No. 08-322

In the

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR.,
Attorney General, et al.,

Appellees.

On Appeal from the
United States District Court
for the District of Columbia

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AND PROJECT 21 IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

1. Section 5 of the Voting Rights Act (Act) requires that certain states and political subdivisions seek approval from the federal government before making any change affecting voting procedures. Section 4(a) of the Act permits these covered jurisdictions to opt out of Section 5 coverage if they can establish a ten-year history of compliance with the Act. The first question presented is whether Section 4(a) must be available to any political subunit of a covered state when the Court's precedent requires "political subdivision" to be given its ordinary meaning throughout most of the Act and no statutory text abrogates that interpretation with respect to Section 4(a)?

2. Beginning with *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court has consistently required that remedial legislation be congruent and proportional to the substantive constitutional guarantees it seeks to enforce. In 2006, Congress enacted the 2006 Voting Rights Act Reauthorization and Amendments Act, which extended Section 5's coverage—without modification—until the year 2031. The second question presented is whether under the congruence and proportionality standard, or even under a purportedly less stringent rational-basis standard, that enactment can be applied as a valid exercise of Congress's remedial powers under the Fourteenth and Fifteenth Amendments when it was founded on a congressional record demonstrating no evidence of a persisting pattern of attempts to evade court enforcement of voting rights guarantees in jurisdictions covered only on the basis of data 35 or more years old?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Center for Equal Opportunity, and Project 21, the National Leadership Network of Black Conservatives, submit this brief amicus curiae in support of Appellant.[1] PLF was founded 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has extensive litigation experience in the area of group-based racial preferences and civil rights. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by the United States Supreme Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). PLF submits this brief because it believes its public policy perspective and litigation

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

experience in the area of voting rights will provide an additional viewpoint with respect to the issues presented. PLF participated as amicus curiae in past Voting Rights Act cases such as *Bartlett v. Strickland*, No. 07-689 (argued before this Court on Oct. 14, 2008); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991); and *City of Rome v. United States*, 446 U.S. 156 (1980).

The Center for Equal Opportunity (CEO) is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. CEO supports color blind public policies and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education, and voting. CEO has participated as amicus curiae in past Voting Rights Act cases, such as *Bartlett v. Strickland*, No. 07-689 (argued before this Court on Oct. 14, 2008), and *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006). In addition, officials from CEO testified before Congress several times during the recent reauthorization of the Voting Rights Act.

Project 21, the National Leadership Network of Black Conservatives, is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. Project 21 participated as amicus curiae in the Voting Rights Act case of *Bartlett v. Strickland*. Project 21 participants

seek to make America a better place for African-Americans, and all Americans, to live and work.

Amici Curiae have a substantial interest in preventing the racial segregation and gerrymandering of voting districts that is the result of Section 5's intrusiveness into traditional state functions, and will show that the 2006 enactment extending the preclearance requirements of Section 5 of the Voting Rights Act is beyond Congress's remedial powers under the Fourteenth and Fifteenth Amendments.

INTRODUCTION AND SUMMARY OF ARGUMENT

The historic election of President Barrack Obama stands as a remarkable testament to the tremendous progress this country has made in terms of racial equality and voting rights. As Americans proudly watched President Obama's inauguration, it must have been difficult for many to imagine that forty-four years ago, state and local governments deliberately disenfranchised blacks in the Deep South, and that the federal government enacted "the most aggressive assertion of federal power over voting issues since the Civil War and Reconstruction"—the Voting Rights Act of 1965 (Act)—to end it. Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 How. L.J. 741, 745 (2006).

The Act, as originally enacted, allowed the Attorney General to deploy federal examiners to the South to take over state and local voter-registration functions. Adopted as an extreme temporary measure, Section 5 of the Act required every political subdivision targeted by the Act to obtain permission from the

federal government before any change to election procedures, no matter how minor, could take place. Today, Section 5 continues to place only certain state and local governments under a form of federal receivership, often without rhyme or reason. However, the "insidious and pervasive evil" of racism in the Deep South, which once justified Section 5's uniquely burdensome remedy, has greatly diminished. *See South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (describing the "insidious and pervasive evil" in parts of the South).

In *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997), this Court explained that for Congress's remedial authority under the Fourteenth and Fifteenth Amendments there must be a congruence and proportionality between the injury to be prevented and the means adopted to that end. Nevertheless, the district court below struggled over whether to apply the *City of Boerne*'s "congruence and proportionality standard," or a separate "rationality" standard. In doing so, the court mistakenly reasoned that the *City of Boerne* standard applied only to Congress's remedial powers under Section 5 of the Fourteenth Amendment, while the "rationality test" applied to Congress's enforcement powers under Section 2 of the Fifteenth Amendment. In its analysis, the court overlooked that *City of Boerne* drew explicitly from Section 2 cases, and that one standard—the congruence and proportionality test—should be used to evaluate congressional power to enforce the Reconstruction Amendments.

Had the district court come to the proper conclusion that the congruence and proportionality standard applies to legislation enacted to enforce substantive rights granted under the Fourteenth *and*

Fifteenth Amendments, and applied that standard correctly, the court would have determined that Section 5 of the Act is no longer a valid exercise of Congress's remedial powers.

