No. 04-775

In the Supreme Court of the United States

BLAINE COUNTY, MONTANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, is a constitutional exercise of Congress's powers under the Constitution.

2. Whether the evidence was sufficient in this case to support the judgment that petitioners' at-large voting system violated Section 2.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-36) is reported at 363 F.3d 897. The opinion of the district court granting summary judgment to respondents (Pet. App. 66-78) is reported at 157 F. Supp. 2d 1145. The findings of fact and conclusions of law and order and final judgment of the district court (Pet. App. 37-65) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2004. A petition for rehearing was denied on September 7, 2004 (Pet. App. 79). The petition for a writ of certiorari was filed on December 6, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed suit against Blaine County, the Blaine County Commission and its members, and the Blaine County Superintendent of Elections (collectively, the County), alleging that the County's at-large method of electing the three-member Commission dilutes American Indian voting strength in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

1. Section 2 prohibits States or localities from imposing or applying any standard, practice, or procedure "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." 42 U.S.C. 1973(a). A violation of that provision is "established if * * * it is shown that the political processes leading to nomination or election * * * are not equally open to participation by members of [a class of citizens] * * * in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b).

Claims that at-large or multi-member elections dilute minority voting strength in violation of Section 2 are governed by the framework set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). The Section 2 inquiry requires that three preconditions be met. The minority group population must be "sufficiently large and geographically compact to constitute a majority in a single member district," the members of the minority group must be "politically cohesive," and it must be shown that the "majority votes sufficiently as a bloc to enable it—in the absence of special circumstances * * * usually

to defeat the minority's preferred candidate." *Id.* at 50-51; see *Growe* v. *Emison*, 507 U.S. 25, 39-40 (1993).

Proof of those three factors tends to show that the challenged at-large electoral structure itself "operates to minimize or cancel out" the ability of minority voters "to elect their preferred candidates." *Gingles*, 478 U.S. at 48; see *e.g.*, *Jenkins* v. *Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993), cert. denied, 512 U.S. 1252 (1994); *NAACP* v. *Niagara Falls*, 65 F.3d 1002, 1019 n.21 (2d Cir. 1995). The ultimate issue of vote dilution is a factual one to be determined based on the totality of circumstances in a particular jurisdiction. *Johnson* v. *De Grandy*, 512 U.S. 997, 1011-1012 (1994). The Senate Report accompanying the 1982 amendments to Section 2 lists a number of additional factors relevant to that analysis.[1]

2. Petitioners moved for summary judgment, arguing that Section 2 of the Voting Rights Act was unconstitutional. The motion was denied. Pet. App. 70-78. The district court held that Section 2 of the Voting Rights Act is a valid exercise of congressional authority. *Id.* at

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[1] Those factors include the history of official voting-related discrimination in the relevant political subdivision at issue; the extent to which voting in that political subdivision is racially polarized; the extent to which the relevant political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political processes; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. S. Rep. No. 417, 97th Cong., 2d Sess. 28-39 (1982).

78. The district court found that Congress acted on the basis of "an extensive record of voting discrimination against minorities," including "ample evidence that American Indians have historically been the subject of discrimination." *Id.* at 77. The district court also held that Section 2 is "proportional," because it "does not require that districts be drawn so that minorities are guaranteed representation," but "merely requires that they be given an equal chance at electing minority representatives only after they have shown that discriminatory results are present as a result of suspect voting procedures." *Id.* at 78.

3. A bench trial followed. The evidence at trial showed that Blaine County is governed by a three-member Board of Commissioners elected at-large. Candidates for County Commission run for office from residency districts, such that each commissioner must reside in one of three different residential districts. Each Commissioner is elected by the voters of the entire County, not just by voters within the candidate's residential district. Commissioners are elected to six-year, staggered terms. Elections are conducted every two years on a partisan basis. Pet. App. 3, 67.

Blaine County is 4638 square miles and has a population of 7009 persons, 52.6% white and 45.2% American Indian. Pet. App. 2, 38; U.S. Exhs. 27, 28. The voting age population of 4722 persons is 59.4% white and 38.8% American Indian. Pet. App. 2, 38; U.S. Exhs. 27, 28. Before this lawsuit against the County, no American Indian had ever been elected to the County Commission. Pet. App. 68.

