No. 01-14940AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ROSE JOHNSON, *et al*.,

Plaintiffs-Appellants/
Cross-Appellees

v.

ROBERT HAMRICK, *et al*.,

Defendants-Appellees/
Cross-Appellants

UNITED STATES OF AMERICA,

Intervenor/Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AS CROSS-APPELLEE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned counsel of record certifies that, to the best of his knowledge, the following listed persons or entities have an interest in the outcome of this appeal:

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe that oral argument is necessary to dispose of Defendants' cross-appeal. However, the United States has no objection to oral argument if this Court believes that it would be helpful.

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STATEMENT OF JURISDICTION

Although the district court entered final judgment for Defendants, they have cross-appealed the denial of their motion to dismiss. Defendants may not take an appeal from a judgment issued wholly in their favor. See *Stone Container Corp.* v. *Hartford Steam Boiler Inspection and Ins. Co.*, 165 F.3d 1157, 1159 (7th Cir. 1999); *Knight* v. *Alabama*, 14 F.3d 1534, 1556 (11th Cir. 1994). However, this Court may consider the arguments asserted in the cross-appeal as alternative grounds for affirming the district court's judgment, if Plaintiffs prevail in their

appeal. See *Jordan* v. *Duff and Phelps, Inc.*, 815 F.2d 429, 439 (7th Cir. 1987), cert. dismissed, 495 U.S. 901 (1998); *Tezze* v. *Director, Office of Workers' Comp. Program*, 814 F.2d 129, 133 (3d Cir. 1987). See also *Califano* v. *Yamasaki*, 442 U.S 682, 692 (1979).

STATEMENT OF ISSUES

1. Whether Section 2 of the Voting Rights Act of 1965, as amended in 1982, is valid legislation to enforce the Fourteenth and Fifteenth Amendments.
2. Whether Section 2 violates constitutional equal protection principles.
3. Whether Section 2 violates the Tenth Amendment or the Guarantee Clause of Article IV.

STATEMENT OF THE CASE

In 1991, Plaintiffs filed this action pursuant to Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, and the Fourteenth Amendment, challenging the at-large election of members of the Gainesville, Georgia, city council.[1]

Section 2 provides:

> (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 * * * as provided in subsection (b) of this section.

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[1] The underlying facts of the case are discussed in the parties' briefs (see Brief for Appellants 3-15; Brief of Appellees/Cross Appellants 2-6 (hereinafter Br.)). These facts, however, are irrelevant to Defendants' facial challenge to the constitutionality of Section 2 (see Br. 40) . The United States is participating in this appeal solely to defend the constitutionality of Section 2 and, therefore, takes no position on the merits of Plaintiffs' appeal.

> (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 leading to the nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizen protected by subsection (a) of this section 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.

The First Round. After a bench trial in 1994, the district court ruled against Plaintiffs' Section 2 claim, but declined to address Plaintiffs' constitutional claims. R-89-27-28.[2] This Court dismissed Plaintiffs' appeal, holding that until the district court resolved Plaintiffs' constitutional claims, the judgment was not final. R-117-2-3.

The Second Round. In response, the district court held additional evidentiary hearings in July 1997 and, based on new evidence, concluded that the City's at-large election system violated Section 2. R-17-16. The district court then rejected Defendants' claim that Section 2 was unconstitutional, relying chiefly on the Supreme Court's summary affirmance in *Mississippi Republican Executive Committee* v. *Brooks*, 469 U.S. 1002 (1984), and this Court's holding in *United States* v. *Marengo County Commission*, 731 F.2d 1546, cert. denied, 469 U.S. 976 (1984). R-117-19-22.

Defendants appealed, arguing that their at-large system did not violate Section 2 and that, in any case, Section 2 was unconstitutional. Defendants

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[2] "R__ - __ - __" refers to the docket entry number and to the page or pages of the document in the record.

asserted (1st Br. 39-40[3]) that the district court erred in relying on a Supreme Court summary affirmance because the Court affirmed without an opinion and because, Defendants implied, the Court's decision was out-of-step with more recent Supreme Court precedent. Defendants similarly argued (1st Br. 40-41) that this Court's decision in *Marengo County* was not binding because it was decided prior to the Supreme Court's interpretation of Section 2 in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), which Defendants contended (1st Br. 44) "added a layer of skin to § 2(b) that made the statute unconstitutional."

On the merits, Defendants argued (1st Br. 41-46) that Section 2 failed the Supreme Court's "congruence and proportionality" test established in *City of Boerne* v. *Flores*, 521 U.S. 506 (1997), because it prohibits election practices with discriminatory results without proof of discriminatory intent, while the Constitution prohibits only purposeful discrimination. Defendants argued (1st Br. 51-54) that to the extent the statute had ever been congruent and proportional, it no longer was. They also argued (1st Br. 46-51) that Section 2, as interpreted by the Supreme Court in *Gingles*, violates the "race neutrality" requirement of the Equal Protection clause.

This Court summarily rejected Defendants' constitutional claims, stating that Defendants' "argument on appeal, that Section 2 is unconstitutional, is

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[3] "1st Br." refers to Defendants' Brief as Appellant in the second appeal, the relevant portions of which were attached as Exhibit A to the United States' brief in the district court, R164.

foreclosed by, *inter alia*, this Court's decision in * * * *Marengo County Comm'n*." *Johnson* v. *Hamrick*, 196 F.3d 1216, 1219 n.3 (11th Cir. 1999). However, this Court concluded that the district court failed to make adequate findings to support its conclusion that Defendants had violated Section 2 and so vacated the decision and remanded for further proceedings. *Id*. at 1224. Defendants did not move for rehearing or rehearing en banc to seek further review of the panel's disposition of their constitutional claims.

*The Third Round***.** On the second remand, Defendants raised again the constitutional objections that both the district court and court of appeals had previously rejected. R-155. Pursuant to 28 U.S.C. 2403, the district court notified the Attorney General of Defendants' constitutional challenge. On March 30, 2001, the court permitted the United States to intervene to defend the constitutionality of Section 2 and rejected Defendants' constitutional attack as barred by law of the case. R-170-2-5. The district court subsequently held further evidentiary hearings regarding recent elections and, based in part on the new evidence, held that Plaintiffs failed to establish a violation of Section 2 or the Constitution. R-193. Plaintiffs appealed the denial of liability and Defendants cross-appealed the rejection of their constitutional claims.

SUMMARY OF ARGUMENT

Defendants argue that Congress exceeded its authority to enforce the Fourteenth and Fifteenth Amendments when it amended Section 2 to prohibit election practices that result in denying minorities equal access to the political

process. This Court explicitly rejected that claim in the last appeal based on prior Circuit precedent. Defendants' argument is barred not only by law of the case and law of the circuit, but also by the binding precedent of a Supreme Court summary affirmance rejecting the same argument.

In any case, Congress had ample authority to amend Section 2 as it did. The amendment does not require wholesale invalidation of at-large election systems or create a right of proportional representation. Instead, Section 2 is a congruent and proportionate response to a well-documented pattern of unconstitutional discrimination in voting, targeting purposeful discrimination that could otherwise evade detection and judicial remedy. Both the Supreme Court and this Court have approved similar results tests enacted to enforce constitutional prohibitions against purposeful discrimination.

Defendants' argument that Section 2 violates equal protection principles was also rejected in the last appeal. Moreover, Defendants have no standing to assert rights under the Equal Protection clause, which protects individuals, not political units. Even if Defendants had standing, their claims are meritless, amounting to little more than a disagreement with a series of Supreme Court decisions interpreting Section 2 and the Equal Protection Clause.

Defendant's last argument is that Section 2 effectively repeals the Tenth Amendment and the federal government's obligation to guarantee States a republican form of government. Defendants waived this claim by not raising it in the last appeal. In any case, legislation authorized by the Fourteenth or Fifteenth

Amendment does not violate the Tenth Amendment and the Guarantee Clause claim is not justiciable.

ARGUMENT

I. Defendants' *Boerne* Argument Is Barred By Law Of The Case, Law Of The Circuit, And On-Point Supreme Court Precedent

A. Law Of The Case

Defendants argue (Br. 45) that "[i]n amending Section 2, Congress exceeded its enforcement powers to enact remedial legislation based on the Fourteenth and Fifteenth Amendments." Defendants made, and this Court rejected, the same argument in the last appeal. See 1st Br. 39-54; 196 F.3d at 1219 n.3. The law of the case doctrine bars relitigation of the same claims in this subsequent appeal.

"As we have repeatedly recognized, findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial or on a later appeal." *Burger King Corp.* v. *Pilgrim's Pride Corp.*, 15 F.3d 166, 169 (11th Cir. 1994) (citations and quotation marks omitted). See also *Heathcoat* v. *Potts*, 905 F.2d 367, 370 (11th Cir. 1990). "The remedy of a losing party who believes that through oversight or impulsiveness the court has erred is to seek rehearing * * * rather than to lie in wait and then years later * * * present its argument for reconsideration in a second appeal." *Vidimos, Inc.* v. *Wysong Laser Co., Inc.*, 179 F.3d 1063, 1065 (7th Cir.), cert. denied, 528 U.S. 1061 (1999). "[T]here would be no end to a suit if every obstinate litigant could,

by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members." *White* v. *Murtha*, 377 F.2d 428 (5th Cir. 1967) (citation and quotation marks omitted). Among other things, the doctrine serves to "discourag[e] 'panel shopping.'" *Burger King*, 15 F.3d at 169.