Changes in the social and political landscape cast doubt on, not only Section 5's relevance, but its constitutionality. These changes show that the justifications for Section 5's remedial measures no longer exist. For instance, when the Act was enacted in 1965 there were few, if any, black elected officials in the South. But now black elected politicians make up an appreciable percentage of many state governments of the Deep South. Forty years ago the drafters of the Act understood that widespread and persistent intentional discrimination in voting occurred predominantly in the jurisdictions targeted, and typically entailed the wilful misuse of tests and devices which Section 5 was specifically designed to remedy. But modern allegations of discrimination in voting may arise equally in both covered and noncovered jurisdictions, and involve a completely different array of problems which Section 5 is ill-suited to resolve.

Nevertheless, in 2006, Congress renewed Section 5 through the Voting Rights Act Reauthorization and Amendments Act. Prior to its passage, several prominent voting rights scholars pointed out the modern landscape in which the Act now operates. These dramatic changes call into question the Act's constitutionality. Without addressing these concerns, Congress extended Section 5's intrusive and constitutionally troubling coverage for another 25 years. Amici urge this Court to find Section 5 unconstitutional.

ARGUMENT

I

THIS COURT HAS ALWAYS APPLIED A STANDARD OF REVIEW HIGHER THAN THE "RATIONALITY" STANDARD TO LEGISLATION PASSED UNDER THE ENFORCEMENT CLAUSES OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS

When discussing the enforcement powers of the Reconstruction Amendments, this Court has routinely interchanged Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. *See City of Boerne*, 521 U.S. at 518-28; *Katzenbach v. Morgan*, 384 U.S. 641, 648-51 (1966); *James v. Bowman*, 190 U.S. 127, 137-39 (1903). The district court, however, differentiated between the standards to be applied in cases arising under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. *Nw. Austin Mun. Util. Dist. No. 1 v. Mukasey*, 573 F. Supp. 2d 221, 235-46 (D.D.C. 2008). Specifically, the district court held that under the Fourteenth Amendment, a statute must be congruent and proportional to the right asserted under that Amendment, but under the Fifteenth Amendment a statute need only survive a "rationality test." *Id.* at 241-46.

This Court never has identified two independent tests for legislation passed pursuant to Congress's Fourteenth and Fifteenth Amendments enforcement powers. The district court's "double standard" should be rejected for two reasons. First, Section 2 of the Fifteenth Amendment, proposed less than a year after

the Fourteenth Amendment was ratified, is nearly identical to Section 5 of the Fourteenth Amendment in its text, history, and treatment by this Court. *Compare* U.S. Const. amend XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."), *with* U.S. Const. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."). Second, this Court has consistently and universally applied more than a "rationality" standard of review to legislation passed pursuant to Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. This Court should make clear that, for legislation enacted under the enforcement provisions of the Reconstruction Amendments, there must be congruence and proportionality between the alleged constitutional injury and the means adopted to remedy it.

A. The Text and History of Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment Require That Legislation Enacted Pursuant to These Clauses Be Reviewed Under the Same Standard

Section 5 of the Fourteenth Amendment, also known as an "Enforcement Clause," reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. Once ratified the Enforcement Clause of the Fourteenth Amendment would come to represent "a positive grant of legislative power." *Morgan*, 384 U.S. at 651. The debate surrounding ratification of the Enforcement Clause clarified, however, that the new grant of legislative power

should be seen as "remedial and preventive" in nature. *See City of Boerne*, 521 U.S. at 520-24 (discussing the ratification history of the Fourteenth Amendment). Ultimately, in July, 1868, the Fourteenth Amendment was ratified and became part of the Constitution of the United States. U.S. Const. amend. XIV; *see also* Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 Ala. L. Rev. 555, 575 (2002) (discussing issues surrounding ratification). Since ratification of the Fourteenth Amendment, this Court never has questioned the remedial and preventive nature of the Enforcement Clause. *See City of Boerne*, 521 U.S. at 525 (noting that the Court has always viewed Congress's power under Section 5 of the Fourteenth Amendment as corrective or preventive) (citing *United States v. Reese*, 92 U.S. 214, 218 (1875); *United States v. Harris*, 106 U.S. 629, 639 (1883); *James*, 190 U.S. at 139).

The Fifteenth Amendment passed in both Houses of Congress less than a year after the Fourteenth Amendment was ratified. *See* U.S. Const. amend XV; James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 Wm. & Mary Bill Rts. J. 443, 483-85 (1999) (discussing the congressional history of the Fifteenth Amendment). By February 1870, the Fifteenth Amendment was ratified, containing an enforcement clause that mirrors the language of the Fourteenth Amendment's Enforcement Clause: "The Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend XV, § 2; *see also United States v. Price*, 383 U.S. 787, 804-05 (1966) (discussing ratification of the Reconstruction

Amendments). The purpose of the Enforcement Clause of the Fifteenth Amendment mirrors the purpose of the Fourteenth Amendment's Enforcement Clause. "[M]any Republicans believed that the Fifteenth Amendment would remain ineffective until and unless it was enforced by additional federal laws . . . . [I]f no further federal laws were enacted, racial discrimination in voting would be constitutionally feasible." Xi Wang, *The Making of Federal Enforcement Laws, 1870-1872*, 70 Chi.-Kent L. Rev. 1013, 1020 (1995). In other words, the Republicans proposing the Amendment understood that legislation to remedy and prevent racial discrimination in voting would be needed to enforce appropriately Section 1 of the Fifteenth Amendment.

