

No. 12-96

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IN THE  
*Supreme Court of the United States*

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SHELBY COUNTY, ALABAMA,

*Petitioner,*

v.

ERIC H. HOLDER, JR. ATTORNEY GENERAL, ET AL.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR AMICI CURIAE MARCIA FUDGE,  
MEMBER OF CONGRESS AND CHAIR OF THE  
CONGRESSIONAL BLACK CAUCUS, RUBÉN HINO-  
JOSA, MEMBER OF CONGRESS AND CHAIR OF  
THE CONGRESSIONAL HISPANIC CAUCUS, AND  
JUDY CHU, MEMBER OF CONGRESS AND CHAIR  
OF THE CONGRESSIONAL ASIAN PACIFIC AMER-  
ICAN CAUCUS, ET AL., IN SUPPORT OF RESPOND-  
ENTS

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## INTEREST OF AMICI CURIAE<sup>1</sup>

Amici curiae are elected members of the United States House of Representatives and members of the Congressional Black Caucus, the Congressional Hispanic Caucus, or the Congressional Asian Pacific American Caucus.<sup>2</sup> Amici collectively serve millions of Americans from communities whose experiences with racial discrimination in voting are the core concern of the Voting Rights Act (VRA), and many amici cast floor votes in favor of reauthorizing the VRA in 2006.

1. Each of the three caucuses was established to provide representation and constituency services for communities who have experienced racial discrimination and political exclusion firsthand. The Congressional Black Caucus (CBC) was formed more than forty years ago to promote racial equality in the design and content of domestic and international programs and services. The CBC has been at the forefront of issues affecting African Americans and has garnered international acclaim for advancing agendas aimed at protecting human rights and civil rights for all people. Today, the CBC has 42 members.

The Congressional Hispanic Caucus (CHC) is a bipartisan group of 16 members dedicated to voicing and advancing through the legislative process issues affecting Hispanic Americans in the United States and the insular areas. Founded in 1976 as a legislative service organization of the United

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<sup>1</sup> Pursuant to Rule 37.3(a), letters of consent to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than the amici curiae, their members, or their counsel made any monetary contribution to the preparation or submission of this brief.

<sup>2</sup> A complete list of all amici is attached as Appendix A.

States House of Representatives, the CHC is now organized as a congressional member organization.

The Congressional Asian Pacific American Caucus (CAPAC) was founded in 1994 to enhance the ability of Members of Congress and their allies to represent the Asian American and Pacific Islander community's concerns effectively in policy debates. Today, the CAPAC has 38 members.

2. Amici write to offer their perspective on why this Court should affirm the constitutionality of perhaps the most important civil rights legislation in the nation's history. Since its enactment in 1965, the Section 5 preclearance mechanism—the heart of the VRA—has prevented state and local jurisdictions covered by the provision from implementing thousands of discriminatory voting procedures and practices. Congress's 2006 reauthorization of Section 5 is a landmark accomplishment that ensures the right of all citizens to cast meaningful and unfettered votes and to be represented by candidates of their choice.

The extensive legislative record Congress compiled in reauthorizing Section 5 of the VRA revealed that racial discrimination remains an enduring problem for minority voters in the covered jurisdictions. Based on that record—perhaps the most substantial ever amassed—Congress made the quintessentially legislative judgment that “40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment.” Fannie Lou Hamer, Rosa Parks, Coretta Scott King, Cesar E. Chavez, Barbara C. Jordan, William C. Velasquez, and Dr. Hector P. Garcia Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(7), 120 Stat. 577, 578 (VRARAA). Congress concluded that “without the continuation of the [VRA's] protections” in the covered jurisdictions “racial and language minority citizens will be deprived

of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.” *Id.* § 2(b)(9).

This Court should not second-guess those determinations. Amici, who represent voters in both covered and non-covered jurisdictions, are uniquely positioned to attest that Section 5 remains an essential tool in the nation’s ongoing struggle to guarantee an equal right to vote regardless of race, and that Section 5’s work of remedying unconstitutional exclusion from the political process in certain jurisdictions is not yet done.

Amici acknowledge—indeed, celebrate—that, due in no small part to the VRA, there has been measurable progress since 1965 in combatting racial discrimination in voting. Indeed, the increasing diversity of Congress—including amici themselves—is a concrete indication that the VRA has had palpable effects. Steadfast enforcement of the VRA, and Section 5 in particular, has ensured minority voters the opportunity to participate in the political process and to elect candidates of their choice. These gains, however are incomplete and only recently won. Continued protection is critical to ensuring that the nation’s long history of backsliding and retrenchment in the area of voting rights is not repeated.

