No. 02-35691

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

BLAINE COUNTY, MONTANA, ET AL.,

Defendants-Appellants

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

UNITED STATES' ANSWER TO PETITION FOR REHEARING EN BANC

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The United States files this answer to Appellant's petition for rehearing en banc pursuant to this Court's request. The panel held that §2 of the Voting Rights Act, 42 U.S.C. 1973, was a constitutional exercise of Congress's powers under the Fourteenth and Fifteenth Amendments, and that Blaine County's at-large method of electing county commissioners violated §2. The panel decision is consistent with the decisions of this Court, the Supreme Court, and with the decisions of other court of appeals. Further review is unwarranted.

I. THE PANEL CORRECTLY RELIED ON THE SUPREME COURT'S SUMMARY AFFIRMANCE IN *MISSISSIPPI REPUBLICAN* v. *BROOKS*

The County erroneously argues (Pet. 2-3) that the panel erred in relying on the summary affirmance in *Mississippi Republican Executive Committee* v. *Brooks*, 469

U.S. 1002 (1984). In *Brooks*, the Supreme Court summarily affirmed a three-judge district court decision, *Jordan* v. *Winter*, 604 F. Supp. 807, 811 (N.D. Miss. 1984), which held the "results" test of §2 constitutional. A question presented in the Jurisdictional Statement in *Brooks* is the same as that presented by the County in this case – whether that portion of §2 that permits a finding of a violation absent direct proof of discriminatory intent "exceeds the power vested in Congress." 469 U.S. at 1003 (Stevens, J., concurring); *United States* v. *Blaine County*, 363 F.3d 897, 904 n.5 (9th Cir. 2004). The Supreme Court has held that "summary affirmances bind lower courts, unless subsequent developments suggest otherwise," *Hicks* v. *Miranda*, 422 U.S. 332, 344-345 (1975), and the Court's holding in *Brooks* "reject[s] the specific challenges presented in the statement of jurisdiction." 469 U.S. at 1002.

There are no subsequent developments in the law suggesting that this Court can ignore the holding in *Brooks*; indeed, the panel noted, 363 F.3d at 905 n.7, Justice O'Connor's observation in *Bush* v. *Vera*, 517 U.S. 952, 991 (1996) (concurring), that numerous federal courts have upheld the constitutionality of §2. The panel, applying the principles set forth in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and cases that followed, determined that the "congruence-and-proportionality cases support, not undermine, the Supreme Court's summary affirmance of section 2's constitutionality in *Mississippi Republican Executive Committee*." 363 F.3d at 905.

II. SECTION 2 OF THE VOTING RIGHTS ACT IS APPROPRIATE ENFORCEMENT LEGISLATION

The County contends (Pet. 3, 5) that the panel erred in holding §2 of the Voting Rights Act constitutional, arguing that the panel "rel[ied] on pre-*Boerne* cases" and "failed to examine or discuss the nature or extent of evidence Congress had before it when it amended Section 2 in 1982." This argument lacks merit.

A. *The Panel Applied The Correct Standard In Holding §2 Constitutional*

Section 5 of the Fourteenth Amendment and §2 of the Fifteenth Amendment give Congress the authority to enforce the prohibitions of racial discrimination "through appropriate legislation." *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966). Both Amendments are "positive grant[s] of legislative power" (*ibid.*), and "include[] the authority both to remedy and to deter violation of rights guaranteed * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80-81 (2000), citing *Boerne*, 521 U.S. at 518 (1997); *Florida Prepaid Postsec. Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 639 (1999).

