled that reservation

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[8] USRE.139; RE.1646-1647. The ban on setting up precincts on Indian reservations was not repealed until 1941. See USRE.162-163; RE.1676.

residents could not vote unless they were government employees and owned a home elsewhere in the state (USRE.146). Dr. Hoxie testified that in 1899, the Montana legislature called for federal legislation to prohibit Indians from leaving reservations (RE.305, 1653).

Dr. Hoxie reported that in 1912, the State Attorney General declared that an individual who takes part in tribal affairs and receives tribal funds may not vote in general or school elections (USRE.146). In 1919, the state legislature prohibited the creation of an election district within the boundaries of an Indian reservation (RE.1671). Dr. Hoxie testified that a 1903 law, not repealed until 1953, limited the personal freedom of Indians by prohibiting "[a]ny Indian" from carrying "any pistol, revolver, rifle or other fire arm, or any ammunition for any fire arm" beyond reservation boundaries (RE. 307, 1660, 1684).

There was significant conflict between Indians on Fort Belknap and local white residents over water rights (RE.1669). In 1908, even though the United States Supreme Court in *Winters* v. *United States*, 207 U.S. 564 (1908), upheld the Indians' water rights from encroachment by white residents (USRE.150-153), local white residents continued efforts to block water availability to local American Indians (USRE.152-154).

Dr. Hoxie testified that Blaine County was organized in 1912, and Congress approved the Fort Belknap allotment in 1921 that made American Indians in Blaine County citizens (RE.309-310; USRE.158). Dr. Hoxie stated that under the allotment, the land on the reservation was divided among the Fort Belknap Indian

residents, who were issued trust patents for the property that restricted the sale of the allotments and exempted the American Indian residents from property taxes (RE.310; USRE.158). Dr. Hoxie reported that County residents opposed the extension of citizenship status to Fort Belknap residents (USRE.160).

Dr. Hoxie reported that when American Indians became citizens there was public concern in Montana about their eligibility and interest in voting (USRE.162; see also U.S. Exh. 51). Dr. Hoxie testified even though the State Attorney General declared in the spring of 1924 that Indians could vote, barriers continued to be placed on that right (RE.303). Dr. Hoxie reported that a 1932 state law required that only "a taxpayer whose name appears upon the last preceding completed assessment roll" could vote on referendums concerning the creation of levies, debts or liabilities (RE.1673; see also USRE.162 & n.112). Dr. Hoxie testified that taxpayer status was also required to vote in elections affecting school bonds (RE.306, 1678-1679, 1681-1682), and road and irrigation districts (RE.306, 1651, 1655-1656, 1665). Dr. Hoxie stated further that American Indians who did not pay property taxes were barred from voting in school bond elections until 1963 (RE.306-307, 1651, 1678-1679; USRE.170 & n.140).

Dr. Hoxie reported that white County residents resisted admitting American Indian children into public schools, resulting in Indian children attending all-Indian one-room schools in isolated communities (USRE.165-166; RE.310). The State supported segregated school systems in 1924 by passing a resolution urging Congress to approve Indian office subsidies for state-run reservation schools

(USRE.166 & n.124). Dr. Hoxie testified that in 1930, the American Indian schoolchildren on Fort Belknap were admitted to public schools in Harlem only following an extensive public debate about the negative impact American Indian children would have on the school system (RE.313; U.S. Exh. 74).[9]

5. *Socioeconomic Conditions Of American Indians In Blaine County*

There are disparities in income, education, and employment between American Indian and white residents in Blaine County. In 1980, the median family income for whites was $16,588, and for American Indians was $9,120 (USRE.205; RE.347). By 1990, the median family income for whites was $24,627, but for American Indians was only $14,176 (USRE.26, 205; RE.363). These disparities are reflected in the poverty rates. In 1990, 13.7% of white families in the County were living below the poverty level compared to 41.1% of American Indian families (USRE.26, 206).

There are also disparities in the educational levels of whites and American Indians. According to the 1990 census, 32% of white but only 24% of American Indian County residents (two-thirds the rate of whites) over 25 years of age graduated from high school (USRE.206; U.S. Exh. 26). Bachelor degrees were held by 14% of whites but only 5% of American Indians – about one-third the rate of whites (USRE.206; U.S. Exh. 26; RE.347). Between 1980 and 1990, the

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[9] See USRE.166-169 & n.127 (parents in 1930 protested that "Indian children were filthy with disease and that the entrance of the Indian children would endanger the health, even the life of the white pupils in the public schools"); RE.310, 312-313; U.S. Exhs. 53, 74.

unemployment rate for white residents increased from only 2% to 3.6%; during that same period the unemployment rate for American Indians increased from 10% to 26% so that the unemployment rate for American Indians was seven times that of whites (USRE.206).

These substantial disparities continue to affect the ability of American Indians to participate fully in County electoral activities. For example, the 1990 census showed that 6.6% of white households in the county did not own a vehicle, compared to 18.5% of American Indian households (USRE.206-207). Interviews with American Indians living in the County revealed that lack of resources, such as not having a car or a phone, or having income below poverty levels, affect their ability to become involved in any political activity (RE.347, 529-532).

Disparities in income, education, employment, and resources also have fueled racial tensions in the County. U.S. expert witness Dr. Daniel McCool interviewed American Indian citizens and many reported that they had heard a variety of racially disparaging comments against them (USRE.208-209). Interviews McCool had with white County residents confirmed this (USRE.209-210 & n.18 (American Indians could "get elected to the county commission if they would just run candidates who 'are not alcoholics and don't abuse their wives and are productive members of the community'"); USRE.210 & n.19 ("When most [Indian] kids get home their parents aren't there; they are probably on their tenth beer down at the vet's bar.")).

McCool found that one reason for racial tension among white residents is

their belief that American Indians do not pay taxes (USRE.210), and that the exemption should bar their right to vote (USRE.210 & n. 20-22 (McCool) ("A former state legislator said he heard such comments 'all the time.' An Indian informant also said she heard this 'all the time.' I interviewed a former county commissioner, and he expressed the sentiment that Indian people should not be allowed to 'help run the county' if they don't pay taxes."); RE.637, 807-808). McCool stated some white residents believe that federal subsidies American Indians receive based on treaty agreements are undeserved (USRE.210; RE.349), and that white resentment surfaces when American Indian residents seek County services, such as applying for vehicle registration tags (USRE.212; RE.350, 941-943, 1014-1022).

American Indians experienced difficulties in obtaining voter registration cards for the purpose of facilitating voter registration drives (RE.1009-1018; 1022, 1090-1091). American Indian voter registration volunteers sought to collect blank voter registration cards at the county courthouse, but were told that they could have only five to twenty-five registration cards at a time (USRE.212). This resulted in volunteers driving back and forth between the courthouse and outlying areas of the County to facilitate voter registration drives (see USRE.212-213; RE.605, 613-614, 901-902, 1009-1018, 1022, 1090-1091).

6. *Experiences Of American Indians In County Politics*

McCool found that the racial divisions in Blaine County have polarized County politics. "[M]any tribal members feel that it is hopeless to run for the

county board of commissioners, knowing that Indian voters will always be in the minority in a polarized county-wide race for county commissioner" (USRE.217; RE.351-352). McCool interviewed Indian candidates who said that they do not campaign off of the reservation for fear of how they would be received (RE.352, 833-837; USRE.216 & n.51). Arthur Kleinjan, a white candidate for County Commissioner, testified that he has experienced no racial hostility when campaigning (RE.952-954).

The limited social interactions between American Indian and white County residents has contributed to the polarized racial climate. Witnesses testified that white residents generally do not go onto the reservation to shop or attend public gatherings (RE.844-846), and social, civic and religious organizations are rigidly separated (RE.429, 903-904, 929-930, 936, 1056). There was testimony that membership in clubs and organizations in the County increases visibility within the community and can make political candidates better known as they seek votes during election seasons, but because of the segregated nature of social clubs and organizations American Indian candidates have difficulty establishing political contacts outside the reservation (RE.1046-1050, 1055-1056, 1072).

Two American Indian candidates for public office testified about their recent election experiences in their races for County Commissioner and a seat in the Montana legislature. Wesley Main, an American Indian, ran in the 1990 Democratic primary for County Commission (RE.376, 383). Main went to meetings of city councils in Harlem and Chinook to announce his candidacy

(RE.385). During the campaign he was not invited to any forums outside of the reservation (RE.385). Main ran newspaper and radio ads, and posted signs throughout the County (RE.386), but his signs were vandalized, some with bullet holes and racial slurs, such as "red prairie nigger" (RE.392-395, 438-440, 485-487). Vic Miller, a white County Commissioner, testified that his signs were not vandalized (RE.794; see also RE.439).

Main testified that one business owner refused to allow him to post his campaign signs along with those of other candidates (RE.397). While Main enlisted 11 to 15 American Indian volunteers for his campaign, no white residents volunteered (RE.387-388).

Main spent between $1,500 and $2,000 on his campaign, most of which was his own money, but said he needed $5,000 to $7,000 to run a successful campaign (RE.402, 404). Main stated that he would not run again for County Commission under the at-large election system because it is not possible for him, or any American Indian candidate, to be successful (RE.426).

Loren Thomas Stiffarm, a member of the Fort Belknap Tribe, ran against a white candidate in the 1992 Democratic primary for state legislature (RE.501, 509). He ran radio and newspaper ads, posted signs during the election, and spent about $3,000 on his campaign, 75% of which was his own money (RE.509-511, 516). The remaining amount was raised from American Indian donors because no white residents contributed to his campaign (RE.993). Stiffarm testified that no majority-white organizations invited him to speak during the campaign (RE.516). Stiffarm

testified that he does not believe that an American Indian candidate in the County can be elected under the at-large system (RE.521-522).

The County Commission is responsible for appointing residents to boards, offices and commissions that administer county programs, including the Board of Health, Public Libraries, Planning Board, Weed Control, and others (U.S. Exhs. 34-39). Even though the County is 45.4% American Indian (pp. 5-6, *supra*), only three of the approximately 85 County officers (3.5%) are American Indian (RE.762-765). Vic Miller testified that he has never asked an American Indian to serve on a County board, office or commission (RE.765-769, 961, 1191-1194). American Indian witnesses also testified that they have never been asked to serve in these appointed positions (RE.383, 480-482, 497, 536, 569, 849, 937).

Witnesses testified to some unique interests of American Indians in which the County plays a role, including improving communications between the commission and tribal council (RE.413, 453-454, 536), administering an alcoholism treatment program on Fort Belknap (RE.413, 460), creating employment opportunities (RE.534-535), and funding for elder care, child foster-care and adoption programs (RE.415-417). Main testified that American Indian residents would like to work with the County to develop bentonite and other natural resources on the reservation (RE.418-419, 463-466).

D. *District Court's March 21, 2002, Decision On The Merits*

The district court stated that the process for evaluating an alleged violation of §2 is set out in *Thornburg* v. *Gingles*, 478 U.S. 30, 47 (1986), and held that the

three *Gingles* preconditions were satisfied (RE.100, 109).

The district court held that the American Indian voting age population is sufficiently large and geographically compact to constitute a majority in a single member district (RE.102), that American Indians are politically cohesive since, on average, "89% of American Indians voted for the same candidate" in 14 county-wide elections, and that this same "cohesive voting pattern" existed in 19 Harlem School Board elections (RE.103). The district court rejected the County's argument that "low voter turnout by American Indians" defeats any showing of political cohesion, holding instead that the proper focus was "actual voting patterns" (RE.104). The district court determined that the County's argument that American Indians lack group interests, and that the commission's work has little impact on American Indians "is not supported by the evidence adduced at trial" (RE.104).