Defendants' only attempt to avoid the law of the case doctrine is their insistence (Br. 38) that this Court's prior resolution of their claims "was in a footnote, did not address the merits of Appellees' challenge and constituted dicta at most." But this Court's last ruling clearly addressed the merits, holding that Defendants' "argument on appeal, *that Section 2 is unconstitutional*, is foreclosed by, *inter alia*, this Court's decision in *United States* v. *Marengo County Comm'n*." 196 F.3d at 1219 n.3 (emphasis added). A holding need not be extensively explained to be law of the case. In fact, the holding need not be discussed at all, since the doctrine "comprehends things decided by necessary implication as well as those decided explicitly." *Morrow* v. *Dillard*, 580 F.2d 1284, 1290 (5th Cir. 1978). See also *Bracewell* v. *Nicholson Air Services, Inc.*, 748 F.2d 1499, 1504 (11th Cir. 1984). Nor is the prior decision dicta, as it was necessary to the resolution of the appeal. This court's remand for more detailed findings on the liability question, 196 F.3d at 1223-1224, would have been unnecessary if Section 2 was facially unconstitutional, as Defendants claimed. See *Wheeler* v. *City of Pleasant Grove*, 746 F.2d 1437, 1441 (11th Cir. 1984) (holding of prior panel

necessarily rejected argument that would have made remand unnecessary); *Vidimos*, 179 F.3d at 1065.

There are other exceptions to the law of the case doctrine. It does not bar reconsideration of previously decided issues when "(1) the evidence on a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of the law applicable to such issues, or (3) the decision was clearly erroneous and would work manifest injustice." *Morrow*, 580 F.2d at 1290. However, because Defendants have not previously attempted to show that they are entitled to the benefit of any of these exceptions, their application is waived. See *Vidimos,* 179 F.3d at 1065.

In any event, none of the exceptions apply. In particular, Defendants identify no "contrary decision of the law" by a "controlling authority." Instead, Defendants rely on *Boerne*, which was the basis of their argument in the last appeal (see 1st Br. 44-46, 51-54). As Defendants acknowledge (Br. 42), subsequent Supreme Court cases applying *Boerne* simply "reaffirm the principles established in *Boerne*." Defendants make no new arguments based on these subsequent cases and, indeed, refer to them only in passing (see Br. 40, 43, 50 n.23, 51). They are not a "contrary decision of law" of the sort required to avoid law-of-the-case. Finally, as discussed more fully below, unless and until the Supreme Court overrules *Mississippi Republican Executive Committee* v. *Brooks*, 469 U.S. 1002 (1984), no other "controlling authority" is capable of issuing a "contrary decision of the law." See *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997).

B. Law Of This Circuit

As this Court held in the last appeal, Defendants' first argument also is foreclosed by *Marengo County*, which squarely rejected the same claim. See 196 F.3d at 1219 n.3. "[E]ach panel of this court is bound by prior decisions of this court * * *. Such prior decisions can only be overruled by the court sitting en banc." *United States* v. *Burns*, 662 F.2d 1378, 1383-1384 (11th Cir. 1981).

As they did in the last appeal (1st Br. 41, 54) Defendants argue (Br. 39) that *Marengo County* is not binding precedent because it was decided before the Supreme Court interpreted Section 2 in *Gingles* and before *Boerne*. This Court's rejection of Defendants' attempts to avoid *Marengo County* in the last appeal is law of the case. Moreover, it was correct. First, to the extent the Supreme Court's interpretation of Section 2 in *Gingles* was different than this Court's understanding in *Marengo County* (which Defendants have not shown), the Supreme Court's interpretation must be seen as placing Section 2 on constitutional grounds more firm, not less. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994). Second, even though this Court did not have the benefit of *Boerne* at the time, the opinion in *Marengo County* effectively applied the same analysis. This Court looked to the same Voting Rights Act cases that formed the basis of the Court's analysis in *Boerne.* Compare 731 F.2d at 1556-1563 with 521 U.S. at 516-520, 529-535. Like the Court in *Boerne*, this Court held that in enforcing the Civil War Amendments, Congress may prohibit "a variety of voting practices not necessarily prohibited by the Constitution." *Marengo County*, 731 F.2d at 1557.

In particular, this Court noted that the Supreme Court had previously upheld Congress's authority to prohibit changes in voting practices in jurisdictions covered by Section 5 of the Act[4] when the change would be "discriminatory either in purpose *or effect*." *Ibid*. (emphasis added) (citing *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966) and *City of Rome* v. *United States*, 446 U.S. 156 (1980)). See also *id*. at 1559. As required by *Boerne*, this Court compared the scope of the statutory prohibition with the need for remedial legislation, and decided that "Congress could reasonably conclude that practices with discriminatory results had to be prohibited to reduce the risk of constitutional violations and the perpetuation of past violations." *Id*. at 1561. Thus, *Boerne* does not undermine this Court's holding in *Marengo County* or justify setting that precedent aside.

C. On-Point Supreme Court Decision

In *Mississippi Republican Executive Committee* v. *Brooks*, 469 U.S. 1002 (1984), the defendants asserted that

> Section 2, if construed to prohibit anything other than intentional discrimination on the basis of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment.

469 U.S. at 1003 (Stevens, J., concurring) (quoting jurisdictional statement). This

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[4] Section 5 prohibits certain specified jurisdictions from implementing any change in voting standards, practices or procedures, unless the change is first "precleared" by the Department of Justice or approved through a declaratory judgment of the United States District Court for the District of Columbia. 42 U.S.C. 1973c.

is the same argument Defendants now make in this case (see Br. 40-52). In summarily affirming the lower court's judgment against the defendants in *Brooks*, the Supreme Court necessarily rejected this constitutional challenge.

"A summary affirmance of the Supreme Court has binding precedential effect." *Picou* v. *Gillum*, 813 F.2d 1121, 1122 (11th Cir. 1987). Although summary affirmances do not necessarily adopt the lower court's rationale, *ibid*., they do "without doubt reject the specific challenges presented in the statement of jurisdiction" and "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). See also *Hicks* v. *Miranda*, 422 U.S. 332, 344-345 (1975) ("[L]ower courts are bound by summary decisions by this court until such time as the Court informs them that they are not.") (citation and internal punctuation omitted).

Defendants make no attempt to explain why *Brooks* does not control. Instead, they simply assert (Br. 39) that "the question of Section 2's constitutionality has not been decided by the U.S. Supreme Court," citing statements in various concurring and dissenting opinions, none of which support that contention. Most of the statements Defendants cite simply reflect that the Court did not decide the constitutionality of Section 2 *in that particular case*.[5]

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[5] See, *e.g.*, *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting); *Johnson* v. *De Grandy*, 512 U.S. 997, 1028-1029, 1031 (1994) (Kennedy, J., concurring in part and concurring in judgment); *Voinovich* v.

(continued...)

None purport to overrule *Brooks*. While some Justices may feel that the constitutionality of Section 2 is an open question *in the Supreme Court*,[6] this Court has observed that

> [t]he fact that some justices of the Supreme Court may feel that a summary affirmance carries less weight with them than an argued case decided by full opinion and hence is easier for them to overrule, gives this court no right or power to overrule or disregard any decision of the United States Supreme Court.

N. H. Newman v. *Alabama*, 522 F.2d 71, 77 n.10 (5th Cir. 1975) (citation omitted). See also *Agostini*, 521 U.S. at 237 (lower courts are not to "conclude our more recent cases have, by implication, overruled an earlier precedent.").

II. Congress Validly Enacted Section 2 Pursuant To Its Constitutional Authority To Enforce the Fourteenth And Fifteenth Amendments

As Justice O'Connor observed, "[t]he results test of § 2 is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment to confront its conscience and fulfill the guarantee of the Constitution with respect to voting." *Bush* v. *Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring) (citation and quotation marks omitted). No court has accepted Defendants' suggestion that Congress lacked authority to enact Section 2 or its results test.[7]

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[5](...continued)
Quilter, 507 U.S. 146, 157 (1993).

[6] See *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974) (suggesting that summary affirmances have limited *stare decisis* effect for the Supreme Court).

[7]Amended Section 2 has been held within Congress's enforcement authority by both this Court in *Marengo County* and by the Fifth Circuit in *Jones* v. *City of*
(continued...)

To the contrary, Section 2 is valid legislation to enforce the Fourteenth and Fifteenth Amendments.[8]

A. Congress May Enact Prophylactic And Remedial Legislation That Extends Beyond The Prohibitions Of The Constitution Itself So Long As The Prohibitions Are Proportional And Congruent To The Injury To Be Prevented Or Remedied

Both the Fourteenth and Fifteenth Amendments specifically grant Congress the "power to enforce" their provisions "by appropriate legislation." See U.S. Const. Amend. XIV, § 5; *id*. at Amend. XV, § 2.