Given that the text and purpose of the two Enforcement Clauses are nearly identical, it is unsurprising that this Court has iterated continuously that the clauses should be interpreted the same. *See, e.g.*, Victor Andres Rodriguez, *Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance*, 91 Cal. L. Rev. 769, 786 (2003) (noting the Court interprets the Enforcement Clauses similarly because of their parallel histories and texts); *Lopez v. Monterey County*, 525 U.S. 266, 294 n.6 (1999) (Thomas, J., dissenting) ("[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as coextensive.").

In *City of Boerne*, which arose under Section 5 of the Fourteenth Amendment, this Court used cases arising under Section 2 of the Fifteenth Amendment to explain the standard courts should apply to Congress's Fourteenth Amendment Enforcement Clause power.

See City of Boerne, 521 U.S. at 518 (citing *Katzenbach*, 383 U.S. at 308; *Oregon v. Mitchell*, 400 U.S. 112 (1970); *City of Rome*, 446 U.S. 156). Moreover, the *City of Boerne* Court explicitly stated Congress's powers under both Enforcement Clauses were "parallel." *City of Boerne*, 521 U.S. at 518. Even in a post-*City of Boerne* decision, this Court has observed that, "Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001).

The district court in this case dismissed this Court's statements in *City of Boerne* and *Garrett*, however, as "dicta." *Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 243. Yet, in both *City of Boerne* and *Garrett*, this Court cited Fifteenth Amendment precedents to elucidate the standard to be applied in Fourteenth Amendment cases. *See City of Boerne*, 521 U.S. at 518; *Garrett*, 531 U.S. at 373. Clearly, "the . . . limitations on Congress's Fourteenth Amendment enforcement power extend also to its Fifteenth Amendment enforcement power." *Rodriguez*, *supra*, at 774. At a minimum, treating the Enforcement Clauses differently would turn this Court's reasoned analysis on its head.

B. This Court has Applied Consistently a More Demanding Standard than Mere "Rationality" to Statutes Passed Pursuant to Congress's Enforcement Clause Powers

Despite this Court's consistent pronouncement that the two Enforcement Clauses should not be treated differently, the district court below determined

that courts are required to apply different standards of review depending upon whether the legislation is passed under Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment. *Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 235-46. Specifically, the district court said that when Congress invokes its power under Section 2 of the Fifteenth Amendment, courts are required to apply a more relaxed, "rationality" standard of review. *Id.* at 236-39. To make its case, the district court examined a number of this Court's precedents holding various portions of the Voting Rights Act constitutional. *Id.* at 236-39. Upon closer inspection the district court's distinction falls apart.

First, as discussed above, the text and history of both Enforcement Clauses, coupled with this Court's clear reasoning, demonstrate convincingly that there is no meaningful distinction between the two Enforcement Clauses. Second, as elaborated below, the "congruence and proportionality" standard discussed in *City of Boerne* is a clearer articulation of this Court's previous jurisprudence with respect to both Enforcement Clauses. In no way should this Court's past decisions upholding portions of the Voting Rights Act under Section 2 of the Fifteenth Amendment be read to require that a standard be used for Section 2 cases that is different from the standard used in cases arising under Section 5 of the Fourteenth Amendment.

1. The "Congruence and Proportionality" Standard Applied to the Early Cases Upholding the Voting Rights Act of 1965

The Act was passed by Congress in 1965 in order to combat the evils of official discrimination in voting. *Katzenbach*, 383 U.S. at 308, 315. Immediately, South Carolina challenged the Act as an unconstitutional exercise of congressional power under Section 2 of the Fifteenth Amendment. *Id.* at 307. Two distinct issues were present in *Katzenbach*: (1) whether the Act encroached on powers reserved to the states; and (2) whether the Act was beyond Congress's Enforcement Clause powers. The *Katzenbach* Court first noted: "*As against the reserved powers of the States*, Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting." *Id.* at 324 (emphasis added). While the district court read this passage as providing the standard courts should apply to determine whether Congress has the power to pass legislation in the first instance, *see Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 236-37, the *Katzenbach* passage simply describes Congress's power vis-a-vis the states only. "The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power." *Id.* at 325.

Immediately after its "rational means" language, the *Katzenbach* Court clarified that this phrase should not be considered the standard by which Congress's Enforcement Clause power is evaluated: "We turn now to a more detailed description of the standards which govern our review of the Act." *Id.* at 324. To resolve

this issue, the *Katzenbach* Court looked to the text of the Fifteenth Amendment, which allows Congress to "enforce the prohibitions by *appropriate* legislation." *Id.* at 326 (citing *Ex parte Virginia*, 100 U.S. 339, 345 (1879)) (emphasis added). By citing *Ex parte Virginia* here, the *Katzenbach* Court demonstrated that for congressional legislation to be a legitimate exercise of Congress's Enforcement Clause powers, something more than mere "rational basis" review is required.

The district court decided this case on the basis that the *Katzenbach* holding required application of the "rationality standard." But the district court failed to reconcile that view with the fact that the *Katzenbach* Court refused to actually apply "rational basis" review.[2] *See Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 237, 241. While the district court may have phrased its review differently, it clearly applied the well-known "rational-basis" review. *See id.* at 246 ("we ask whether Congress could rationally have concluded"). Furthermore, by phrasing the *Katzenbach* holding as the "rationality" standard, the district court reads each case affirming *Katzenbach* as also applying the "rationality standard." *See Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 237-39.