4. On March 21, 2002, the district court entered findings of fact and conclusions of law that the at-large method of electing county commissioners in Blaine

County diluted minority voting strength in violation of Section 2. Pet. App. 37.

a. The district court determined that the three *Gingles* preconditions were met. Pet. App. 44-54. It was undisputed that the first factor was satisfied—*i.e.*, that the American Indian population in Blaine County is sufficiently compact and numerous to form a majority in a single-member district. *Id.* at 44.

With respect to the second factor, the court found that American Indians are politically cohesive. The court found that, on average, "89% of American Indians voted for the same candidate" in 14 county-wide elections and that the same "cohesive voting pattern" existed in 19 school board elections in the Harlem School District, Pet. App. 46—"an area of high American Indian concentration within Blaine County," *id.* at 23. The court considered petitioners' argument that "American Indians in Blaine County * * * lack group interests," but found that "[t]he evidence presented at trial shows the contrary." *Id.* at 47. Similarly, the court rejected as "not supported by the evidence adduced at trial" petitioners' contention that American Indians have relatively low voter turnout because the County Commission "plays only a limited role in their lives." *Ibid.*

The district court held that the third *Gingles* precondition was satisfied, because there was "compelling evidence of legally significant polarized voting." Pet. App. 52. In seven local general elections that involved American Indian and white candidates, "American Indian voters vot[ed] cohesively for the Indian candidate," and in "five of [those] elections, the Indian candidate cohesively supported by American Indians * * * was defeated by white bloc voting." *Id.* at 51. The court explained that the "other two elections were congressio-

nal elections involving American Indian candidate Bill Yellowtail," whose "margin of victory in Blaine County was 51% of the total votes cast after receiving support from 98% of the American Indian voters and 32% of white voters." *Ibid.* The district court found those results confirmed by "five contested Democratic primary elections for County Commission conducted since 1980," in which white bloc voting defeated the candidate preferred by American Indian voters four times. *Id.* at 52. The district court further found that the elections for the Harlem School Board show that "American Indians cohesively supported Indian candidates over white candidates and that white voters preferred white candidates over Indian candidates." *Ibid.*

b. The district court also found evidence to support other factors identified in the Senate Report, see p. 3 n.1, *supra*, including a history of official discrimination against American Indians by the State and County, Pet. App. 54-55, racially polarized voting, *id.* at 55, the consistent use of an at-large election method that hinders the ability of American Indians to elect candidates of their choice, *ibid.*, past discrimination that "has resulted in depressed socio-economic conditions which have hindered the ability of American Indians * * * to participate fully in the political process," *id.* at 56, and the near total absence of American Indian elected officials, *id.* at 56-57. The district court also found that "the policy underlying the County's use of the at-large election method for its County Commission is tenuous." *Id.* at 58.

5. The court of appeals affirmed. Pet. App. 1-36. The court held that this Court's summary affirmance of the constitutionality of Section 2 in *Mississippi Republican Executive Committee* v. *Brooks*, 469 U.S. 1002

(1984), aff'g *Jordan* v. *Winter*, 604 F. Supp. 807, 811 (N.D. Miss. 1984) (3-judge district court), binds the lower courts. Pet. App. 10-11. The court determined that there "have been no doctrinal developments that suggest [the court] should ignore the Supreme Court's summary affirmance of Section 2's constitutionality." *Id.* at 12. The court further observed that *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and other recent decisions concerning the scope of Congress's enforcement authority, "strengthen[] the case for section 2's constitutionality." Pet. App. 12-13. The court held that, even if it could ignore this Court's summary affirmance, as petitioners argued it should, it would still hold Section 2 constitutional. *Id.* at 13.