> Congress's § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress's power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder 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, 81 (2000). This broad "remedial" authority, however, does not include the power to enact "substantive" legislation to define the content of those constitutional prohibitions. *Boerne*, 521 U.S. at 519.

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[7](...continued)
Lubbock, 727 F.2d 364, 373-375 (5th Cir. 1984).

[8] Defendants purport (Br. 40) to bring a facial challenge to Section 2. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Defendants do not even attempt to show that Congress lacks authority to prohibit purposeful racial dilution, gerrymandering, or any other of a wide range of unconstitutional devices and practices. To the extent Defendants suggest that this Court should invalidate Section 2 in its entirety, based on their arguments regarding the results test's application to at-large systems, this suggestion ignores the proper scope of an as-applied challenge as well as the Act's separability provision. See 42 U.S.C. 1973p.

The line between "remedial" and "substantive" legislation often "is not easy to discern, and Congress must have wide latitude in determining where it lies." *Ibid*.

In *Boerne* and its progeny, the Supreme Court has faced a series of statutes, unlike Section 2, that the Court believed extended far beyond the constitutional prohibition they were purportedly "enforcing."[9] This substantial legal overbreadth gave rise to a suspicion that Congress was attempting to alter the content of the Constitution rather than enforce it.[10] This suspicion, however, was not conclusive. Substantial overbreadth may represent a "powerful remed[y]" to "difficult and intractable problems," *Kimel*, 528 U.S. at 88, although this explanation is plausible only if there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520. When a statute prohibits substantially more conduct that the constitution itself, proportionality may require a record showing a "significant pattern of unconstitutional discrimination" since "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Kimel*, 528 U.S. at 89, 91.

On the other hand, courts have consistently upheld statutes, like Section 2, that extend only somewhat beyond the Constitution even if the historical records

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[9] See *Board of Trustees* v. *Garrett*, 531 U.S. 356, 372-373 (2001); *Kimel*, 528 U.S. at 86; *Florida Prepaid PostSecondary Ed. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 646-647 (1999); *Boerne*, 521 U.S. at 532-34;

[10] See *Kimel*, 528 U.S. at 88-89.

supporting those enactments fell far short of the extensive record established under the Voting Rights Act.[11] Proportionality demands less of a statute that closely tracks the constitutional rights it was enacted to enforce, for there is less reason to suspect that Congress was attempting to alter the meaning of the Constitution. See *Kimel*, 528 U.S. at 88; *Boerne*, 521 U.S. at 533; *Cherry*, 265 F.3d at 553. So long as a limited measure is reasonably adapted to addressing unconstitutional conduct or its continuing effects, there is no basis for concluding that the statute "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S. at 532.

In this case, Section 2 is a limited remedial measure, but it is premised on a record sufficient to support a much more extensive remedy.

B. Section 2 Is Only A Limited Extension Of The Prohibitions Of The Constitution

Under *Boerne*, then, courts must compare the scope of the challenged statute to the scope of the related constitutional prohibition. See *Garrett*, 531 U.S. at 365; *Kimel*, 528 U.S. at 82-88. In this case, the scope of Section 2 is relatively modest, prohibiting only "a somewhat broader swath of conduct" than the Constitution itself. *Kimel*, 528 U.S. at 81.

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[11] See, *e.g.*, *Cherry* v. *University of Wisc. Sys. Bd. of Regents*, 265 F.3d 541, 553 (2001) (Equal Pay Act); *In Re: Employment Discrimination Litigation Against the State of Alabama*, 198 F.3d 1305 (11th Cir. 1999) (Title VII); *Hundertmark* v. *Florida Dep't of Transp.*, 205 F.3d 1272 (11th Cir. 2000) (Equal Pay Act).

1. The Constitution Prohibits Purposeful Discrimination In Voting, Which May Be Proved By Circumstantial Evidence

Together, the Fourteenth and Fifteenth Amendments prohibit intentional racial discrimination in voting, including both denial of the right to cast a ballot and actions that dilute the effectiveness of the ballots cast. See *e.g.*, *Rogers* v. *Lodge*, 458 U.S. 613, 617 (1982); *Marengo County*, 731 F.2d at 1555. While both amendments prohibit only purposeful discrimination, discriminatory intent may be proved by circumstantial evidence. See, *e.g.*, *Rogers*, 458 U.S. at 618-619.

In *White* v. *Regester*, 412 U.S. 755 (1973), the Supreme Court considered the type of circumstantial evidence needed to support a finding of unconstitutional vote dilution. The Court held that it was

> the plaintiffs' burden * * * 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.

412 U.S. at 766. This showing, in turn, could be based on a number of other facts, such as a history of official racial discrimination, lingering effects of that discrimination, few successful minority candidates, 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. *Id*. at 765-767. The Court did not specifically say that these circumstances were sufficient to infer *purposeful* discrimination, and did not require a specific *finding* of discriminatory intent. Subsequent cases, however, made clear that the standard in

White is sufficient to support a finding of purposeful discrimination, but that an actual finding of discriminatory intent must be made to find a constitutional violation.

Both points were made in *Mobile* v. *Bolden*, 466 U.S. 55 (1980), which considered a vote dilution challenge to an at-large system under Section 2 and the Constitution. In a splintered decision, a majority of the Court concluded that Section 2 was intended to be coextensive with the Constitution, 446 U.S. at 60-61 (plurality); *id*. at 105 n.2 (Marshall, J., dissenting), and therefore required proof of discriminatory intent. *Id*. at 66 (plurality opinion); *id*. at 94-95 (White, J., dissenting). A majority held that *White* v. *Regester* was consistent with this requirement, concluding that the facts in *White* established an inference of purposeful discrimination. See *id*. at 68-70 (plurality); *id*. at 94 (White, J., dissenting). The same majority made clear, however, that an actual finding of discriminatory purpose must be made. See *id*. at 71-72 (plurality); *id*. at 94-95 (White, J., dissenting).

A four-Justice plurality then concluded that the facts in *Mobile* did not support an inference of discriminatory intent. See *id*. at 70-73. In the process, the plurality cast serious doubt on whether purposeful intent (and therefore a Section 2 violation) could be proved under the *White* standard. Among other things, the plurality faulted the district court for relying on the factors set forth in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), which, in turn, relied on considerations

identified by the Court in *White*. Four other Justices disagreed with this analysis and thought the facts in *Mobile* and *White* were indistinguishable.[12]

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 reiterated the *Mobile* plurality's requirement of an actual finding of discriminatory intent, but reaffirmed 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 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. The Court found that although this fact bore "heavily on the issue of purposeful discrimination," *ibid.,*

> such facts are insufficient in themselves 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 affirmed the district court's finding that this standard had been met, specifically approving the use of the *Zimmer* factors for this purpose. See *id*. at 624-627.

Thus, *Rogers* resolved any question over the adequacy of the *White* standard to support an inference of unconstitutional purposeful discrimination, even while

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[12] See *id*. at 80 (Blackmun, J., concurring in the result); *id*. at 94 (Brennan, J., dissenting); *id*. at 94-95 (White, J., dissenting); *id*. at 105 (Marshall, J., dissenting). Justice Stevens expressed no opinion on whether intentional discrimination had been proved. *Id*. at 89-94.

making clear that *White*'s failure to require an actual finding of intent no longer represented the current understanding of the Constitution.

2. Section 2 Prohibits Voting Practices That Result In The Political Process Being Not Equally Open To Minority Voters

Congress reacted to *Mobile* with alarm. It concluded that *Mobile*'s requirement of a finding of intent, together with the plurality's apparent rejection of the *White* showing as sufficient to prove intentional discrimination, created "an impossible burden" under Section 2 and substantially impaired the Act's ability to detect and remedy purposeful discrimination in voting. See S. Rep. No. 417, 97th Cong., 2d Sess. 15-16 (1982) (hereinafter "Senate Report"); H. Rep. No. 227, 97th Cong., 2d Sess. 28-29 (1982) (hereinafter "House Report"). Understanding that it lacked the authority to overrule the Court's interpretation of the Constitution, Congress nonetheless recognized that it could legitimately change the standards under Section 2.[13] Congress therefore amended Section 2 to remove the requirement of a specific finding of intent and replace it with a "results" test based on the *White* standard. See 42 U.S.C. 1973(b); Senate Report 2; House Report 29-30 & n.104; *Chisom* v. *Roemer*, 501 U.S. 380, 397-398 (1991). Thus, in its present form Section 2 does not require a finding of intent, but does require proof that minorities have been denied equal participation in the political process, based on the totality of the circumstances. Congress made clear that these circumstances

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[13] See *Marengo County*, 731 F.2d at 1556; Senate Report 39-41; House Report 31.

include the factors considered by the Supreme Court in *White* and *Rogers*. See *Marengo County*, 731 F.2d at 1564-1566.