The results test of §2 satisfies this standard. The Court has "repeatedly affirmed that Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Tennessee* v. *Lane*, 124 S. Ct. 1978, 1985 (2004); see also *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 727-728 (2003); *Boerne*, 521 U.S. at 518; *Kimel*, 528 U.S. at 80-81. Congress's 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*, 527 U.S. at 639. "When Congress seeks to remedy or prevent unconstitutional discrimination, §5 [of the Fourteenth Amendment] authorizes it to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause." *Lane*, 124 S. Ct. at 1986; *Hibbs*, 538 U.S. at 727-728; see also *Board of Trs.* v. *Garrett*, 531 U.S. 356, 365 (2001). At the outset, we note that the Voting Rights Act is intended primarily to prohibit *racial* discrimination. The prohibition of racial discrimination is at the heart of the Fourteenth Amendment's concerns. Accordingly, racial classifications are subject to strict scrutiny and Congress is at the height of its Fourteenth Amendment power in legislating to prohibit racial discrimination.

In all cases, of course, valid §5 prophylactic legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Hibbs*, 538 U.S. at 728, quoting *Boerne*, 521 U.S. at 520. The Court has upheld federal voting rights provisions that prohibited actions with discriminatory effect as appropriate enforcement measures under the Fifteenth Amendment. *Boerne*, 521 U.S. at 518, citing *South Carolina* v. *Katzenbach*, 383 U.S. 301, 336-337 (1966) (upholding preclearance requirements that prohibit actions based solely on their racially discriminatory effect); *Morgan*, 384 U.S. at 641 (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 panel observed, in *Boerne* and cases that followed, the Supreme Court compared the constitutionality of other statutes under the congruency and proportionality test with the Voting Rights Act, and consistently cited the Act as "the prime example of a congruent and proportionate response to well documented violations of the Fourteenth and Fifteenth Amendments." 363 F.3d at 904. The panel observed that in *Boerne*, when the Court "first announced the congruence-and-proportionality doctrine," it "twice pointed to the V[oting] R[ights] A[ct] as the model for appropriate prophylactic legislation." *Ibid.*; see also *id.* at 905, *Boerne*, 521 U.S. at 518, 525-526. The panel stated that "subsequent congruence-and-proportionality cases have continued to rely on the Voting Rights Act as the baseline for congruent and proportionate legislation." 363 F.3d at 904-905, citing *Hibbs*, 538 U.S. 721; *Garrett*, 531 U.S. at 373-374; *United States* v. *Morrison*, 529 U.S. 598, 626 (2000); *Florida Prepaid*, 527 U.S. at 638; see also *Lane*, 124 S. Ct. at 1986 n.4.

B. *Section 2 Is Congruent To Addressing The Problem Of Discrimination In Voting*

The panel correctly rejected the County's contentions (Pet. 5-6) that Congress lacked a factual predicate for applying §2 nationwide because it did not have a record of discrimination in voting beyond the southern states.

First, Congress need not find evidence of discrimination state-by-state prior to applying §2 nationwide. The Supreme Court's decision in *Hibbs*, 538 U.S. 721, upheld the constitutionality of the Family Medical Leave Act, 29 U.S.C.

2612(a)(1)(C), from a similar challenge. The panel here, citing *Hibbs*, correctly "decline[d] to hold that Congress had to find evidence of unconstitutional voting discrimination by each of the fifty states in order to apply section 2 nationwide." 363 F.3d at 907. *Hibbs* recognized that despite the absence of specific state-by- state findings of discrimination, the "States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic §5 [of the Fourteenth Amendment] legislation" with nationwide application. 538 U.S. at 735. The Court has never required Congress to make state-by-state findings prior to adopting nationwide remedial measures. Indeed, the Supreme Court upheld Congress's nationwide ban on literacy tests in *Oregon*, 400 U.S. at 132-133, despite the lack of evidence before Congress that the tests had been used in a discriminatory manner in every state in the union.