As this Court has recently noted, “racial discrimination and racially polarized voting are not ancient history.” *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009). Amici thus have a profound interest in the implementation of Congress’s considered judgment that the preclearance provisions of the VRA remain vital to ensuring equal participation in the political process for all. Amici therefore urge this Court to uphold the reauthorization of Section 5 under the pre-existing coverage scope of Section 4(b) as a proper exercise of congressional power under the Fourteenth and Fifteenth Amendments.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Since 1965, Congress and five Presidents have acted to create or preserve the VRA—the nation’s landmark commitment “to ensure that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the Constitution.” VRARAA § 2. And on four occasions, this Court has upheld the constitutionality of the political branches’ considered judgments that the VRA and its preclearance requirement are necessary to ensure equal access to a meaningful vote. *See Lopez v. Monterey County*, 525 U.S. 266, 282-285 (1999); *City of Rome v. United States*, 446 U.S. 156, 177-178 (1980); *Georgia v. United States*, 411 U.S. 526, 534-535 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966).

Congress’s 2006 reauthorization, resting on its judgment that Section 5 remains vital to ensure that minority voters have free and full access to the polls, was an equally appropriate exercise of Congress’s authority under the Reconstruction Amendments. As this Court has recognized, Congress acted, as it had with respect to prior reauthorizations, on the basis of a “sizable record.” *Nw. Austin Mun. Util. Distr. Number One v. Holder*, 557 U.S. 193, 205 (2009). Further, both courts below held that record sufficient to demonstrate a continuing need for Section 5 that justified the continuing burden on covered jurisdictions. *See* Pet. App 48a; 269a-270a.

Consisting of 21 hearings, the testimony of more than 90 witnesses, and 15,000 pages of supporting materials, the legislative record leaves no doubt that “conduct transgressing the Fourteenth Amendment’s substantive provisions,” *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1333 (2012), persists in covered jurisdictions. *See* H.R. Rep. No. 109-478, at 5 (2006); S. Rep. No. 109-295, at 2-4 (2006). Specifically, Congress found ample evidence of voting dis-

crimination in these jurisdictions, including intentional discrimination, as documented by continued disparities in registration and turnout; low levels of minority elected officials; the number of Section 5 enforcement actions since 1982; the amount of Section 2 litigation; and evidence of racially polarized voting. Congress also determined that the VRA's bailout and bail-in mechanisms would work hand-in-hand to ensure that Section 5 remains targeted where, and only where, it is needed.

Congress's predictive judgments have proven well-founded. The absolute number of Section 5 objections to practices in covered jurisdictions since the 2006 reauthorization of the VRA is powerful evidence of the continuing need for Section 5 to deter core violations of the Fourteenth and Fifteenth Amendments. Indeed, the Section 5 preclearance process has recently blocked a stringent Texas photo ID law that would have had a retrogressive effect on minority voters' access to the ballot, and it led South Carolina officials to re-interpret a photo ID law to ameliorate its discriminatory effect. Moreover, recent litigation involving Texas redistricting validates Congress's concern that intentional racial discrimination in voting continues to pose a credible threat to the rights of minority voters. In addition, the post-2006 record demonstrates that Congress was on firm footing in finding that the VRA's bailout and bail-in mechanisms would ensure Section 5 remains geographically tailored.

Finally, Congress's finding that Section 2 remains an inadequate remedy in covered jurisdictions is the type of fact-based, predictive judgment that deserves deference. In reaching its conclusion, Congress credited evidence that Section 2 claims are ineffective substitutes for Section 5 because they shift the burden of proof, occur after-the-fact, and involve intensely complex litigation that is costly and time-consuming. That, together with the magnitude and persistence of discrimination in covered jurisdictions, supported Congress's conclusion that case-by-case litigation would be

ineffective to protect the rights of minority voters” in those jurisdictions. H.R. Rep. No. 109-478, at 57.

## ARGUMENT

### I. A DEFERENTIAL STANDARD GOVERNS JUDICIAL REVIEW OF CONGRESS’S DECISION TO REAUTHORIZE SECTION 5 IN THE COVERED JURISDICTIONS

Congress is “a coequal branch of government whose Members take the same oath ... to uphold the Constitution” as the Justices of this Court. *Rotsker v. Goldberg*, 453 U.S. 57, 64 (1981). In part for that reason, when this Court is “called upon to judge the constitutionality of an Act of Congress—‘the gravest and most delicate duty that [it] is called upon to perform’—the Court accords ‘great weight to the decisions of Congress.’” *Id.* (citations omitted); *accord Nw. Austin* 557 U.S. at 193.

Specifically, in reviewing any legislation, this Court owes deference to Congress’s fact-finding, and it “accords substantial deference” to Congress’s “predictive judgments.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665 (1994) (plurality). That deference is accorded not simply because Congress is a co-equal branch, but also because “[a]s an institution ... Congress is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon a[] ... complex and dynamic [issue].” *Id.* at 665-666; *see Fullilove v. Klutznick*, 448 U.S. 448, 502-503 (1980) (Powell, J., concurring) (noting “special attributes” of Congress as a fact-finding body). For that reason, in reviewing Congress’s findings, the proper inquiry is not whether this Court would reach the same decision, but whether there is sufficient evidence showing Congress’s decision was reasonable. *Turner*, 512 U.S. at 666. Although this Court must “exercise independent judgment when [constitutional] rights are implicated,” that “is not a license [for the Court] to re-

weigh the evidence *de novo*, or to replace Congress' factual predictions" with its own. *Id.*

Amici submit that the case for deference to Congress's judgments in the context of the VRA is especially strong for two reasons. First, members of Congress are intimately involved with and knowledgeable about the electoral process, voting problems, and the operation of the VRA. Members of Congress are able to bring to bear local knowledge of the effects of racial discrimination on their district's electoral systems, and are well-positioned to assess what measures are necessary to ensure the right of all citizens to vote is guaranteed. That is particularly so with respect to amici, who have a unique concern with the consequences of racial discrimination in voting.

