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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

LARGE, *et al.*,	)	
	)	
Plaintiffs	)	
	)	
v.	)	Case No. 2:05-cv-00270-ABJ
	)	
FREMONT COUNTY, *et al.*,	)	
	)	
Defendants	)	
	)	

BRIEF OF THE UNITED STATES AS INTERVENOR SUPPORTING THE CONSTITUTIONALITY OF SECTION 2 OF THE VOTING RIGHTS ACT

The United States intervened to defend the constitutionality of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973, and will address defendants' facial challenge to the statute.

Since the passage of the Voting Rights Act, Section 2 has provided, in pertinent part, that:

> [n]o 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.

In 1982, Congress redesignated the existing provision of Section 2 as subsection (a), and added subsection (b), which provides that:

> [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 nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens 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. * * * [N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

SUMMARY OF ARGUMENT

Defendants argue that Congress exceeded its authority to enforce the Fourteenth and Fifteenth Amendments when it amended Section 2 of the Voting Rights Act to prohibit election practices that result in denying minority voters equal access to the political process. That argument is foreclosed by the Supreme Court's decision in *Mississippi Republican Executive Committee* v. *Brooks*, 469 U.S. 1002 (1984). Supreme Court cases decided since *Brooks* have not altered the binding effect of *Brooks* on lower courts. See *United States* v. *Blaine County*, 363 F.3d 897 (9th Cir. 2004), cert. denied, 544 U.S. 992 (2005).

In any case, it is well-settled that Congress may enact prophylactic and remedial legislation that extends beyond the prohibitions of the Constitution itself, provided the prohibitions are proportional and congruent to the constitutional injury to be prevented or remedied. Here, Congress had before it evidence of a long history and continuing pattern of unconstitutional discrimination in voting. Congress reasonably concluded that a limited results test was necessary to enforce the Constitution's prohibition against purposeful discrimination.

Although Section 2 is premised on a record sufficient to support a far reaching remedy, in fact it is a limited remedial measure. Indeed, Section 2's results test prohibits only a somewhat broader swath of conduct than the Constitution itself. The evidence for proving a Section 2 violation is substantially similar to that for proving a constitutional violation by circumstantial evidence. Section 2's reach is also quite limited, as it does not invalidate all at-large elections systems; rather, Section 2's results test prohibits only those election practices which, under the totality of circumstances, make it more likely that the practice is being used for purposeful discrimination or is perpetuating the effects of past discrimination. The Supreme Court has repeatedly approved statutory provisions enacted to enforce constitutional prohibitions which similarly do not require proof of intentional discrimination.

Section 2's nationwide reach does not render it unconstitutional. The Supreme Court has explicitly rejected a requirement that Congress demonstrate a nationwide record of violations before it can employ its enforcement powers on a nationwide basis, and Congress's finding of a substantial history, continuing pattern, and lingering legacy of unconstitutional discrimination in voting fully supports Section 2's nationwide reach. Moreover, even if evidence of nationwide discrimination were a prerequisite to Section 2's nationwide application, Congress did, in fact, have before it a record of discriminatory practices outside of those jurisdictions covered by Section 5 of the Voting Rights Act that fully supports Section 2's nationwide reach.

The other courts of appeals which have directly addressed this issue have upheld the constitutionality of Section 2. See *Blaine County*, *supra*; *United States* v. *Marengo County*, 731 F.2d 1546 (11th Cir. 1984); *Jones* v. *City of Lubbock*, 727 F.2d 364, 373-375 (5th Cir. 1984).

ARGUMENT

I

THE SUPREME COURT HAS PREVIOUSLY REJECTED A SIMILAR CONSTITUTIONAL CHALLENGE TO SECTION 2 OF THE VOTING RIGHTS ACT

Defendants' challenge to the constitutionality of Section 2 is foreclosed by Supreme Court precedent. In *Mississippi Republican Executive Committee* v. *Brooks*, 469 U.S. 1002 (1984), affirming *Jordan* v. *Winter*, 604 F. Supp. 807, 811 (N.D. Miss. 1984), the Supreme Court summarily affirmed a three-judge district court decision which held that the "results" test of Section 2 is constitutional. The question presented in the jurisdictional statement asked:

> Whether 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). The Supreme Court's summary affirmance necessarily "reject[ed] the specific challenges presented in the statement of jurisdiction." *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977).

The Supreme Court's summary affirmance is binding on lower courts. *Hicks* v. *Miranda*, 422 U.S. 332, 344-345 (1975). Although summary affirmances do not necessarily adopt the lower court's rationale, 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*, 432 U.S. at 176. See also *Hicks*, 422 U.S. at 344-345.

Defendants argue (Def. Br. at 19-21) that *Brooks* does not control because a series of Supreme Court decisions beginning with *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) and continuing through *Tennessee* v. *Lane*, 541 U.S. 509 (2004),[1] have signaled a "doctrinal shift" such

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[1] *City of Boerne* v. *Flores*, 521 U.S. 507 (1997); *Florida Prepaid Postsec. Educ. Expense Bd.* v.