Petitioners challenged the constitutionality of Section 2 on two grounds—that Congress had insufficient evidence of discrimination to apply Section 2 nationwide and that the Constitution requires Section 2 plaintiffs to prove intentional discrimination. The court of appeals rejected both arguments.

a. Petitioners' challenge to the nationwide application of Section 2 was based on the "limited geographic scope" of "section 5 of the [Act]," which goes beyond the prohibitions of Section 2 by imposing "sweeping preclearance requirements" to "changes in voting procedures" in "jurisdictions with a recent history of using voting tests and devices to deny the right to vote." Pet. App. 14. The court of appeals explained that Section 5 is an "extraordinary measure which requires covered jurisdictions to submit every change in their voting procedures to the Department of Justice for preclearance," and "places the burden of proof on the state or locality, not on the party challenging the voting procedure." *Id.* at 15. The court held that since Section

5 "imposes such a significant burden on state and local governments, Congress had reason to limit its application to jurisdictions with a recent history of pervasive voting discrimination." *Ibid.*

The court explained that, in contrast to Section 5, "Section 2 is a far more modest remedy," since the "burden of proof is on the plaintiff, not the state or locality," and Section 2 "makes no assumptions about a history of discrimination." Pet. App. 15-16. Furthermore "plaintiffs [in Section 2 cases] must not only prove compactness, cohesion, and white bloc voting, but also satisfy the totality-of-the-circumstances test." *Id.* at 16 (citing *Gingles*, 478 U.S. at 48-50).

The court of appeals further concluded that the constitutionality of Section 2 is supported by this Court's holding that the Voting Rights Act's "nationwide ban on literacy tests" is constitutional, Pet. App. 16, despite the fact that "literacy tests are not *per se* unconstitutional." *Ibid.* (citing *Oregon* v. *Mitchell*, 400 U.S. 112 (1970)). The court observed that Section 2 "is more limited than the literacy test ban upheld in *Mitchell* because it does not label any procedure as impermissible *per se*." *Ibid.* Finally, the court of appeals held that "after the Supreme Court's recent decision in *Nevada* v. *Hibbs*, it is clear that Congress need not document evidence of constitutional violations in every state to adopt a statute that has nationwide applicability." *Ibid.* (citing *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003)). Citing the legislative history of Section 2, the court held that "even if nationwide evidence were a prerequisite to national utilization of Section 2, Congress had before it sufficient evidence of discrimination in jurisdictions not covered by Section 5 to warrant nationwide application." *Id.* at 17. The court thus con-

cluded that Congress did not exceed its enforcement powers by applying Section 2 nationwide. *Ibid.*

b. The court of appeals also rejected petitioners' argument that Section 2 exceeds Congress's constitutional authority because the Constitution proscribes only intentional discrimination. Pet. App. 18. The court observed that the "most obvious problem with [petitioners'] argument is that on the exact same day that the Court issued its opinion in *Bolden*, the Court also held in *City of Rome* v. *United States* that section 5 of the VRA could constitutionally be applied to electoral procedures that only had discriminatory results and were not motivated by discriminatory intent." Pet. App. 18 (citing *City of Rome* v. *United States*, 446 U.S. 156, 173-178 (1980)). The court held that "under *City of Rome*, Congress can prohibit voting requirements that have discriminatory results." *Id.* at 19. Based on Congress's "extensive hearings and debate on all facets of the Voting Rights Act and [its] conclu[sion] that the 'results' test was necessary to secure the right to vote and to eliminate the effects of past purposeful discrimination," the court held that the results test is a "constitutional exercise of Congress's Fourteenth and Fifteenth Amendment enforcement powers." *Id.* at 22.

c. On the merits of the case, the court of appeals held that evidence presented at trial was sufficient to support the district court's ruling that the County's at-large election method violated Section 2. The presence of the first *Gingles* precondition was undisputed. With respect to the other two preconditions, the court of appeals held that evidence presented by "[b]oth sides' experts" established that American Indians vote cohesively, and the United States's expert evidence established that "white voters frequently vote as a bloc, which precludes

American Indians from electing candidates of their choice." Pet. App. 31.