The district court held that the third *Gingles* precondition was satisfied because, first, in the seven elections involving American Indian and white candidates, "American Indian voters vot[ed] cohesively for the Indian candidate," and in "five of [those] elections, the Indian candidate * * * cohesively supported by American Indians * * * was defeated by white bloc voting" (RE.107). The court stated that the "other two elections were congressional elections involving American Indian candidate Bill Yellowtail and in one of those, Yellowtail's margin of victory in Blaine County was 51% of the total votes cast after receiving support from 98% of the American Indian voters and 32% of white voters" (RE.107-108).

The district court found that "these seven elections represent strong evidence of legally significant polarized voting" (RE.108). Second, the court stated that in "five contested Democratic primary elections for County Commission conducted since 1980" white bloc voting defeated the candidate American Indian voters preferred four times (RE.108). The district court also held that 19 elections for Harlem School Board show that "American Indians cohesively supported Indian candidates over white candidates and that white voters preferred white candidates over Indian candidates" (RE.108).

The district court also referred to the "Senate factors" that bolster a finding of dilution, and found evidence to support an overwhelming number of those factors, including evidence of a history of official discrimination against American Indians by the State and County (RE.110), racially polarized voting (RE.111), the consistent use of an at-large election and other devices that hinder the ability of American Indians to elect candidates of their choice (RE.111), discrimination that hinders American Indians from participating effectively in the political system (RE.111-112), and the near total absence of American Indian elected officials (RE.112-113).

STANDARDS OF REVIEW

The district court's legal determinations are subject to *de novo* review. *Thornburg* v. *Gingles*, 478 U.S. 30, 79 (1986). The district court's factual findings should be reviewed for clear error, including its ultimate finding of vote dilution. *Id.* at 78-79. The district court's evidentiary rulings are reviewed for abuse of

discretion. *United States* v. *Alatorre*, 222 F.3d 1098, 1100 (9th Cir. 2000).

SUMMARY OF ARGUMENT

In challenging the constitutionality of §2 of the Voting Rights Act and the district court's application of the *Gingles* criteria in this case, the County takes issue with settled precedent. The constitutionality of §2 is not an issue of first impression. In *Mississippi Republican Executive Committee* v. *Brooks*, 469 U.S. 1002 (1984), the Supreme Court summarily affirmed a three-judge district court decision which held that §2 does not exceed Congress' enforcement power, rejecting the argument the County advances here. Moreover, the Supreme Court has repeatedly cited the Voting Rights Act as an example of circumstances justifying broad remedial and prophylactic legislation. See *City of Boerne* v. *Flores*, 521 U.S. 507, 532-533 (1997); *Board of Trs* v. *Garrett*, 531 U.S. 356, 373 (2001). Congress enacted §2 of the Act to eradicate discriminatory voting practices and the continuing effects of historical discrimination, pursuant to its enforcement authority under the Fourteenth and Fifteenth Amendments to the Constitution. Section 2 is clearly appropriate enforcement legislation because it (a) addresses pervasive problems of discrimination in voting identified by Congress and documented through vast legislative history of the 1965 Voting Rights Act, and its subsequent amendments, and (b) provides remedies proportionate to those harms.

In challenging the application of §2 to this case, the County takes issue with nearly every legal holding and factual finding by the district court, and seeks to disturb this Court's settled precedent. The district court, however, correctly applied

the criteria of §2 the Supreme Court established in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), and this Court applied in *Old Person* v. *Cooney*, 230 F.3d 1113 (9th Cir. 2000), and *Gomez* v. *City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989). In applying settled legal standards to the circumstances in Blaine County, the district court found ample bases to support its determination that the County's at-large method of electing County Commissioners violated the Act. The district court correctly found that American Indians vote cohesively, and that white voters vote in a way that results in the defeat of American Indian-preferred candidates in satisfaction of the *Gingles* preconditions. There is also ample evidence to support the district court's determination that the totality of circumstances in Blaine County establishes a violation of §2. Finally, the district court acted well within its discretion by admitting and relying on the United States' expert testimony and exhibits. The United States' experts' evidence was reliable and relevant. This thorough and well supported decision should be affirmed.

ARGUMENT

I

SECTION 2 OF THE VOTING RIGHTS ACT IS APPROPRIATE ENFORCEMENT LEGISLATION UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS TO THE CONSTITUTION

Section 2 of the Voting Rights Act reads:

> a. No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> b. A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes * * * are not equally open to participation by members of a class of citizens * * * in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. * * * [N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. 1973. The constitutionality of §2 is not an issue of first impression. In *Mississippi Republican Executive Committee* v. *Brooks*, 469 U.S. 1002 (1984), affirming *Jordan* v. *Winter*, 604 F. Supp. 807, 811 (N.D. Miss. 1984), the Supreme Court summarily affirmed a three-judge district court decision which held §2 constitutional. A question presented in the statement of jurisdiction in *Brooks*, *supra*, is the same as that presented by the County in this case; whether §2 "exceeds the power vested in Congress" under the Constitution. 469 U.S. at 1003 (Stevens, J., concurring). By affirming the district court's decision in *Jordan*, the

Supreme Court "rejected the specific challenges presented in the statement of jurisdiction." *Id*. at 1002, quoting *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). The Supreme Court's summary affirmance is binding on this Court. *Hicks* v. *Miranda*, 422 U.S. 332, 344-345 (1975).[10]

Congress enacted §2 pursuant to its Fourteenth and Fifteenth Amendment authority to eradicate discriminatory voting practices and procedures, and to eliminate the effects of such discrimination from continuing to abridge voting rights. S. Rep. No. 417, 97th Cong., 2d Sess. 17 (1982) ("1982 Senate Report"). Section 5 of the Fourteenth Amendment and §2 of the Fifteenth Amendment, which give Congress the authority to enforce the prohibitions of racial discrimination in these amendments through "appropriate" legislation, are "positive grant[s] of legislative power." *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966). "It is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *Kimel* v. *Florida Bd. of Regents*, 528

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[10] Since §2 was adopted by Congress, federal courts have upheld its constitutionality. *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, cert. denied, 469 U.S. 976 (1984); *Jones* v. *City of Lubbock*, 727 F.2d 364 (5th Cir. 1984); *Sanchez* v. *Colorado*, 97 F.3d 1303, 1314, 1327 (10th Cir. 1996), cert. denied, 520 U.S. 1229 (1997); *Knox* v. *Milwaukee County Bd. of Election Comm'rs*, 607 F. Supp. 1112, 1119-1126 (E.D. Wis. 1985); *Major* v. *Treen*, 574 F. Supp. 325, 342-349 (E.D. La. 1983) (three-judge court); *Wesley* v. *Collins*, 605 F. Supp. 802, 808 (M.D. Tenn. 1985), aff'd on other grounds, 791 F.2d 1255 (6th Cir. 1986); *Prosser* v. *Elections Bd.*, 793 F. Supp. 859, 869 (W.D. Wis. 1992) (three-judge court); *Shaw* v. *Hunt*, 861 F. Supp. 408, 438-439 (E.D.N.C. 1994) (three-judge court), aff'd in part, rev'd in part, 517 U.S. 899 (1996).

U.S. 62, 80-81 (2000), quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997) (internal quotations omitted).

Congress' enforcement powers "[are] not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel*, 528 U.S. at 81; *Florida Prepaid Postsec. Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639 (1999). "Legislation 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.'" *Boerne*, 521 U.S. at 518. For example, the Supreme Court has upheld a series of federal voting rights provisions, which prohibited actions with discriminatory effect, as appropriate enforcement measures under the Fifteenth Amendment "despite the burdens those measures placed on the States." *Ibid.*, citing *South Carolina* v. *Katzenbach*, 383 U.S. 301, 336-337 (1966) (upholding preclearance requirements of the Voting Rights Act that prohibit actions based solely on their racially discriminatory effect); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (ban on literacy tests); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (nationwide ban on literacy tests); *City of Rome* v. *United States*, 446 U.S. 156, 173-178 (1980) (upholding extension of preclearance requirements). As the Court explained in *Kimel*, "Congress' power 'to enforce' the [Fourteenth Amendment] includes the authority both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself

forbidden by the Amendment's text." 528 U.S. at 81; see also *Boerne*, 521 U.S. at 518; *Board of Trs.* v. *Garrett*, 531 U.S. 356, 365 (2001). "Difficult and intractable problems often require powerful remedies," and the Supreme Court has "never held that [the Fourteenth Amendment] precludes Congress from enacting reasonably prophylactic legislation." *Kimel*, 528 U.S. at 88.

While Congress' enforcement power is broad, "it is not unlimited," and extends to "enforc[ing]" violations of the constitution but "not * * * to determin[ing] what constitutes a constitutional violation." *Boerne*, 521 U.S. at 518-519 (internal citations omitted). The Supreme Court framed the distinction, stating that

> [w]hile the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a *congruence* and *proportionality* between the injury to be prevented or remedied and the means adopted to that end.

Id. at 519-520 (emphasis added); *Kimel*, 528 U.S. at 81. In analyzing the congruency of legislation, courts must identify the unconstitutional "'evil' or 'wrong' that Congress intended to remedy," *Florida Prepaid*, 527 U.S. at 639-640, and in doing so can look to the "legislative record containing the reasons for Congress' action" to determine whether legislation falls within Congress' enforcement authority. *Kimel*, 528 U.S. at 88. Proportionality determines whether the enactment is "responsive to, or designed to prevent, unconstitutional behavior." *Kimel*, 528 U.S. at 82 (quoting *Boerne*, 521 U.S. at 532).

A. *Section 2 Is Congruent In Addressing The Pervasive Problems Caused By Discrimination In Voting Congress Identified*

The Supreme Court has repeatedly referred to the historical background and legislative record of the Voting Rights Act as the foremost example of circumstances justifying broad remedial and prophylactic legislation. See *Boerne*, 521 U.S. at 532-533; *Garrett*, 531 U.S. at 373. The same legislative background that supports other provisions of the Act also fully supports §2 of the Voting Rights Act.

1. *Congress Found A Substantial History, Continuing Pattern, And Lingering Legacy Of Unconstitutional Discrimination In Voting Requiring Nationwide Remedial Measures*

The County argues (Br. 14, 18) that §2 of the Voting Rights Act cannot be applied nationwide. This argument is belied by the vast legislative background supporting the 1965 Act and its subsequent amendments. "The constitutional propriety of the Voting Rights Act of 1965 must be judged with reference to the historical experience which it reflects." *South Carolina* v. *Katzenbach*, 383 U.S. at 308. "One means by which we have made such a determination in the past is by examining the legislative record containing the reasons for Congress's action." *Kimel*, 528 U.S. at 88. "The ultimate question [is] * * * whether, given all the information before the Court, it appears that the statute in question can appropriately be characterized as legitimate remedial legislation." *Hibbs* v. *Department of Human Res.*, 273 F.3d 844, 857 (9th Cir. 2001), cert. denied, 122 S. Ct. 2618 (2001). Congress' factual findings are entitled to substantial deference.

Boerne, 521 U.S. at 536.

Congress enacted §2 of the 1965 Act in light of "nearly a century of systematic resistance to the Fifteenth Amendment." *South Carolina* v. *Katzenbach*, 383 U.S. at 328. Section 5 of the 1965 Act requires requires administrative or judicial preclearance of any changes in voting in certain jurisdictions by developing a coverage formula affecting those areas that Congress found maintained particularly flagrant discriminatory voting practices. 42 U.S.C. 1973c. Congress later reviewed the nation's progress and concluded that while minority voter registration had increased, "several jurisdictions" developed new, unlawful ways to impede minority political participation, including using at-large election methods. H.R. Rep. No. 397, 91st Cong., 1st Sess. 7 (1969). Moreover, §5's coverage requirements were to expire in 1970, but because of ongoing voting problems throughout the country Congress enacted the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970), which extended voting rights protections.

