ELECTION LAW — VOTING RIGHTS ACT — DISTRICT COURT REJECTS CHALLENGE TO REAUTHORIZED SECTION FIVE. — *Northwest Austin Municipal Utility District No. One v. Mukasey*, No. 06-1384, 2008 WL 4097645 (D.D.C. Sept. 4, 2008).

In the eleven years since the Supreme Court decided in *City of Boerne v. Flores*[1] that legislation enacted pursuant to the enforcement clause of the Fourteenth Amendment must be "congruen[t] and proportional[]" to the severity of the constitutional violation,[2] critics of the Voting Rights Act of 1965[3] (VRA) have been waiting for the opportunity to show that the landmark voting rights law fails to meet the *Boerne* standard. Congress gave opponents that chance when it reauthorized the VRA in 2006 without the slightest effort at updating the law, despite "obviously changed circumstances" since it was last amended in 1982.[4] Within days of the reauthorization, foes of the VRA filed a lawsuit viewed as the test case for the new law's validity.[5] In that case, *Northwest Austin Municipal Utility District No. One (NAMUD) v. Mukasey*,[6] a three-judge panel of the U.S. District Court for the District of Columbia[7] upheld the new section 5. Current doctrine under *Boerne* may have compelled that decision, but the court bent over backward to avoid taking up the "gauntlet" that Congress had thrown down by refusing to answer critical questions surrounding the 2006 reauthorization.[8] It remains to be seen whether the Supreme Court will accept the challenge by striking down the statute in order to force Congress to update it.[9] If not, VRA critics and voting rights activists alike should hope that the Court will at least shun the district court's approach of uncritical approval, lest the next renewal debate be as unproductive as the last.

Northwest Austin Municipal Utility District Number One (NAMUD) is a small utility district in Austin, Texas, that holds public elec-

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[1] 521 U.S. 507 (1997).

[2] *Id.* at 520.

[3] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

[4] Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148, 153 (2007), http://thepocketpart.org/2007/12/10/pildes.html.

[5] *See* J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 763 (2008). The lawyer behind the challenge is former Texas Solicitor General Gregory Coleman, a former clerk for Justice Thomas. *Id.*

[6] No. 06-1384, 2008 WL 4097645 (D.D.C. Sept. 4, 2008).

[7] The panel was composed of Circuit Judge Tatel and District Judges Friedman and Sullivan; federal law requires a three-judge panel with at least one circuit judge for Voting Rights Act cases. *See* 28 U.S.C. § 2284(b)(1) (2006); 42 U.S.C. § 1973b(a)(5) (2000).

[8] Pildes, *supra* note 4, at 153.

[9] *See* Kousser, *supra* note 5, at 774 (arguing that "invalidation of Section 5 under *Boerne* might, ironically, make it politically feasible to pass an amended VRA that is truly congruent and proportional to the existing and developing threats to racial political equality").

tions for its board members.[10] It is a "covered jurisdiction" under section 5,[11] meaning that it must "preclear" any proposed change in voting qualifications or any new voting "standard, practice, or procedure" by sending it to either the Attorney General of the United States or the District Court for the District of Columbia.[12] The change will not be precleared if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[13] However, covered jurisdictions may "bail out" of section 5 coverage if they meet a stringent set of requirements.[14]

In 2006, Congress reauthorized the VRA in an "exceptionally freighted" environment,[15] with politicians of both parties falling over each other to declare support for the bill.[16] Eight days after the reauthorization bill was enacted, NAMUD filed suit in the District Court for the District of Columbia, seeking bailout or, in the alternative, a declaratory judgment that section 5 was unconstitutional.[17]

Writing for a unanimous panel, Judge Tatel began by reciting the history of the VRA, from its initial enactment in 1965 and the Supreme Court's affirmation of its constitutionality in *South Carolina v. Katzenbach*[18] through the reauthorizations and expansions of 1970, 1975, and 1982, to arrive finally at the evidence marshaled by Congress in support of the 2006 reauthorization.[19] The court then rejected NAMUD's request for bailout, holding that NAMUD did not conduct voter registration and was thus not a "political subdivision" eligible to seek bailout under the 1982 amendments.[20]

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[10] Complaint at 2, *NAMUD* (No. 06-1384), 2006 WL 2705828.

[11] *Id.* at 3 (internal quotation marks omitted).

[12] *See* 42 U.S.C.A. § 1973c(a) (West 2006). Jurisdictions were covered under the initial enactment of the VRA if they used a "test or device" as a prerequisite for voting and they had overall voter turnout under 50% in the presidential election of 1964. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 437, 438.