Petitioners argued that in assessing political cohesion, the second *Gingles* precondition, plaintiffs must show evidence of "distinct political concerns" among minority voters. Pet. App. 24. The court of appeals rejected that argument, stating that petitioners "misconstrue[] the inquiry for racial bloc voting" and that "it is actual voting patterns, not subjective interpretations of a minority group's political interests, that informs the political cohesiveness analysis." *Ibid.* (citing *Gingles*, 478 U.S. at 31). The court of appeals also noted that petitioners' argument "would force courts to second guess voters' understanding of their own best interests." *Ibid.*

The court of appeals rejected petitioners' argument that low voter turnout among American Indians proves lack of political cohesion, noting that low turnout may itself be caused by a Section 2 violation consisting in the lack of ability of minority group members to participate effectively in the political process. Pet. App. 25. The court also rejected petitioners' contention that a white voter cohesion level of more than 60% is necessary to show that there is white bloc voting under the third *Gingles* precondition. *Id.* at 26. The court of appeals observed that petitioners' theory "flatly ignores the test laid out in *Gingles*," which "rejected a blanket numerical threshold for white bloc voting because * * * [t]he amount of white bloc voting that can generally minimize or cancel black voters' ability to elect representatives of their choice * * * will vary from district to district according to a number of factors." *Ibid.* (quoting *Gingles*, 478 U.S. at 56).

Finally, the court of appeals upheld the district court's finding that the totality of the circumstances demonstrate a violation of Section 2. Citing a history of state discrimination against the exercise of the franchise by American Indians continuing through 1963, the court held that "the district court's conclusion that there was a history of official discrimination against American Indians in Montana was not clearly erroneous." Pet. App. 30. The court rejected petitioners' argument that there was no evidence to satisfy the third Senate factor, stating that the County's use of "staggered terms" and its "enormous size" makes it extremely difficult for American Indian candidates to get elected. *Id.* at 31-32. The court of appeals held that the fifth Senate factor was satisfied based on evidence of disparities in poverty, graduation, unemployment and vehicle-ownership rates, between American Indian and non-Indian County residents. *Id.* at 32.

The court of appeals rejected petitioners' claim that other factors preclude a liability determination under Section 2. The court rejected petitioners' contention "that American Indians are unwilling to run for office," stating "that American Indians frequently run for the Harlem School Board, which demonstrates that there is a pool of qualified American Indian candidates." Pet. App. 32. The court of appeals also rejected as tenuous petitioners' argument that at-large elections are necessary to ensure that "county commissioners [are] responsive to voters throughout Blaine County," since "the county government depends largely on residency districts for purposes of road maintenance and appointments to County Boards, Authorities and Commissions." *Id.* at 33.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Contrary to petitioners' contention (Pet. 8-21), the court of appeals correctly held that Section 2 is a constitutional exercise of Congress's power under the Fourteenth and Fifteenth Amendments.

a. In *Brooks*, this Court summarily affirmed the decision of the three-judge district court in *Jordan* v. *Winter*, 604 F. Supp. 807, 811 (N.D. Miss. 1984), that the "results" test of the amended Section 2 is constitutional. The jurisdictional statement in *Brooks* presented the question "[w]hether 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." See 469 U.S. at 1003 (Stevens, J., concurring) (quoting 83-1722 J.S. at i). The 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). It therefore necessarily established that the amended Section 2, including its results test, is a valid exercise of Congress's powers.

b. Petitioners argue (Pet. 9-21) that *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and the cases that have followed it have so altered the legal analysis of Congress's powers under the enforcement clauses of the Civil War Amendments that *Brooks* should be overruled. As the court of appeals recognized, however, at the same time that the Court has refined its analysis of Congress's powers under those Amendments, it has consistently cited various provisions of the Voting Rights Act

as "the prime example of a congruent and proportionate response to well documented violations of the Fourteenth and Fifteenth Amendments." Pet. App. 12-13.