In the post-*Katzenbach* cases, while the Court reaffirmed *Katzenbach*, it did not reaffirm the "rationality standard" as understood by the district court. Rather, the Court continued (often explicitly) the tradition established in *Ex parte Virginia* which held that "legislation is appropriate [when it is]

[2] By 1966, "rational basis" review was prevalent in the Supreme Court. *See, e.g.*, *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938); *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 509 (1937).

adapted to carry out the objects the amendments have in view." *Ex parte Virginia*, 100 U.S. at 345. In *Morgan*, for example, the Court invoked explicitly *Ex parte Virginia* when discussing the standard to apply under Section 5 of the Fourteenth Amendment. *Morgan*, 384 U.S. at 648. The *Morgan* Court refused to apply the familiar "rational basis" review, opting instead to clarify that Section 5 requires that legislation be "'*plainly adapted*' to furthering [the] aims of the Equal Protection Clause." *Id.* at 652 (emphasis added). Similarly, *Georgia v. United States*, 411 U.S. 526 (1973), "reaffirm[ed] that the Act is a permissible exercise of congressional power under [Section] 2 of the Fifteenth Amendment." *Georgia*, 411 U.S. at 535. The *Georgia* holding no more invokes the district court's "rationality standard" than do *Katzenbach* or *Morgan*.

The district court also relies heavily on *City of Rome* for formulating its "rationality standard." *See Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 241-43 (citing *City of Rome*, 446 U.S. 156). *City of Rome*, however, is again simply reaffirming the standard applied in *Katzenbach* and *Morgan*. The *City of Rome* Court cites to *Ex parte Virginia*, *Katzenbach*, and *Morgan* for the standard to be applied when Congress invokes its enforcement power under the Reconstruction Amendments. *City of Rome*, 446 U.S. at 172-78. Moreover, the *City of Rome* Court makes clear that the standard is more than mere "rationality." *City of Rome*, 446 U.S. at 177 ("[U]nder [Section] 2 of the Fifteenth Amendment Congress may prohibit practices . . . so long as the prohibitions attacking racial discrimination in voting are

'appropriate,' as that term is defined in *McCulloch v. Maryland*, [17 U.S. 316 (1819)], and *Ex parte Virginia*.").

In short, when properly viewed, the cases relied upon by the district court for its "rationality standard" begin, not with *Katzenbach*, but rather *McCulloch* and *Ex parte Virginia*. Moreover, this Court has continuously applied something more than mere "rationality" when upholding the various portions of the Act as constitutional assertions of Congress's Section 2 power. Had the district court read properly *Katzenbach* and its progeny, it would have applied a heightened standard of review—a point clarified by this Court in *City of Boerne*. *City of Boerne*, 521 U.S. at 519-20.

2. *City of Boerne* Clarifies the Standard of Review to Be Applied to All Legislation Passed by Congress Pursuant to Its Enforcement Clause Powers

In 1997, this Court precisely and clearly expressed that the standard to be applied to legislation passed pursuant to Congress's Enforcement Clause power is more than mere "rationality." *City of Boerne*, 521 U.S. 507. The *City of Boerne* Court began its analysis in the same place as it did in early cases—with a clear understanding of *McCulloch* and *Ex parte Virginia*. *City of Boerne*, 521 U.S. at 516-18. Quoting the latter case at length, the *City of Boerne* Court reiterated that "appropriate" legislation requires that the legislation be "adapted to carry out the objects the amendments have in view." *Id.* at 517 (quoting *Ex parte Virginia*, 100 U.S. at 545).

The *City of Boerne* Court then delved into an analysis of the cases relied upon by the district court for its "rationality standard." *See City of Boerne*, 521 U.S. at 518 (discussing the holdings of *Katzenbach*, *Morgan*, and *City of Rome*, *et al.*) Distilling these cases, the *City of Boerne* Court came to a conclusion not reached by the district court here—namely, that Congress's enforcement power extends only to enforcing and remedying the provisions of the amendment. *City of Boerne*, 521 U.S. at 519. "It has been given the power to enforce, not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the provisions of the Fourteenth Amendment." *Id.* (quoting *Katzenbach*, 383 U.S. at 326) (internal quotations omitted).

This Court clarified:

> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. *There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.* Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.

City of Boerne, 521 U.S. at 519-20 (emphasis added). *City of Boerne* made clear what the district court confused: Congress must have more than a mere rational basis for passing legislation pursuant to its Enforcement Clause powers.

3. Since *City of Boerne*, This Court Has Always Applied the "Congruence and Proportionality" Test when Determining the Constitutionality of Legislation Enacted Pursuant to Congress's Enforcement Clause Powers

The district court made one final legal observation for applying a "rationality" standard only for legislation enacted pursuant to Section 2 of the Fifteenth Amendment. Calling it the "final case in the [rationality] series," the district court read *Lopez*, 525 U.S. 266, as a case applying a more relaxed standard of review than *City of Boerne*. *Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 239. The lower court misread the case.