(continued...)

that *Brooks* is no longer binding on lower courts. There is nothing in those cases, however, indicating that *Brooks* is no longer good law. As explained more fully in Part II.B., the line of cases cited by defendants in fact supports the constitutionality of Section 2.

Defendants also suggest (Def. Br. at 20), by citing statements in various Justices' concurring and dissenting opinions, that the constitutionality of Section 2 is an open question in the Supreme Court. None of the statements identified by defendants supports their contention; rather, most of the statements defendants cite simply reflect that the Court did not decide the constitutionality of Section 2 *in that particular case*. None purports to overrule *Brooks*.

II

CONGRESS HAS BROAD POWERS TO ENACT PROPHYLACTIC AND REMEDIAL LEGISLATION PROHIBITING SOME CONSTITUTIONAL CONDUCT WHEN THE LEGISLATION IS CONGRUENT AND PROPORTIONAL TO THE CONSTITUTIONAL INJURY TO BE PREVENTED OR REMEDIED

Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment give Congress the authority to enforce the prohibitions of racial discrimination in these amendments through "appropriate" legislation, and are "positive grant[s] of legislative power." *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966).[2] "It is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80-81 (2000), quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997) (internal quotations omitted). Congress's enforcement powers "[are] not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel*, 528 U.S. at 81; *Florida Prepaid*

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[1](...continued)
College Sav. Bank, 527 U.S. 627 (1999); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000); *United States* v. *Morrison*, 529 U.S. 598 (2000); *Board of Tr. of the Univ. of Alabama* v. *Garrett*, 531 U.S. 356 (2001); *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003); *Tennessee* v. *Lane*, 541 U.S. 509 (2004).

[2] Congress's power to enforce the Fifteenth Amendment "parallel[s]" Congress's enforcement power under the Fourteenth Amendment. *Boerne*, 521 U.S. at 518.

Postsec. Educ. Expense Bd. v. *College Sav. Bank*, 527 U.S. 627, 639 (1999). "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *Boerne*, 521 U.S. at 518.

To determine whether prophylactic legislation, such as Section 2 of the Voting Rights Act, is valid, a court must consider: (1) the constitutional right or rights that Congress sought to protect when it enacted the statute; (2) whether there was a history of constitutional violations to support Congress's determination that prophylactic legislation was necessary; and (3) whether the statute is a congruent and proportional response to the history and pattern of constitutional violations. See *Tennessee* v. *Lane*, 541 U.S. 509, 522-531 (2004). In analyzing the *congruency* of legislation, courts must identify the unconstitutional "'evil' or 'wrong' that Congress intended to remedy," *Florida Prepaid*, 527 U.S. at 639-640, and in doing so can look to the "legislative record containing the reasons for Congress' action" to determine whether legislation falls within Congress's enforcement authority. *Kimel*, 528 U.S. at 88. *Proportionality* determines whether the enactment is "responsive to, or designed to prevent, unconstitutional behavior." *Kimel*, 528 U.S. at 82 (quoting *Boerne*, 521 U.S. at 532).

III

SECTION 2 IS A VALID EXERCISE OF CONGRESS'S CONSTITUTIONAL AUTHORITY TO ENFORCE THE FOURTEENTH AND FIFTEENTH AMENDMENTS

Congress enacted Section 2 pursuant to its Fourteenth and Fifteenth Amendment authority to eradicate discriminatory voting practices and procedures, and to eliminate the effects of such discrimination from continuing to abridge voting rights. S. Rep. No. 417, 97th Cong., 2d Sess. 17 (1982) ("1982 Senate Report"). Defendants' argument (Br. 11-15) that the Section 2 results test cannot be congruent with the purpose of the Fourteenth and Fifteenth Amendments, which prohibit only intentional discrimination, is without merit. Section 2 is a congruent and proportional means to remedy what Congress identified as a long and persistent history of unconstitutional conduct and its lingering effects.

A. Congress Found A Substantial History, Continuing Risk, And Lingering Legacy Of Unconstitutional Discrimination In Voting That Warranted A Prophylactic And Remedial Response

"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' action." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 88 (2000). "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). In reviewing the legislative record, Congress's conclusions are entitled to substantial deference. See *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997).

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; *Board of Tr. of the Univ. of Alabama* v. *Garrett*, 531 U.S. 356, 373 (2001).[3]

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[3] Even as the Court has developed *Boerne*'s "congruence and proportionality" standard in later cases, the Court has continued to refer to various provisions of the Voting Rights Act as examples of constitutional exercises of Congress's power. See, *e.g.*, *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 737-738 (2003) (noting that "difficult and intractable proble[ms]" in voting rights context "justify added prophylactic measures in response") (internal quotation marks omitted); *Garrett*, 531 U.S. at 373 (contrasting "constitutional shortcomings" of Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, in that case with "Congress' efforts in the Voting Rights Act of 1965 to respond to a serious pattern of constitutional violations"); *Florida Prepaid Postsec. Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640 (1999) (contrasting statute providing for patent remedies that exceeded Congress's power with "the undisputed record of racial discrimination confronting Congress" that supported the constitutionality of the Voting Rights Act).