In *Boerne*, for example, the Court explained that "[l]egislation 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.'" 521 U.S. at 518.[2] Illustrating that principle, the Court referred to provisions of the Voting Rights Act that suspended literacy tests on a nationwide basis "despite the facial constitutionality of the tests" under this Court's cases. *Ibid.* The Court also illustrated that principle by referring to the extension of Section 5 of the Voting Rights Act, which plainly precludes covered jurisdictions from putting into effect changes in law that would otherwise be perfectly constitutional. *Ibid.*; see *id.* at 525-526 (same).

The reasoning of *Boerne* refutes petitioners' contention (Pet. 19-21, 24-27) that the amended Section 2 is unconstitutional unless it requires direct proof of discriminatory intent. The Court reinforced that conclusion in *Tenneessee* v. *Lane*, 124 S. Ct. 1978, 1985-1986 (2004), where it noted that Congress may "enact

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[2] Accord *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (recognizing that Congress's power under Section 5 of the Fourteenth Amendment is "not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment" and that "Congress' power 'to enforce' the Fourteenth Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text"); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 638 (1999).

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 Resources* 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." 124 S. Ct. at 1986. See *Chisom* v. *Roemer*, 501 U.S. 380, 394 (1991) ("Under the amended [Section 2], proof of intent is no longer required to prove a § 2 violation.").[3]

c. Petitioners argue (Pet. 16) that Section 2 does not satisfy *Boerne* because "there was no evidence of a widespread pattern of purposeful voting discrimination outside jurisdictions subject to Section 5 of the [Voting Rights Act]" when Congress enacted and amended

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[3] Moreover, 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.*, *Hibbs*, 538 U.S. at 737-738 (noting that "serious and intractable proble[ms]" in voting rights context "justify added prophylactic measures in response") (internal quotation marks omitted); *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 373 (2001) (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 Postsecondary Ed. Expense Bd.*, 527 U.S. at 640 (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). Indeed, even Justices who view the Court's Section 5 cases as granting Congress too much authority distinguish the Voting Rights Act. See *Lane*, 124 S. Ct. at 2010-2012 (Scalia, J., dissenting).

Section 2 as a nationwide measure. This Court's decisions reject petitioners' requirement that a nationwide record of violations akin to the record of voting discrimination in jurisdictions covered by Section 5 is necessary before Congress can employ its enforcement powers on a nationwide basis, and Congress in any event had sufficient evidence before it to support the constitutionality of the amended Section 2.

(i) Petitioners' argument was rejected 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. As the court of appeals observed, this Court in *Hibbs* found that "important shortcomings of *some* state policies," Pet. App. 16 (quoting *Hibbs*, 538 U.S. at 733), showed "sufficient evidence of constitutional violations by the states" to find that the Act was a valid exercise of Congress's enforcement powers. *Ibid.* *Hibbs* recognized that despite the absence of specific state-by-state findings of discrimination, the "States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 [of the Fourteenth Amendment] legislation" with nationwide application. 538 U.S. at 735; 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."); 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). The Court has never required Congress to make state-by-state or region-by-region findings prior to

employing its enforcement powers under the Civil War Amendments to adopt nationwide remedial measures. What was necessary were findings by Congress that the violations to be remedied, and the denial of equal opportunity, were sufficiently weighty to indicate the presence of a nationwide problem.

(ii) In any event, petitioners' assertion that Section 2 is based on a record containing little evidence of voting discrimination outside jurisdictions covered by Section 5 is 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, there was evidence of voting discrimination in other regions as well. Subsequent re-enactments and amendments to the Voting Rights Act presented more evidence of such far-flung voting 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 H.R. Rep. No. 196, 94th Cong., 1st Sess. 10 (1975); S. Rep. No. 295, 94th Cong., 1st Sess. 16-17 (1975) (*1975 Senate Report*). Congress expanded the Act to afford protection "to additional areas throughout the country," including localities with concentrations of American Indian voters such as Alaska, Arizona, California, Colorado, Florida, Idaho, Iowa, Louisiana, Mississippi, Nevada, New Mexico, New York,

North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Utah. *1975 Senate Report* 9; 28 C.F.R. Pt. 55 App.