Second, in reauthorizing Section 5, Congress was exercising the unique constitutional authority textually committed to it by the Reconstruction Amendments. The Amendments' enforcement provisions constitute "a positive grant of legislative power' to Congress" that this Court has consistently described in "broad terms." *City of Boerne v. Flores*, 521 U.S. 507, 517 (1997); *Nw. Austin*, 557 U.S. at 205 ("The Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it."). Congress is accordingly "entitled to much deference" in "determin[ing] whether and what legislation is needed to secure th[ose] guarantees." *Boerne* 521 U.S. at 536 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

Indeed, in legislating in the context of the VRA, Congress is acting within the heartland of the Reconstruction Amendments because it is seeking to combat an evil lying at the crossroads of the "immediately suspect" classification of race, *Johnson v. California*, 543 U.S. 499, 509 (2005), and the "fundamental political right" to vote, *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). *See Lane*, 541 U.S. at 562 (Scalia,

J., dissenting). Congress’s considered judgment in favor of reauthorizing Section 5 is, accordingly, entitled to great respect.

II. IN 2006, CONGRESS MADE A CONSIDERED AND WELL-SUPPORTED JUDGMENT THAT SECTION 5 REMAINS NECESSARY TO ENSURE MINORITY VOTERS HAVE FREE AND UNFETTERED ACCESS TO THE POLLS

In 2006, Congress determined that the record documenting the continuing need for Section 5 in the covered jurisdictions “resemble[d] the evidence before [it] in 1965 and the evidence that was present again in 1970, 1975, 1982, and 1992.” H.R. Rep. No. 109-478, at 6; *id.* at 11-12. This Court in each instance approved the sufficiency of those historical records—both directly in cases like *Katzenbach* and *City of Rome*, and indirectly as examples of how to “document a marked pattern of unconstitutional action,” *Board of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001). The record before Congress in 2006 contained abundant evidence that the nation’s struggle to overcome a century of state-sanctioned voting discrimination in the covered jurisdictions was not yet complete and thus that there remained a “current need[]” for Section 5, *Nw. Austin*, 557 U.S. at 203.

A. The Record Before Congress Demonstrated The Continuing Need For Section 5

In exercising its authority under the Reconstruction Amendments to redress the “evil[]” of race discrimination in voting, “Congress ... may avail itself of information from any probative source.” *South Carolina*, 383 U.S. at 330. In 2006, Congress was not writing on a blank slate. Instead, operating against a backdrop of several reauthorizations, each upheld by this Court, Congress looked to the same categories of evidence this Court approved in *South Carolina* and *City of Rome*—namely, disparities in turnout and registration, disproportionately low numbers of minority elected officials,

and the nature and number of Section 5 objections in the covered jurisdictions. In each category, and in several others, Congress confronted probative, unassailable evidence of a continuing need for Section 5 to ensure full and fair access to the ballot for minority voters.

### 1. Turnout and Registration

As it had in prior reauthorizations of the VRA, Congress found that, despite progress, “significant disparit[ies] persisted ... in at least several of the covered jurisdictions” with respect to registration and turnout. *City of Rome*, 446 U.S. at 580. Congress learned, for example, that in Virginia in 2004, white voter registration exceeded black voter registration by 11 percentage points and black turnout was 13 percentage points lower than white turnout. S. Rep. No. 109-295, at 11. In Texas, white voter registration exceeded Hispanic registration by 20 points. *Id.*<sup>3</sup>

In addition to this statistical evidence, Congress reviewed testimony and other evidence demonstrating that “there remains an enormous gap in political participation” for language minority citizens in many covered jurisdictions. *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 13 (2006); *see, e.g., id.* 68-69 (Florida); *id.* 309 (Texas); *id.* 1313 (Alaska); *id.* 1379 (Arizona). Together, these disparities are comparable to those that this Court found sufficient in *City of Rome* when it up-

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<sup>3</sup> These disparities are even more pronounced than Congress realized. In computing registration and turnout rates for whites, the figures before Congress included Hispanics, “reducing the true disparity between black and white voter registration and turnout (as well as the disparity between Hispanic and white voter registration and turnout).” Pet. App. 200a. When the statistics are adjusted, black registration rates in 2004 trail those of non-Hispanic whites in all but one covered State. Pet. App. 201a; *id.* 200a-203a.

held a prior reauthorization of Section 5. 446 U.S. at 180; Pet. App. 199a (citing S. Rep. No. 94-295, at 779 (1975)).