[13] Beer v. United States, 425 U.S. 130, 141 (1976); *see also* 42 U.S.C.A. § 1973c(b).

[14] *See* 42 U.S.C.A. § 1973b(a) (listing six requirements that must have been met over the ten years prior to seeking bailout); Press Release, Campaign Legal Center, Court Clears Voting Rights Act Bailout for Virginia County (Sept. 24, 2008) (noting that only sixteen of the hundreds of covered local jurisdictions have bailed out since they were first allowed to try in 1982).

[15] Pildes, *supra* note 4, at 152.

[16] *See* James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 234 (2007) (describing a joint press conference in support of reauthorization on the steps of the Capitol, featuring, among others, the majority and minority leaders of both Houses). "The vote was predictable," Professor Nathaniel Persily writes, "in that virtually no one wanted to be on record opposing the legislation." Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 180 (2007).

[17] Complaint, *supra* note 10, at 1. Professor J. Morgan Kousser suggests that Coleman and the NAMUD plaintiffs would have been "dismayed" if the court had granted bailout eligibility. Kousser, *supra* note 5, at 764.

[18] 383 U.S. 301 (1966).

[19] *NAMUD*, 2008 WL 4097645, at *2–7.

[20] *Id.* at *8–12.

The court then turned to NAMUD's "primary argument"[21] that section 5 "is an unconstitutional overextension of Congress's enforcement power to remedy past violations of the Fifteenth Amendment."[22] Addressing NAMUD's suit as a facial challenge,[23] the court began by deciding what standard of review governed the case.[24] In their briefs, both sides had focused their arguments on the *Boerne* "congruence and proportionality test."[25] The court, however, found that the correct standard of review was *Katzenbach*'s rationality standard, under which legislation is constitutional if it is a "rational means" of addressing the specific problem of racial discrimination in voting.[26]

The court pointed out that the only other challenge to section 5 since *Katzenbach* itself also applied the *Katzenbach* standard.[27] It found similarly persuasive the fact that "this case implicates Congress's express constitutional authority to remedy *racial* discrimination in *voting*" through the Fifteenth Amendment,[28] given that the Supreme Court has never applied *Boerne* to a statute that was enacted under the Fifteenth as well as the Fourteenth Amendment.[29] In other words, because there is less danger that Congress will step beyond its enforcement powers when it legislates to enforce the Fifteenth Amendment, *Boerne* was especially inapplicable.

After using the Supreme Court's decision in *City of Rome v. United States*[30] to "dispose of three . . . broader attacks on the Act's constitutionality,"[31] the court proceeded to its "primary task": to determine, using the deferential *Katzenbach* standard, whether Congress "acted rationally when it extended section 5 for another twenty-five years."[32]

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[21] *Id.* at *12.

[22] Complaint, *supra* note 10, at 8.

[23] *See NAMUD*, 2008 WL 4097645, at *13. The court later addressed and swiftly rejected "two arguments . . . that could reflect an as-applied challenge," *id.* at *56, holding NAMUD's arguments precluded by *City of Rome v. United States*, 446 U.S. 156 (1980). *NAMUD*, 2008 WL 4097645, at *56–59.

[24] *See NAMUD*, 2008 WL 4097645, at *13–23.

[25] *See* Memorandum in Support of Defendant's Motion for Summary Judgment at 9–11, *NAMUD* (No. 1:06-CV-1384); Plaintiff's Motion for Summary Judgment with Memorandum of Points and Authorities in Support of Motion for Summary Judgment at 36, *NAMUD* (No. 1:06-CV-1384).

[26] *See NAMUD*, 2008 WL 4097645, at *14 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966)). This standard, the court suggested, applied to VRA cases regardless of whether the legislation was passed pursuant to the Fifteenth Amendment or the Fourteenth Amendment. *See id.* at *15 (citing Katzenbach v. Morgan, 384 U.S. 641 (1966)).

[27] *See id.* at *19 (citing *City of Rome*, 446 U.S. 156).

[28] *Id.* at *22.

[29] *Id.* at *21.

[30] 446 U.S. 156.

[31] *NAMUD*, 2008 WL 4097645, at *23.

[32] *Id.* at *24.

The court held that it did, citing several categories of evidence showing that covered jurisdictions continue to discriminate in voting.