As amended, Section 2 applies to the full spectrum of devices and practices affecting voting, including electoral systems that dilute minority votes. In *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), the Supreme Court interpreted amended Section 2 as it applies to vote dilution claim against an at-large system. The Court explained that under the amendments, the question is "whether as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Id*. at 44 (citation and quotation marks omitted). The Court observed that the use of an at-large system "generally will not impede the ability of minority voters to elect representatives of their choice" except in certain narrowly-defined circumstances. *Id*. at 48. The Court then described three necessary, *but not sufficient*, conditions for finding that an at-large system violates Section 2: "[1] a bloc voting majority must *usually* be able to defeat candidates supported by a [2] politically cohesive, [3] geographically insular minority group" that could be a majority in a single-member district. *Id*. at 48-49. If these three "*Gingles* factors" are satisfied, a court must then consider "whether, on the totality of circumstances, minorities have been denied an equal opportunity to participate in the political process and to elect representatives of their choice." *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997) (citation and quotation marks omitted).

3. The Evidence To Prove A Violation Of Section 2's Results Test Is Substantially Similar To That Sufficient To Prove Purposeful Discrimination By Circumstantial Evidence

Properly understood, the effective scope of Section 2 does not go far beyond the requirements of the Constitution. As amended and interpreted, Section 2 is not a simple disparate impact test. It is not enough to show that under the challenged system minority candidates or the preferences of minority voters have been defeated, or that the system does not produce racially proportionate results. See *Johnson* v. *De Grandy*, 512 U.S. 997, 1011 (1994). Instead, the inquiry focuses on *equality of access* to the process. *Id*. at 1011-1012. Moreover, while not requiring a finding of intent, the Section 2 results test does require a showing of circumstantial evidence that is very close to, if not the same as, the showing the Supreme Court found sufficient in *White* and *Rogers* to permit an inference of intentional discrimination. Compare Section 2(b) with *White*, 412 U.S. at 766 and *Rogers*, 458 U.S. at 624.

This is not to say that Section 2 is exactly the same as the constitutional standard. It does not require courts to make a finding of intentional discrimination based on the circumstantial case.[14] And it *requires* courts to find liability when the *White* standard is met, whereas under the Constitution, the *White* standard *permits* a finding of purposeful discrimination but does not require it. See *White*, 412 U.S.

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[14] Neither did *White*, but in this respect, after *Mobile* and *Rogers*, "*White* ceased to represent the current understanding of the Constitution." *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 483 (1997).

at 767; *Rogers*, 458 U.S. at 624; Senate Report 28 & n.112. Finally, some may question whether meeting Section 2's *White* standard continues to permit an inference of purposeful discrimination under the Constitution. Cf. *Lee County NAACP* v. *Opelika*, 748 F.2d 1473, 1478 n.7 (11th Cir. 1984) (suggesting that Section 2's results standard is "more easily proved" than a constitutional claim).

The question, however, is not whether a Section 2 showing is precisely sufficient to permit a court to find a constitutional violation, since Congress may enact remedial legislation that prohibits more than the Constitution does itself. See *Kimel*, 528 U.S. at 81. The important point is that "[t]he evidence relevant to determining whether a discriminatory impact exists under § 2 overlaps substantially with the evidence deemed important in *Lodge*" to prove a constitutional violation. *Hall* v. *Holder*, 117 F.3d 1222, 1226 n.5 (11th Cir. 1997). This substantial overlap provides "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *Boerne*, 521 U.S. at 532. And this, in turn, largely eliminates the risk that Congress was attempting to change the meaning of the Constitution. See *Kimel*, 528 U.S. at 88.

Defendants nonetheless vigorously assert (Br. 50) that Section 2 far exceeds the requirements of the Constitution because it invalidates many at-large systems that are not purposefully discriminatory. Although Section 2 (like the Constitution) applies to all at-large election systems, it prohibits only those that result in the denial of equal access to the electoral process. Defendants provide no

reasonable basis for their assertion that Section 2, limited in this way, invalidates large numbers of at-large systems that have been enacted and maintained for nondiscriminatory purposes.[15] Congress specifically disavowed any such intent. See Senate Report 33-35; House Report 30.

Defendants also argue (Br. 52-55) that Section 2 departs radically from the Constitution because it creates a "right to proportional representation." But, as Defendants recognize (Br. 52), Section 2 specifically provides that "nothing 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(b). Defendants insist (Br. 53-55) that the Supreme Court ignored this admonition in *Gingles*, citing Justices who disapproved of the majority's decision in that case and one of the few Senators to oppose the Section 2 amendment. But, as the Court has made clear, failure of an election system to result in proportional representation is not, even combined with "an allegedly dilutive electoral mechanism," a basis for finding a Section 2 violation. See *Gingles*, 478 U.S. at 46.[16]

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[15] Defendants also argue (Br. 49-50) that a Section 2 violation does little to prove purposeful government discrimination because the test turns, in part, on factors outside the government's control, such as voters' behavior. But under Section 2, liability is premised on the government action of using a particular voting system that interacts such factors "to cause an inequality in the opportunities enjoyed by black and white voters." *Gingles*, 478 U.S. at 47. Without this government action, there can be no violation.

[16] Moreover, even when a Section 2 violation is proven, the plaintiffs are *not* "entitled to a remedy [of] a form of proportional representation" (Br. 55). Instead, the remedy must simply ensure equal opportunity for minority voters to elect

(continued...)

In this case, the close fit between the statute and the constitutional prohibition stands in stark contrast to the statutes struck down for lacking congruence and proportionality. Most cases have concerned attempts by Congress to afford certain groups a substantially higher level of protection against discrimination than is provided by the Constitution. For example, in *Kimel* and *Garrett*, the Court struck down statutes that applied a heightened level of review to state laws affecting the aged or persons with disabilities, even though laws affecting these classes are subject to rational basis scrutiny under the Constitution. See *Kimel*, 528 U.S. at 86; *Garrett*, 531 U.S. at 372-373.[17] This substantial legal overbreadth gave rise to a strong suspicion that Congress was attempting to alter the level of constitutional protection offered to the aged and individuals with disabilities. In contrast, in amending Section 2, Congress was not attempting to expand the class of individuals entitled to heightened constitutional protection. Instead, as shown below, Congress was seeking to ensure that the high level of protection already promised by the Constitution was not diminished by the problems of proof in judicial proceedings.

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[16](...continued)
representatives of their choice, not equal representation in the elected body. See *Marengo County*, 731 F.2d at 1560 n.24.

[17] See also *Boerne*, 521 U.S. at 533-534 (comparing "stringent test" RFRA to lower constitutional standard for neutral legislation burdening religious practices); *Florida Prepaid*, 527 U.S. at 646-647 (few patent law violations implicate constitutional rights).

C. Congress Found A Substantial History, Continuing Risk, And Lingering Legacy Of Unconstitutional Discrimination In Voting

"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. 301, 308 (1966). "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 remains not whether Congress created a sufficient legislative record, but rather whether, given all of 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). See also *Varner* v. *Illinois State Univ.*, 226 F.3d 927, 935 (7th Cir. 2000) (same), cert. denied, 121 S.Ct. 2241 (2001); *Kilcullen* v. *New York State Dep't of Labor*, 205 F.3d 77, 81 (2d Cir. 2000) (same). In reviewing the legislative record, Congress's factual findings are entitled to substantial deference. See *Boerne*, 521 U.S. at 536.

In *Boerne* and its progeny, 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 521 U.S. at 532-533; *Garrett*, 531 U.S. at 373. Although those cases did not consider the validity of Section 2, the same background,

supplemented by Congress's 1982 findings, fully supports Congress's decision to amend Section 2 to include a results test.

In particular, Congress amended Section 2 in light of an historical experience that clearly reflected three important facts:

(1) There is a long history and continuing pattern of intentional discrimination in voting. This discrimination has been both overt and subtle, frequently taking the form of voting tests, devices and practices that, while racially-neutral on their face, were intended to discriminate against minority voters;

(2) Requiring more proof of subjective discriminatory intent than the *White* standard required could fail to detect, correct, and deter much intentional discrimination;

(3) Voting practices that result in depriving minorities of an equal opportunity to participate in the political process frequently perpetuate the effects of intentional discrimination.

These congressional findings and judgments have ample support in the cases of the Supreme Court and this Court, the historical record, and in the proceedings and records of Congress as it has repeatedly attempted to enforce the promises of the Civil War amendments.

1. Congress Found A Long History And Continuing Pattern Of Unconstitutional Discrimination In Voting

Congress initially enacted Section 2 in 1965 in light of "nearly a century of systematic resistence to the Fifteenth Amendment." *Katzenbach*, 383 U.S. at 328. Over time, openly discriminatory rules were replaced with more subtle devices and procedures intended to deprive minorities of the right to vote. See *id*. at 309-310. When one device, such as a literacy test, was struck down by the courts, "some of

the States affected have merely switched to [other] discriminatory devices." *Id.* at 311. Section 2 was part of Congress's attempt to put an end to this practice.

Four years later, Congress reviewed the nation's progress and concluded that:

> as Negro voter registration has increased * * * several jurisdictions have undertaken new, unlawful ways to diminish the Negroes' franchise and to defeat Negro and Negro-supported candidates * * * * [including] measures that have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts and facilitating the consolidation of predominently [sic] Negro and predominently [sic] white counties.

H.R. Rep. No. 397, 91st Cong., 1st Sess. 7 (1969). After additional hearings in 1975, Congress found that this trend continued. See H.R. Rep. No. 196, 94th Cong., 1st Sess. 10 (1975); S. Rep. No. 295, 94th Cong., 1st Sess. 16-17 (1975).