## 2. Minority Elected Officials

Congress also considered evidence of the disproportionately low numbers of minority elected officials in covered jurisdictions. As in *City of Rome*, Congress recognized that “undeniable” progress had been made, *see* 446 U.S. at 180, but that troubling disparities persisted.

Congress found, for example, that in Alabama, Georgia, Louisiana, Mississippi, South Carolina, and North Carolina, African Americans comprised 35% of the population, but only 20.7% of the state legislators. H.R. Rep. No. 109-478, at 33. Latino and Asian-American elected officials similarly “failed to keep pace with [the relevant] population growth,” *id.* at 33-34, demonstrating on the whole that the “number [of minority elected officials] in the State legislatures” again “fell ... short of being representative of the number of [minority voters] residing in the covered jurisdictions,” *City of Rome*, 446 U.S. at 181.

Moreover, as of 2000, only 35 African Americans held a statewide office in the covered jurisdictions, and some of these officials had initially been appointed, rather than elected, to those positions. H.R. Rep. No. 109-478, at 33. In three of the nine covered states—Mississippi, Louisiana, and South Carolina—*no* African American had been elected to statewide office despite substantial African-American voting populations. H.R. Rep. No. 109-478, at 33 (quoting a 2005 statement from Governor of South Carolina indicating that he “did not expect to see such an election in the foreseeable future”). And language minority candidates fared no better, “rarely garner[ing] the support of white voters, resulting in a

disparity [in office-holding].” *Id.* at 34.<sup>4</sup> When confronted with similar evidence in *City of Rome*, this Court found that an extension of Section 5 of the VRA was warranted. 446 U.S. at 181.

### 3. Section 5 Objections

Finally, Congress carefully considered Section 5 objections, a category of evidence that “clearly bespeak[s] the continuing need for this preclearance mechanism.” *City of Rome*, 446 U.S. at 181; VRARAA § 2(b)(4)(A). From 1982 to 2006, the Attorney General interposed more than 700 objections—*more* objections than were lodged between 1965 and 1982. H.R. Rep. No. 109-478, at 21-22, 36; *see* S. Rep. No. 109-295, at 13; *Continued Need* 177-178 (noting a similar pattern for judicial denials of preclearance).<sup>5</sup> Each fully covered State drew at least two statewide objections, with most fully covered States drawing many more. *See Continued Need* 260. Notably, a single objection may encompass more than one voting change, and a single voting change

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<sup>4</sup> Congress also found that racially polarized voting in the covered jurisdictions “demonstrates that [minority voters] remain politically vulnerable” and undermined their ability to elect candidates of their choice. *See* VRARAA § 2(b)(3); H.R. Rep. 109-478, at 34. That finding is relevant because, as this Court has recognized, racially polarized voting provides facially neutral voting changes with their retrogressive force. *See City of Rome*, 446 U.S. at 183; *Rodgers v. Lodge*, 458 U.S. 613, 623 (1982). Congress’s determination that racially polarized voting persists—indeed that it was increasing, *see Continued Need* 215—in the covered jurisdictions, bolstered its determination that minority voters are “vulnerable” to discriminatory voting schemes. VRARAA § 2(b)(3).

<sup>5</sup> Petitioner (Br. 29-30) discounts the significance of Section 5 objections, arguing the objection rate “has been declining steadily.” But Congress learned that the decline in the rate of objections is “not a product of objections going down, but of submissions becoming . . . more frequent.” *Continuing Need* 58. And it in no way diminishes the significance this Court—and Congress—has attributed to the “number and nature” of Section 5 objections. *City of Rome*, 446 U.S. at 181.

may affect thousands of voters. Objections interposed by the Attorney General between 2000 and 2006, for example, affected some 660,000 minority voters. *The Continuing Need for Section 5 Pre-clearance, Hearing Before the S. Committee on the Judiciary*, 109th Congress 58 (2006).

Of the objections interposed between 1980 and 2000, nearly two-thirds related to voting changes enacted with racial animus. *See Voting Rights Act: Section 5 – Preclearance Standards, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 180 tbl. 2 (2005) (McCrary Study). The record Congress examined was replete with such examples. *See* S. Rep. No. 109-295, at 14; Pet. App. 212a-220a (reciting record evidence); *Nw. Austin v. Mukasey*, 573 F. Supp. 2d 221, 289-301 (D.D.C. 2008) (same). To recount just a few: Attorney General objections prevented the Mayor and Board of Aldermen in Kilmichael, Mississippi from cancelling an election because an unprecedented number of African American candidates were running for office, H.R. Rep. No. 109-478, at 36-37; thwarted threats by the Waller County, Texas district attorney to prosecute students from Prairie View A&M, a local historically black university, for illegal voting if they voted in the 2004 election for County Commissioners' Court and frustrated the county's subsequent attempt to limit early voting to reduce minority participation by the students in the same election, *Continued Need* 186; and blocked a majority vote requirement for a city council election in Freeport, Texas after the first Latino-preferred candidate was elected, *Voting Rights Act: Section 5 – History Scope and Purpose, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2291-2292, 2528-2530 (2006).