In 1975, Congress amended the Act after additional hearings revealed that discrimination affecting minority voting rights continued. Congress evaluated, specifically, the negative effect that voting practices had on minority participation in voting in areas with large non-English speaking communities, and communities with large numbers of American Indians. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400, 402 (1975). See also H.R. Rep. No. 196, 94th Cong., 1st Sess. 10 (1975); S. Rep. No. 295, 94th Cong., 1st Sess. 16-17 (1975)

("1975 Senate Report").[11] For example, Senator Goldwater testified, "people [who] had at times difficulty voting in my State have been Indians because when we became a State, we were not allowed to allow Indians to vote." *Extension of the Voting Rights Act of 1965, Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. 723 (1975) ("1975 Senate Hearings").[12] During the 1975 Senate hearings, the League of Women Voters described

> problems in Arizona counties covered by the Voting Rights Act. In Tuba City, Coconino County, there are two precincts where large numbers of Navajos live. Navajos experienced voting problems in the 1974 election in both precincts. They waited up to four hours to vote because there were not enough bilingual election officials to translate information and instructions into Navajo. Moreover, a separate polling booth for school board candidates was set up in each of these two precincts, so that voters had to use two booths. This time-consuming arrangement was *not* used in other precincts in Coconino County where fewer Navajos were voting.

1975 Senate Hearings 932. During floor debates, Congressman Drinan viewed as compelling evidence that American Indians "suffer from extensive infringement of their voting rights," including the fact that the Department of Justice "has been involved in 33 cases involving discrimination against American Indians since

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[11] See *Extension of the Voting Rights Act, Hearings Before the House Subcomm. On Civil and Constitutional Rights of the House Comm. on the Judiciary,* 94th Cong., 1st Sess., Vols. I-II (1975) ("1975 House Hearings"); *Extension of the Voting Rights Act of 1965, Hearings Before the Senate Subcomm. On Constitutional Rights of the Comm. on the Judiciary,* 94th Cong., 1st Sess. (1975) ("1975 Senate Hearings").

[12] See 1975 House Hearings I 88-89, 90 (Letter to Cong. Don Edwards from Assistant Attorney General Stanley Pottinger explaining that Native Americans are protected citizens under the Voting Rights Act).

1970." 121 Cong. Rec. H4825 (daily ed. June 3, 1975); see also 121 Cong. Rec. H4711 (daily ed. June 2, 1975) (statement of Rep. Rodino). Senator Scott stated:

> Discrimination of the most basic kind has been directed against the American Indian from the day that settlers from Europe set foot upon American shores * * * [As] late as 1948 certain Indians were still refused the right to vote. The resulting distress of Indians is as severe as that of any group discriminated against in American society.

121 Cong. Rec. S13,603 (daily ed. July 24, 1975). Congress' concerns over discrimination affecting American Indians' right to vote is consistent with Congress' longstanding efforts to redress the social and economic conditions of American Indians through legislative efforts.[13] When the 1970 amendments to the Voting Rights Act were enacted, President Nixon stated:

> The first Americans – the Indians – are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement – employment, income, education, health – the condition of the Indian people ranks at the bottom. This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny.

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[13] See Indian Education Act, Pub. L. No. 92-318, §§401-453, 86 Stat. 235, 334-345 (1972); Education Amendments of 1974, Pub. L. No. 93-380, §632, 88 Stat. 484, 586 (1974); Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975); Housing and Urban Development Act of 1970, Pub. L. No. 91-609, §802, 84 Stat. 1770, 1806 (1970); Housing and Community Development Act of 1974, Pub. L. No. 93-383, §102, 88 Stat. 633, 635 (1974); Headstart, Economic Opportunity, and Community Partnership Act of 1974, Pub. L. No. 93-644, §11, 88 Stat. 2291, 2323 (1975); Indian Health Care Improvement Act of 1976, Pub. L. No. 94-437, §2(d), 90 Stat. 1400 (1976). In 1981, the U.S. Civil Rights Commission issued a report which included a discussion on the civil rights problems faced by American Indians, including "pervasive discrimination in voting rights." *Indian Tribes: A Continuing Quest for Survival*, A Report of the United States Comm. on Civil Rights (June 1981) at 36-37, 181.

Richard M. Nixon, *The President's Message To The Congress Of The United States On The American Indians*, 6 Weekly Comp. Pres. Doc. 28 (July 8, 1970); see also *The President's Message To The Congress On Goals And Programs For The American Indian*, 4 Weekly Comp. Pres. Doc. 10 (Mar. 6, 1968) (statement of Pres. Johnson).

In its consideration of the 1975 Act, Congress noted other impediments placed on minority voters, including

> denial of the ballot by such means as failing to locate voters' names on precinct lists[;] location of polls at places where minority voters feel unwelcome or uncomfortable[;] or which are inconvenient to them, and the inadequacy of voting facilities[;] * * * under-representation of minority persons as poll workers; unavailability or inadequacy of assistance to illiterate voters; lack of bilingual materials at the polls for these non-English speaking persons; and problems with the use of absentee ballots.

1975 Senate Report 26; *id*. at 30-31 ("documentation concerning [discrimination against] Asian Americans, American Indians and Alaskan Natives was substanial"). Based on this evidence of discrimination in voting, Congress expanded the Act to afford protection "to additional areas throughout the country." 1975 Senate Report 9. Many of the states required to conduct bilingual elections pursuant to the 1975 amendments contain localities with concentrations of American Indian voters, including Alaska, Arizona, California, Colorado, Florida, Idaho, Iowa, Louisiana, Mississippi, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Utah. 28 C.F.R. Pt. 55, App.

In 1981, Congress conducted extensive hearings and debate on extending

and revising portions of the Voting Rights Act, and heard substantial evidence of persistent abuses of the electoral process. As Sen. Mathias stated, "[d]ay after day, the subcommittee heard testimony about the continuing need for the Voting Rights Act," including "sophisticated dodges, such as at-large elections" that dilute minority voting strength, 127 Cong. Rec. 32,177 (1981),[14] as well as "voluminous examples of direct efforts to bar minority participation,"[15] annexation of largely white areas,[16] and racially gerrymandered districts.[17] These findings were supported not only by extensive testimony from a wide range of individuals and

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[14] See H.R. Rep. No. 227, 97th Cong., 1st Sess. 18-20 (1981) ("1981 House Report"); 1982 Senate Report 10.

[15] 1981 House Report 14-16. See also, *e.g.*, *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 97th Cong., 1st Sess., Vol. I 373-374, Vol. II 1531, 1533-1534, 1569-1570, 1581, 1670-1671 (1981) ("1981 House Hearings"); *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong., 2d Sess., Vol. I 315, 755-760, 772-773; *id.* at I 1385-1386 (Drew Days, former Assistant Attorney General for Civil Rights); *id.* at II 238, 359 (National Congress of American Indians) ("Indians have found themselves purged from election rolls without notification, or their polling places closed") (1982) ("1982 Senate Hearings"); 1982 Senate Report 10 n.22.; 127 Cong. Rec. H6872 (daily ed. Oct. 2, 1981) (Rep. Dixon).

[16] 1981 House Report 19; 1982 Senate Report 13. See also 1982 Senate Hearings I 665; *id.* at II 215, 238-239; 1981 House Hearings I 369-370; *id.* at II 1682-1689.

[17] 1982 Senate Report 11, 13; 1981 House Report 19-20. See also, *e.g.*, 1982 Senate Hearings I 301, 682-687, 763-764, 995-997; *id.* at II 193, 355-356, 358 (National Congress of American Indians); 1981 House Hearings I 35 (William Velasquez, Southwest Voter Registration Education Project) ("As many as 128 counties throughout the Southwest may be gerrymandered at the County Commissioner level against Chicanos."); *id.* at 238-239.

organizations, but also by numerous reports from government agencies, private groups, and social scientists,[18] and the recent record of enforcement.

One of the bill's sponsors observed that "there is ample research which supports the conclusion that many of the so-called reforms at the turn of the century, such as at-large elections, were designed to [exclude] or dilute the voting strength of many on the basis of race or class." 127 Cong. Rec. H6984 (daily ed. Oct. 5, 1981) (Rep. Sensenbrenner). Congress "heard numerous examples of how at-large elections are one of the most effective methods of diluting minority strength* * *." H.R. Rep. No. 227, 97th Cong., 1st Sess. 18 (1981) ("1981 House Report"). The legislative record before Congress is replete with specific examples from around the country showing how voting practices, such as at-large elections, gave rise to an inference of purposeful discrimination against minorities,[19]

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[18] See Rolando Rios, *The Voting Rights Act: Its Effect in Texas* (April 1981) (cited in 1981 House Report 7-8); C. Davidson & G. Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence*, Journal of Politics (Nov. 1981); R. Engstrom & M. McDonald, *The Election of Black City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, American Political Science Review (June 1981); D. Taebel, *Minority Representation on City Councils*, 59 Social Science Quarterly 143-152 (June 1978); 1982 Senate Hearings I 324-338; 1981 House Hearings I 255-269; Report of the Comptroller General of the United States, *Voting Rights Act – Enforcement Needs Strengthening* 26-28 (Feb. 6, 1978) (GAO Report).

[19] See, *e.g.*, 1981 House Report 17-20 (specifically discussing instances in Alabama, Nebraska, and New Mexico); 1982 Senate Hearings II 358 (National Congress of American Indians) (discussing Nebraska and New Mexico); See 1981 House Report 18, citing *The Voting Rights Act: Unfulfilled Goals* 42-55 (Sept. 1981), United States Comm. on Civil Rights; 1981 House Hearings I 263-265.

including American Indians. For example, David Dunbar, General Counsel for the National Congress of American Indians, and an enrolled member of the Blackfeet Tribe of Montana, testified:

> Indian people have experienced a considerable amount of blatant discrimination in voting rights during recent years. One Wisconsin town attempted to gerrymander Indians out of their voting district [] in an active attempt to keep them from voting. In a Nevada county, county registrars refused to register Indians for such reasons as failing to fill out registration cards properly, while non-Indians were not subject to the same fine scrutiny. Nebraska and New Mexico counties were successfully sued for attempting to dilute (and thereby effectively destroy) the Indian vote by instituting at-large voting schemes. In South Dakota there was an attempt to deny an Indian candidate the right to run for office. Indians have found themselves purged from election rolls without notification, or their polling places closed. The Voting Rights Act has been a key element in the drive to bring the vote to Tribal people.

Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess., Vol. III 1901 (1981) (internal citations omitted); see also *id.* at 1909; *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong., 2d Sess., Vol. II 357 (1982) (statement of the National Congress of American Indians) ("1982 Senate Hearings").

During debates on both the 1975 and 1982 amendments to the Act, Congress identified federal district court cases involving discrimination against American Indians. See *Extension of the Voting Rights Act, Hearings Before the House Subcomm. On Civil and Constitutional Rights of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. Vol. II 1225-1230 (1975) ("1975 House Hearings"), citing *Klahr* v. *Williams*, 339 F. Supp. 922, 927 (D. Ariz. 1972) (state

legislative plan adopted for the purpose of diluting minority voting strength); *id.* at 1225-1230 and 121 Cong. Rec. H4709 (daily ed. June 2, 1975) (Rep. Young), citing *Goodluck* v. *Apache County*, 417 F. Supp. 13 (D. Ariz. 1975) (redistricting plan for county board of supervisors adopted to dilute American Indian voting strength); 1981 House Report 16 & n.35, citing *United States* v. *Humboldt County, Nevada*, Civil Action No. R 70-0144 HEC (D. Nev. 1979) ("registrars refused to register Indians for failing to properly fill out registration cards; non-Indians were not subjected to the same scrutiny"); *Little Thunder* v. *South Dakota*, 518 F.2d 1253 (8th Cir. 1975) (court of appeals held that not allowing Indian residents to vote in county elections was unconstitutional); *Yanito* v. *Barber*, 348 F. Supp. 587 (D. Utah 1972) (failure of county election official to provide Indians with information regarding candidate qualification violated the constitutional rights of Indians).