Second, this question is not presented here, as the legislative record of the Voting Rights Act contains ample evidence of discrimination in voting occurring in many regions of the United States. *Florida Prepaid*, 527 U.S. at 639-640; *Kimel*, 528 U.S. at 88. Congress enacted §2 of the 1965 Act in light of "nearly a century of systematic resistance to the Fifteenth Amendment." *Katzenbach*, 383 U.S. at 328. While the most far-reaching provision of the 1965 Voting Rights Act – the requirement that some States must preclear new voting changes under §5 of the Act – was enacted in response to voluminous findings by Congress of flagrant discriminatory voting practices in those areas, 42 U.S.C. 1973c, there was evidence

of voting discrimination beyond those areas as well. Subsequent re-enactments and amendments to the Voting Rights Act presented more evidence of voting discrimination beyond those southern states. See, *e.g.*, H.R. Rep. No. 397, 91st Cong., 1st Sess. 7 (1969); see also Brief For The United States As Appellee (filed Mar. 19, 2003), at 31-40. In 1975, Congress amended the Act after additional hearings revealed further discrimination affecting minority voting participation 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). Congress expanded the Act to afford protection "to additional areas throughout the country," including localities with concentrations of American Indian voters such as Alaska, Arizona, California, Colorado, Florida, Idaho, Iowa, Louisiana, Mississippi, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Utah. 1975 Senate Report 9; 28 C.F.R. Pt. 55, App.

When amending §2 in 1982, Congress heard further evidence of persistent abuses of the electoral process nationwide, including "sophisticated dodges, such as at-large elections" that dilute minority voting strength, 127 Cong. Rec. 32,177 (1981), voluminous examples of efforts to bar minority participation, annexation of largely white areas, and racially gerrymandered districts. These findings were supported not only by extensive testimony from a wide range of individuals and

organizations, but also by numerous reports from government agencies, private groups, and social scientists, and the recent record of enforcement throughout the United States. See Brief For The United States As Appellee at 31-37, 42-44.

The panel addressed the County's argument and rejected it. The panel concluded that based on these extensive findings of discrimination in voting, Congress "was justified in applying section 2 nationwide." 363 F.3d at 907. The panel stated that Congress heard evidence of discrimination in voting in states not covered by the preclearance requirements of §5 of the Voting Rights Act. 363 F.3d at 907 ("Congress had before it sufficient evidence of discrimination in jurisdictions not covered by section 5" of the Voting Rights Act). The Attorney General's report to Congress on vote dilution cases during the 1981 hearings included cases in Nebraska, Wisconsin, New Mexico, and California. *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess., Vol. I at 1804-1806, 1808 (1982) (1982 Senate Hearings); see also Brief For The United States As Appellee at 39; *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1559 (11th Cir. 1984) ("Congress did find evidence of substantial discrimination outside [covered] jurisdictions."), cert. denied, 469 U.S. 976 (1984). During debates on both the 1975 and 1982 amendments to the Act, Congress identified federal district court cases involving discrimination against American Indians in numerous States outside the south. See Brief For The United States As Appellee at 37-38.

Finally, although there is some merit in the position that application of the

results test of §2 to a State with an absolutely pristine history is unfair, this is hardly the case in which to address that argument. As the panel found, there is a lengthy history of discrimination in Montana and Blaine County against Native Americans. See 363 F.3d at 913; see also Brief For The United States As Appellee at 13-21.

C. *Section 2 Is Proportional To Remedying Discrimination In Voting*

The County argues (Pet. 5-6) that §2's general prohibition against discriminatory voting methods nationwide overbroadly proscribes all at-large methods of election. This argument lacks merit.

First, courts have never held that all at-large methods of election violate §2. Several courts have upheld at-large elections in a §2 case. See, *e.g.*, *Perez* v. *Pasadena Indep. Sch. Dist*., 165 F.3d 368 (5th Cir. 1999), cert. denied, 528 U.S. 1114 (2000); *Jenkins* v. *Manning*, 116 F.3d 685 (3d Cir. 1997). Second, the Supreme Court has repeatedly upheld nationwide application of limited prophylactic legislation, *Morgan*, 384 U.S. 641; *Mitchell*, 400 U.S. at 118, and has not required geographic restrictions on general legislation, *Boerne*, 521 U.S. at 533.