#### 4. Other Categories of Evidence

In addition to the categories of evidence this Court approved in *City of Rome*, Congress reviewed other probative evidence of discrimination against minority voters. Congress

found, for example, that “[e]vidence of continued discrimination includes ... the continued filing of section 2 cases ... in covered jurisdictions.” VRARAA § 2(b)(4)(C); *see* H.R. Rep. No. 109-478, at 52. More than 600 successful Section 2 cases were filed in covered jurisdictions between 1982 and 2005, affecting 825 counties. *Continued Need* 205-208, 251. Among successful Section 2 suits that ended in a published decision, more than half involved a covered jurisdiction even though covered jurisdictions account for less than a quarter of the country’s population, *see* Pet. App. 49a; Katz et. al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982 Final Report of the Voting Rights Initiative*, 39 U. Mich. J. L. Reform 643, 656 (2006), and a significant number involved intentional discrimination, *see* Pet. App. 232a.

Congress also found “indicia of discrimination” in the continued need for federal observers to monitor and report “harassment and intimidation inside polling locations” in covered jurisdictions. H.R. Rep. No. 109-478, at 44; VRARAA § 2(b)(5). Two-thirds of observers dispatched between 1982 and 2005 on the basis of “meritorious” threats of misconduct were dispatched to covered jurisdictions. H.R. Rep. No. 109-478, at 44. Congress learned, for example, that observers had been “recently assigned to Georgia, Alabama, and Texas, to protect Latino and Asian American voters,” and in Alabama, “Asian American voters attempting to vote in an election with an Asian American candidate were harassed and threatened by supporters of an opposing candidate in polling locations.” *Id.* at 45.<sup>6</sup>

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<sup>6</sup> Notwithstanding petitioner’s effort (Br. 31) to cast observers and the events they witness as mere hypotheticals or conjecture, the record before Congress is clear that once dispatched, federal observers did witness harassment and animus. One particularly disturbing incident occurred in Alabama, where observers witnessed a white poll worker asking a black voter whether he “want[ed] to vote for white or niggers,” and remarking “niggers don’t have principle enough to vote and they

Furthermore, Congress logically concluded that any assessment of the continuing need for Section 5 must account for those discriminatory voting changes “that have never gone forward as a result of Section 5.” H.R. Rep. No. 109-478, at 24; S. Rep. No. 109-295, at 11 (“without the Voting Rights Act’s deterrent effect,” evidence of discrimination in the covered jurisdictions “might be considerably worse”). This determination was not guesswork, but was informed by expert testimony about and specific examples of Section 5’s deterrent effect. For example, when Georgia redrew its congressional districts in 2005, it began the process by adopting resolutions that required compliance with Section 5, and proceeded to draw non-retrogressive plans that maintained the black voting age population in majority black districts. H.R. Rep. No. 109-478, at 24. As Congress explained, “officials in covered jurisdictions ... understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables ... because the chances are good that an objection will result.” *Id.* (quoting The National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work* 1982-20005, Feb. 2006, at 57); *see also* Pet. App. 252a-255a. In addition, Congress observed that between 1982 and 2003 covered jurisdictions withdrew more than 205 Section 5 submissions after receiving a request for more information (“MIR”) from the Attorney General, a reaction Congress reasonably determined is “illustrative of a jurisdiction’s motives,” H.R. Rep. No. 109-478, at 40, 41; *see* 28 C.F.R. § 51.37; *Continued Need* 124 (“a withdrawal suggests ... officials in the jurisdiction concluded that the change would [oc-

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shouldn’t be allowed.” *The Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program, Subcomm. the Constitution, Committee on the Judiciary*, 109th Cong. 30 (2005). The legislative record documented additional incidents in covered jurisdictions affecting Hispanic and Asian American voters. *See id.* 34-35; Pet. App. 242a-245a (citing examples).

casation an objection]”). Combining withdrawals with the number of material alterations made to proposed voting changes after receipt of an MIR, Congress learned that MIRs deterred more than 800 potentially discriminatory voting changes. *Id.* at 41; *The Continuing Need for Section 203 Provisions, Hearing Before the S. Committee on the Judiciary*, 109th Congress 213, 223 (2006).