The volume of evidence fully supports the nationwide scope of Congress' measures under §2. Contrary to the County's arguments (Br. 14-18), there is plenty of evidence of discrimination in voting outside states covered under §5 of the Act.[20] For example, the legislative record of the 1975 amendments contains ample evidence of discrimination against language minorities in jurisdictions that were not already covered under §5. See pp. 32-34, *supra*. This evidence was so

[20] The formula developed under §5 subjects to preclearance many southern states, such as Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia. 42 U.S.C. 1973c; 28 C.F.R. Pt. 51, App.

compelling that Congress brought certain states within the Act's special coverage by requiring bilingual elections for certain jurisdictions with concentrations of language minority communities (p. 34, *supra*). Congress also heard evidence of discrimination in voting in noncovered jurisdictions when it considered the 1982 Amendments to the Act. For example, the Attorney General's report to Congress on vote dilution cases during the 1981 hearings included cases in Nebraska, Wisconsin, New Mexico, and California. 1982 Senate Hearings I 1804-1806, 1808; see also *The Voting Rights Act: Unfulfilled Goals*, Report of the U.S. Comm. on Civil Rights 10-11 (Sept. 1981), discussing cases involving rights of American Indians in Nebraska (*United States* v. *Thurston County*, No. 78-0-380 (D.Neb. May 9, 1979)), Wisconsin (*United States* v. *Town of Bartelme*, No. 78-c-101 (E.D.Wis. Feb. 17, 1978)), New Mexico (*United States* v. *County of San Juan*, C.A. No. 79-507 JB (D.N.M. Apr. 8, 1980)), and California (*United States* v. *City of San Francisco*, No. C-78 2521 CFP (N.D.Cal. May 8, 1980)).

Congress' ample evidence of discrimination against minorities in voting fully across the country supports §2's nationwide application. The Supreme Court has repeatedly upheld nationwide application of limited prophylactic legislation, *Morgan*, 384 U.S. 641; *Mitchell*, 400 U.S. at 118,[21] and has not required

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[21] The County attempts (Br. 16) to distinguish the Supreme Court's decision in *Mitchell* by arguing that Congress' nationwide ban on literacy tests was designed to suspend a specific voting prerequisite that impeded black voter participation, and states that "literacy tests anywhere would be unconstitutional." The Court upheld the nationwide ban, but never concluded that literacy tests would always be unconstitutional.

geographic restrictions on general legislation, *Boerne*, 521 U.S. at 533.U.S. at 328-329.[22] Congress was entitled to conclude that effective enforcement of the right to vote was important in *all* jurisdictions, even in those where violations were less frequent. See *Williams* v. *United States*, 341 U.S. 97 (1951) (federal statute criminalizing constitutional violations under color of law valid without prosecutorial inquiry into pervasiveness of violations); *Ex parte Virginia*, 100 U.S. 339 (1879) (upholding federal statute prohibiting discrimination in jury selection). Section 2, additionally, "avoids the problem of potential overinclusion entirely by its own self-limitation," 1982 Senate Report 43, by invalidating only those practices that are found to dilute minority voting strength.

The treatment of American Indians in the State of Montana is sufficiently similar to that of blacks in the South and nationwide (pp. 13-16, *supra*). By adopting the Senate factors for establishing a violation of §2, Congress established a process for weeding out those jurisdictions that maintain barriers affected by voting discrimination from those states without such history of discrimination. See 1982 Senate Report 28-29 and *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). The factual circumstances in Blaine County with respect to American Indians are similar to those of blacks in many Southern states, illustrating the situation where

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[22] The County's argument (Br. 26) that §2 is defective in the absence of an opt-out provision fails for similar reasons. An opt-out provision has never been a prerequisite for Congress to enact prophylactic legislation, and, again, the Supreme Court has upheld legislation that has applied nationwide and that has not contained any provision for States to opt out of the legislation's enforcement umbrella. See, *e.g.*, *Mitchell*, 400 U.S. at 118; *Morgan*, 384 U.S. at 657.

an at-large method of election facilitates dilution of minority voting strength.

The County argues (Br. 12-13) that §2 should not apply to at-large elections because there is no evidence in the legislative record before Congress to show that state and local officials who created those electoral procedures did so with an intent to discriminate. Of course, Congress was aware that "[b]enign explanations may be offered" for certain methods of election, 1981 House Report 20, but also understood that

> [s]ophisticated rules regarding elections may seem part of the everyday rough-and-tumble of American politics–tactics used traditionally by the "ins" against the "outs." Viewed in context, however, the schemes reported here are clearly the latest in a direct line of repeated efforts to perpetuate the results of past voting discrimination and to undermine the gains won under other sections of the Voting Rights Act.

1982 Senate Report 12. Congress thus reasonably concluded that election systems which result in diluting the strength of minority votes can represent not only current purposeful discrimination, but the effects of past purposeful discrimination as well. Congress found that in the past, many jurisdictions used ostensibly race-neutral voting practices purposefully to prevent minority registration and voting and to dilute minority voting strength. 1981 House Report 18. These practices resulted in disproportionately low minority voter registration, voting, and electoral success. 1981 House Report 18-19. In 1982, Congress found that many jurisdictions continued to use at-large elections that impeded political participation by minorities. *Id*. at 11-13, 18-19; 1982 Senate Report 13-14. From these facts and circumstances, Congress had ample basis to conclude that unconstitutional

discrimination through facially neutral voting practices, such as the use of at-large elections, remained a continuing problem. *Rome*, 446 U.S. at 182 (extension of Voting Rights Act "is both unsurprising and unassailable.").

2. *Congress Properly Concluded That The Results Test Was Necessary To Detect, Correct And Deter Purposeful Discrimination And Its Continuing Effects*

Congress amended §2 in response to the legislative record and its reasoning that a results test was necessary to enforce the Constitution's prohibition against purposeful discrimination. As Senator Baucus explained:

> While accidental and incidental discrimination will be illegal under this test, the broadened standard will also serve to ensure that discriminatory practices that are intentional will not slip through the legal cracks merely because it is difficult and sometimes impossible to prove in a courtroom that their enactment was racially motivated.

1982 Senate Hearings II 77. In debates on the Act, Congress recognized that the use of at-large methods of election discriminatorily diluted minority votes in some communities. 127 Cong. Rec. H6841 (daily ed. Oct. 2, 1981) (Rep. Glickman) (testifying about the need for the "results" test); 127 Cong. Rec. H6849 (daily ed. Oct. 2, 1981) (Rep. Washington); 127 Cong. Rec. H6877 (daily ed. Oct. 2, 1981 (Rep. Chisholm); 127 Cong. Rec. H6985 (daily ed. Oct. 5, 1981) (Rep. Edwards); 128 Cong. Rec. S6778 (daily ed. June 15, 1982) (Sen. Specter); 128 Cong. Rec. S6930-S6931 (daily ed. June 17, 1982) (Sen. DeConcini); 128 Cong. Rec. S6959 (daily ed. June 17, 1982) (Sen. Mathias); 127 Cong. Rec. H6978 (daily ed. Oct. 5, 1981) (Rep. Leland); 127 Cong. Rec. H7008 (daily ed. Oct. 5, 1981) (Rep. Collins).

Congress also had ample basis to conclude that requiring the often difficult and disruptive proof of discriminatory intent under §2 would, from a practical standpoint, immunize much intentional discrimination from legal restraint. "Discriminatory purpose is frequently masked and concealed, and officials have become more subtle and more careful in hiding their motivations when they are racially based." 1981 House Report 31. Those intent on discriminating may offer "a non-racial rationalization for a law which in fact purposefully discriminates" or "plant[] a false trail of direct evidence in the form of official resolutions, sponsorship statements and other legislative history eschewing any racial motive, and advancing other governmental objectives." 1982 Senate Report 37; 1982 Senate Hearings II 6 (Sen. Hollings); *id.* at 92 (Sen. Mathias); *id*. at 212 (Alfredo Gutierrez, Arizona State Senator); *id*. at 290 (Bruce Babbitt, Governor of Arizona); *id*. at 380 (National Conference of State Legislatures); 127 Cong. Rec. H6983 (daily ed. Oct. 5, 1981) (Rep. Franks).

In addition, direct evidence of a state or local legislator's subjective intent would be highly difficult to present because it may be privileged or unobtainable, particularly in smaller jurisdictions or with respect to practices instituted many years ago. 1982 Senate Report 36-37; 1981 House Report 29. See also 1982 Senate Hearings II 196 (John Jacob, National Urban League) ("in many cases records were not kept, the culprits have long died or the governmental body failed to record debates or other legislative history."). Moreover, obtaining such evidence and demonstrating the discriminatory motives of legislators is likely to be

disruptive to legislative bodies and divisive to the community. 1982 Senate Report 36-37. In light of these considerations, and the testimony of numerous attorneys with substantial experience in voting rights litigation,[23] Congress concluded that an "intent test places an unacceptably difficult burden on plaintiffs." 1982 Senate Report 16; 1981 House Report 31. Indeed after *Mobile* v. *Bolden*, 446 U.S. 55 (1980), "[m]inority voters lost some cases despite egregious factual situations," and plaintiffs experienced enormous burden and expense pursuing cases even of flagrant and obvious discrimination. 1982 Senate Report 36-39.

3. *The Evidence For Proving A "Results Test" Violation Of §2 Is Substantially Similar To That For Proving Purposeful Discrimination By Circumstantial Evidence*

The County erroneously argues (Br. 19-21) that §2 improperly "defines" the constitutional standard, rather than serves as enforcement legislation. The effective scope of §2 does not extend far beyond the Constitution itself. As amended and interpreted, §2 is not a simple disparate impact test; plaintiffs cannot just show that, under a challenged system, minority candidates or the preferences of minority voters have been defeated, or that the system does not produce racially

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[23] 1982 Senate Hearings I 289 (Vilma Martinez, Mexican American Legal Defense and Educ. Fund); *id*. at 368-369 (Laughlin McDonald, Southern Regional Office, ACLU); *id*. at 639-641 (David Walbert, attorney); *id*. at 1238 (Frank Parker, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law); *id*. at 1258-1266 (Julius Chambers, NAACP Legal Defense Fund); *id*. at 1401 (Drew Days, former Assistant Attorney General for Civil Rights); *id*. at 1425-1426 (Archibald Cox, Common Cause, Professor, Harvard Law School); *id*. at 1606 (David Brink, American Bar Association); 1981 House Hearings I 185-186 (Archibald Cox, Common Cause).

proportionate results. *Johnson* v. *De Grandy*, 512 U.S. 997, 1011 (1994). Instead, the inquiry focuses on discriminatory denial of equal access to the voting process. *Id*. at 1011-1012. Congress amended §2

> to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.

1982 Senate Report 27.

In *White* v. *Regester*, 412 U.S. 755 (1973), the Court affirmed a three-judge district court order invalidating multi-member county voting districts because of vote dilution. 412 U.S. at 758. Noting that "multi-member districts are not per se unconstitutional" (*id.* at 765), the Court considered the type of circumstantial evidence needed to support a finding of racially based unconstitutional vote dilution, stating:

> [t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question – that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Id. at 766. The Court held this burden could be met with a showing of a history of official racial discrimination, lingering effects of that discrimination, few successful minority candidates for office, elected officials' lack of responsiveness to the interests of minority voters, and recent use of "racial campaign tactics" to defeat candidates preferred by minority voters, as well as discriminatory disparities

in education, employment, economics, health and politics. *Id.* at 765-769.