The court began by noting that minority registration and turnout in covered jurisdictions is lower than white registration and turnout[33] and that, despite some gains, the number of minority elected officials is out of proportion with the minority population in those jurisdictions.[34] It further recognized the poor record of covered jurisdictions in four related categories: Attorney General objections to proposed changes (that is, preclearance denials), Attorney General letters requesting more information about a change,[35] court decisions denying preclearance,[36] and private section 5 enforcement suits.[37] Finally, Judge Tatel credited evidence that section 5 significantly deters racial discrimination in voting that would occur if the law expired.[38] Taking all of this evidence into account, the court found that Congress had justified the restrictions of section 5 just as convincingly as it had in the original VRA, upheld in *Katzenbach*, and in the 1975 reauthorization, upheld in *City of Rome*.[39] The new VRA thus easily met *Katzenbach*'s standard.[40]

Although the court could have ended its analysis there, Judge Tatel went on to uphold the law under the District's preferred *Boerne* standard as well.[41] Addressing the first step of the *Boerne* test, "the nature of the constitutional right Congress sought to protect," the court held that section 5 "simultaneously enforces two rights, each of which receives the highest level of judicial scrutiny": the right to be free of racial discrimination and the right to vote.[42] Continuing to the second step, the seriousness of the constitutional violations Congress sought to remedy, the court held that the record compared very favorably with that of the *Boerne* line of cases. The evidence supporting racial discrimination in voting, it held, was "far more powerful" than the evidence of constitutional violations in cases where the Supreme Court found the congressional remedy congruent and proportional.[43] Finally,

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[33] *Id.* at *24–26. Low overall turnout was part of the original coverage formula in the 1965 Act. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(b), 79 Stat. 437, 438.

[34] *NAMUD*, 2008 WL 4097645, at *26.

[35] *See id.* at *31–32. These "more information requests," the court held, were nearly as damning as actual objection letters. *Id.* at *31 (internal quotation marks omitted).

[36] *See id.* at *32–33.

[37] *See id.* at *34–35. Other successful voting discrimination suits, filed under section 2 of the VRA, "offer[ed] powerful evidence of continuing intentional discrimination," *id.* at *36, as did appointment of federal election observers, *id.* at *39, and racially polarized voting, *id.* at *40.

[38] *See id.* at *41–42.

[39] *See id.* at *42–44.

[40] *See id.* at *44.

[41] *See id.* at *45–55.

[42] *Id.* at *46.

[43] *Id.* at *48 (citing Tennessee v. Lane, 541 U.S. 509 (2004); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003)).

citing the favorable comparisons drawn by the Court between the Voting Rights Act — praised as a "detailed but limited remedial scheme"[44] — and legislation where Congress went too far, the court found that the new VRA was congruent and proportional to the violations of the Fourteenth and Fifteenth Amendments in covered jurisdictions.[45]

The post-*Boerne* doctrine left room for the *NAMUD* court to uphold the new VRA, despite *Boerne*'s stricter test and the fact that Congress failed in 2006 to update the law.[46] On the way to that conclusion, however, the court blurred several important questions, treating the 2006 VRA as if it were as straightforwardly justified by the situation on the ground as in 1965. Political constraints made this the easy path for the court, as they did for Congress and may yet for the Supreme Court. But in upholding the law, the court need not have shrunk from drawing attention to the law's deficiencies.

The court first blurred the analysis of the standard of review, holding that the standard was clearly *Katzenbach*'s rational basis. Because Congress "could have relied solely on the Fifteenth Amendment" each time it reauthorized the VRA, *NAMUD* was "a sequel to [*Katzenbach* and] *City of Rome*" and the court needed only to find that Congress's judgment in reauthorizing the statute was rational.[47] The crucial logical step was that "this case implicates Congress's express constitutional authority to remedy *racial* discrimination in *voting*."[48] Yet that conclusion is not obvious. It was not obvious to the parties, who focused their arguments on whether the new law satisfied *Boerne*. And it is not obvious from the history of the statute. The 1969 decision in *Allen v. State Board of Elections*[49] marked a shift in the focus of section 5 from access to the voting booth to more subtle forms of discrimination,

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[44] *Id.* at *51 (quoting Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 373 (2001)) (internal quotation mark omitted).

[45] *See id.* at *55. On the issue of congruence and proportionality, the court found it particularly convincing that the 2006 reauthorization expanded and facilitated bailing out and bailing in under VRA § 3 and that it had a twenty-five-year time limit. *See id.* at *51.

[46] *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY 481 (3d ed. 2007) (questioning whether "*City of Boerne* simply treat[ed] . . . voting rights precedents as sacrosanct, without giving persuasive grounds for doing so"); Persily, *supra* note 16, at 176 (describing the VRA as "the standard against which all other statutes are judged" with regard to congruence).

[47] *NAMUD*, 2008 WL 4097645, at *22.

[48] *Id.*; *see also* Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 394 (2008); Pamela S. Karlan, *Section 5 Squared: Congressional Power To Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 17 (2007).