As this Court observed in *Marengo County*, "Congress conducted extensive hearings and debate" in May 1981 to consider extending and revising portions of the Voting Rights Act. 731 F.2d at 1557. The House

> held eighteen days of hearings, including regional hearings in Montgomery, Alabama and Austin, Texas, during which testimony was heard from over 100 witnesses. Witnesses included current and former Members of Congress, two former Assistant Attorneys General of the U.S. Department of Justice, representatives of the U.S. Commission on Civil Rights, national, state, and local civil rights leaders, State and local government officials, representatives of various civic, union and religious organizations, private citizens, as well as social scientists and attorneys who specialize in voting discrimination issues.

House Report 2-3. The Senate relied upon the evidence accumulated by the House and held an additional nine days of hearings itself. See Senate Report 3. The needfor amending Section 2 received extensive consideration, especially in

the Senate.[18] Based on all the evidence, the House and Senate reports concluded that although progress had been made, "voting violations are still occurring with shocking frequency," House Report 14, and "discrimination continues today to affect the ability of minorities to participate effectively within the political process." *Id*. at 11. In response, Congress amended Section 2 to its present form with the support of a broad bi-partisan coalition in both Houses of Congress, President Reagan, the Attorney General, and the Assistant Attorney General for Civil Rights.[19]

"Empirical findings by Congress of persistent abuses of the electoral process, and the apparent failure of the intent test to rectify those abuses, were meticulously documented and borne out by ample testimony." *Jones* v. *City of Lubbock*, 727 F.2d at 375 n.6 (citation omitted). The hearings did far more than, as Defendants' claim (Br. 47), "rehash[] old electoral problems such as impediments to black registration and voting." Instead, as Sen. Mathias stated,

> [d]ay after day, the subcommittee heard testimony about the continuing need for the Voting Rights Act. Far from merely rehashing tales of abuses dating back to the 1960's, the hearing record is replete with contemporary

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[18] See Senate Report 15-43, 27 & n.107; *Voting Rights Act: Report of the Subcomm. on the Constitution of the Senate Judiciary Comm.,* 97th Cong. (1982) (reprinted in Senate Report 127-151).

[19] See 127 Cong. Rec. H7011 (Oct. 5, 1981) (amendments passed House 389-24); 127 Cong. Rec. S7139 (June 18, 1982) (amendments passed Senate 85-8); *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., Vol. II, p. 119 (1982) (hereinafter "Senate Hearings II" or "Senate Hearings I" for first volume) (letter from Attorney General Smith).

> examples of voting discrimination. Some are reminiscent of the 1960's – intimidation or harassment of minority members seeking to vote or register. But, other, more sophisticated dodges, such as at-large elections, annexations, majority vote requirements, purging of voters, and even changes in polling places, have been effectively employed to dilute the impact of minority voters.

127 Cong. Rec. S15694 (1981).

Thus, "[b]oth the House and Senate hearing records contain examples of direct efforts to bar minority participation," Senate Report 10 n. 22, including physical violence and intimidation of voters and candidates,[20] discriminatory purging of voter rolls and re-registration requirements,[21] and various other methods.[22] Congress also found that some jurisdictions had "substantially moved

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[20] Senate Report 10 n.22; 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., 1531 (1982) (hereinafter "House Hearings") (Joe Reed, Alabama Democratic Conference); *id*. at 1569-1570 (Maggie Bozeman); *id*. at 1670-1671 (Betty Paulette); Senate Hearings I 1385-1386 (Drew Days, former Assistant Attorney General for Civil Rights); *id*. at 770-773 (Abigail Turner, attorney); Senate Hearings II 238 (United States Catholic Conference).

[21] See Senate Report 10 n.22; House Report 16. See also, *e.g.*, Senate Hearings I 755-760, 772-773 (Abigail Turner, attorney); Senate Hearings II 238 (United States Catholic Conference); House Hearings 1533-1534 (Joe Reed, Alabama Democratic Conference).

[22] See, *e.g.*, House Report 16; 127 Cong. Rec. H6872 (Rep. Dixon) (1981) ("30 predominantly black polling places were changed the night before an election in which there was a major black candidate for the U.S. Senate"); Senate Hearings I 315 (Ruth Hinerfeld, president, National League of Women Voters) (describing that election officials in New York City resist requests by minority groups, but not the League of Women Voters, for materials to conduct registration drives); Senate Hearings II 359 (National Congress of American Indians) ("Indians have found themselves purged from election rolls without notification, or their polling places

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from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength," Senate Report 10, such as at-large elections,[23] annexation of largely white areas,[24] and racially gerrymandered districts.[25]

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,[26] as well as the recent

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[22](...continued)
closed"); House Hearings 373-374 (Michael Brown, NAACP) (various methods in Virginia); *id*. at 1581 (Prince Arnold, Sheriff, Wilcox Co., Alabama) (In 1978 election, only polling place in predominantly African American community was in the private residence of a white family related to the white candidate for Sheriff, with the effect of suppressing African American votes).

[23] See House Report 18-20; Senate Report 10. See also pp. 35-36, *infra*.

[24] House Report 19; Senate Report 13. See also Senate Hearings I 665 (Henry J. Kirksey, Mississippi state senator); Senate Hearings II 215 (American Federation of State, County and Municipal Employees); *id*. at 238-239 (United States Catholic Conference); House Hearings 369-370 (Henry Marsh, Mayor of Richmond, Virginia) (Virginia); 1682-1689 (Charles McTeer, attorney).

[25] Senate Report 11, 13; House Report 19-20. See also, *e.g.*, Senate Hearings I 301 (Vilma Martinez, executive director Mexican American Legal Defense and Education Fund (MALDEF)) (Texas); *id*. at 682-687 (Henry J. Kirksey, Mississippi state senator) (Mississippi); *id*. at 763-764 (Abigail Turner, attorney) (Alabama); *id*. at 995-997 (Rolando Rios, attorney) (New Mexico); Senate Hearings II 355-356 (Barbara Major, Louisiana Hunger Coalition) (New Orleans); *id*. at 358 (National Congress of American Indians) (Wisconsin); *id*. at 193 (John Jacob, National Urban League) (Mississippi); House Hearings 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 (James Clyburn, South Carolina Human Affairs Commissioner) (South Carolina).

[26] See Rolando Rios, *The Voting Rights Act: Its Effect in Texas* (April 1981) (continued...)

record of Voting Rights Act enforcement. For example, despite the burden and expense of voting rights litigation, the number of voting rights cases brought in federal court had remained more or less the same since the last revision to the Act in 1975.[27] Many of these cases ended in findings of purposeful discrimination.[28]

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[26](...continued)
(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) (same); 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) (same); D. Taebel, *Minority Representation on City Councils*, 59 Social Science Quarterly 143-152 (June 1978) (same); T. Robinson & T. Dye, *Reformism and Black Representation on City Councils*, 59 Social Science Quarterly 133-141 (June 1978) (same); A. Karnig, *Black Representation on City Councils*, 12 Urban Affairs Quarterly 223-243 (Dec. 1976) (same); C. Johes, *The Impact of Local Election Systems on Black Political Representation*, 11 Urban Affairs Quarterly 345-356 (March 1976) (same); Lawyers Committee for Civil Rights Under the Law, *Voting in Mississippi: A Right Still Denied* (1982) (Senate Report 10, 13); American Civil Liberties Union, *Voting Rights in the South* (1982) (hereinafter ACLU Report) (Senate Report 11, 13). See also Senate Hearings I 324-338 (results from survey by League of Women Voters); House Hearings 255-269 (results of study by James Loewen, Prof. of Sociology, Univ. of Vermont); see also Report of the Comptroller General of the United States, *Voting Rights Act – Enforcement Needs Strengthening* 26-28 (Feb. 6, 1978) (GAO Report) (attached to *Hearings before the Subcomm. on Civil and Constitutional Rights of the Senate Judiciary Comm.*, 95th Cong., (1978))

[27] See Senate Hearings II 709 (ACLU Report). See also Senate Hearings 289 (Vilma Martinez, MALDEF) ("Since 1975 we have participated in approximately 50 lawsuits under the Voting Rights Act in Texas, Arizona, California, and Washington State."); *id*. at 417 (Laughlin McDonald, Southern Regional Office, ACLU) (noting that in past 10 years prior to 1982 amendments, organization filed approximately 70 voting rights lawsuits).

[28] Senate Hearings 1828-1829 (at least 10 covered jurisdictions subject of a judicial finding of discrimination in six years prior to amendments, and 17 other counties that had entered settlements). See also, *e.g.*, *NAACP* v. *Gadsden County*
(continued...)