Subsequently in *Mobile*, 446 U.S. 55 (1980), a majority of the Court concluded that Congress intended §2 in 1965 to be coextensive with the Constitution, 446 U.S. at 60-61 (plurality opinion by Chief Justice, Justices Stewart, Powell and Rehnquist); *id.* at 105 n.2 (Marshall, J., dissenting), and therefore required a finding of discriminatory purpose. *Id.* at 66 (plurality opinion); *id.* at 94-95 (White, J., dissenting). The *Mobile* plurality cited *White* as illustrative of the elements necessary for establishing an inference of purposeful discrimination in the context of voting. *Id.* at 69; *id.* at 70 ("disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose."); see also *id.* at 101 (White, J., dissenting) ("plurality * * * reaffirms the vitality of *White v. Regester* * * * which established the standards for determining whether at-large election systems are unconstitutionally discriminatory."). The concurring opinions of Justices Blackmun and Stevens as well referred to the *White* standard as appropriate for proving a §2 violation. *Mobile*, 446 U.S. at 80 (Blackmun, J., concurring) ("assuming that proof of intent" is required to satisfy a constitutional claim of vote dilution, and that the "findings of the District Court [that reflected the *White* inquiry] amply support an inference of purposeful discrimination").

In *Rogers* v. *Lodge*, 458 U.S. 613 (1982), the Court again examined the circumstantial showing needed to support an inference of purposeful discrimination in a vote dilution case. The Court, in reiterating the *Mobile* plurality, stated that

discriminatory intent "need not be proved by direct evidence," *id*. at 618, and affirmed that the *White* standard was sufficient to permit (but not require) a fact-finder to infer purposeful discrimination. *Id.* at 617-622. The Court noted the district court's findings that although African Americans formed a substantial majority of citizens in Burke County, Georgia, none had been elected under the challenged system. *Id*. at 623-624. The Court found that although this fact is "important evidence of purposeful exclusion," it is insufficient to "prove purposeful discrimination absent other evidence such as *proof that blacks have less opportunity to participate in the political processes and to elect candidates of their choice*." *Id.* at 624 (emphasis added) (citing *White* v. *Regester*). As in *White,* the Court in *Rogers* affirmed the district court's finding that this standard was met, by virtue of the district court's findings with respect to the various *Zimmer* factors. See *id*. at 624-627, citing *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), aff'd sub nom., *East Carroll Parish Sch. Bd.* v. *Marshall*, 424 U.S. 636 (1976).

Rogers both resolved any question over the adequacy of the *White* standard to support an inference of unconstitutional purposeful discrimination, and made clear that satisfying the *White* standard establishes an inference of intentional discrimination under §2 of the Act. Congress nonetheless concluded that *Mobile*'s requirement of an express finding of discriminatory intent created an unfairly difficult burden for §2 plaintiffs, and impaired the Act's ability to detect and remedy purposeful discrimination and its effects in voting. 1982 Senate Report 15-16; 1981 House Report 28-29. Lacking the authority to overrule the Court's

interpretation of the Constitution, Congress recognized that it could change the standards under §2. 1982 Senate Report 41; 1981 House Report 31. Congress amended §2 to remove the requirement of a specific finding of discriminatory intent, and replaced it with a "results" test based on the *White* standard. See 42 U.S.C. 1973(b); 1982 Senate Report 2; 1981 House Report 29-30 & n.104; *Chisom* v. *Roemer*, 501 U.S. 380, 397-398 (1991). Accordingly, §2 does not require a specific finding of discriminatory intent, but rather requires proof that minorities have been denied equal participation in the political process based on the totality of circumstances that are tied to racially discriminatory practices and their continuing effects. Congress determined that these circumstances include the factors the Supreme Court considered in *White* and *Rogers*. 1982 Senate Report 17-35. See, *e.g.*, *Hall* v. *Holder*, 117 F.3d 1222, 1226 n.5 (11th Cir. 1997) ("The evidence relevant to determining whether a discriminatory impact exists under §2 overlaps substantially with the evidence deemed important in *Lodge*.").

The close fit between §2 and the constitutional prohibition on racial discrimination it implements is in sharp contrast to the statutes struck down for lacking congruence and proportionality. For example, the Supreme Court in *Garrett*, 531 U.S. 356 (2001), held that the Americans With Disabilities Act, 42 U.S.C. 12101 *et seq.*, did not apply to the states because the legislative record of the ADA failed to identify a broad pattern of irrational state discrimination in employment against persons with disabilities. *Id.* at 368-370. Juxtaposing the legislative record Congress compiled for the Voting Rights Act, the Court stated:

> The ADA's constitutional shortcomings are apparent when the Act is compared to Congress' efforts in the Voting Rights Act of 1965 to respond to a serious pattern of constitutional violations. In *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), we considered whether the Voting Rights Act was "appropriate' legislation" to enforce the Fifteenth Amendment's protection against racial discrimination in voting. Concluding that it was a valid exercise of Congress' enforcement power under §2 of the Fifteenth Amendment, we noted that "[b]efore enacting the measure, Congress explored with great care the problem of racial discrimination in voting."

Garrett, 531 U.S. at 373. Thus the underlying basis for the ruling in *Garrett*, the absence of evidence of discrimination by the states, stands in sharp contrast to the well-documented history of discrimination in voting that prompted Congress to enact §2.

B. *Section 2 Is A Proportionate Measure For Remedying The Harm*

1. *The Results Test Is Proportionate To Congress' Remedial Purposes*

Section 2 is well tailored to ending intentional discrimination and the continuing effects that prior discrimination has on voting practices. Congress "may, under the authority of §2 of the Fifteenth Amendment, prohibit state action that, though not itself violative of §1, perpetuates the effects of past discrimination." *Rome*, 446 U.S. at 176, *Boerne*, 521 U.S. at 519. Contrary to the County's suggestions (Br. 25), §2 does not outlaw all at-large voting systems. Instead, §2 evaluates such practices on a case-by-case basis, prohibiting a practice only in circumstances that make it more likely that it is being used for purposeful discrimination or is perpetuating the effects of past purposeful discrimination. For example, a §2 plaintiff alleging vote dilution must show the existence of racial bloc voting and a persistent pattern of majority voters collectively preventing

the election of minority-preferred candidates. *Thornburg* v. *Gingles*, 478 U.S. 30, 44-45 (1986). Even when such proof is made, a court must consider additional circumstances described by the Senate factors (see p. 65, *infra*), and only then may conclude that, with the presence of these conditions, there is sufficient basis for finding that §2 has been violated. *Ibid.*

The County attempts to defend its use of at-large elections by arguing (Br. 13, 24-25) that Congress may only undertake preventive measures if there is a "significant likelihood" that targeted conduct is unconstitutional. Indeed, §2 does exactly that, as the factors relevant to a §2 claim are similar to a circumstantial case of intentional discrimination. Congress never sought an outright ban on at-large elections, but instead developed the Senate factors as a way of detecting when the maintenance of a method of election extends the effects of past discrimination. See 1982 Senate Report 27-30.

The County's argument (Br. 22-24) that §2's standard of proof does not give defendants an opportunity to provide evidence of nondiscriminatory intent is without merit. One of the Senate factors deemed "probative of a §2 violation" is evidence of "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." *Gingles,* 478 U.S. at 36-37. The County could, and did, present evidence of nondiscriminatory reasons for using an at-large method of electing County Commissioners. Nonetheless, there was *significant* evidence of historical, official

discrimination against American Indians in voting and other areas and matters in Blaine County which strongly outweighed the County's reasons, and in fact the district court found the County's reasons for maintaining its at-large election method "tenuous" (RE.113).

Contrary to the County's suggestion that §2 is entirely statistical (Br. 22), §2 permits a jurisdiction to try to show that its policy reasons for maintaining a challenged election procedure are significant. 1982 Senate Report 29; see pp. 72-73, *infra*. But, as Congress recognized, the use of at-large elections for legislative bodies is not supported with interests weighty enough to justify their dilutive effects. In 1981 and 1982, Congress heard exhaustive testimony of how at-large methods of electing legislative bodies unfairly dilute minority voting strength. See 1982 Senate Report 6; 1981 House Report 18 ("Although [at large elections] are used throughout the country * * * where there is severe racially polarized voting, they often dilute emerging minority political strength."); see also pp. 35-36, *supra*. Congress found that at-large legislative elections oftentimes dilute minority voting, and the facts of this case demonstrate factors similar to those circumstances that Congress was determined to eliminate. See also *Chapman* v. *Meier*, 420 U.S. 1 (1975).[24]

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[24] The only time courts have found at-large elections to have significant governmental interest is in election of trial judges. *Nipper* v. *Smith*, 39 F.3d 1494 (11th Cir. 1994), cert. denied, 514 U.S. 1083 (1995); *League of United Latin Am. Citizens* v. *Clements*, 999 F.2d 831 (5th Cir. 1993), cert. denied, 510 U.S. 1071 (1994). But, even multi-member election of appellate judges can violate §2. See *Prejean* v. *Foster*, 227 F.3d 504 (5th Cir. 2000). See also *United States* v.

2. *Section 2 Expressly Guards Against Proportional Representation*

Despite express statutory language to the contrary, the County argues (Br. 26-28) that §2 seeks an "unconstitutional objective" of proportional representation. But §2 states that "[n]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." The legislative history makes clear Congress' intent that §2 not be used to achieve that objective. 1982 Senate Report 16 ("In case after case, the court expressly rejected proportional representation, and the disclaimer in [§]2 codifies this judicial disavowal."). Indeed, the *Gingles* requirement that minority voters be numerous and concentrated enough to be a majority in a single-member district ensures that proportionality is not guaranteed by §2.

II

THE COUNTY'S AT-LARGE METHOD OF ELECTING COMMISSIONERS VIOLATES §2

Proving a violation of §2 requires showing that an electoral scheme is not equally open to participation by a minority group in that the group has less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice. *Thornburg* v. *Gingles*, 478 U.S.

Marengo County, 731 F.2d 1546, 1571 (11th Cir.) (viewing state policy as a "relevant" but "less important" factor under the §2 results test), cert. denied, 469 U.S. 976 (1984); *Jones* v. *City of Lubbock*, 727 F.2d 364, 383 (5th Cir. 1984) (recognizing the "diminished importance" of the state policy factor), both of which dealt, as here, with at-large election of legislative bodies.

30, 48 (1986). As this Court explained in *Old Person* v. *Cooney*, 230 F.3d 1113, 1120 (9th Cir. 2000), quoting *Gingles*:

> The §2 inquiry requires that three preconditions be met:
>
> 1) the population of American Indians "is sufficiently large and geographically compact to constitute a majority in a single-member district";
>
> 2) American Indians are "politically cohesive"; and
>
> 3) the "white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, * * * usually to defeat the minority's preferred candidate."

Once met, the court next determines whether "the totality of the circumstances [establishes that] American Indians have been denied an equal opportunity to 'participate in the political process and to elect representatives of their choice,'" by considering a "nonexhaustive list of factors" known as the "Senate factors" set out in the legislative history to the Act. *Old Person*, 230 F.3d at 1120; *Johnson* v. *DeGrandy*, 512 U.S. 997, 1010 n.9, 1013-1014 (1994).

The district court here found that the *Gingles* preconditions were met, and that, under the totality of circumstances, the County's at-large election method denies American Indians an equal opportunity to elect candidates of their choice. The County challenges nearly every legal holding and factual finding the district court reached. But the district court's analysis of the law was clearly correct, and there is more than ample evidence to support its decision.

A. *American Indians Vote Cohesively*

The County challenges (Br. 29-39) the district court's finding that American Indians are politically cohesive, but fails to demonstrate legal or factual error.[25] This Court has held that political cohesiveness is judged by looking at "the voting preferences expressed in actual elections," and "showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim." *Gomez* v. *City of Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989) (emphasis added), quoting *Gingles*, 478 U.S. at 56; see also *Sanchez* v. *Colorado*, 97 F.3d 1303, 1312 (10th Cir. 1996), cert. denied, 520 U.S. 1229 (1997). Examining political cohesiveness, courts must "look to the same statistical evidence plaintiffs must offer to establish vote polarization" because "political cohesiveness is implicit in racially polarized voting." *Ibid.*; see also *Gingles*, 478 U.S. at 50.