When amending 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 S. Rep. No. 417, 97th Cong., 2d Sess. (1982) (*1982 Senate Report*); 1 & 2 *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) (*1982 Senate Hearings*); H.R. Rep. No. 227, 97th Cong., 1st Sess. 18-20 (1981) (*1981 House Report*); 1-3 *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981). 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. 1 *1982 Senate Hearings* 1804-1806, 1808; see *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1559 (11th Cir. 1984) ("Congress did find evidence of substantial discrimination outside those jurisdictions [covered by § 5 of the Act]."), cert. denied, 469 U.S. 976 (1984).[4] Petitioners'

[4] Petitioners assert (Pet. 15) that the court of appeals relied only on one sentence of the majority Senate Report to hold that there was evidence of widespread discrimination. In fact, the government's brief supplied the court numerous citations to support its conclusion, and the court of appeals referred to those citations in its rejection of petitioners' arguments. See Pet. App. 17, 19-22. Petitioners quote (Pet. 16) from a portion of S. Rep. No. 417, 97th Cong. 2d Sess. (1982) that asserts that there was little evidence of discrimination outside the Southern states presented to Congress. That portion of the report was a report of a subcommittee which, unlike the full committee, recommended

assertion (Pet. 18) that there is a "nonexistent historical record" of the use of discriminatory practices in voting outside the South, including the use of at-large elections, is without merit.

Finally, regardless of whether Congress had before it specific evidence of discrimination affecting voting by American Indians in Montana, the evidence in this case demonstrated that such discrimination had occurred and that it was similar in kind to the evidence on the basis of which Congress had enacted and amended Section 2. Based on "extensive testimony at trial relating to the history of official discrimination against American Indians in the State of Montana and specifically in Blaine County" and other evidence, the trial court found that the government had made out a history of official discrimination in this case. Pet. App. 55. The court of appeals held that the district court's findings regarding the history of discrimination were amply supported. *Id.* at 29-30. Accordingly, there was a sufficient basis to apply Section 2 in this case.

d. Petitioners err in contending (Pet. 14-15) the Ninth Circuit's conclusion that Section 2 is a constitutional application of Congress's enforcement powers conflicts with the Second Circuit's decision in *Muntaqim* v. *Coombe*, 366 F.3d 102, cert. denied, 125 S. Ct. 480 (2004). The issue in *Muntaqim* was whether the "results" test of Section 2 could be applied to invalidate a state law disenfranchising felons.

First, the Second Circuit recently decided to rehear *Muntaqim* en banc. 396 F.3d 95 (2004). Accordingly, it

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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.

cannot be concluded that the panel decision on which petitioner relies states the current view of the Second Circuit.[5]

Second, although the panel in *Muntaqim* concluded that Section 2 does not apply to state felon disenfranchisement statutes (including New York's), 366 F.3d at 130, the panel made quite clear that it "d[id] not purport to decide whether as a general rule the 'results' methodology of § 1973 is constitutionally valid," *id.* at 121. The panel thereby emphasized that it did not intend to invalidate any other applications of Section 2. The panel added that "the courts of appeals that have squarely addressed the issue have concluded that § 1973, on its face, meets the requirements for 'appropriate legislation' under the Fourteenth and Fifteenth Amendments," and the panel stated that "[w]e do not doubt this conclusion." *Ibid.* The panel explained that "[t]he question before us is not whether Congress exceeded its authority when it enacted § 1973; rather, it is whether Congress would exceed its authority if § 1973 were applied to state felon disenfranchisement statutes." *Ibid.* Finally, the panel noted that "felon disenfranchisement statutes cannot be conflated with other facially neutral voting rules that might fall within the ambit of § 1973," and it explained in some detail the basis for that conclusion.[6] *Ibid.* Accordingly, the panel opinion in *Muntaqim*

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[5] The United States recently filed a brief as amicus curiae at the invitation of the court in *Muntaqim*, arguing that Section 2 does not apply to New York's felon disenfranchisement law. See <http://www.usdoj.gov/crt/briefs/muntaqim.pdf>.

[6] Among the reasons the panel gave were an analogy to this Court's conclusion in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), that a provision of the Voting Rights Act prohibiting the disenfranchisement of 18-year-olds in state and local elections was unconstitutional; the support for

does not conflict with the Ninth Circuit's decision in this case, which had nothing to do with felon disenfranchisement.