During this same time, the Department of Justice was involved in 24 vote dilution cases, even though the General Accounting Office reported that the Department's "litigation efforts have * * * been limited" by a lack of resources and the demands of preclearance review.[29] In the course of those preclearance duties, the Attorney General had determined that 500 voting changes submitted since 1975 violated the

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[28](...continued)
School Bd., 691 F.2d 978 (11th Cir. 1982) (Florida); *McMillan* v. *Escambia County*, 688 F.2d 960 (5th Cir. 1982), vacated in part on other grounds 466 U.S. 48 (1982) (Florida); *Perkins* v. *City of West Helena*, 675 F.2d 201 (8th Cir.), aff'd 459 U.S. 801 (1982) (Arkansas); *Searcy* v. *Williams*, 656 F.2d 1003 (5th Cir. 1981), aff'd 455 U.S. 984 (1982) (Georgia); *Lodge* v. *Buxton*, 639 F.2d 1358 (5th Cir. 1981), aff'd 458 U.S. 613 (1982) (Georgia); *Wyche* v. *Madison Parish Police Jury*, 635 F.2d 1151 (5th Cir. 1981) (Louisiana); *Rybicki* v. *State Bd. of Elections*, 574 F. Supp. 1082 (N.D. Ill. 1982) (Illinois); *Busbee* v. *Smith*, 549 F. Supp. 494 (D.C. 1982), aff'd 459 U.S. 1166(1983) (Georgia); *Brown* v. *Board of Sch. Comm'n*, 542 F. Supp. 1078 (S.D. Ala. 1982), aff'd 706 F.2d 1103 (11th Cir.), aff'd, 464 U.S. 1005 (1983) (Alabama); *Bolden* v. *City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982) (Alabama); *City of Port Arthur* v. *United States*, 517 F. Supp. 987 (D.C. 1981), aff'd 459 U.S. 159 (1982) (Texas); *Bailey* v. *Vining*, 514 F. Supp. 452 (M.D. Ga. 1981) (Georgia); *Hale Co.* v. *United States*, 496 F. Supp. 1206 (1980) (Alabama); *United States* v. *Board of Supervisors of Thurston Co., Nebraska*, No. 79-0-380 (D. Neb. 1979) (Nebraska); *United States* v. *Humbolt County, Nevada*, No. R 70-0144 HEC (D. Nev. 1979) (Nevada); *United States* v. *San Juan County*, No. 79-507 (D.N.M. 1979) (New Mexico); *U.S.* v. *Bartleme, Wisconsin*, No. 78-C-101 (D. Wisc. 1978) (Wisconsin); *Hendrix* v. *McKinney*, 460 F. Supp. 626 (N.D. Ala. 1978) (Alabama); *Stewart* v. *Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (Mississippi); *Moore* v. *Leflore Co. Bd. of Election Comms.*, 361 F. Supp. 603 (N.D. Miss. 1972) (Mississippi); *Yanito* v. *Barbara*, 348 F. Supp. 587 (D. Utah 1972) (Utah); *Klahr* v. *Williams*, 339 F. Supp. 922, 927 (D. Ariz. 1972) (Arizona). See also Senate Hearings II 697-701 (*Voting Rights in the South*) (describing consent decrees challenging at-large systems in 12 counties in Georgia).

[29] See Senate Hearings 1803-1805 (attachments to statement of Wm. Bradford Reynolds, Assistant Attorney General) (also citing six pending cases); GAO Report 26-28.

Act. House Report 11. This included changes in jurisdictions in 12 States, including not only Southern states, but also Arizona, California, and New York. See Senate Hearings 1760-1782 (report listing objections).[30] Congress concluded that these incidents represented "only the tip of the iceburg," Senate Report 14, in light of substantial evidence of continued resistance to the existing remedial and prophylactic provisions of the Voting Rights Act.[31]

Congress was also aware that many jurisdictions continued to employ election schemes and devices that had been originally imposed with clear discriminatory intent, had never been changed, and continued to have a discriminatory effect. See, *e.g.*, House Report 28; *The Voting Rights Act: Unfulfilled Goals* at 62-63; *Underwood* v. *Hunter*, 471 U.S. 222 (1985)

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[30] While not every Section 5 violation represents an instance of purposeful discrimination, Congress was entitled to conclude that many did, particularly in light of the established history of discrimination in these jurisdictions, see *Katzenbach*, 383 U.S. at 309-315, the pervasiveness of the violations, and the particular facts surrounding many of the violations that were presented to Congress. See Senate Report 9-15; House Report 14-20.

[31] "A number of covered jurisdictions continue to defy the Act by either failing to submit changes or boldly implementing others to which objections have been interposed by the Attorney General." House Report 11-13 (including a number of Georgia counties). In 1980 alone, the Attorney General became aware of at least 124 voting changes that had been implemented without preclearance. *Ibid*. In the six years prior to the 1982 amendments, "more than 50 suits have been brought, by [the Attorney General] or by private persons, to enjoin implementation of changes that had not been precleared." Senate Hearings 1718.

(invalidating law enacted in 1901 as part of the "movement that swept the post-Reconstruction South to disenfranchise blacks."). [32]

Thus, 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 (Rep. Sensenbrenner). Congress "heard numerous examples of how at-large elections are one of the most effective methods of diluting minority strength in covered jurisdictions." House Report 18. The legislative record is replete with specific examples from around the country giving rise to an inference of purposeful discrimination.[33]

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[32] Congress knew that although many such laws affected jurisdictions covered by Section 5, they would be "outside the scope of the Act's preclearance provision * * * because they were in existence before 1965." House Report 28. Section 2, therefore, provides the only remedy for such discriminatory practices.

[33] See, *e.g.*, House Report 17-20 (specifically discussing instances in Alabama, Nebraska, and New Mexico); Senate Report 13-14, 37-39 (Alabama, South Carolina, Florida, Georgia); Senate Hearings II 358 (National Congress of American Indians) (Nebraska and New Mexico); House Hearings 906-907 (Robert Krueger, former member of Congress) (Texas); *id*. at 942-949, 1128-1146 (report of MALDEF) (Texas); *id*. at 1254 (Ruben Bonilla, League of United Latin American Citizens) (Corpus Christi, Texas); *id*. at 1279-1280 (Paul Ragsdale, Texas state representative) (school boards in Texas); *id*. at 1526 (Joe Reed, Alabama Democratic Congress) (Montgomery, Alabama); *id*. at 1612-1614 (Michael Figures, Alabama state senator) (same); *id*. at 1702-1703 (Martha Bergmark, Southeast Mississippi Legal Services) (Hattiesburg, Mississippi); *id*. at 1704-1705 (Laurel, Miss.); *id*. at 1740, 1744 (Henry Kirskey, Mississippi state senator) (Mississippi); Senate Hearings II at 696-697 (ACLU Report) (counties in Georgia and Alabama); House Hearings 39-41 (William Velasquez, Southwest

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Congress was aware that "[b]enign explanations may be offered for why these methods have been selected." House Report 20. But Congress was entitled to disbelieve these explanations cases, in light of circumstances that made benign explanations implausible in many cases. The Senate Report explained:

> Sophisticated 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.

Senate Report 12. Congress's conclusion that many dilutive practices represented purposeful discrimination was reasonable. Congress knew that in the past, many jurisdictions had used ostensibly race-neutral voting practices purposefully to prevent minority registration and voting and to dilute minority voting strength. House Report 18. These practices resulted in disproportionately low minority voter registration, voting, and electoral success. House Report 18-19. In 1982, Congress found that many jurisdictions continued widespread use of these

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[33](...continued)
Voter Registration Education Project) (Texas); *id*. at 225-227 (Julian Bond, Georgia state senator) (Georgia); *id*. at 243-244 (James Clyburn, South Carolina Human Affairs Commissioner) (South Carolina); House Hearings 369-371 (Henry Marsh, Mayor of Richmond, Virginia) (Virginia); *id*. at 499-514 (Lawyers' Committee For Civil Rights Under the Law) (Mississippi); *id*. 599-623 (Laughlin McDonald, Southern Regional Office, ACLU) (Georgia); *id.* at 790-800 (Jane Cox and Abigail Turner) (Alabama); *id*. at 1804-1806 (Raymond Brown, Voting Rights Research Project) (North Carolina). See United States Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* 42-54 (1981) (summarizing dilution cases from Alabama, Georgia, Mississippi, North Carolina, and Virginia) (cited by House Report 18).

practices and that these practices continued to impede full political participation by minorities, resulting in disproportionately low minority voter registration, voting, and electoral success. See House Report 18-19. In many jurisdictions, these practices took place against the backdrop of continued resistence to the prophylactic provisions of the Voting Rights Act. See *id*. at 11-13; Senate Report 13-14.

From these facts and circumstances, Congress had ample basis to conclude that unconstitutional discrimination through facially neutral voting practices remained a persistent problem.[34] Based upon a similar record, the Supreme Court in *City of Rome* held that the extension of portions of the Voting Rights Act in

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[34] Congress is not require to find facts in the same manner, or under the same standards, as courts. See *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 666 (1994) (opinion of Kennedy, J.); *Fullilove* v. *Klutznick*, 448 U.S. 448, 502 (1980) (Powell, J.)*; Katzenbach*, 383 U.S. at 330. However, in this case, Congress considered many of the factors the Supreme Court has consistently relied on for inferring intentional discrimination in voting. See *Rogers*, 458 U.S. 623-627 (considering disparity in electoral success of minority-preferred candidates; racial bloc voting; historical discrimination in voting, employment, education and other areas; elected officials' unresponsiveness to minority community interests; interaction between electoral system and lingering economic effects of past discrimination; tendency of voting device to minimize minority voting strength); *White*, 412 U.S. at 765-767 (same). See also *Katzenbach*, 383 U.S. at 310-315 (historical discrimination, continued use of purposefully discriminatory devices, Department of Justice enforcement experience, racially disparate application of tests, racially disparate registration rates, court cases); *Morgan*, 384 U.S. at 652-656 & n.14 (racially disparate impact and historical discrimination); *Garrett*, 531 U.S. at 373 (discussing relevant facts from *Katzenbach*, including history of purposeful discrimination and "otherwise inexplicable" disparate registration rates). See also *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (disparate impact, lack of non-discriminatory explanation, historical background, sequence of events).