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

Congress initially enacted the Voting Rights Act, including 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 * * * merely switched to [other] discriminatory devices." *Id*. at 314. Section 2 was part of Congress's attempt to put an end to these practices.

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) ("1975 House Report"); S. Rep. No. 295, 94th Cong., 1st Sess. 15-17 (1975) ("1975 Senate Report").

As the Eleventh Circuit observed in *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, cert. denied, 469 U.S. 976 (1984), "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.

H.R. Rep. No. 227, 97th Cong., 1st Sess. 2-3 (1981) ("1981 House Report"). The Senate relied upon the evidence accumulated by the House and held an additional nine days of hearings itself. See 1982 Senate Report 3. A major focus was on the need to amend Section 2.[4] 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," 1981 House Report 14, and "discrimination continues today to affect the ability of minorities to participate effectively within the political process." *Id*. at 11.

"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 364, 375 n.6 (5th Cir. 1984) (citation omitted). 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 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. 32,177 (1981).

Thus, "[b]oth the House and Senate hearing records contain examples of direct efforts to bar minority participation," 1982 Senate Report 10 n.22, including physical violence and intimidation of voters and candidates,[5] discriminatory purging of voter rolls and re-registration requirements,[6]

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[4] See 1982 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 1982 Senate Report 127-151).

[5] 1982 Senate Report 10 n.22; 1981 House Report 14-16. See also, *e.g.*, *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong. 1531 (1981) ("House Hearings") (Joe Reed, Ala. Dem. Conf.); *id*. at 1569-1570 (Maggie Bozeman, NAACP); *id*. at 1670-1671 (Betty Paulette, member

(continued...)

and various other methods.[7] Congress also found that some jurisdictions had "substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength," 1982 Senate Report 10, such as at-large elections,[8] annexation of largely white areas,[9] and racially gerrymandered districts.[10]

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[5](...continued)
of Dem. Party exec. comm., Noxubee Cty, Ga.); *Voting Rights Act: Hearings Before the Subcomm. on the Constit. of the Senate Comm. on the Judiciary*, 97th Cong., Vol. I, 1385-1386 ("Senate Hearings I" or "Senate Hearings II" for second volume) (Drew Days, former Ass't Atty. Gen. for the Civil Rights Division); *id*. at 770-773 (Jane Reed Cox, Abigail Turner, att'ys); Senate Hearings II 238 (U.S. Catholic Conf.).

[6] See 1982 Senate Report 10 n.22; House Report 16. See also, *e.g.*, Senate Hearings I 755-760, 772-773 (Jane Reed Cox, Abigail Turner, att'ys); Senate Hearings II 238 (U.S. Catholic Conf.); House Hearings 1533-1534 (Joe Reed, Ala. Dem. Conf.); Senate Hearings II 359 (Nat'l Cong. of Am. Indians) ("Indians have found themselves purged from election rolls without notification, or their polling places closed.").

[7] See, *e.g.*, House Report 16; 127 Cong. Rec. 22,932 (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, pres., Nat'l League of Women Voters) (describing election officials in New York City resisting requests by minority groups, but not the League of Women Voters, for materials to conduct registration drives); House Hearings 373-374 (Michael Brown, NAACP) (various methods in Va.); *id*. at 1581 (Prince Arnold, Sheriff, Wilcox Cty, Ala.) (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).

[8] See 1981 House Report 18-20; 1982 Senate Report 13.

[9] 1981 House Report 19; 1982 Senate Report 13. See also Senate Hearings I 665 (Henry J. Kirksey, Miss. state senator); Senate Hearings II 215 (Am. Fed. of State, County and Mun. Employees); *id*. at 238-239 (U.S. Catholic Conf.); House Hearings 369-370 (Henry Marsh, Mayor of Richmond, Va.) (VA); *id.* at 1682-1689 (Charles McTeer, att'y).

[10] 1982 Senate Report 11, 13; 1981 House Report 19-20. See also, *e.g.*, Senate Hearings I 301 (Vilma Martinez, exec. dir. Mexican Am. Legal Def. and Educ. Fund (MALDEF)) (TX); *id*. at 682-687 (Henry J. Kirksey, Miss. state senator) (MS); *id*. at 763-764 (Abigail Turner, att'y)
(continued...)