The *Lopez* Court was not presented with the issue of whether the Act exceeded Congress's authority under Section 2 of the Fifteenth Amendment. Rather, the Court was presented with a separate issue, namely, whether "requiring preclearance here would *tread on rights constitutionally reserved to the States*." *Lopez*, 525 U.S. at 282 (emphasis added). Given this issue, it is not surprising that the *Lopez* Court did not discuss the proper standard—whether it be the "rationality" or "congruence and proportionality" standard—for evaluating congressional power under Section 2 of the Fifteenth Amendment. Yet, the district court read this Court's silence as a direct rebuff

of *City of Boerne*'s "congruence and proportionality test" for cases arising under Section 2 of the Fifteenth Amendment. *Nw. Austin Mun. Util. Dist. No. 1*, 573 F. Supp. 2d at 239. The *Lopez* Court was not presented with the issue raised here—whether reauthorization of the Act exceeds Congress's power under Section 2 of the Fifteenth Amendment. Thus, the district court's reading of a *Lopez* "rationality" standard of review is unpersuasive.

Since *City of Boerne*, this Court has applied consistently the "congruence and proportionality" standard to resolve whether Congress has exceeded its Enforcement Clause power. *See*, *e.g.*, *Tennessee v. Lane*, 541 U.S. 509, 519-34 (2004) (applying congruence and proportionality review to reject a challenge to provisions of the Americans with Disabilities Act); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728-40 (2003) (applying congruence and proportionality review to reject a challenge to provisions of the Family and Medical Leave Act); *Garrett*, 531 U.S. at 372-74 (applying congruence and proportionality review to invalidate provisions of Title I of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81-91 (2000) (applying congruence and proportionality review to invalidate provisions of the Age Discrimination in Employment Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999) (applying congruence and proportionality review to invalidate provisions of the Patent and Plant Variety Protection Remedy Clarification Act).

Clearly, the congruence and proportionality standard is not different from the standard this Court applied in *Ex parte Virginia*, *Katzenbach*, *City of*

Boerne, or *Lane*. Congress's use of its enforcement power under the Fourteenth or Fifteenth Amendment is "appropriate" when it is "adapted to carry out the objects the amendments have in view." *Ex parte Virginia*, 100 U.S. at 345. In other words, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520.

II

THE REAUTHORIZED SECTION 5 OF THE VOTING RIGHTS ACT SHOULD BE DECLARED UNCONSTITUTIONAL BECAUSE IT IS NO LONGER JUSTIFIED BY CHANGED SOCIAL AND POLITICAL CONDITIONS

Amici urge this Court to invalidate Section 5 of the Voting Rights Act, because changes in the social and political landscape do not justify the application of its measures to the same jurisdictions for twenty-five more years. Today, even in the South, political and social conditions are far different from what they were forty years ago when certain state legislatures and county officials did whatever was necessary to ensure the continued disenfranchisement of black voters. Government action approaching such blatantly racist conduct could not even exist today given this country's growing shift to a color-blind society that just recently saw the election of our nation's first black President, the increasing intolerance for racism among most Americans, and the ever present scrutiny of news media. *See* Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 Geo. J.L. & Pub. Pol'y 41, 74 (2007) (describing decline of white racism).

The ultimate question this case presents is whether the reauthorized Section 5 is an invalid congressional act. The absence of government action aimed intentionally at disenfranchising minority voters, the sporadic emergence of voting problems evenly distributed between covered and noncovered jurisdictions, and the inability of Section 5 to remedy the voting problems of today have made Section 5 unconstitutional.

A. The Deplorable Government Conduct Which Once Justified Section 5's Extreme and Temporary Remedy Has Been Eradicated

Section 5 is a federally intrusive law that injects directly the federal government into the policy-making process at the state and local level. In extending Section 5, Congress simply assumed that covered jurisdictions remain mired in a discriminatory past. The measures provided by Section 5 were necessary in 1965, "because case-by-case adjudication of voting rights lawsuits proved incapable of reining in crafty Dixiecrat legislatures determined to deprive African Americans of their right to vote, regardless of what a federal court might order." Samuel Issacharoff, et al., *The Law of Democracy: Legal Structure of the Political Process* 546-47 (2d ed. 2002); *see* H.R. Rep. No. 89-439, *reprinted in* 1965 U.S.C.C.A.N. 2437, 2440-41 (describing repeated delays in the judicial process).

Originally, Section 5's coverage was limited mainly to jurisdictions of the Deep South. The experience federal officials gained from enforcing the early voting rights statutes prior to 1965 allowed the framers of the Act to precisely identify which states and counties continuously and deliberately committed

Fifteenth Amendment violations. In the context of this "unremitting and ingenious defiance of the Constitution," it was possible to infer that any change in voting procedures that occurred in certain southern jurisdictions was for a discriminatory purpose. *See Katzenbach*, 383 U.S. at 309 (describing the "insidious and pervasive evil" in parts of the South). Those jurisdictions were all of Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and most counties in North Carolina. Hearings on H.R. 4249, Before Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 1st Sess. 92-93 (1969). Armed with this knowledge, the framers of the Act carefully crafted a triggering formula to make Section 5 apply to those states and jurisdictions. Thernstrom, *supra*, at 46, 49.

As a result, Section 5 of the Act "remains alone in American history in its intrusiveness on values of federalism and the unique and complicated procedures it requires of states and localities that want to change their laws." Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, 49 How. L.J. 717, 718 (2006).