In any case, §2's general prohibition against discriminatory voting methods is not overbroad. A voting process can be struck down only if there is proof of its discriminatory operation in the jurisdiction before the federal court. This can be achieved in two ways: "Plaintiffs must either prove [discriminatory] 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." S. Rep. No. 417, 97th Cong., 2d Sess. 27

(1982) (1982 Senate Report). To prove, as here, that a voting method has discriminatory *results* and violates the Act, 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). And even with such proof, a court must consider additional circumstances described by the Senate factors, and only then may find a violation of §2. *Ibid*.[1] Section 2 thus "avoids the problem of potential overinclusion entirely by its own self-limitation," 1982 Senate Report 43, by invalidating only those practices that are found*, after trial*, to dilute minority voting strength. In addition, as the panel observed, in §2 the "burden of proof is on the plaintiff, not the state or locality." 363 F.3d at 906 ("[S]ection 2's results test makes no assumptions about a history of discrimination. Plaintiffs must not only prove compactness, cohesion, and white bloc voting, but also satisfy the totality of circumstances test"), citing *Gingles*, 478 U.S. at 48-50.

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[1] The County incorrectly suggests (Pet. 5-6, 10 & n.7) that the panel's decision conflicts with *Muntaqim* v. *Coombe*, 366 F.3d 102 (2d Cir. 2004). *Muntaqim* held that §2 is not applicable to New York State's felony disenfranchisement statute, and cited to §2's legislative history that the provision was not intended to prohibit state statutes that deny convicted felons the right to vote. 366 F.3d at 108-109, citing S. Rep. No. 162, 89th Cong., 2d Sess., 24 (1965). Congress, however, found ample evidence that at-large methods of election resulted in the dilution of the votes of minorities. See Brief For The United States As Appellee at 36 & n.19. Similarly, the County's citation (Pet. 2) to Judge Kozinski's dissent from this Court's denial of the petition for rehearing en banc in *Farrakhan* v. *Washington*, 359 F.3d 1116, 1123 (2004), in a similar case is unavailing; that dissent raised the issue of the constitutional application of §2 when a case is purely statistical, without proof of discrimination or its effects.

III. SECTION 2 DOES NOT REQUIRE PLAINTIFFS TO PRODUCE EVIDENCE OF INTENTIONAL DISCRIMINATION

The County erroneously argues (Pet. 6, 8-10) that for §2 to be constitutional, courts *must* find intentional discrimination. Proving a violation of the results test of §2 requires proof that an electoral scheme is not equally open to participation by a minority group, because it deprives that group of an equal opportunity to participate in the political process and elect representatives of their choice. *Thornburg* v. *Gingles*, 478 U.S. 30, 48 (1986). This Court explained in *Old Person* v. *Cooney*, 230 F.3d 1113, 1120 (9th Cir. 2000), quoting *Gingles*, that the §2 inquiry requires three preconditions (478 U.S. at 48), and once met the court determines whether "the totality of the circumstances" shows that American Indians have been denied an equal opportunity to elect representatives of their choice by considering a "nonexhaustive list of factors" known as the "Senate factors" (1982 Senate Report 28-29). In *White* v. *Regester* and *Rogers* v. *Lodge*, *infra*, the Supreme Court established that these criteria create an inference of purposeful discrimination in voting, and therefore actual proof of intentional discrimination is not required.

In *White* v. *Regester*, 412 U.S. 755, 758 (1973), the Court considered the type of circumstantial evidence needed to support a finding of racially based unconstitutional vote dilution. *Id*. at 765-769 (citing to factors virtually identical to those adopted by the Senate in 1982 with the adoption of §2). Subsequently in *City of Mobile* v. *Bolden*, 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), and therefore required a finding of discriminatory purpose. *Id.* at 66. 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. The concurring opinions of Justices Blackmun and Stevens as well referred to the *White* standard as appropriate for proving a §2 violation. *Id.* at 80 (Blackmun, J., concurring).