1. *The Voting Patterns Of American Indian Voters In County Elections Illustrate Strong Political Chesion*

In *Gingles*, the Supreme Court concluded that black support for candidates which ranged from 71% to 96% in elections proved that black voters were politically cohesive. 478 U.S. at 59. Arrington examined 14 County-wide elections between 1982 and 1998, and found that American Indian voter support

[25] The County does not challenge the district court's finding that American Indians could be a majority in a single-member district (R.102).

for candidates ranged from 75% to 100% (USRE.1B), exceeding levels of cohesion found in *Gingles*. Based on Arrington's 67% benchmark for finding cohesion, American Indian voters were politically cohesive in 100% of these County-wide elections. American Indian voters displayed the same strong cohesive voting patterns in elections for Harlem School Board based on Arrington's standards (USRE.21, 37-40; RE.169, 205, 212).

Indeed, the County's own expert testified that, based on his standard for finding cohesion, American Indian voters showed cohesive voting patterns in *95%* of the 134 exogeneous elections (both contested and uncontested primary and general elections) he examined (see p. 12, *supra*). The cohesive voting patterns of American Indian voters in Blaine County surpass those demonstrated by black voters in *Gingles*, *supra*. The district court thus had ample statistical evidence to conclude, as it did, that American Indians vote cohesively. RE.104.

2. *Other Non-statistical Evidence Further Substantiates That American Indian Voters Are Politically Cohesive*

The County argues (Br. 29-30) that to show political cohesiveness under *Gingles*, American Indians must demonstrate that they possess interests centered on community issues that are "distinct or unique" and that the County Commission can address. Courts, including this one, that have addressed this issue have *never* required §2 plaintiffs to show that they possess distinct or unique interests. Rather, courts rely on the *voting patterns of minority voters* in order to determine whether they vote cohesively. *Old Person*, 230 F.3d at 1121 (court relies on statistical

evidence to determine cohesive voting); *Sanchez*, 97 F.3d at 1315-1322; *Solomon* v. *Liberty County*, 899 F.2d 1012, 1019-1020 (11th Cir. 1990), cert. denied, 498 U.S. 1023 (1991); *Monroe* v. *City of Woodville*, 897 F.2d 763, 764 (5th Cir.), cert. denied, 498 U.S. 822 (1990); *City of Carrollton Branch NAACP* v. *Stallings*, 829 F.2d 1547, 1550-1563 (11th Cir. 1987), cert. denied, 485 U.S. 936 (1988).

As the district court found, the County's claim (Br. 30-34) that American Indian voters lack group interests is belied by the evidence. RE.104. Witnesses testified about the interests of American Indians that the County Commission could address, including improving communications between the County and tribe, providing social programs, paving and maintaining County and state roads leading to and from the Fort Belknap Reservation, and developing natural resources. See p. 21, *supra*; see also RE.624.[26] Witnesses testified that the interests of American Indians in particular are amplified since most reside on Fort Belknap, and social, civic and religious organizations are segregated (RE.429, 679-684, 688-689, 844-847; see also pp. 17-19, *supra*), and American Indians suffer from more poverty, unemployment, and lower education levels, than whites in the County (RE.533-535; USRE.25-26, 205-206; see also pp. 16-17, *supra*). Clearly, the County Commission's actions affect American Indian residents of the County.

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[26] The County's claim (Br. 36-37) that the unique interests of American Indians stem from their membership in the Fort Belknap tribe is irrelevant to determining the §2 violation. "[W]henever similarities in political preferences along racial lines exist * * * the cause of the correlation is irrelevant." *Holder* v. *Hall*, 512 U.S. 874, 904 (1994) (Thomas, J., concurring).

3. *Voter Turnout Does Not Undermine The District Court's Finding Of Political Cohesion*

Despite statistical evidence showing the strong political cohesion of American Indian voters (pp. 7-8, 12, *supra*), the County argues (Br. 37-40) that this evidence is insufficient because of low voter turnout. This Court has already rejected that argument. In *Gomez*, where Hispanic voters challenged the City of Watsonville's at-large elections, the district court found that 95% of Hispanic voters in heavily Hispanic precincts supported Hispanic candidates, and that Hispanic voters voted the same way in substantial proportions in those elections analyzed. 863 F.2d at 1414. The district court determined, however, that the second *Gingles* prong was not met because of low Hispanic voter turnout. *Id.* at 1415.

This Court reversed the district court's holding, and held that by focusing on turnout the lower court "applied the wrong legal standard." *Id.* at 1415-1416. "The court should have looked only to *actual voting patterns* rather than speculating as to the reasons why many Hispanics were apathetic." *Id.* at 1416 (emphasis in original). This Court held that the "the issue of political cohesiveness is to be judged primarily on the basis of the voting preferences expressed in actual elections," *id.* at 1415, and the district court's finding that Hispanic voters "demonstrated near unanimous support for Hispanic political candidates" established political cohesion regardless of turnout numbers. *Id.* at 1416; *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1568-1569 (11th Cir.), cert.

denied, 469 U.S. 976 (1984) ("Congress and the courts have rejected efforts to blame reduced black participation on 'apathy.'"). Indeed, this Court in *Gomez* stated that depressed voter participation "may often be traceable in part to historical discrimination." 863 F.2d at 1416 n.4. The district court thus correctly rejected the County's reliance on American Indian voter turnout. See RE.104.

B. *White Citizens In Blaine County Vote In A Way That Results In The Defeat Of American Indian-Preferred Candidates In Satisfaction Of The Third Gingles Prong*

The final *Gingles* precondition requires a showing that whites vote as a bloc usually to "defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51; *Ruiz* v. *City of Santa Maria*, 160 F.3d 543, 555 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999). The *Gingles* inquiry into racial polarization is two-fold:

> (1) to ascertain whether minority group members constitute a politically cohesive unit, *and*
>
> (2) to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates.

478 U.S. at 56 (emphasis added). *Gingles* stated that legally significant racial polarization exists "where there is a 'consistent relationship between [the] race of the voter and the way in which the voter votes * * * or to put it differently, where [minority] voters and white voters vote differently.'" 478 U.S. at 53, n.21. The Court adopted a "functional view" for determining the legal significance of white bloc voting that will "vary from district to district," *id.* at 56, focusing on "the effect of bloc voting on the ability of minority voters fully to participate in the politically process and to elect their representatives of choice." *Jenkins* v. *Red*

Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103, 1122 (3d Cir. 1993), cert. denied, 512 U.S. 1252 (1994); *Salas* v. *Southwest Tex. Jr. Coll. Dist.*, 964 F.2d 1542, 1553 (5th Cir. 1992).

1. *White Voters In The County Consistently Vote As A Bloc To Defeat Candidates Preferred By American Indian Voters*

a. There is ample statistical evidence supporting the district court's finding that white bloc voting results in the consistent defeat of American Indian-preferred candidates. RE.107-108. This Court has made clear that "[e]lections between white and minority candidates are the most probative in determining the existence of legally significant white bloc voting." *Old Person*, 230 F.3d at 1123-1124; *Ruiz*, 160 F.3d at 553-554. In County-wide elections held between 1986 and 1998, American Indian candidates ran in seven elections and lost five elections, or 71%, despite strong cohesive support by American Indian voters. See pp. 10-11, *supra* and USRE.1B, 41-47. The two elections where white bloc voting did not result in the defeat of the American Indian-preferred candidate – Bill Yellowtail's Democratic primary and general elections for the United States Congress in 1986 – were the two least probative minority candidate elections because they involved a national office and one was a general election. See RE.162; USRE.23; see also p. 10, *supra*.

In analyzing five county commission primary elections – two races involving minority candidates and three races involving only white candidates – that are probative for determining racially polarized voting in this case, both Arrington and

Weber found that the candidate preferred by American Indian voters was defeated in four elections (80% of the time), despite an average American Indian voter cohesion level of 90% (USRE.1B, 41-42, 48-50).[27] The district court thus correctly concluded that the third *Gingles* precondition was satisfied.

b. The County argues (Br. 42-46) that determining the presence of bloc voting by white voters requires an assessment of whether white voters also vote cohesively for the same candidate in elections, and that "white voting must be 60% cohesive to constitute bloc voting." But this is not the proper standard. The Supreme Court made clear in *Gingles* that the purpose of analyzing the voting patterns of white voters is to determine whether white voters vote in a way that "'minimize[s] or cancel[s] [minority] voters' ability to elect representatives of their choice." 478 U.S. at 56. Neither the Supreme Court nor this Court has subscribed to a rigid requirement that §2 plaintiffs show that white voters vote for a single white-preferred candidate at a minimum threshold level of 60%. Indeed, the question is not *what* single white candidate the white voters are voting for in each election analyzed by the district court, but instead *whether* white voters consistently voted for candidates *other than the American Indian-preferred candidates*, thus consistently defeating the votes of American Indian voters. *Gingles* referred to a pattern of white voting that *consistently defeats* minority votes regardless for whom

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[27] In addition, the district court found that in 19 elections for Harlem School Board, American Indian candidates were clearly preferred by American Indian voters, and consistently failed to attract the support of white voters (RE.108; see also USRE.21-22, 35, 37-40).

white voters vote. 478 U.S. at 56. Where white voters consistently vote for candidates other than the minority-preferred candidate, and the minority-preferred candidate is consistently defeated, courts have found the existence of racial vote dilution. *Ibid*; *Goosby* v. *Town Bd.*, 180 F.3d 476 (2d Cir. 1999); *Citizens for a Better Gretna* v. *City of Gretna*, 834 F.2d 496 (5th Cir. 1987); *Buchanan* v. *City of Jacksonville*, 683 F. Supp. 1515 (W.D. Tenn. 1988).

The County cites (Br. 44) to *Old Person* and argues that this Court requires a showing that white-preferred candidates win elections with at least 60% of the white vote. This Court in *Old Person* did not address the propriety of that legal requirement, but instead reversed the district court with respect to the third *Gingles* prong and determined that plaintiffs had proven that white bloc voting resulted in the defeat of American Indian-preferred candidates for state senate and house of representatives. *Old Person*, 230 F.3d at 1122-1127 ("Considering all the evidence in the aggregate, we conclude that the white majority in the four districts challenged on appeal 'votes sufficiently as a block to enable it . . . usually to defeat the [American Indians'] preferred candidate.' * * * This conclusion holds *even if we assume, as did the district court, that at least 60% of the white majority must vote for a candidate to constitute a white bloc.*") (emphasis added). The County fails to cite to any other case where that threshold requirement was adopted.[28] But

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[28] The County relies (Br. 43-44) for its argument on *Clay* v. *Board of Education of St. Louis*, 896 F. Supp. 929, 934-935 (E.D. Mo. 1995), aff'd, 90 F.3d 1357 (8th Cir. 1996), and *African American Voting Rights Legal Defense Fund* v. *Missouri*, 994 F. Supp. 1105, 1117-1118 (E.D. Mo. 1997), aff'd, 133 F.3d 921 (8th

even that requirement would not change the district court's finding of vote dilution here. Of the seven elections involving American Indian and white candidates, 60% or more of white voters voted for the same candidate in four elections (USRE.43-45, 47), and split 60% or more of their votes among two or more white candidates in two elections (USRE.41, 42).[29]

2. *The District Court Correctly Evaluated County Elections That Included White And American Indian Candidates In Deciding The Third Gingles Prong*

The County argues (Br. 46-49) that in determining vote dilution, elections that involve minority candidates are no more probative than elections that do not. The district court, however, did not err in relying primarily on elections involving minority candidates. The Supreme Court in *Gingles* made clear that "[b]ecause both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that a [minority] candidate is the choice of [minorities,] while a white candidate is the choice of whites." 478 U.S. at 68. Moreover, this Court has stated that "elections between white and

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Cir. 1998). In both cases, the defendant's expert advanced that standard, but neither district court expressly adopted that rigid statistical standard as a definitive element in its decisions.