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 academics,[11] as well as the recent 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 1975.[12] Many of these cases

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[10](...continued)
(AL); *id*. at 995-997 (Rolando Rios, att'y) (NM); Senate Hearings II 355-356 (Barbara Major, La. Hunger Coal.) (New Orleans); *id*. at 358 (Nat'l Cong. of Am. Indians) (WI); *id*. at 193 (John Jacob, Nat'l Urban League) (MS); House Hearings 35 (William Velasquez, SW Voter Reg. Educ. 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, S.C. Human Affairs Comm'r) (SC).

[11] See Rolando Rios, *The Voting Rights Act: Its Effect in Texas* (April 1981) (1981 House Report 7-8); C. Davidson & G. Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence*, Journal of Politics (Nov. 1981) (1981 House Report 18); 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. Jones, *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); ACLU, *Voting Rights in the South* (1982) ("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 Soc., Univ. of Vt.); see also Report of the Comptroller General of the United States, *Voting Rights Act – Enforcement Needs Strengthening* 26-28 (Feb. 6, 1978) ("GAO Report").

[12] See Senate Hearings II 709 (ACLU Report). See also Senate Hearings I 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).

ended in findings of purposeful discrimination.[13] 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.[14]

Congress was 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.*, 1981 House Report 28; U.S. Comm'n on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* 62-63 (1981); *Underwood* v. *Hunter*, 471 U.S. 222 (1985) (recognizing law enacted in 1901 as part of the "movement that swept the post-Reconstruction South to disenfranchise blacks.").

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[13] Senate Hearings I 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 Sch. Bd.*, 691 F.2d 978 (11th Cir. 1982) (FL); *McMillan* v. *Escambia County*, 688 F.2d 960 (5th Cir. 1982), vacated in part on other grounds, 466 U.S. 48 (1984) (FL); *Perkins* v. *City of West Helena*, 675 F.2d 201 (8th Cir.), aff'd, 459 U.S. 801 (1982) (AR); *Searcy* v. *Williams*, 656 F.2d 1003 (5th Cir. 1981), aff'd, 455 U.S. 984 (1982) (GA); *Lodge* v. *Buxton*, 639 F.2d 1358 (5th Cir. 1981), aff'd, 458 U.S. 613 (1982) (GA); *Wyche* v. *Madison Parish Police Jury*, 635 F.2d 1151 (5th Cir. 1981) (LA); *Rybicki* v. *State Bd. of Elections*, 574 F. Supp. 1082 (N.D. Ill. 1982) (IL); *Busbee* v. *Smith*, 549 F. Supp. 494 (D.C. 1982), aff'd, 459 U.S. 1166 (1983) (GA); *Brown* v. *Board of Sch. Comm'r*, 542 F. Supp. 1078 (S.D. Ala. 1982), aff'd, 706 F.2d 1103 (11th Cir.), aff'd, 464 U.S. 1005 (1983) (AL); *Bolden* v. *City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982) (AL); *City of Port Arthur* v. *United States*, 517 F. Supp. 987 (D.C. 1981), aff'd, 459 U.S. 159 (1982) (TX); *Bailey* v. *Vining*, 514 F. Supp. 452 (M.D. Ga. 1981) (GA); *Hale Co.* v. *United States*, 496 F. Supp. 1206 (1980) (AL); *Hendrix* v. *McKinney*, 460 F. Supp. 626 (N.D. Ala. 1978) (AL); *Stewart* v. *Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (MS); *Moore* v. *Leflore Co. Bd. of Election Comm'r*, 361 F. Supp. 603 (N.D. Miss. 1972) (MS); *Yanito* v. *Barbara*, 348 F. Supp. 587 (D. Utah 1972) (UT); *Klahr* v. *Williams*, 339 F. Supp. 922, 927 (D. Ariz. 1972) (AZ). See also Senate Hearings II 697-701 (*Voting Rights in the South*) (describing consent decrees challenging at-large systems in 12 counties in Ga.).

[14] See Senate Hearings I 1803-1805 (attachments to statement of Wm. Bradford Reynolds, Ass't Att'y Gen.) (also citing six pending cases); GAO Report 26-28.

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. 23,175 (1981). Congress "heard numerous examples of how at-large elections are one of the most effective methods of diluting minority strength in the covered jurisdictions." 1981 House Report 18. The legislative record is replete with specific examples from around the country which raise an inference of purposeful discrimination.[15]

Congress was aware that "[b]enign explanations may be offered for why these methods have been selected." 1981 House Report 20. But Congress was entitled to disbelieve these explanations, 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.