Today, however, the unconscionable and deliberate vote suppression tactics that were implemented by governments in the Deep South in 1965, and which were the sole justification for the temporary intrusiveness of Section 5, have been eradicated. The Jim Crow inspired barriers to voting, such as intentionally discriminatory literacy tests and poll taxes, are no longer in use, and the numbers of minority officeholders are at historically high levels, as are levels of minority electoral participation. Persily, *supra*, 49 How. L.J. at 719. Almost thirty years ago,

there were few black elected officials; the Democratic Party was the only political party in much of the South; voting was extremely polarized along racial lines; and major voting issues were multimember and at-large election structures that hindered black political representation. Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 Yale L.J. Pocket Part 148 (2007). Today there is robust two-party competition in the South; a significant number of black officials serve at all levels in states with large minority populations, with black elected state legislators making up 31 to 45% of all Democrat state legislators in the Deep South states of Alabama, Florida, Georgia, Louisiana, Mississippi, and South Carolina; multiethnic jurisdictions abound, rather than the old biracial districts of the South thirty years ago; and there has been a decline in polarized racial voting. *Id.* at 149.

However, the 2006 reauthorization of Section 5 fails to reflect *any* of these changes, *id.* at 149-50, and as a result, Section 5's coverage has become even more overinclusive and underinclusive since its last reauthorization in 1982. Persily, *supra*, 49 How. L.J. at 723. Those jurisdictions that were selected for coverage based upon voting statistics from 1975 or earlier are no longer the worst or most notorious offenders of minority voting rights. *Id.* at 723-24 (citing the National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005, A Report* (Feb. 2006)).[3] Thus, subjecting these jurisdictions to the continued coverage of Section 5 cannot logically be supported. *See id.*

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[3] *Available at* http://www.votingrightsact.org/homepageimages/comreport_summary.pdf (last visited Feb. 23, 2009).

at 724 (discussing how renewal of Section 5's old coverage would leave the Act "incongruent" and "disproportionate"). For instance, Section 5 covers counties in New Hampshire and Michigan, but not the counties which experienced recent voting problems in Ohio and Florida. *Id.* at 723 (citing U.S. Dep't of Justice, Civil Rights Div., Voting Section Home Page, *Section 5 Covered Jurisdictions*).[4]

The reauthorization of Section 5's invasive scheme on the same jurisdictions for another 25 years is an act of political abdication, not responsibility. Pildes, *supra*, 117 Yale L.J. Pocket Part at 148. In extending Section 5 without altering its coverage, Congress failed to address difficult policy issues created by the changed social landscape, and locked Section 5 in place until the year 2031 in the hopes those issues will go away. *Id.* Congress made no concessions to the post 1982 *City of Boerne* doctrines, nor to the social, political, and institutional changes since 1982. *Id.* at 153. It is true that Congress held hearings prior to the 2006 reauthorization, but strangely those hearings had no effect on the content of the law. *Id.* at 151. It was as if the reauthorization legislation was drafted first, and then Congress simply marshaled one-sided evidence to support its conclusions rather than undertaking the difficult task of amending Section 5 to accommodate the changed circumstances since its last extension 25 years before.

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[4] *Available at* http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Feb. 23, 2009).

B. The Evidence in the Legislative Record Fails to Support Section 5's Reauthorization

Since Section 5 continues to burden only certain jurisdictions, the reauthorization can only be justified on evidence showing how differences in minority voter discrimination exist between the covered and noncovered jurisdictions. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174, 195 (2007). The legislative record contains four categories of evidence in support of reauthorization: statistics as to minority voter turnout, registration, and rates of office holding; statistics concerning Department of Justice and jurisdiction behavior with respect to the preclearance process; examples of voting rights violations in covered jurisdictions; and data as to all nationwide litigation under Section 2 of the Act. *Id.* Upon examination, the evidence in these categories justifies the invalidation of Section 5, not its reauthorization.

For the first category, voter turnout statistics no longer justify the targeting of specific geographical areas for continuous and oppressive coverage. Turnout rates in the covered and noncovered jurisdictions do not differ significantly, and in some covered jurisdictions in California, Georgia, North Carolina, Mississippi, and Texas, the turnout of black voters exceeds that of white voters. *Id.* at 196-97 (citing S. Rep. No. 109-295, at 11 (2006)). These statistics do not quantify unconstitutional discrimination in either covered or noncovered jurisdictions. *See id.* at 197 (discussing how turnout statistics no longer capture the levels of unconstitutional discrimination that may exist). Moreover, there is not even a rational basis for

defending Section 5's coverage of certain counties, such as in Michigan and New Hampshire, which have no significant history of minority voting problems, but not the counties of Ohio and Florida where the most prominent voting rights issues in recent elections occurred. *See id.* at 208 (describing how Section 5's coverage is difficult to defend). In addition, the legislative record established a significant increase in the number of minorities in public office, but not whether there is a difference in rates of minorities holding office between covered and noncovered jurisdictions. *Id.* at 199 (citing David A. Bositis, Joint Ctr. for Political & Econ. Studies, *Black Elected Officials: A Statistical Summary* 16 (2001); Charles S. Bullock III & Ronald Keith Gaddie, *Focus on the Voting Rights Act: Good Intentions and Bad Social Science Meet in the Renewal of the Voting Rights Act*, 5 Geo. J.L. & Pub. Pol'y 1, 7 (2007)).