[49] 393 U.S. 544 (1969). At issue in *Allen* were four proposed changes to state election laws: a statute switching from districted to at-large elections, a statute changing a local office from elected to appointed, a new set of state requirements for independent candidates to get on the ballot, and a bulletin issued to election judges permitting them to help illiterate voters who wanted to write in. *Id.* at 550–54.

an "expansive reading"[50] that "breathed new life into Section 5."[51] The Court soon found covered changes in cases that, contrary to the *NAMUD* court's view, seem to have had no more than a tangential connection to race or voting.[52] This drift in section 5's meaning has, in at least one coverage case, resurrected the federalism concern dismissed in *Katzenbach*,[53] a concern that the court might have done well to address directly.[54]

Even when the court did take the time to decide the case under *Boerne*'s congruence and proportionality standard, it often accepted uncritically the quantitative measures that Congress crafted with the goal of supporting renewal. The court's discussion of the number of minority elected officials in covered jurisdictions is a good example:

> In three of the six originally covered states — Mississippi, Louisiana, and South Carolina — the House committee found that not one African American had ever been elected to statewide office. The committee also reported that African Americans accounted for only 21% of state legislators in six southern states where the black population averaged 35% . . . .[55]

The number of minority representatives does say something about whether minority voters have equal access to the political process. On its face, however, this seems to be a "sixth-grade arithmetic"[56] ap-

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50 ISSACHAROFF ET AL., *supra* note 46, at 495.

51 Victor Andres Rodríguez, *Section 5 of the Voting Rights Act of 1965 After* Boerne*: The Beginning of the End of Preclearance?*, 91 CAL. L. REV. 769, 783 (2003); *see also* Holder v. Hall, 512 U.S. 874, 895 (1994) (Thomas, J., concurring in the judgment) (calling *Allen* "a fundamental shift in the focal point of the [VRA]").

52 *See, e.g.*, Dougherty County, Ga., Bd. of Educ. v. White, 439 U.S. 32, 42 (1978) (holding that a local school board's enactment of a rule requiring school board employees who ran for office to take an unpaid leave of absence was a covered change); Perkins v. Matthews, 400 U.S. 379, 388 (1971) (holding that a small city's annexation of adjacent areas, which enlarged the number of eligible voters, was a covered change).

53 *See* Presley v. Etowah County Comm'n, 502 U.S. 491, 510 (1992) ("If federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments."); *see also id.* at 506 ("[T]he constant adjustments required for the efficient governance of every covered State illustrate the necessity for us to . . . confine the coverage of § 5 to its legitimate sphere: voting.").

54 *Cf.* Pildes, *supra* note 4, at 153 (arguing that, in renewing the VRA, Congress should have demonstrated "a good-faith effort to honor the Court's modern *Boerne* line of cases" in order to appease the Supreme Court).

55 *NAMUD*, 2008 WL 4097645, at *26 (internal citation omitted).

56 Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 750 (1964) (Stewart, J., dissenting). Justice Marshall expressed well the problem of overquantifying the question of voting rights progress in his dissent in *Beer v. United States*, 425 U.S. 130 (1976). Rejecting the Court's establishment of a retrogression standard for section 5, he questioned whether drawing one more black-majority district would be progress if that district decreased black voting strength elsewhere: "I realize, of course, that determining the ultimate question of 'abridgment' may involve answering questions similar to those I have posed above and that those questions will be just as difficult to answer. My point, however, is exactly that the inquiry is a difficult one . . . ." *Id.* at 154 n.12 (Marshall, J., dissenting). The Court addressed Justice Marshall's point directly in *Geor-*

proach to voting rights that tells us little about whether African Americans and other minority groups are really making progress toward equality. Is all finally forgiven, and can Congress allow the VRA to expire, when the percentage of black legislators reaches 35% in those six southern states,[57] or when South Carolina, Louisiana, and Mississippi elect their first black statewide officeholders? The concerns expressed by black leaders about complacency in the wake of victory by Senator Barack Obama[58] indicate that the answer is no. But the court did not raise any concern on that point, simply accepting the evidence as good enough to satisfy *Katzenbach*.