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[15] See, *e.g.*, 1981 House Report 17-20 (specifically discussing instances in AL, NE, and NM); 1982 Senate Report 13-14, 37-39 (AL, SC, FL, GA); Senate Hearings II 358 (National Congress of American Indians) (NE, NM); House Hearings 906-907 (Robert Krueger, former member of Cong.) (TX); *id*. at 942-949, 1128-1146 (report of MALDEF) (TX); *id*. at 1254 (Ruben Bonilla, LULAC) (Corpus Christi, TX); *id*. at 1279-1280 (Paul Ragsdale, Tex. state representative) (school boards in Tex.); *id*. at 1526 (Joe Reed, Ala. Dem. Cong.) (Montgomery, Ala.); *id*. at 1612-1614 (Michael Figures, Ala. state senator) (same); *id*. at 1702-1703 (Martha Bergmark, S.E. Miss. Legal Servs.) (Hattiesburg, Miss.); *id*. at 1704-1705 (Laurel, Miss.); *id*. at 1740, 1744 (Henry Kirskey, Miss. state senator) (MS); Senate Hearings II at 696-697 (ACLU Report) (counties in Ga. and Ala.; House Hearings 39-41 (Rolando Rios, att'y) (TX); *id*. at 225-227 (Julian Bond, Ga. state senator) (GA); *id*. at 243-244 (James Clyburn, S.C. Human Affairs Comm'r) (SC); *id.* at 369-371 (Henry Marsh, Mayor of Richmond, Va.) (VA); *id*. at 499-514 (Frank Parker, Lawyers' Comm. For Civil Rights Under the Law) (MS); *id*. 599-623 (Laughlin McDonald, Southern Regional Office, ACLU) (GA); *id.* at 790-800 (Jane Cox and Abigail Turner) (AL); *id*. at 1804-1806 (Raymond Brown, Voting Rights Res. Project) (NC). See *The Voting Rights Act: Unfulfilled Goals* at 42-55 (summarizing dilution cases from AL, GA, MS, NC, and VA) (cited by 1981 House Report 18).

1982 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. 1981 House Report 18. These practices resulted in disproportionately low minority voter registration, voting, and electoral success. 1981 House Report 18-19. In 1982, Congress found that many jurisdictions continued widespread use of these 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 1981 House Report 18-19. In many jurisdictions, these practices took place against the backdrop of continued resistence to the requirements of Section 5 of the Voting Rights Act. See *id*. at 11-13; 1982 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. Defendants may disagree with Congress's 1982 conclusions, but *Boerne* requires courts to give Congress's determinations substantial deference. 521 U.S. at 536.

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

In 1980 the Supreme Court held in *City of Mobile* v. *Bolden* that Congress intended Section 2 to regulate only that conduct prohibited by the Fifteenth Amendment, and therefore plaintiffs claiming a violation of Section 2 were obligated to show that the challenged system or procedure was adopted with the intent to discriminate. 446 U.S. 55, 60-62 (1980). Congress reacted quickly by holding hearings. In light of the evidence before it (see Part III.A.1., above), Congress concluded that a limited results test was necessary to enforce the Constitution's prohibition against purposeful discrimination.

Congress had ample basis to conclude that an intent requirement in the voting rights context would render much intentional discrimination immune from legal restraint. See *Blaine County*, 363 F.3d at 908; see also *Marengo County*, 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 1981 House Report 29 & n.97; 1982 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." 1981 House Report 31. Those intent on discriminating may offer "a non-racial rationalization for a law which in fact purposely discriminates" or "plant[] a false trail of direct evidence in the form of official resolutions, sponsorship statements and other legislative history eschewing any racial motive, and advancing other governmental objectives." 1982 Senate Report 37.[16]

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. 1982 Senate Report 36-37; 1981 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,[17] Congress concluded that an "intent test places an unacceptably difficult burden on plaintiffs." 1982 Senate Report 16. See also 1981 House Report

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[16] This observation was echoed by numerous officeholders appearing as witnesses and participating in the deliberations. See, *e.g.*, Senate Hearings I 92 (Sen. Mathias); Senate Hearings II 6 (Sen. Hollings); *id*. at 212 (Alfredo Gutierrez, Ariz. state senator); *id*. at 290 (Bruce Babbitt, Gov. of Ariz.); *id*. at 380 (Nat'l Conf. of State Legislatures); 127 Cong. Rec. 23,175 (1981).

[17] See Senate Hearings I 289 (Vilma Martinez, MALDEF); *id*. at 368-369 (Lauglin McDonald, Southern Regional Office, ACLU); *id*. at 639-641 (David Walbert, att'y); *id*. at 1238 (Frank R. Parker, Voting Rights Project, Lawyers' Comm. for Civil Rights Under Law); *id*. at 1258-1266 (Julius Chambers, pres., NAACP Legal Def. Fund); *id*. at 1401 (Drew Days, former Ass't Att'y Gen. for Civil Rights); *id*. at 1425-1426 (Archibald Cox, Chairman, Common Cause, Prof., Harvard Law School); *id*. at 1606 (David Brink, pres., ABA).

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." 1982 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." *Id.* at 26.[18]

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." 1982 Senate Report 40. 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.

3. Congress Was Justified In Considering That 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." *Thornburg* v. *Gingles*, 478 U.S. 30, 69 (1986). 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

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[18] See also Senate Hearings I 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).

which minorities were purposefully excluded from opportunities to register and vote." 1981 House Report 31. See also 1982 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 1982 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. *Gingles*, 478 U.S. at 69-70. Based on the evidence before it, Congress was justified in concluding that a nationwide prohibition of certain voting practices with discriminatory results was necessary to remedy the effects of purposeful discrimination throughout the country. See *Blaine County*, 363 F.3d at 905-907; *Marengo County*, 731 F.2d at 1560.