1975 "is both unsurprising and unassailable." 446 U.S. at 182. Defendants may disagree with Congress's 1982 findings and inferences, but *Boerne* requires courts to give Congress' determinations substantial deference. 521 U.S. at 536.

2. Congress Concluded That Results Test Was Necessary To Detect, Correct And Deter Purposeful Discrimination

Congress amended Section 2 in response to this evidence and in light of its conclusion that a limited 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.

Senate Hearings II at 77.

As this Court found in *Marengo County*, Congress had ample basis to conclude that an intent requirement in the voting rights context, particularly as applied by the plurality in *Mobile*, would render much intentional discrimination immune from legal restraint. 731 F.2d at 1557-1558. As the Supreme Court has observed, proving the collective subjective intent of a legislative body is extremely difficult. See, *e.g.*, *Hunter*, 471 U.S. at 228; *United States* v. *O'Brien*, 391 U.S. 367, 383-384 (1968). See also House Report 29 & n.97; Senate Report 36-37 (noting that the problem is even more difficult in the case of referenda). "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." House Report 31 (quotation marks and citation omitted). 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." Senate Report 37.[35]

Even absent such manipulation, direct evidence of legislators' subjective intent may be privileged, and circumstantial evidence will frequently be illusive, particularly in smaller jurisdictions or with respect to practices instituted years ago. Senate Report 36-37; House Report 29. At the very least, obtaining such evidence and demonstrating the discriminatory motives of legislators is likely to be disruptive to legislative bodies and divisive to the community. *Id*. at 36-37.

In light of these considerations, and the testimony of numerous attorneys with substantial experience in voting rights litigation,[36] Congress concluded that

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[35] This observation was echoed by numerous politicians appearing as witnesses and participating in the deliberations. See, *e.g.*, Senate Hearings 92 (Sen. Mathias) ; Senate Hearings II 6 (Sen. Hollings); *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 rec. Oct. 5, 1981) (Rep. Franks).

[36] See Senate Hearings 289 (Vilma Martinez, MALDEF); *id*. at 368-369 (Lauglin McDonald, Southern Regional Office, ACLU); *id*. at 639-641 (David Walbert, attorney); *id*. at 1238 (Frank R. Parker, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law) ; *id*. at 1258-1266 (Julius Chambers, president, NAACP Legal Defense Fund); *id*. at 1401 (Drew Days, former Assistant Attorney General for Civil Rights); *id*. at 1425-1426 (Archibald Cox, Chairman,

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an "intent test places an unacceptably difficult burden on plaintiffs." Senate Report 16. See also House Report 31. This was not idle speculation. Review of *Mobile*'s effect on pending litigation confirmed "its decidedly negative impact on the ability of minority voters to end discrimination." Senate Report 37-39. After *Mobile*, "[m]inority voters lost some cases despite egregious factual situations." *Id*. at 37. Even when plaintiffs did prevail, they did so through enormous burden and expense and mostly in cases of flagrant and obvious discrimination. See *id*. at 36-39. As a result, "litigators virtually stopped filing new vote dilution cases." Senate Report 26.[37]

The net result, Congress found, was that "the difficulties faced by plaintiffs forced to prove discriminatory intent through case-by-case adjudication create a substantial risk that intentional discrimination barred by the Fourteenth and Fifteenth Amendments will go undetected, uncorrected and undeterred unless the results test proposed for section 2 is adopted." Senate Report 40.

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[36](...continued)
Common Cause, Professor, Harvard Law School); *id*. at 1606 (David Brink, president American Bar Association).

[37] See also Senate Hearings 1271-1272 (data from Administrative Office of the U.S. Courts suggested 80% reduction in number of voter dilution cases filed after *Mobile*); Senate Hearings II 713-722 (ACLU Report) (describing effects of *Mobile* on pending litigation).

3. Election Practices That Deprive Minority Voters Of Equal Access To The Electoral Process Perpetuate The Lingering Effects Of Past Intentional Discrimination In Voting

Beyond simply stopping discrimination in voting, "Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination." *Gingles*, 478 U.S. at 69. Congress understood that even when there is no proof of an intent to discriminate, "practices which have a discriminatory result also frequently perpetuate the effects of past purposeful discrimination, and continue the denial to minorities of equal access to the political processes which was commenced in an era in which minorities were purposefully excluded from opportunities to register and vote." House Report 31. See also Senate Report 40 ("[V]oting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination."). The Supreme Court also has recognized "that political 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 incomes." *Gingles*, 478 U.S. at 69. See also Senate Report 29 (same). For example, the Court has observed that an at-large voting system, which generally requires greater financial resources for successful campaigns, may perpetuate the results of prior purposeful discrimination that has depressed minority income levels, translating the economic disadvantage caused by discrimination into political disadvantage at the polls. *Id*. at 69-70.

Based on the evidence, this Court held in *Marengo County* that "Congress could justifiably conclude that a nationwide prohibition of voting practices with discriminatory results was necessary to remedy the effects of purposeful discrimination throughout the country." *Marengo County*, 731 F.2d at 1560.

D. Section 2 Is Reasonably Adapted To Detecting, Deterring And Remedying Unconstitutional Discrimination In Voting

The results test of Section 2 is clearly adapted to the end of eliminating forms of intentional discrimination and the vestiges of past discrimination.

1. Section 2 Is A Proportionate Response To The Difficulty In Identifying Purposeful Discrimination In Voting

Results tests have been repeatedly approved as a valid exercise of Congress's power to enforce the Civil War amendments, both by the Supreme Court and this Court. In *Lopez* v. *Monterey County*, 525 U.S. 266 (1999), the Supreme Court made clear that even after *Boerne*, Congress may, in appropriate circumstances, "guard against both discriminatory animus and the potentially harmful *effect* of neutral laws." *Id*. at 283 (quoting *City of Rome*, 446 U.S. at 175). See also *City of Rome*, 446 U.S. at 175 ("[U]nder the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect."). The Court went even further in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334 (1966) and *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), in each case approving the outright banning of *all* literacy tests, even though the statute did not require proof of discriminatory purpose or even discriminatory results and even though

Congress did not find that literacy tests were uniformly used for discriminatory purposes.

This Court recently upheld the Equal Pay Act, 29 U.S.C. 206(d) (EPA), under a *Boerne* challenge. See *Hundertmark* v. *Florida Dep't of Transp.*, 205 F.3d 1272 (11th Cir. 2000). Although the EPA does not require a finding of discriminatory intent, its substitute circumstantial showing is probative of purposeful discrimination. See *id*. at 1277; *Varner* v. *Illinois State Univ.*, 226 F.3d 927, 932 (7th Cir. 2000). And like Section 2, the EPA seeks to protect rights given a high level of constitutional protections under the Equal Protection Clause. *Hundertmark,* 205 F.3d at 1276-1277. Even though Congress had not made specific findings about gender discrimination in public sector employment, *id*. at 1275, this Court upheld the Act because of the general history of sex discrimination in this country and the close relationship between the constitutional protection and the circumstantial showing required by the EPA. *Id*. at 1276-1277. These facts made clear that "Congress sought to remedy the injury of intentional gender-based wage discrimination" rather than change the substance of the constitutional protection. *Id*. at 1276.

This Court similarly held that the disparate impact provisions of Title VII are "a valid exercise of Congress's Fourteenth Amendment enforcement power." *In Re: Employment Discrimination Litigation,* 198 F.3d at 1318. Like Section 2, the effects test of Title VII was "designed as a 'prophylactic' measure to get at discrimination that could actually exist under the guise of compliance with Title VII." *Id*. at 1321 (citation and internal punctuation omitted). Although a finding

of intent is not required, Title VII (like Section 2) requires a substitute circumstantial showing under which "a genuine finding of disparate impact can be highly probative of the employer's motive" to discriminate. *Id*. at 1321. In light of the limited nature of the test, and the "nation's sad history of racial domination and subordination," *id*. at 1323, this Court concluded that "the disparate impact provisions of Title VII can reasonably be characterized as 'preventive rules' that evidence a 'congruence between the means used and the ends to be achieved.'" *Id*. at 1322 (quoting *Boerne*, 521 U.S. at 530).

Like Title VII and the Equal Pay Act, Section 2's results test is a limited prophylactic measure targeted at unconstitutional conduct that receives significant constitutional scrutiny. The amendment to Section 2 was a reasonable, proportionate response to the continuing pattern of discrimination in voting established in the record.