**B. Congress Properly Determined That Bailout And Bail-in Mechanisms Would Ensure That Section 5 Applied Only To Jurisdictions Where It Was Needed**

In addition to the record demonstrating the continuing need for a preclearance remedy in the covered jurisdictions, Congress in 2006 took into account the bailout and bail-in mechanisms in ensuring that the VRA would remain appropriately targeted. Although petitioner suggests that bailout is a minor provision of the VRA, Congress understood things differently.<sup>7</sup>

Under the statutory bailout mechanism, which Congress expanded in 1982, any covered jurisdiction may terminate its Section 5 coverage by demonstrating a ten-year record of non-discriminatory practices and a current effort to eliminate intimidation and harassment of voters. *See* 42 U.S.C. § 1973b(a)(1)(A)-(F). This Court has observed the importance of the bailout procedure to the constitutionality of Section 5. *See Boerne*, 521 U.S. at 544 (availability of bailout “reduce[s] the possibility of overbreadth” and helps “ensure Congress’ means are proportionate to [its] ends”).

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<sup>7</sup> Where the record before Congress required it to amend the Act, it did not hesitate to ensure that the VRA implemented only “relevant and ... effective remed[ies].” H.R. Rep. No. 109-478, at 61; *see id.* at 61-62 (allowing the federal examiner program to expire); VRARAA § 3(c).

In 2006, Congress again determined that the bailout mechanism helped to ensure geographic tailoring of Section 5. *See* H.R. Rep. No. 109-478, at 25. In doing so, it considered testimony from legal scholars, voting rights practitioners, and DOJ officials. *See, e.g., Continuing Need* 174-198. Congress also learned that between August 1984—when the 1982 amendments took effect—and the 2006 reauthorization, 10 jurisdictions successfully bailed out. *Continuing Need* 2677, 2691. No jurisdiction seeking a bail-out was denied one. *Id.* at 2683; *see* JA 84a (“The Attorney General has consented to every bailout ... since 1984.”). Based on this evidence, Congress reasonably concluded that: “(1) covered status is neither permanent nor over-broad; and (2) covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so.” H.R. Rep. No. 109-478, at 25. “Bailout ... has proven to be achievable to those jurisdictions that can demonstrate an end to their discriminatory histories.” *Id.* at 61.

While the bailout process guards against over-inclusiveness, the bail-in procedure guards against under-inclusiveness. Under the VRA, federal courts may place States and political subdivisions under Section 5’s preclearance requirement upon a finding of a Fourteenth or Fifteenth Amendment violation. *See* 42 U.S.C. § 1973a(c). Congress heard evidence in 2006 that this provision was working: from 1982 to 2006, courts bailed-in two States (Arkansas and New Mexico), three counties (including Los Angeles County), and one city (Chattanooga, Tennessee). *See Continued Need* 154; Travis Crum, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 Yale L. J. 1992, 2010 (2010).

In short, the legislative record underlying the 2006 reauthorization established that there was a continuing need for administrative preclearance in jurisdictions with an entrenched history of discrimination. But, in view of the complementary bailout and bail-in mechanisms, Congress understood that Section 5 would continue to apply only where it is needed and that it would, as in the past, take account of changing circumstances. As amici have shown, the record amply supports Congress’s judgment that “[f]orty years” of Section 5 in the covered jurisdictions had been “an insufficient amount of time to address the century during which racial minorities were denied the full rights of citizenship.” H.R. Rep. No. 109-478, at 56; VRARAA § 2(b)(7), (9). Against a voluminous record of pervasive discrimination and a tragic history of backsliding and retrenchment, Congress made the quintessentially legislative judgment that extending Section 5 for an additional 25 years was necessary.

### III. DEVELOPMENTS SINCE 2006 CONFIRM THE REASONABLENESS OF CONGRESS’S JUDGMENT THAT THERE WAS A CONTINUING NEED FOR SECTION 5 IN THE COVERED JURISDICTIONS

Congress reauthorized Section 5 in 2006 based on a robust record of discrimination in the covered jurisdictions. Its conclusion that the work of this monumental civil rights legislation was not done rested on both historical facts and predictive judgments pointing to the continuing need for Section 5. That record is more than sufficient to establish that Congress appropriately exercised its broad authority to enforce the Reconstruction Amendments.

Developments since 2006, however, vindicate Congress’s judgment “that conditions continue to warrant preclearance under the Act.” *Nw. Austin*, 557 U.S. at 203. In particular, post-enactment evidence, which this Court may

properly consider, demonstrates that “[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions,” *Strickland*, 556 U.S. at 25, and that Section 5 continues to be critical to achieving that goal.

#### A. The Court May Consider Post-Enactment Evidence

The court of appeals correctly held that “post-enactment” evidence is relevant to whether Congress properly exercised its authority under the Reconstruction Amendments in reauthorizing the VRA. Pet. App. 54a. In *Lane*, for example, this Court concluded that Title II of the Americans with Disabilities Act was a valid exercise of Congress’s enforcement power under the Fourteenth Amendment—a determination the Court made in part based on post-enactment evidence of state laws reflecting unequal treatment in the administration of state services and programs. 541 U.S. at 524-525 & nn.6-8, 11, 13-14. Indeed, as the panel below noted, this Court relied in *Lane* on “articles and cases published ten or more years after the Americans with Disabilities Act was enacted.” Pet. App. 54a; *see Hibbs*, 538 U.S. at 733-734 & nn.6-9 (citing discriminatory state laws from 1997-2003 in rejecting constitutional challenge to FMLA, enacted in 1993); *see also Gonzalez v. Raich*, 545 U.S. 1, 21 n.31 (2005) (considering post-enactment evidence in reviewing Congress’s exercise of its authority under the Commerce Clause).