B. Section 2 Is Congruent And Proportionate To Congress's Remedial And Preventative Purposes

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

1. Section 2's "Results" Test Is A Highly Congruent And Proportionate Response To Unconstitutional Voting Practices Because It Has A Limited Reach And The Evidence For Proving A Results Test Violation Of Section 2 Is Substantially Similar To That For Proving Purposeful Discrimination By Circumstantial Evidence

The effective scope of Section 2 does not extend far beyond the Constitution itself. Although a plaintiff need not prove discriminatory intent to prove a Section 2 violation, the statute does not simply prohibit practices that adversely impact protected classes of voters. That is, plaintiffs cannot just show that, under a challenged system, minority candidates or the preferences of minority voters have been defeated, or that the system does not produce racially proportionate results. *Johnson* v. *De Grandy*, 512 U.S. 997, 1011 (1994). Instead, the inquiry focuses on discriminatory denial of

equal access to the voting process. *Id*. at 1011-1012; see also 1982 Senate Report 27. As the Ninth Circuit explained in *Blaine County*, "calling section 2's test a 'results test' is somewhat of a misnomer" because plaintiffs "must establish that under the totality of the circumstances, the challenged procedure prevents minorities from effectively participating in the political process." 363 F.3d at 909. Thus, Section 2's reach is actually quite limited. It 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. See *Blaine County*, 363 F.3d at 909 (explaining Congress determined that Section 2 is "'self-limiting' because of the numerous hurdles that plaintiffs must cross to establish a vote dilution claim"); see also 1982 Senate Report 43 (explaining that Section 2 "avoids the problem of potential overinclusion entirely by its own self-limitation"); see also *Blaine County*, 363 F.3d at 906 ("Section 2 is a far more modest remedy" than Section 5 of the VRA because "the burden of proof is on the plaintiff," and because it "makes no assumptions about a history of discrimination."). Defendants' arguments (Br. 15-16) that Section 2 is overreaching and intrusive are simply without merit.

Moreover, the evidence necessary to prove discriminatory denial of equal access to the voting process is substantially similar to that for proving purposeful discrimination by circumstantial evidence. In *White* v. *Regester*, 412 U.S. 755 (1973), the Court affirmed a three-judge district court order invalidating multi-member county voting districts because of vote dilution. 412 U.S. at 758. Noting that "multi-member districts are not per se unconstitutional" (*id.* at 765), the Court considered the type of circumstantial evidence needed to support a finding of racially based unconstitutional vote dilution, stating:

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

Id. at 766. The Court held this burden could be met with a showing of a history of official racial discrimination, lingering effects of that discrimination, few successful minority candidates for office, elected officials' lack of responsiveness to the interests of minority voters, and recent use of "racial campaign tactics" to defeat candidates preferred by minority voters, as well as discriminatory disparities in education, employment, economics, health and politics. *Id*. at 765-769.

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

In *Rogers* v. *Lodge*, 458 U.S. 613 (1982), the Court again examined the circumstantial showing needed to support an inference of purposeful discrimination in a vote dilution case. The Court, in reiterating the *Mobile* plurality opinion, stated that discriminatory intent "need not be proved by direct evidence," *id*. at 618, and affirmed that the *White* standard was sufficient to permit (but not require) a fact-finder to infer purposeful discrimination. *Id.* at 617-622. The Court noted the district court's findings that although African Americans formed a substantial majority of citizens in Burke County, Georgia, none had been elected under the challenged system. *Id*. at 623-624. The Court found that although this fact is "important evidence of purposeful exclusion," it is insufficient to "prove purposeful discrimination absent other evidence such as *proof that blacks have less opportunity to participate in the political processes and to elect candidates of their choice*."

Id. at 624 (emphasis added) (citing *White* v. *Regester*). As in *White*, the Court in *Rogers* affirmed the district court's finding that this standard was met, by virtue of the district court's findings with respect to the factors identified in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), aff'd sub nom., *East Carroll Parish Sch. Bd.* v. *Marshall*, 424 U.S. 636 (1976), as relevant to the issue of purposeful discrimination. See *Rogers*, 458 U.S. at 624-627. *Rogers* both resolved any question over the adequacy of the *White* standard to support an inference of unconstitutional purposeful discrimination, and made clear that satisfying the *White* standard can establish an inference of intentional discrimination under Section 2 of the Act.