[29] It is entirely arbitrary for the County to insist on a showing that 60% or more of white voters vote in opposition to a candidate receiving the cohesive support of minority voters before an election is deemed legally polarized. In some instances white voters can block the preferred candidate of minority voters with less than 60% of whites voting for one candidate, particularly where minority voters are a small percentage of voters. Such an approach does not comport with §2 and *Gingles*' "functional" approach.

minority candidates *are the most probative* in determining the existence of legally significant white bloc voting," and "contests [] occurring in the challenged districts and involving the same public office subject to challenge [are] more probative than election contests for other offices," *Old Person*, 230 F.3d at 1123-1125 (emphasis added), and has focused primarily on elections involving minority and white candidates in assessing the presence of vote dilution. *Romero* v. *City of Pomona*, 883 F.2d 1418, 1422 (9th Cir. 1989); *Gomez*, 863 F.2d at 1417; *Old Person*, 230 F.3d at 1123-1124; *Ruiz*, 160 F.3d at 553-554; see also *Jenkins*, 4 F.3d at 1128 ("[W]e believe that elections involving white candidates only are much less probative of racially polarized voting than elections involving both black and white candidates.").

In *Gingles*, the Court upheld the trial court's finding of vote dilution based upon analyses only of those races in which minority candidates ran. 478 U.S. at 58-61. While Justice Brennan's plurality opinion does not state that a minority candidate is tantamount to minority preference, "implicit in the *Gingles* holding is the notion that [minority] preference is determined from elections which offer the *choice* of a [minority candidate]." *Citizens for a Better Gretna*, 834 F.2d at 503-504 (emphasis added). The district court here found correctly that the most probative elections for determining the existence of vote dilution were the "seven American Indian versus white elections [that] were held in Blaine County." RE.107.

The County's insistence (Br. 49) that more weight should have been given to

general elections and other county and state-wide elections involving only white candidates conflicts with this Court's precedent. See *Old Person*, 230 F.3d at 1123-1125; *Gomez*, 863 F.2d at 1417. In this case, the district court properly relied on seven elections involving American Indian and white candidates, as these are probative of racially polarized voting in County Commission elections. *Meek* v. *Metropolitan Dade County*, 985 F.2d 1471, 1482 (11th Cir. 1993) (reliance on seven elections over three elections years "is sufficient on the circumstances of this case to" find racial polarization); *Gingles*, 478 U.S. at 57 n.25 ("the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim.").[30]

C. *The District Court's Analysis Of The Totality Of Circumstances Is Clearly Supported By The Record*

The "totality of circumstances" referred to in §2 incorporates the analytical framework established in the pre-*Bolden* cases of *White* v. *Regester*, 412 U.S. 755 (1973) and *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), aff'd. sub nom., *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). See *Gingles*, 478 U.S. at 36 n.4. These factors were enumerated in the Senate Report on the 1982 Voting Rights Act amendments and elaborate on circumstances that may help

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[30] Out of 134 local and federal elections Dr. Weber examined, only seven involved American Indian candidates, and many of the contests involved uncontested elections with only white candidates. General elections where the American Indian-preferred candidate lost in the primary are not probative of vote dilution, particularly in Blaine County where both white and American Indian voters vote overwhelmingly for Democratic candidates. See *Ruiz*, 160 F.3d at 552; *NAACP* v. *Niagra Falls*, 65 F.3d 1002, 1019 (2d Cir. 1995).

establish a §2 violation (1982 Senate Report 28-29):

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors include lack of responsiveness of elected officials to the particular needs of minorities, and whether the jurisdiction's reasons for the challenged voting procedure are tenuous. 1982 Senate Report 28-29. This list of factors is "neither comprehensive nor exclusive" and there is "no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Gingles*, 478 U.S. at 45, quoting 1982 Senate Report 29-30.

1. *Evidence Of Historical Official Discrimination Satisfies The First Senate Factor*

The County's argument (Br. 71-75) that there is no evidence of historical official discrimination against American Indians clearly is meritless. The district court heard extensive testimony of historical official discrimination against American Indians in Blaine County in voting and other areas, see pp. 13-16, *supra* (RE.110-111). See also *Old Person*, 230 F.3d at 1129 ("[t]here was a history of discrimination by the federal government and the State of Montana from the 1860's until as recently as 1971").[31]

The County's argument (Br. 85) that proving a §2 violation recognizes only evidence that the "targeted jurisdiction" (Blaine County) engaged in the official discrimination is incorrect. This Court in *Gomez* expressly rejected the claim that evidence of discrimination is limited to discrimination committed by the relevant political subdivision. 863 F.2d at 1418 ("[G]iven that the enumerated Senate factors are 'neither comprehensive nor exclusive,' * * * there is nothing to suggest that courts are *forbidden* to consider discrimination committed by parties other than the relevant subdivision * * * such as the state of California."). Court decisions from which the Senate factors were derived considered the existence of official

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[31] The County erroneously argues (Br. 76) that the district court relied exclusively on the district court's findings in *Old Person*, No. CV-96-004-GF (D. Mont. 1998), in support of its determination on the first Senate factor. In addition to citing the findings in *Old Person*, the district court stated that "Plaintiff presented *extensive* testimony at trial relating to the history of official discrimination against American Indians in the State of Montana and specifically in Blaine County." RE.110-111.

discrimination by the state. See, *e.g.*, *White*, 412 U.S. at 767-768 (referring to state and county-wide discrimination against blacks in Dallas County, Texas); *Zimmer*, 485 F.2d at 1305-1306 (referring to effect of state discrimination).

The County argues (Br. 77-79), again without legal support, that state statutes enacted prior to 1924 should have been excluded because they relate to treatment prior to American Indian citizenship. The district court in *Old Person* relied on such evidence of official discrimination (see 230 F.3d at 1129), and the legislative history of the 1982 Act notes the impact that historical prohibition against citizenship had on the current socioeconomic and political lives of minority persons.

> The Chinese, one House witness noted, were not permitted to become naturalized citizens until 1943. This historic prohibition against citizenship by Chinese Americans has had a devastating impact on many of today's elderly citizens who were denied equal educational and socio-economic opportunities during their younger days. Similarly, American Indians were not accorded citizenship until 1924 and were not permitted to vote in federal elections until the 1960s.

1982 Senate Report 65-66. In this case, the district court heard ample evidence of official discrimination by the State and County that occurred both before and after 1924 affecting American Indians (see pp. 13-16, *supra*).[32]

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[32] The County cites to the writings of Father Francis Paul Prucha (Br. 77 n.43), which were read into the record by counsel during U.S. expert witness Hoxie's cross-examination, and are incorrectly cited by the County as testimony. The United States objected to counsel's recitation of Prucha's treatise into the record (RE.318). The district court permitted Counsel to read portions of the treatise, but not to introduce it into the record as evidence (RE.318). Pursuant to Fed. R. Evid. 803(18), statements in a treatise may only be used for impeachment purposes, and are not admissible as substantive evidence unless expert testimony

2. *Racially Polarized Voting And The Absence Of American Indian Electoral Success Also Satisfy The Senate Factors*

Evidence of racially polarized voting, and the fact that no American Indians had been elected to the County Commission prior to this lawsuit, are the "most important Senate Factors bearing on §2 challenges." *Gingles*, 478 U.S. at 51 n.15. If there is evidence of racially polarized voting and little or no minority electoral success,

> other factors * * *are supportive of, but not essential to a minority voter's claim. In recognizing that some Senate Report factors are more important to multi-member district vote dilution claims than others, the Court effectuates the intent of Congress.

Ibid.

Blaine County has 13 elective offices. Despite the fact that Blaine County is 45.4% American Indian, no person identified as American Indian had *ever* been elected to these offices prior to this case. See RE.112.[33] Thus, the district court correctly determined that this "compelling" evidence shows that "American Indian electoral failure in Blaine County is nearly total." RE.112.[34]

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establishes the treatise as "reliable authority" or the court takes "judicial notice." The preconditions for admitting Prucha's treatise under Rule 803(18) were not met here.

[33] Charles Hay was elected to Sheriff, but the district court determined that the evidence was "inconclusive" as to whether voters were aware of Hay's American Indian ancestry. RE.112.

[34] The failure of American Indian candidates to win election to county-wide office is further underscored by the County Commission's record of appointing so few American Indians to boards, authorities, and commissions. As the district court found, the County Commission made 85 appointments in 1997, 94 in 1998,

The County argues (Br. 64-66), again without legal support, that the district court erred in relying on the political participation of American Indians in Harlem School Board elections, and that this election data cannot be used for any purpose in this case. Election data from Harlem elections bolsters the district court's finding of racially polarized voting in Blaine County. The law is quite clear that a district court may rely on exogenous elections in making its vote dilution determination. *Citizens for a Better Gretna*, 834 F.2d at 502. Such reliance is appropriate here, since these elections further demonstrated that "American Indians cohesively supported Indian candidates over white candidates, and that white voters preferred white candidates over Indian candidates." RE.108.

3. *The County Uses Devices That Enhance The Opportunity To Minimize American Indian Voting Strength*

The third Senate factor asks whether there are voting circumstances, such as anti–single shot voting or size of the election district, that may enhance the opportunity for discrimination against minorities. The County's challenge (Br. 86) here is meritless.

The County Commission is comprised of three members who reside in one of three different residential districts and who are elected at-large for six-year staggered terms, so that "every even-numbered year in November, one of the three

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85 in 1999, and 85 in 2000. RE.109. The district court aptly observed that "[t]he systematic failure of the Blaine County Commission to appoint American Indians to boards, authorities, and commissions illustrates how racial separation makes it more difficult for Indian candidates to solicit white votes." RE.109.

Commissioners must stand for election." RE.98. The district court heard evidence that

> [b]y staggering the [terms of County Commissioners], only one is up every time. The Indians cannot cast a bullet vote [vote for one candidate], and therefore, that particular technique of getting representation is denied to them.

RE.175. See, *e.g.*, *City of Lockhart* v. *United States*, 460 U.S. 125, 135 (1983) ("use of staggered terms also may have a discriminatory effect under some circumstances"). The district court also heard evidence that Blaine County is very large; at 4,638 square miles it is in the top four percent of the nation's largest counties, and the ninth largest in Montana, RE.175, and that the County's size puts "an enormous strain on candidates who are trying to campaign countywide, especially if they have economic problems." RE.174; see *Rogers* v. *Lodge*, 458 U.S. 613, 627 (1982) (geographic size of county made it "more difficult for Blacks to get to polling places or to campaign for office."). When deciding on the third Senate factor, the court had before it evidence that many aspects of the election procedure, *i.e.*, the staggered elections and size of Blaine County, enhanced the opportunity for discrimination.[35] Indeed, only after the electoral district was divided into three single-member districts were American Indian voters able to

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[35] Even if the district court was required to make specific findings with respect to staggered terms and geographic size, its failure to do so is not fatal to its ultimate vote dilution determination because the presence or absence of the third Senate factor is "not essential" to a §2 challenge when there is ample evidence showing the presence of factors two and seven. See p. 68, *supra; Gingles*, 478 U.S. at 48 n.15.

elect a representative of their choice (see p. 5, *supra*).

4. *Evidence That American Indians Suffer The Present Effects Of Past Discrimination Satisfies The Fifth Senate Factor*

The fifth Senate factor considers the extent to which past discrimination has caused American Indians to suffer lower socioeconomic conditions which currently hinder their ability to participate in the political process. *Gingles*, 478 U.S. at 69; 1982 Senate Report 29. "[P]olitical participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low income." *Gingles*, 478 U.S. at 69; *White*, 412 U.S. at 768.