2. Section 2 Is Congruent And Proportional To Permissible Congressional Purpose Of Eliminating Effects Of Past Discrimination

Even if Congress found little continuing intentional discrimination in voting, "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." *City of Rome*, 446 U.S. at 176. See also *Boerne*, 521 U.S. at 519. Section 2 is reasonably tailored to this end. The Act does not outlaw all at-large voting systems or similar practices that pose a risk of perpetuating the effects of historical discrimination. Instead, Section 2 evaluates such practices on

a case-by-case basis, prohibiting devices only in circumstances that make it more likely that the device is either being used for purposeful discrimination or is perpetuating the effects of past purposeful discrimination. For example, in the case of a vote dilution challenge, a plaintiff must show the existence of racial bloc voting and a persistent pattern of white voters collectively preventing the election of minority-preferred candidates. *Gingles*, 478 U.S. at 45. Even when such proof is made, a court must go on to consider additional circumstances, such as "the history of voting-related discrimination," and "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process." *Ibid*. Congress could justifiably conclude that when these conditions are satisfied, the denial of equal access to the political system is likely a vestige of this nation's long history of official racial discrimination.

For these reasons, this Court held in *Marengo County* that Section 2 was valid legislation to remedy the present effects of past discrimination. See 731 F.2d at 1560. There is no basis for departing from that precedent here.

3. Section 2 Properly Applies Nationwide And Has Not Been Rendered Unconstitutional By The Passing Of Time

Defendants nonetheless argue that Section 2 is not congruent and proportional because the record does not show "a widespread, substantial, pattern and practice of unconstitutional conduct" (Br. 43) and that even if it did, no such pattern exists today (Br. 61-63). Neither argument has merit.

As shown above, Congress had ample evidence of continued widespread unconstitutional voting discrimination. See also *Marengo County*, 731 F.2d at

1559. However, "proportionality" does not require "egregious predicates" to justify limited remedial legislation. See *Boerne*, 521 U.S. at 533. *Boerne* does not limit Congress to enacting remedial legislation only as a last resort or demand that the measures chosen be the least restrictive means available. Congress may enforce the Civil War Amendments even in those times and places where constitutional violations are rare. See *Williams* v. *United States*, 341 U.S. 97 (1951) (federal statute criminalizing constitutional violations under color of law held valid legislation to enforce Civil War Amendments, without inquiring into pervasiveness of such violations); *Screws* v. *United States*, 325 U.S. 91 (1945) (same); *Ex parte Virginia*, 100 U.S. 339 (1879) (same with respect to discrimination in jury selection).

Nor was Congress required to limit Section 2 to the areas of the country with the most significant voting rights problems. Although Congress continued to find a higher level of voting problems in "the jurisdictions covered by preclearance, Congress did find evidence of substantial discrimination outside those jurisdictions." *Marengo County*, 731 F.2d at 1559. Even if it had not, proportionality does not require geographic restrictions on general legislation. See *Boerne*, 521 U.S. at 533; *Marengo County*, 731 F.2d at 1546. Both the Supreme Court and this Court have repeatedly upheld nationwide application of limited prophylactic legislation. See *Oregon* v. *Mitchel*, 400 U.S. at 118 (nationwide ban on literacy tests); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (nationwide ban on

English literacy requirements); *Hundertmark*, 205 F.3d at 1277 (Equal Pay Act); *In Re: Employment Discrimination Litigation*, 198 F.3d at 1324 (Title VII). Singling out particular jurisdictions for individualized prohibitions, while sometimes justifiable, is highly unusual, administratively difficult, disruptive of comity, and constitutionally suspect. See *Katzenbach*, 383 U.S. at 328-329; *Marengo County*, 731 F.2d at 1560 & n.23. Morever, the difficulties in proving subjective intent that Congress sought to address in amending Section 2 arise in every case, regardless of jurisdiction. 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. Finally, "Section 2 avoids the problem of potential overinclusion entirely by its own self-limitation," Senate Report 43, applying nationwide but only invalidating practices that meets its stringent requirements.

Defendants also argue (Br. 61-63) that even if Congress had an adequate basis for amending Section 2 in 1982, that basis has dissipated in the wake of "electoral realities of recent history." There is no factual or legal basis for this assertion. Defendants' factual support is a citation to a chapter in one book (see Br. 63 n.31). On the basis of such evidence, their argument can only succeed if this Court either presumes the unconstitutionality of a validly enacted statute, or holds as a matter of law that the Government, when enforcing an act of Congress, must ask Congress to update its fact-finding and re-establish the legitimacy of a

statute every time a defendant states, as an affirmative defense, that the need for

the statute may have lapsed. Defendants cite no authority for either proposition, and there is none. "Congressional legislation enjoys a presumption of constitutionality. The party contending that the statute, or a portion thereof, is unconstitutional has the burden of overcoming that presumption." See *Wood* v. *United States*, 866 F.2d 1367, 1370 (11th Cir. 1989) (citation and quotation marks omitted). See also *Bush* v. *Vera*, 517 U.S. at 992 (O'Connor, J., concurring) (applying presumption to Section 2). These rules are particularly appropriate here. As the Supreme Court has observed in a related context, "a century of systematic resistence to the Fifteenth Amendment" justifies placing "the advantage of time and inertia" in favor of the Government's efforts to enforce the Constitution. *Katzenbach*, 383 U.S. at 328.

III. Defendants' Equal Protection Challenge To Section 2 Is Meritless And Barred By Law Of The Case

Defendants also argue (Br. 55) that Section 2 violates the Equal Protection Clause of the Fourteenth Amendment "because it is not racially neutral." They raised, and this Court rejected, the same claims in the last appeal. Compare 1st Br. 47-50 with 196 F.3d at 1219 n.3. Defendants do not attempt to show that any exception to the law of the case doctrine allows reconsideration of this argument here.

In any event, Defendants have no standing to raise this claim. States and their political subdivisions have no equal protection rights against the federal government arising from the Fifth or Fourteenth Amendments. See *Katzenbach*, 383 U.S. at 323-324 ("The word 'person' in the context of the Due Process Clause

of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union."). "Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate *parens patriae* of every American citizen." *Id*. at 324.

Finally, Defendants' claim is meritless. They argue (Br. 55-56) that a series of Supreme Court cases requires officials to take race into account in creating electoral systems to comply with Section 2, while the Equal Protection Clause requires race neutrality. As an initial matter, it is difficult to understand this argument as anything other than a complaint that the Supreme Court has consistently misinterpreted both the Voting Rights Act and the Equal Protection Clause. In any event, the Supreme Court has recognized, in the very cases Defendants criticize, that the Equal Protection clause does not preclude compliance with Section 2, both because a limited use of race in districting does not trigger strict scrutiny protection,[38] and because compliance with Section 2 is a compelling state interest.[39] Defendants clearly think the Court is wrong about this, but that is not an argument this Court may accept.

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[38] See *Bush* v. *Vera*, 517 U.S. 958 ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race.") (plurality); *id*. at 1008-1009 (Stevens, J., dissenting, joined by Ginsburg, J. and Breyer, J.,) (same).

[39] See *Bush*, 517 U.S. at 990-992 (O'Connor, J., concurring); *id*. at 1033-1035 (Stevens, J., Ginsburg, J., Breyer, J., dissenting); *id*. at 1065 (Souter, J., Ginsburg, J., Breyer, J., dissenting); *Askew* v. *City of Rome*, 127 F.3d 1355, 1376 (11th Cir. 1997).

IV. Defendants' Federalism Claims Are Waived And Meritless

Defendants' final argument (Br. 58-61) is that the Supreme Court's cases interpreting Section 2 and the Equal Protection clause are so muddled and impossible to follow that States are left in a "Section 2/*Gingles*/*Shaw* Conundrum" that "effectively repeals the Tenth Amendment and the Guarantee Clause (Art. IV, § 4) of the Constitution." The only reason this argument is not barred by law of the case is because Defendants failed to raise it in the prior appeal. It is, therefore, waived. See *Nationalist Movement* v. *City of Cumming*, 92 F.3d 1135, 1138-1139 (11th Cir. 1996), cert. denied, 519 U.S. 1058 (1997).

The argument is also meritless. It again hinges on Defendants' unremitting dissatisfaction with the Supreme Court's treatment of race-conscious districting under the Equal Protection Clause (see Br. 58-59). As Justice O'Connor has observed, "the results test of § 2 * * * * can coexist in principle and in practice with *Shaw* v. *Reno*, 509 U.S. 630 (1993), and its progeny." 517 U.S. at 990. Defendants disagree, but fail to explain how this disagreement translates into a repeal of the Tenth Amendment or Guarantee Clause, much less cite any authority for the proposition that courts may strike down statutes to resolve disarray in the Supreme Court's constitutional analysis. In any case, this Court has already rejected a Tenth Amendment challenge to Section 2. See *Marengo County*, 731 F.2d at 1560-1561. Finally, Defendants' Guarantee Clause claim is non-justiciable. See *City of Rome*, 446 U.S. at 183 n.17.

CONCLUSION

For the foregoing reasons, this Court should reject Defendants' challenge to the constitutionality of Section 2.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 29(d) and Eleventh Circuit Rule 29-2, the attached brief was prepared using Word Perfect 9 and contains 13,530 words of proportionally spaced type.

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CERTIFICATE OF SERVICE

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