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

2. The Supreme Court Has Repeatedly Approved Legislation Barring Practices Because Of Their Discriminatory Effect

The Supreme Court has upheld a series of voting rights provisions which prohibited actions because of their discriminatory effects. *South Carolina* v. *Katzenbach*, 383 U.S. at 334 (Section 5, literacy tests); *City of Rome* v. *United States*, 446 U.S. 156 (1980) (Section 5); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (literacy tests); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (literacy tests). In barring literacy tests Congress did not even require proof of demonstrated discriminatory results. 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.

Moreover, the Court has also recognized congressional power, post-*Boerne*, to legislate against discriminatory effects in contexts other than voting. Most recently, the Supreme Court noted in *Tennessee* v. *Lane*, 541 U.S. 509, 520 (2004), that Congress may "enact prophylactic legislation proscribing practices that are discriminatory in effect, if not intent, to carry out the basic objectives of the Equal Protection Clause." The Court in *Lane* also noted that it had held in *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003), that the Family Medical Leave Act is a "valid exercise of Congress' § 5 power to combat unconstitutional sex discrimination, even though there was no suggestion that the State's leave policy was adopted or applied with a discriminatory purpose." 541 U.S. at 519. These cases leave little room for doubt that a "results" or "effects" test can be an appropriate means for Congress to enforce the Fourteenth and Fifteenth Amendments.

3. Section 2 Properly Applies Nationwide

Defendants argue (Br. 9-11) that Section 2 is unconstitutional because there was insufficient evidence to support its nationwide application. See Br. at 9 ("When Congress adopted the 1982 amendments, it made no findings of a systematic pattern of intransigent voting discrimination outside the jurisdictions [covered under Section 5 of the VRA]."). Defendants' argument fails for two reasons. First, recent Supreme Court decisions have rejected the argument that Congress may employ its enforcement powers on a nationwide basis only where there is a showing of a nationwide record of voting discrimination. Second, Congress had sufficient evidence before it to support Section 2's nationwide application.

a. Prophylactic And Remedial Legislation Need Not Be Based On Nationwide Findings Of Unconstitutional Conduct

Defendants argue (Br. 7) that prophylactic legislation must be premised on widespread patterns of unconstitutional state action occurring "across the country, in most or the great

majority of the States." Defendants' argument is foreclosed by the Supreme Court's decision in *Hibbs*. In that case, the Court upheld the constitutionality of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2612(a)(1)(C), in the face of a similar challenge. The Court found that in light of "important shortcomings of *some* state policies" Congress was justified in enacting the FMLA as remedial legislation. 538 U.S. at 733 (emphasis added). The *Hibbs* Court recognized that despite the absence of specific state-by-state findings of discrimination, the "States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 [of the Fourteenth Amendment] legislation" with nationwide application. 538 U.S. at 735; see *id.* at 742 (Scalia, J., dissenting) ("Today's opinion for the Court does not even attempt to demonstrate that each one of the 50 States covered by [the FMLA] was in violation of the Fourteenth Amendment."); *Blaine County*, 363 F.3d at 906 ("[A]fter the Supreme Court's * * * decision in [*Hibbs*], it is clear that Congress need not document evidence of constitutional violations in every state to adopt a statute that has nationwide applicability."); see also *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding nationwide ban on literacy tests despite lack of evidence that such tests had been used to discriminate in every State); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) (nationwide ban on English literacy requirements).

The Supreme Court has never required Congress to make state-by-state or region-by-region findings prior to employing its enforcement powers under the Fourteenth and Fifteenth Amendments to adopt nationwide remedial measures. What is necessary are findings by Congress that the violations to be remedied, and the denial of equal opportunity, are sufficiently weighty to indicate the presence of a nationwide problem.[19]

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[19] Defendants' reliance on *United States* v. *Morrison*, 529 U.S. 598 (2000), is misplaced. In that case, the Supreme Court struck down the civil remedy portion of the Violence Against Women Act because it did not target state action, but rather the actions of individuals. 529 U.S. at 619-626. The Court's discussion further distinguishing the remedy at issue in *Morrison* from those upheld under Congress's § 5 authority, upon which Defendants rely, is merely *dicta*. *Id.* at 626-

b. The Evidence Before Congress Fully Supports Section 2's Nationwide Application

Defendants' assertion that Section 2 is based on a congressional record containing little evidence of voting discrimination outside jurisdictions covered by Section 5 is simply incorrect. Although the most far-reaching provision of the 1965 Voting Rights Act – the requirement that some states must preclear new voting changes under Section 5 of the Act, 42 U.S.C. 1973c – was supported by voluminous congressional findings of flagrant discriminatory voting practices in the covered jurisdictions, "Congress had before it sufficient evidence of discrimination in jurisdictions not covered by section 5 [of the Voting Rights Act] to warrant nationwide application." *Blaine County*, 363 F.3d at 907; see also *Marengo County*, 731 F.2d at 1559 ("Congress did find evidence of substantial discrimination outside [covered] jurisdictions.").