The court's discussion of other statistics was similarly superficial. It pointed to disparities in registration rates between whites and nonwhites without examining whether or how Congress had attributed those disparities to racial discrimination and without making the basic distinction between black turnout and Hispanic turnout.[59] By contrast, its lengthy discussion of Attorney General objections to voting law changes strayed from discussion of bare statistics, which the court conceded were uninformative.[60] Indeed, the court was at its most persuasive here, acknowledging that the number of objections "depends on a variety of factors unrelated to actual levels of discrimination," then bolstering the data by noting the relative evenness of objection rates across geography and level of government.[61]

Worst of all, perhaps, the court shrugged off NAMUD's argument that the VRA's coverage formula — which was based on turnout from the 1964 election and was itself the product of a political compromise that did not fully respond to the problem[62] — needed to be up-

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gia v. Ashcroft, 539 U.S. 461 (2003), holding that drawing districts this way could satisfy the nonretrogression burden. *Cf.* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1729 (2004) (arguing that "a narrow focus on securing the electability of minority candidates could . . . actually thwart minority political gains" when interracial coalitions are possible).

[57] Full proportionality in covered states may be impossible anyway due to the concentration of southern black voters in cities or belts and the reality of territorial districting, even assuming no discriminatory intent on the part of those drawing districts.

[58] *See, e.g.*, Rachel L. Swarns, *Blacks Debate Civil Rights Risk in Obama's Rise*, N.Y. TIMES, Aug. 25, 2008, at A1; *see also* Abigail Thernstrom, Op-Ed., *The Voting Rights Battle Is Over; We All Won*, L.A. TIMES, Aug. 31, 2008, at A26 (apparently bearing out this concern).

[59] The registration rate among Hispanic citizens in the South (including Texas and Florida) is actually higher than in the Midwest, a region that includes almost no covered jurisdictions. U.S. Census Bureau, Voting and Registration in the Election of November 2006: Detailed Tables, *available at* http://www.census.gov/population/www/socdemo/voting/cps2006.html (last visited Nov. 9, 2008) (click on Table 3: Hispanic).

[60] *See NAMUD*, 2008 WL 4097645, at *28 ("[A]s the intervenors point out, the number and rate of objections reveal little about the true impact of a proposed change.").

[61] *Id.*

[62] *See* E.W. Kenworthy, *Debate Clouds Voting Bill*, N.Y. TIMES, Apr. 25, 1965, at E5. There was "criticism . . . that the bill . . . left untouched areas of discrimination in states without literacy

dated.[63] The court first held that the "way out" for jurisdictions like NAMUD is "declaratory judgments allowing bailout,"[64] a particularly perverse holding given that the court had already ruled that NAMUD was ineligible for bailout. It went on to call "incorrect"[65] NAMUD's argument that there was no evidence that section 5 coverage under the new VRA satisfied what Professor Adam Cox calls "the 'things are worse there than elsewhere' test."[66] The court cited Professor Ellen Katz's research[67] for the proposition that "the success rate of section 2 suits in covered jurisdictions exceeded the success rate of such litigation elsewhere," showing that the coverage formula still makes sense.[68] As with much of the other evidence supporting renewal, the court ignored counterarguments, like the rejoinder that Professor Katz's inquiry failed to control for factors more likely to explain the disparity between covered and non-covered jurisdictions.[69]

How exactly Congress should have adapted the VRA to modern times is up for debate. Asking whether the law should be done away with entirely may be premature in light of the stories of persisting discrimination that the court was able to cite in its opinion and appendix,[70] but the view has its adherents,[71] and the Supreme Court itself may reject political expediency and reach this result. Alternatively, a politically sensitive Congress, or a Congress convinced that keeping the VRA is the right policy, might have chosen a narrower improvement: updating the coverage formula, or, less ambitiously, making bailout easier or giving the statute an earlier sunset date.[72] The court should have raised these difficult questions explicitly, or at least signaled that there *were* questions that Congress had neglected to answer. By failing to do so, it simply passed to the Supreme Court the dilemma that Congress had passed to it, a strategy that may lead to a well-received opinion, but not to a Voting Rights Act that will help solve the political problems of today rather than those of 1965.

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tests," *id.*, including "areas in which voting discrimination was known to exist, such as southeastern Arkansas and northern Florida," DAVID J. GARROW, PROTEST AT SELMA 114 (1978).

63 *See NAMUD*, 2008 WL 4097645, at *52–53.

64 *Id.* at *52.

65 *Id.* at *53.

66 Posting of Adam Cox to Election Law Blog, http://electionlawblog.org/archives/011019.html (June 11, 2008, 21:24).

67 Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, *in* VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION AND POWER 183 (Ana Henderson ed., 2007).

68 *NAMUD*, 2008 WL 4097645, at *53.

69 *See generally* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008).

70 *See NAMUD*, 2008 WL 4097645, at *36–39, *60–71.

71 *See, e.g.*, Issacharoff, *supra* note 56, at 1731 ("[S]ection 5 has served its purposes.").

72 *See* Pildes, *supra* note 4, at 153.