2. There is no support for petitioners' contention (Pet. 21-24) that the court of appeals held "that Section 2 does not require proof of a minority group's unequal opportunity to participate in the political process." The court of appeals explained that "[i]f the plaintiff establishes the[] three [*Gingles*] factors, the court then must consider whether under the totality of circumstances the at-large voting system operates *to prevent the minority group from participating equally in the political process and electing representatives of its choice*." Pet. App. 8 (emphasis added). The court also engaged in a careful analysis of the evidence in this case to determine whether it was sufficient to make out a Section 2 violation under that standard. See *id.* at 22-36.

Petitioners argue (Pet. 22) that the court of appeals erred by stating that "the most important Senate Report factors bearing on § 2 challenges to multimember districts are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized,'" and that other factors "are supportive of, but *not essential to*, a

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disparate treatment of felons with respect to voting in the text of Section 2 of the Fourteenth Amendment, which provides that a State's representation in the House of Representatives will not be reduced because its felons have been disenfranchised; and the "longstanding practice in this country of disenfranchising felons as a form of punishment." 366 F.3d at 122-123. The recent amicus brief filed by the United States in *Muntaqim*, see note 5, *supra*, likewise underscores the uniqueness of the felon disenfranchisement context in arguing that the Voting Rights Act did not extend to the claims at issue there.

minority voter's claim." Pet. App. 35. Suffice it to say, however, that the passage of the court of appeals' opinion that petitioner highlights, including the emphasis, is a quote from this Court's opinion in *Gingles*. See 478 U.S. at 48-49 n.15.

Moreover, although petitioners appear to contend that the court of appeals was attempting to state that proof of the *Gingles* preconditions alone could make out a Section 2 violation "irrespective of the other [Senate] factors," Pet. 22, that was not the point the court was making. Rather, the court of appeals was making the correct legal point that no single factor other than the three *Gingles* preconditions is essential to a showing that Section 2 has been violated. In any event, the court held that the particular factor the court was discussing at that point in its opinion—the history of discrimination—was proven in this case. See Pet. App. 35.

3. Petitioners contend (Pet. 24) that the court of appeals held "that proof of purposeful discrimination is irrelevant." The court of appeals in fact stated that "the County's assumption that intentional discrimination among white voters must be shown is contrary to the plain language of section 2's results test." Pet. App. 28. As this Court itself explained in *Gingles*, the amended Section 2 "dispositively reject[ed]" the contention that Section 2 "required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters." 478 U.S. at 43-44; see *ibid.* ("intent test was repudiated").

Of course, the fact that the amended Section 2 does not require a plaintiff to produce direct proof of intentional discrimination by majority voters does not mean that a governmental electoral structure can be invalidated even though it may be totally divorced from

discriminatory action. A voting practice or procedure can be struck down under Section 2 only if there is proof of its discriminatory operation in the jurisdiction. To prove, as here, that a voting method has discriminatory results, a Section 2 plaintiff alleging vote dilution must not only show the existence of racial bloc voting and a persistent pattern of majority voters collectively preventing the election of minority-preferred candidates, *Gingles*, 478 U.S. at 44-45, but also must prove some of the additional circumstances described by the Senate factors that demonstrate that there are effects of discrimination that affect voters in that jurisdiction. *Ibid.* Both courts below found that the plaintiffs had carried that burden on the facts of this case.

Contrary to petitioners' contention (Pet. 26), the court of appeals' conclusion that plaintiffs in a Section 2 case need not introduce direct evidence of discriminatory motivation by majority voters does not conflict with the decisions in *League of United Latin American Citizens* v. *Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), or *Nipper* v. *Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc), cert. denied, 514 U.S. 1083 (1995). In *Clements*, for example, the Fifth Circuit agreed with the court of appeals in this case that, in amending Section 2, "Congress intended 'to make clear that proof of discriminatory intent is not required to establish a violation of Section 2.'" 999 F.2d at 849 (quoting *1982 Senate Report* 2).