The County argues (Br. 81-82, 87-89) that American Indians and whites are "equally poor" and that plaintiffs must establish a causal link between socio-economic disparities and discrimination, and the effect on minority political participation. First, the record here showed that American Indians are consistently and significantly lower than whites in income, education, and employment in Blaine County. Census data from 1990 show that the average income of white families is almost double that of American Indians, and that three times as many American Indians (41.1%) are living below the poverty level as compared to white families (13.7%) (p. 16, *supra*). American Indians graduate from high school at two-thirds the rate of whites, and graduate from college at about one-third the rate of whites (p. 16, *supra*). American Indians are unemployed at a rate seven times (26%) higher than whites (3.6%), and 18.5% of American Indian families do not

own a vehicle, compared to 6.6% of whites (pp. 16-17, *supra*).

Second, contrary to the County's claim (Br. 89-90), plaintiffs need not establish a causal nexus between socioeconomic disparities and the impact on minority voter participation. Where such disparities exist, and minority political participation is low, this Court has found the nexus presumed. *Gomez*, 863 F.2d at 1418; 1982 Senate report 29 n.114 (where minority group members suffer inferior education, poor employment opportunities and low income, "plaintiffs need not prove any further causal nexus between their disparate socioeconomic status and the depressed level of political participation."). See also, *Ortiz* v. *City of Phila.*, 28 F.3d 306, 312 n.9 (3d Cir. 1994); *Niagra Falls*, 65 F.3d at 1021; *Stabler* v. *County of Thurston*, 129 F.3d 1015, 1023 (8th Cir.1997), cert. denied, 523 U.S. 1118 (1998).

5. *The County's Reasons For Maintaining At-Large Elections Are Tenuous*

The County argues (Br. 91-92) that at-large districts have been used historically throughout the State and, given the County's large size and rural nature, this voting method makes commissioners "responsive to all areas of the county." The district court determined correctly that the County's reasons are "tenuous." RE.116.

First, commissioners are elected based on residency districts (p. 6, *supra*). Appointments to boards, authorities and commissions are made based on residency districts (RE.625, 760-761), and commissioners are responsible for maintaining roads in their respective districts (RE. 624-625 (Commissioner Swensen agrees that

the "purpose of the residency districts is to provide representation to the different interests and different geographic areas in the county.")). *Goosby* v. *Town of Hempstead*, 956 F. Supp. 326, 347 (E.D. NY 1997), aff'd, 180 F.3d 476 (2d Cir. 1999) (district court rejects policy justifications for maintaining at-large method of election because "Town Board has created de facto districts, assigning principal responsibility for areas in the Town to particular members"). Second, there is no requirement that the County maintain at-large elections, as Montana law "allows for changes in the method of electing County Commissioners, including the adoption of single-member district plans, and has been adopted by several Montana counties." RE.115. Finally, in enacting the results test in 1982, Congress was aware of many cases (pp. 31-36, *supra*) in which at-large elections diluted minority voting, and clearly expressed its view that in legislative cases, single-member districts are equally valid and effective electoral systems without the dilutive effects of many at-large systems.

6. *Evidence Of Racial Discrimination By The White Electorate Is Not Required To Prove A Violation Of §2*

The County argues (Br. 27, 66-70) that the district court must find that white voters discriminate. *Gingles*, however, expressly rejected that as a requirement for proving a §2 violation. 478 U.S. at 70-73 & n.33. To require a showing that white bloc voting is caused by "white voters' racial hostility toward [minority] candidates" would "frustrate the goals Congress sought to achieve by repudiating the intent test." *Gingles*, 478 U.S. at 70-71. The results test instead targets the

locality's maintenance of election policies and procedures that, coupled with the continuing effects of historical racial discrimination, result in diminished minority electoral strength. Indeed, this Court in *Ruiz* stated that "[t]he focus is voter behavior, not voter motivation." 160 F.3d at 557.

Nonetheless, the district court here heard evidence of racial tension in the County, including statements that suggest racial discrimination against American Indians by white voters (see p. 17, *supra*). The United States presented evidence and expert testimony as to racially disparaging remarks by white residents, and the belief of some that American Indians should not have the right to vote or be elected to the County Commission (see pp. 17-18, *supra*). Given the evidence of racially polarized voting, additional evidence of white voter hostility further supports the district court's determination that the County's at-large election method violates §2.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY RELYING ON THE UNITED STATES' EXPERT TESTIMONY AND EXHIBITS

1. The admissibility of expert opinion testimony is governed by Fed. R. Evid. 702, which imposes a "gatekeeping" obligation on trial judges to ensure that testimony is "relevant" and "reliable." *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993); *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 147 (1999). The admission of expert evidence is based "solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. *Daubert*

suggested a number of factors the trial court may consider in admitting expert testimony, but made clear that the Rule 702 inquiry is "'a flexible one,' * * * [and that] 'factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony.'" *Kumho*, 526 U.S. at 150; *White* v. *Ford Motor Co.*, 312 F.3d 998, 1007 (9th Cir. 2002). "[T]he trial judge [has] considerable leeway in deciding in a particular case how to go about determining whether the particular expert testimony is reliable." *Kumho*, 526 U.S. at 152.

In determining the admissibility of expert testimony, *Daubert* instructs the trier of fact to allow "[v]igorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof * * * [to test] shaky but admissible evidence." 509 U.S. at 596. This is particularly appropriate since a trial judge conducting a bench trial has substantial flexibility in admitting proffered expert testimony at trial and deciding later whether the evidence is reliable and relevant. See this Court's decision in *Jones* v. *United States*, 127 F.3d 1154, 1156 (9th Cir. 1997), cert. denied, 524 U.S. 946 (1998). In bench trials there is "little danger * * * that the court [will be] unduly impressed by the expert's testimony or opinion." *Shore* v. *Mohave County*, 644 F.2d 1320, 1322-1323 (9th Cir. 1981).

2. The County argues (Br. 51, 58, 61), again erroneously, that the district court failed to rule on its objections to the United States' expert evidence. The district court acted on the County's objections by either admitting the evidence in its rulings during the trial, or by virtue of relying on that evidence in its *Findings*.

The district court was well within its discretion in hearing expert testimony prior to ruling on its admissibility, and giving each expert's testimony "the weight [the court] felt it deserved." *Id.* at 1323; *Fed-Mart Corp.* v. *United States*, 572 F.2d 235, 238 (9th Cir. 1978).

The County's assertion (Br. 51) that the district court did not evaluate the admissibility of Arrington's testimony is meritless. The County's objection stems from the request for admission of U.S exhibits 1-21, supported by Arrington's testimony that relies on race-identified voter registration lists. Prior to Arrington's testimony, the district court advised the parties that it would reserve ruling on the County's objection to U.S. exhibits 1-21 and the weight to be given to it (p. 3, *supra*). The County did not object to the district court's approach (p. 3, *supra*). In its decision, the district court "overruled Defendant's objection and admit[ted]" the United States' exhibits, holding that use of the underlying data was appropriate because the same lists were "used by experts in the same area in *Old Person* v. *Cooney*, 230 F.3d at 1121." RE.103 n.3. The district court also observed that "Arrington and Weber testified that race-identified registration lists are consistently accepted methods of data collection for § 2 voting rights cases." RE.103.

The County's claim that the district court did not rule on the admission of Hoxie's testimony is equally meritless. During the trial, the County objected to Hoxie's testimony and report with respect to its discussion of the history of official discrimination against American Indians by the United States and State of Montana. The district court considered the County's objections, and the United

States' response, and overruled the County's objections during the trial (pp. 3-4, *supra*).

The district court ruled on the County's objections to McCool's expert testimony and report on the political participation of American Indians in the County. After advising the County to address the bases of its objection in its post-trial briefing, which the County agreed to do, the district court admitted the evidence, as it relied on McCool's statistical and anecdotal evidence in its decision. RE.111.

3. The County argues (Br. 53-57) that the race-identified voter registration lists Arrington relied on are unreliable. This argument is meritless.

Arrington relied on official voter registration lists to determine the racial composition of each precinct. For elections of 1980, 1982, 1984, 1986 and 1988, Arrington used coders, or "local experts to identify the race of voters from official voter rolls to determine the racial composition of each precinct." USRE.8. The coders identified voters from names and addresses on voter registration rolls. *Ibid.* For the 1980 registration list the coders disagreed about the race of only 103 voters for an "intercoder reliability of 97.5%." *Id.* at 9. Arrington reported that "anything above 90% intercoder agreement is considered acceptable." *Ibid.* Arrington relied on racial identification lists used in *Old Person* for election years 1990, 1992, 1994 and 1996. *Id.* at 10.

The race-identified registration lists are reliable. As the district court pointed out, RE.103 n.3, Arrington's and Weber's bivariate ecological regression analyses

and homogeneous precinct analyses findings generated very similar results, confirming the reliability of the underlying data. Moreover, Weber conceded at trial that experts have long accepted the use of race-identified registration lists in voting rights cases, and generally prefer race-identified registration lists to census data. RE.182, 282. An accounting of the race of registered voters in each precinct will provide better estimates of minority voting percentages than census data that relate only to the race of the voting age population. RE.182, 282. Moreover, voter registration lists are updated every two years, compared to every ten years for census figures. RE.181-182; U.S. Exhs. 15-17. Arrington controlled for the accuracy of the data by personally supervising the coding process and using five persons divided into two groups to do the identifying, RE.180, and the coders reached a consensus before identifying an individual as either American Indian or white. RE.180, 209.

The race-identified registration lists from years 1990 to 1996 in fact were used by the district court in *Old Person*. Arrington interviewed one of the coders involved in identifying the *Old Person* registration lists, and independently determined that coders reliably identified American Indians. RE.210.

4. The County's argument (Br. 58-60) that Hoxie's report on the history of Indian and white relations in the United States, State of Montana and Blaine County, U.S. Exh. 22 (USRE.129-194), is unreliable, is baseless. Hoxie's testimony and report are based on a wide variety of official sources. USRE.130; see also RE.296. Based on this research, Hoxie concluded that American Indians

in the County have long suffered discrimination sanctioned by State and local officials. USRE.131; see also pp. 13-16, *supra*. Hoxie testified extensively as to his findings and opinions at trial (RE.293-317), and was subject to extensive cross-examination by the County (RE.317-342). *Daubert*, 509 U.S. at 596.

5. Finally, the County's argument (Br. 61-64) that McCool's testimony and report is unreliable lacks merit, as both were based on primary and secondary print sources, and interviews (USRE.203-223). The print sources are "scholarly research published in leading social science journals, census data, official election returns, government reports, relevant books, court cases, and local newspaper articles." USRE.203; RE.345. McCool conducted interviews with County citizens as "part of the qualitative technique" to corroborate the other sources. RE.346; USRE.224-233 (McCool's resume). Qualitative research methodology is broadly accepted within political science. See Gary King, Robert Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton, NJ: Princeton Univ. Press, 1994).

For his interviews McCool sought a "broad spectrum of people that represented a significant variety of viewpoints," RE.346, and interviewed by telephone and in person tribal officials, former county and state officials, people who had run for office, and people "identified as having a position that was contemporary to some of the positions of the tribal officials." RE.346. He did not conform his interviews to a sampling technique as he did not view sampling as relevant. RE.359-360. McCool has used this same technique consistently in all of

his published research for over 20 years. RE.345-347, 359. McCool testified that his methodology has attracted widespread acceptance within the academic community, and that social scientists engaged in qualitative research usually conduct interviews in the manner that he conducted them, and that interview data is broadly accepted by political scientists as part of the qualitative methodology. RE.345-346. McCool's direct testimony was subject to rigorous cross-examination by the County. RE.355-365; *Daubert*, 509 U.S. at 596.

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

There is no related case pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached Brief For The United States As Appellee complies with the type-volume limitations authorized by this Court's order entered December 24, 2002. The brief was prepared using WordPerfect 9.0 and contains 20,995 words of proportionally spaced text. The type-face is Times New Roman, 14-point font.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the Brief For The United States As Appellee, and one copy of the Excerpts of Record for the United States were sent by overnight Federal Express delivery to each of the following counsel of record on this 19th day of March, 2003:

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