In *Rogers* v. *Lodge*, 458 U.S. 613 (1982), the Court examined the circumstantial showing needed to support a finding of purposeful discrimination in a vote dilution case, and held that discriminatory intent "need not be proved by direct evidence." *Id*. at 618. *Rogers* resolved any question over the adequacy of the *White* standard to support an inference of unconstitutional purposeful discrimination. Congress, to clarify the scope of the Act after *Mobile,* amended §2 to add 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. 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 deemed acceptable in *White* and *Rogers*. 1982 Senate Report 17-35; *Gingles*, 478 U.S. at 36-37 & n.4.

IV. THE PANEL PROPERLY ASSESSED AMERICAN INDIAN COHESION

The County's argument (Pet. 11-13) that American Indians are not politically

cohesive lacks merit. Pursuant to *Gingles*, this Circuit determines political cohesiveness by looking at "the voting preferences expressed in actual elections." *Gomez* v. *City of Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988), cert. denied, 489 U.S. 1080 (1989), quoting *Gingles*, 478 U.S. at 56. In *Gingles*, the Supreme Court found black voters politically cohesive based on black voters' support for candidates that ranged from 71% to 96%. 478 U.S. at 59. Here, experts for both the United States and the County found that American Indians voted cohesively for the same candidates in local and county elections. 363 F.3d at 910; see also *United States* v. *Blaine County*, CV-S-99-122-GF-PMP, Slip op. 7-9 (D. Mont. Mar. 21, 2002). There is no split in the circuits on this issue; none have required that §2 plaintiffs show distinct or unique interests. Instead, like the panel, other circuits rely on the *voting patterns of minority voters* in order to determine whether they vote cohesively. *Old Person*, 230 F.3d at 1121; *Sanchez* v. *Colorado*, 97 F.3d 1303, 1315-1322 (10th Cir. 1996), cert. denied, 520 U.S. 1229 (1997); *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).[2]

V. THE PANEL GAVE APPROPRIATE WEIGHT TO COUNTY ELECTIONS

The County erroneously argues (Pet. 13-15) that the panel erred in finding

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[2] Even if a showing of distinct political interests is required, evidence at trial showed that American Indian voters in the County have common interests. Brief For The United States As Appellee at 55-56.

elections involving minority candidates more probative of racially polarized voting. The Supreme Court in *Gingles* observed that frequently minority candidates are the "choice of [minority voters]" while white candidates are the choice of white voters, and upheld the trial court's finding of vote dilution based upon analyses only of those races in which minority candidates ran. *Gingles*, 478 U.S. at 58-61, 68. Consistent with *Gingles*, this Circuit recognizes that "[e]lections between white and minority candidates *are the most probative* in determining the existence of legally significant white bloc voting," as are elections "in the challenged districts and involving the same public office." *Old Person*, 230 F.3d at 1123-1125 (emphasis added). In this case, the panel correctly focuses on elections involving minority and white candidates as the most probative 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* v. *City of Santa Maria*, 160 F.3d 543, 553-554 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999); see also *Jenkins*, 4 F.3d at 1128.[3]

CONCLUSION

The petition for rehearing en banc should be denied.

Respectfully submitted,

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[3] Contrary to the County's claim (Pet. 14-15), the court of appeals' decision in *Solomon*, does not conflict with the panel's holding. 221 F.3d at 1227 ("a court may assign more probative value to elections that include more minority candidates, than elections with only white candidates."); see also *Rural West Tennessee African-American Affairs Council* v. *Sundquist*, 209 F.3d 835, 840 (6th Cir. 2000) (same), cert. denied, 531 U.S. 944 (2000).

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached Answer To Petition For Rehearing En Banc is:

____ Proportionately spaced, has a typeface of 14 points or more and contains ___ words (petitions and answers must not exceed 4,200 words).

or

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or

____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

_____
Lisa Wilson Edwards

CERTIFICATE OF SERVICE

I hereby certify that two copies of the United States' Answer To Petition For Rehearing En Banc were sent by Federal Express overnight delivery to the following counsel of record on this 26th day of July, 2004:

J. Scott Detamore
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