Section 5 requires covered jurisdictions to request preclearance from the federal government prior to instituting a change to an existing voting procedure. 42 U.S.C. § 1973c. A Department of Justice preclearance denial possibly signifies a voting rights violation, and a large number of voting rights violations would help justify the need for the continuation of Section 5. Rodriguez, *supra*, at 804; *but see* Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 Ohio St. L.J. 177, 190 (2005) (arguing that DOJ statistics are a poor indicator of intentional discrimination). But like voter turnout statistics, preclearance evidence does not support reauthorization. In the first five years after the enactment of the Act, the rate of Department of Justice

objections to preclearance requests was 4% per year. Persily, *supra*, 117 Yale L.J. at 199. In the last ten years there have only been 92 total preclearance objections, or 0.2% per year. *Id.* (citing *Modern Enforcement of the Voting Rights Act: Hearing on S. 2703 Before the S. Comm. on the Judiciary*, 109 Cong. 117 (2006) (statement of Wan J. Kim, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice)).

The evidence of voting rights violations limited to covered jurisdictions is similarly unhelpful. Charges of discrimination in voting practices are just as likely to occur in areas not covered by Section 5 as in jurisdictions that are covered. *See* Pildes, *supra*, 49 How. L.J. at 752-54 (describing cases of racially polarized voting in covered and noncovered jurisdictions). Today, the greatest majority of cases brought under the Act involve vote dilution claims which are not concentrated in any one part of the country and which are addressed through Section 2 of the Act nationwide. *Id.* at 753. Since 1990, the same number of Section 2 violations have occurred in Pennsylvania (a noncovered jurisdiction) as in South Carolina (a covered jurisdiction). *Id.* (citing Ellen Katz & the Voting Rights Initiative, *Documenting Discrimination in Voting Under Section 2 of the Voting Rights Act*, Voting Rights Initiative Database (2005)).[5] Even more Section 2 violations occurred in New York. *Id.* (citing Katz & the Voting Rights Initiative, *supra*). Of the twenty four reported cases since 1982 in which courts found intentional discriminatory voting practices, only eleven were from covered jurisdictions,

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[5] *Available at* http://sitemaker.umich.edu/votingrights/files/violationlocations.pdf (last visited Feb. 23, 2009).

while thirteen were from noncovered jurisdictions. *Id.* at 754 (citing Katz & the Voting Rights Initiative, *supra*). One study contained in the Senate Report in support of the 2006 reauthorization analyzed published opinions in all lawsuits since 1982 involving Section 2 claims and found that slightly more than half of the cases were filed in noncovered jurisdictions. Persily, *supra*, 117 Yale L.J. at 203 (citing Ellen Katz, et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J.L. Reform 643, 654 (2006)).

Prior to 2006 reauthorization, legal scholars warned that if Congress left Section 5 unchanged, it would become increasingly difficult to account for the differences between jurisdictions covered and not covered in terms of addressing new specific areas of systematic minority voting-rights problems. Pildes, *supra*, 49 How. L.J. at 754; *see* Persily, *supra*, 117 Yale L.J. at 183 n.32 (describing testimony of Professors Richard Hasen, Samuel Issacharoff, Nathaniel Persily, and Richard Pildes in the Senate hearings prior to reauthorization). Congress's failure to change Section 5's coverage area thus raises serious questions about Section 5's constitutionality, because it no longer provides a remedy to areas currently having race-based voting rights problems.

C. Section 5 Does Not Provide a Remedy to Modern Voting Problems Impacting Minorities

Section 5 is based on the notion that the federal government can identify, in advance, regions of the country where minority voting rights violations are more likely to arise systematically than in other areas of the country. Pildes, *supra*, 49 How. L.J. at 748.

That is why Section 5 only applied to the limited jurisdictions where race-based discrimination in voting was prevalent at the time of the Act's enactment. Having been made applicable in only certain parts of the country, Section 5 is designed to address only changes in voting laws and procedures, but not the practices that are already in place. *Id.* at 751 (citing *Beer v. United States*, 425 U.S. 130 (1976)). This approach fails to address the kinds of voting problems more likely to plague minority voters today.

The old style and systemic, race-based discrimination that made the Act necessary in 1965 exists only sporadically, if at all, while new allegations of minority voting problems stem from issues motivated by partisan politics rather than racial prejudice. Persily, *supra*, 49 How. L.J. at 723. Modern voting problems from the 2000 and 2004 elections, which are not significantly different than those faced by nonminority voters, include: registration problems (caused by existing procedures, but distinct from discriminatory problems of the past), barriers to voting by registered voters (long lines, voter identification requirements, insufficient machines and ballots), provisional ballots, precinct maladministration, errors or fraud in vote tabulation, reliance on old voting technology, and poor ballot design. *Id.* at 720-21; *see* Pildes, *supra*, 49 How. L.J. at 750 (describing similar modern voting issues).

Current voting problems occur mainly through the failure to change voting procedures. For instance, voting technology issues arise through the reliance on old outdated voting machines brought about from the failure to change. *Id.* at 751-52. But Section 5 obstructs change by requiring all covered jurisdictions

to undergo a costly and burdensome administrative process in order to "preclear" its changes with the federal government. *Id.* at 752. This encourages jurisdictions to simply maintain their old voting procedures.

D. Application of Section 5's Old Style Remedy to Modern Voting Issues Obstructs the Development of the Minority Political Establishment

Section 5's intrusiveness deprives "local jurisdictions a customary range of political decisions—including districting, terms of office, and electoral systems—that were ordinarily subject to what Justice Souter would term the pulling and hauling of everyday politics." Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 Colum. L. Rev. 1710, 1712 (2004) (citing *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)). An inequity materializes in covered districts when Section 5 works to deprive black elected officials of the ability to engage in full political integration, and prevents the expansion of minority voter influence.