In *Nipper*, the Eleventh Circuit did state that "if the evidence shows * * * that the community is not motivated by racial bias in its voting patterns, then a case of vote dilution has not been made." 39 F.3d at 1515. But the court in *Nipper* also explained that "[p]roof of the second and third *Gingles* factors—

demonstrating racially polarized bloc voting that enables the white majority usually to defeat the minority's preferred candidate—is circumstantial evidence of racial bias operating through the electoral system to deny minority voters equal access to the political process." *Id.* at 1524. Indeed, the court in *Nipper* concluded that "the existence of [the second and third *Gingles* factors], and a feasible remedy, generally will be sufficient to warrant relief." *Ibid.* Thus, the Eleventh Circuit too agreed that a Section 2 plaintiff may prevail without direct proof of intentional discrimination by non-minority voters.

4. Finally, petitioners contend (Pet. 27) that the court of appeals held "that whether minority groups possess unique or distinctive political interests is irrelevant" in determining whether the second *Gingles* factor —the political cohesiveness of minority voters—has been proven. What the court actually said was that "it is actual voting patterns, not subjective interpretations of a minority group's political interests, that informs the political cohesiveness analysis." Pet. App. 24.

The court of appeals' standard follows from *Gingles*. This Court found minority voters in *Gingles* politically cohesive based on their support for candidates that ranged from 71% to 96% and stated that "[a] showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim." *Gingles*, 478 U.S. at 56, 59. The court of appeals followed the same path here, relying on the fact that experts for both the United States and the County testified that American Indians voted cohesively for the same candidates in local and county elections. Pet. App. 23; see also *id.* at 47-48. Other circuits similarly have

held that reliance on the voting patterns of minority voters can be sufficient to determine whether they vote cohesively. *Uno* v. *City of Holyoke*, 72 F.3d 973, 982-983 (1st Cir. 1995); *Cane* v. *Worcester County*, 35 F.3d 921, 926 (4th Cir. 1994), cert. denied, 513 U.S. 921 (1995); *Monroe* v. *City of Woodville*, 897 F.2d 763, 764 (5th Cir.), cert. denied, 498 U.S. 822 (1990); *Harvell* v. *Blytheville Sch. Dist.*, 71 F.3d 1382, 1386-1388 (8th Cir. 1995), cert. denied, 517 U.S. 1233 (1996); *Old Person* v. *Cooney*, 230 F.3d 1113, 1121 (9th Cir. 2000); *Sanchez* v. *Colorado*, 97 F.3d 1303, 1315-1322 (10th Cir. 1996), cert. denied, 520 U.S. 1229 (1997); *Solomon* v. *Liberty County*, 899 F.2d 1012, 1019-1020 (11th Cir. 1990), cert. denied, 498 U.S. 1023 (1991).

Contrary to petitioners' contention (Pet. 28), the court of appeals' decision does not conflict with *Sanchez* v. *Bond*, 875 F.2d 1488, 1493-1494 (10th Cir. 1989), cert. denied, 498 U.S. 937 (1990). In *Sanchez*, the court stated that "[i]t is clear from *Gingles* that a showing that a significant number of minority group members usually vote for the same candidates can establish the requisite political cohesiveness under § 2" and that "[t]he reasons why minority voters may vote alike is unimportant in determining whether in fact the minority group votes as a bloc." *Id.* at 1493. That is entirely consistent with this Court's decision in *Gingles*, the decision of the court of appeals in this case, and the decisions of other courts of appeals cited above. The court in *Sanchez* went on to state that a trial court is not "*prohibited* from considering lay testimony in deciding whether a minority group is politically cohesive" because "[t]he experiences and observations of individuals involved in the political process are clearly relevant to the question of whether the minority group is politically

cohesive." *Id.* at 1493-1494. There is no conflict between the court's conclusion in *Sanchez* that the district court did not "violate the standards of *Gingles*" in considering such evidence, *id.* at 1494, and the court of appeals conclusion in this case that such evidence was not necessary, see Pet. App. 24.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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