Consideration of such post-enactment evidence is especially relevant here with respect to assessing the reasonableness of Congress’s predictive judgments: “[S]ubsequent events have borne [them] out.” *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1478 n.29 (D.C. Cir. 1984) (Ginsburg, R.B., J.) (finding that “[s]ubsequent events have borne out a number of the [agency’s] predictions” in assessing the reasonableness of challenged agency decision).

## B. Post-Enactment Attorney General Objections Confirm The Continuing Need For Section 5

Attorney General objections since the 2006 reauthorization strongly support Congress's judgment that Section 5 remains necessary to ensure full and equal minority voting rights. *See City of Rome*, 446 U.S. at 181 (recognizing probative value of such objections); Pet. App. 206a (same). By amici's count, since 2006, covered jurisdictions have proposed 42 voting changes that would have had the effect or purpose of discriminating against minority voters. Of the proposed changes, the Attorney General blocked 37 and the District Court for the District of Columbia prevented 5 from taking effect. Of the 37 changes blocked by the DOJ, 14 reflected evidence of a discriminatory purpose, as did 2 of the 5 changes blocked by the district court.<sup>8</sup>

Although the absolute number of Attorney General objections is itself strong evidence of continuing need for a prophylactic remedy, amici will discuss two objections—pertaining to photo ID laws in Texas and South Carolina—

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<sup>8</sup> This analysis is based on reported Attorney General objections since 2006, *see* [http://www.justice.gov/crt/about/vot/sec\\_5/obj\\_activ.php](http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php), and follows the methodology of an academic study of Section 5 objection letters by a historian of the Civil Rights Division, which was considered by Congress. *See Preclearance Standards* 126-130, 180 tbl. 2; *see also* Peyton McCrary *et. al.*, *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 Mich. J. Race & L. 275 (2006). Objections were coded as involving discriminatory purpose where “the letter cited at least some specific evidence of the sort set forth by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Corporation*.” *Preclearance Standards* 129. Those factors include the impact on minority groups, the historical background of the action, the sequence of events leading up to the action or decision, the legislative or administrative history regarding the action, departures from normal procedures, and evidence that the decision-maker ignored factors it had otherwise considered important or controlling in similar decisions. *See Arlington Heights*, 429 U.S. 252, 265-266 (1977).

that illustrate different ways in which Section 5 remains vital to ensuring that minority voters have free and equal access to the polls. These examples also highlight that Section 5 continues to block both second-generation barriers, which affirmatively undermine the effectiveness of minority votes, and laws that block minority ballot access.

We begin with Texas. In 2011, Texas passed one of the “most stringent” voter ID laws in the nation. *Texas v. Holder*, -- F. Supp. 2d --, 2012 WL 3743676, at \*33 (D.D.C. Aug. 30, 2012). The law would have required all voters to have one of five forms of photo ID, and barred the use of non-photographic IDs or voter registration cards (permissible under preexisting Texas law). *See id.* at \*1. After carefully studying the law and calling for additional information from the State, the Attorney General denied preclearance. *See* Objection 2011-2775.<sup>9</sup>

Texas, anticipating this denial, sought judicial preclearance before the United States District Court for the District of Columbia. After an accelerated week-long trial, the three-judge court declined preclearance of the Texas law. The court concluded that the law, if implemented, “would in fact have a retrogressive effect on Hispanic and African American voters.” *Id.* at \*26. That finding rested on “three basic facts: (1) a substantial subgroup of Texas voters, many of whom are African American or Hispanic, lack photo ID; (2) the burdens associated with obtaining ID will weigh most

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<sup>9</sup> The Attorney General began his analysis with a recognition of “the state’s legitimate interest in preventing voter fraud” under *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). *See* Objection 2011-2775, at 2. But he concluded that Texas failed to show the law would not have “the effect of denying or abridging the right to vote on account of race.” *Id.* at 1-2. In particular, he found that “a Hispanic registered voter is at least 46.5 percent, and potentially 120.0 percent, more likely than a non-Hispanic registered voter to lack [the required] identification.” *Id.* at 3.

heavily on the poor; and (3) racial minorities in Texas are disproportionately likely to live in poverty.” *Id.* The court concluded that “many Hispanics and African Americans who voted in the last election will, because of the burdens imposed by [the new law], likely be unable to vote in the next election.” *Id.* at \*29.