A striking example of how minorities are treated differently in covered versus noncovered jurisdictions is exemplified by comparing the outcome in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), with that of *Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001). *Ashcroft* and *Bartels* both involved similar state redistricting efforts strongly supported by Democratic and black elected officials. *Ashcroft* involved redistricting in Georgia, a covered state, while *Bartels* involved redistricting in New Jersey, a noncovered state.

In *Bartels*, the New Jersey Apportionment Commission adopted a redistricting plan. The plan, supported by minorities, increased Democratic controlled districts by unpacking black voters from three districts where they had been the majority of voters and assigned them to a fourth district. *See Bartels*, 144 F. Supp. 2d at 354, 355 (describing support of the redistricting plan from Martin L. King III, of the Southern Christian Leadership Conference). This created four districts where black voters, though in the minority, were in a position to elect more preferred Democrat candidates through the aid of white cross-over voters and the building of multi-racial coalitions. Issacharoff, *supra*, 104 Colum. L. Rev. at 1723-24.

The plaintiffs challenging the redistricting in *Bartels* were seventy Republican members of the New Jersey legislature and a few minority voters. *Id.* at 1721. Since New Jersey is not a covered state, the plaintiffs brought a minority vote dilution claim under Section 2 of the Act, which applies nationwide. Under Section 2, the plaintiffs had to meet their initial burden by satisfying the three factors from *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), so that the district court could consider the "totality of the circumstances" when determining whether the redistricting violated the Act. Ultimately the three judge panel of the court approved the redistricting and concluded the minority-favored plan "will encourage franchise participation of New Jersey voters, including African-American and Hispanic voters," without diluting or impairing minority participation. *Bartels*, 144 F. Supp. 2d at 369.

Like *Bartels*, *Ashcroft* also involved a state redistricting plan supported by the Democratic and black political establishment. The purpose of the redistricting in *Ashcroft* was also to increase the number of elected Democratic politicians by unpacking the most heavily concentrated majority-minority districts to create new influence districts. *See Ashcroft*, 539 U.S. at 470-71 (describing the percentages of black voters in the old and new districts). The Georgia Senate narrowly approved the plan by a partisan vote, with ten of the eleven black Senators voting in support. *Id.* at 471. The plan also passed in the Georgia House of Representatives, where thirty-three of the thirty-four black Representatives voted in its favor. *Id.* No Republican Senators or Representatives voted in favor of the redistricting, *id.*, leaving no doubt that this was a Democratic plan with overwhelming support from black elected officials.

Because Georgia is a covered state, it had to first seek Section 5 preclearance from the Department of Justice or the District Court for the District of Columbia prior to implementing the redistricting plan. Under Section 5, no voting procedure changes can be made " 'that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'" *Id.* at 477 (citations omitted). Unlike the district court in *Bartels*, which approved similar redistricting, the three judge district court panel in *Ashcroft* denied preclearance of the Georgia plan. The court held that Georgia failed in its burden to show that the redistricting would not have a retrogressive effect on black voters, because the percentages of black voters in majority-minority districts were decreased. *Id.* at 475.

The Georgia plan was not a measure imposed on black elected officials, because it received overwhelming minority support. Issacharoff, *supra*, 104 Colum. L. Rev. at 1716. Thus, the result of the district court decision was to obstruct the strategy of black elected officials who sought to exert a geographically broader influence in state politics. This Court vacated the judgment below in *Ashcroft* and remanded the case for further consideration in light of a new standard. *Ashcroft*, 539 U.S. at 491. But the 2006 Reauthorization overruled *Ashcroft*. 42 U.S.C. § 1973c(b); *see* Persily, *supra*, 117 Yale L.J. at 234 ("By adding the words 'ability . . . to elect' to the new section 5, Congress attempted to overrule [*Ashcroft*] and return the retrogression inquiry to what it was under the *Beer v. United States* standard.").

The end result in *Ashcroft* and *Bartels* is troublesome for at least two reasons. First, the outcomes are remarkably different. The redistricting was upheld in New Jersey, but denied in Georgia (at the district court level). Second, the result means that Section 5, which formerly afforded more protection to blacks in covered jurisdictions, now acts to impede the political progress of minorities. Section 5 has emerged as "a brake on black political aspirations in the heart of the Deep South." Issacharoff, *supra*, 104 Colum. L. Rev. at 1717.

As a result of Congress's refusal to address Section 5's coverage, modern voting issues, or preclearance requirements, Congress has in effect "thrown down a gauntlet to the Court" in a dare to take action. Pildes, *supra*, 117 Yale L.J. Pocket Part at 153. In the *City of Boerne* line of cases, this Court demands that Congress have evidence that its remedial

legislation is congruent and proportional to the constitutional aim it seeks to advance. The systemic discrimination of the Old South which justified the Act in 1965 is no longer prevalent, and can no longer serve to justify Section 5's extreme measures today. Similarly, modern voting problems are not tied to specific geographic locations, and are not amenable to resolution by Section 5 even if they were. By failing to justify Section 5's continued relevance through 2031, Congress has acted outside its enforcement powers.

CONCLUSION

For the foregoing reasons, this Court should hold that the 2006 reauthorization of Section 5 of the Voting Rights Act is not a valid exercise of Congress's remedial powers under the Fifteenth Amendment.

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Respectfully submitted,

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