Subsequent re-enactments and amendments to the Voting Rights Act presented more evidence of such far-flung discrimination. See, *e.g.*, H.R. Rep. No. 397, 91st Cong., 1st Sess. 7 (1969). For example, in 1975, Congress amended the Voting Rights Act after hearings revealed discrimination affecting minority voting participation in areas with large non-English speaking communities and communities with large numbers of American Indians. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 401. See 1975 House Report; 1975 Senate Report. Congress expanded the Act to afford protection "to additional areas throughout the country," including localities with concentrations of American Indian voters such as Alaska, Arizona, California, Colorado, Florida, Idaho, Iowa, Louisiana, Mississippi, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Utah. 1975 Senate Report 9; 28 C.F.R. Pt. 55 App.

When amending Section 2 in 1982, Congress heard further evidence of persistent abuses of the electoral process nationwide, including "sophisticated dodges, such as at-large elections" that dilute minority voting strength. 127 Cong. Rec. 32,177 (1981); see 1982 Senate Report;

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[19](...continued)
627.

Senate Hearings I and II; 1981 House Report; House Hearings. The Attorney General's report to Congress on vote dilution cases during the 1981 hearings included reports on cases outside the South – for example, in Nebraska, Wisconsin, New Mexico, and California. Senate Hearings I 1804-1806, 1808. Defendants' assertion (Br. 9-10) that there was "scanty evidence" of the use of discriminatory voting practices outside covered jurisdictions, including the use of at-large elections, is wholly without merit.[20]

IV

COURTS OF APPEALS HAVE REJECTED SIMILAR CONSTITUTIONAL CHALLENGES TO SECTION 2 OF THE VOTING RIGHTS ACT

The Ninth Circuit recently considered, and rejected, a constitutional challenge nearly identical to the one presented by Defendants. In *United States* v. *Blaine County*, 363 F.3d 897 (9th Cir. 2004), cert. denied, 544 U.S. 992 (2005), the Ninth Circuit held that Congress acted within its enforcement powers under the Fourteenth and Fifteenth Amendments when it enacted the 1982 amendments to the Voting Rights Act. *Id.* at 904. Specifically, by relying on Supreme Court precedent holding that effects tests can be constitutional, see *City of Rome* v. *United States*, 446 U.S. 156 (1980), the Ninth Circuit flatly rejected the argument that Section 2 exceeds Congress's constitutional authority because the Constitution proscribes only intentional discrimination.[21] *Blaine*

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[20] Defendants' quote (Br. 9) from a portion of the 1982 Senate Report that asserts that there was little evidence presented to Congress of discrimination outside the Southern states. That portion of the report was a report of a subcommittee which, unlike the full committee, recommended *against* amending Section 2. There is accordingly no reason for taking the subcommittee's comments even as the findings of the Senate committee responsible for the bill – much less as findings reached or endorsed by the Senate as a whole.

[21] Other courts have reached similar conclusions. See *United States* v. *Marengo County*, 731 F.2d 1546, 1556-1563 (11th Cir. 1984) (holding that Section 2's "results" test is a valid exercise of Congress's enforcement powers under the Fourteenth and Fifteenth Amendments), cert. denied, 469 U.S. 976 (1984); *Jones* v. *City of Lubbock*, 727 F.2d 364, 373-375 (5th Cir. 1984) (same); see also, *e.g.*, *United States* v. *Alamosa County*, 306 F. Supp. 2d 1016, 1026 (D. Colo. 2004) (treating the Supreme Court's decisions in *South Carolina* v. *Katzenbach*, 383 U.S. 301,

(continued...)

County, 363 F.3d at 907-909. Relying on additional Supreme Court precedent, the Ninth Circuit also held, 363 F.3d at 906-907, that Congress did not exceed its enforcement powers by applying Section 2 nationwide. See *City of Boerne* v. *Flores*, 521 U.S. 507, 533 (1997) (legislation enacted pursuant to Congress's Section 5 enforcement authority is not required to have geographic restrictions); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding nationwide bans on voting procedures that are not *per se* unconstitutional); *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 732 (2003) (Congress need not document constitutional violations in every state prior to enacting a statute with nationwide applicability). The reasoning of *Blaine County* is equally applicable here.

CONCLUSION

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

Dated this 16th day of January, 2007.

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[21](...continued)
308 (1966) and *Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1003 (1984) and this court's decision in *Sanchez* v. *Colorado*, 97 F.3d 1303, 1314 (10th Cir. 1996), cert. denied, 520 U.S. 1229 (1997) as binding precedent that Section 2 is constitutional); *Major* v. *Treen*, 574 F. Supp. 325, 342-349 (E.D. La. 1983) (three-judge court).

CERTIFICATE OF SERVICE

I certify that on this 16th day of January 2007, one copy of the foregoing **BRIEF OF THE UNITED STATES AS INTERVENOR SUPPORTING THE CONSTITUTIONALITY OF SECTION 2 OF THE VOTING RIGHTS ACT** was served on the following counsels of record by electronic filing and by First-call United States Postal Service, postage pre-paid:

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