Although neither the Attorney General nor the district court needed to decide whether the law was enacted with a discriminatory purpose—because the discriminatory effect was palpable, *see* Objection 2011-2775, at 2; 2012 WL 3743676 at \*32—the example nonetheless underscores that Section 5 remains vital to preventing changes in voting laws that have the direct and substantial effect of suppressing minority turnout. It also highlights the substantial risk of backsliding absent Section 5.<sup>10</sup>

The South Carolina case illustrates an equally essential attribute of continued Section 5 enforcement. In that case, the Attorney General objected to a South Carolina law imposing new photo ID requirements, noting “the state’s data demonstrate that non-white voters are both significantly burdened by [the photo ID requirement] in absolute terms, and also disproportionately unlikely to possess the most common types of photo identification among the forms of identification that would be necessary for in-person voting under the proposed law.” *Id.* at 3.

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<sup>10</sup> Had the court reached the purpose prong of Section 5, there was ample evidence demonstrating the law was enacted with discriminatory intent. In addition to the “strict, unforgiving burdens” the law would impose on minorities, the court stated that the legislature “ignor[ed] warnings that [the law] would disenfranchise minorities and the poor,” and tabled or defeated amendments to alleviate these burdens. 2012 WL 3743676, at \*33. Moreover, DOJ and intervenors presented substantial evidence of discriminatory intent. *See* DOJ’s Proposed Findings of Fact at 24-40, 58-71, *Texas v. Holder*, No. 12-cv-128 (D.D.C. June 25, 2012) [Dkt. No. 223]; Def.-Intervenors’ Proposed Findings of Fact at 28-40, *Texas v. Holder*, No. 12-cv-128 (D.D.C. June 27, 2012) [Dkt. No. 241].

The South Carolina voter ID law was later precleared by the District Court for the District of Columbia, but only because South Carolina officials offered an interpretation of the law—in direct response to scrutiny of the law in preclearance process—that significantly minimized the burden on minority voters. *See South Carolina v. United States*, 2012 WL 4814094 (D.D.C. Oct. 10, 2012). The court explained that, “[a]t first blush, one might have thought South Carolina had enacted a very strict photo ID law.” *Id.* at \*4. However, the court concluded that the law “contains a significant reasonable impediment provision that allows registered voters with non-photo voter registration cards to vote without photo IDs,” so long as they take minor administrative steps at the polling place. *See id.* at \*5 (the law “will deny no voters the ability to vote and have their votes counted”). The court made clear that, when enacted, the scope of this exemption was ambiguous, but that “[a]s th[e] [Section 5] litigation unfolded,” *id.* at \*4, South Carolina advocated an expansive reading of the provisions. *Id.* That “extremely broad interpretation” was “central to [the court’s] resolution of the case.” *Id.* at \*6.

Although the South Carolina law was eventually precleared, the example evidences that the Section 5 process can work to bring about interpretations of voting laws that protect the interests of covered jurisdictions while at the same time avoiding interpretations that impose a substantial retrogressive effect on minority voters. Absent Section 5, it is far from clear the State would have liberally interpreted the exemption to safeguard the interests of minority voters.<sup>11</sup>

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<sup>11</sup> Since reauthorization, Congress has continued to scrutinize recently enacted barriers to ballot access, particularly as they relate to the disenfranchisement of voters who are members of racial and language minority groups. *See, e.g., State Voting Laws: Barriers to the Ballot?*: Hearing Before the Subcomm. On the Constitution of the S. Comm. On the Judiciary, 111th Cong. (2011); *Voting Wrongs: Oversight of the Justice Department’s Voting Rights Enforcement*: Hearing Before the Sub-

### C. Post-2006 Litigation Over Texas Redistricting Underscores The Ongoing Importance Of The Section 5 Preclearance Process

The Texas redistricting litigation, although ongoing, bears out Congress's predictive judgment about the ongoing threat of intentional voting discrimination in covered jurisdictions, as well the central role Section 5 preclearance plays in guarding against such unconstitutional burdens on minority voting rights.

In 2011, Texas sought judicial preclearance of a redistricting plan enacted in the wake of the 2010 census for the U.S. House of Representatives, the Texas House of Representatives, and the Texas Senate. *See Texas v. United States*, -- F. Supp. 2d --, 2012 WL 3671924, at \*1 (D.D.C. Aug. 28, 2012) *petition noting probable jurisdiction filed* -- U.S.L.W. -- (U.S. Oct. 19, 2012) (No. 12-496). Following an eight-day trial and after review of a “voluminous” record, the three-judge district court, in an opinion by Judge Griffith, unanimously denied preclearance for all three redistricting plans. *Id.* at \*2. Importantly, the court detailed substantial circumstantial evidence of intentional race-based discrimination with respect to each of the plans.<sup>12</sup>

The most damning evidence of intentional discrimination, however, was with respect to U.S. congressional districts. On that score, the court made specific findings of

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comm. On the Constitution of the H. Comm. On the Judiciary, 112th Cong. (2012).

<sup>12</sup> *See id.* at \*23-\*26 (evidence of intentional cracking—i.e., spreading out minority voters among many districts in order to deny them a voting bloc anywhere—in the State Senate plan), at \*36-\*37 (not reaching intent issue with respect to State House plan, but detailing “record evidence that causes concern,” including a pattern of swapping precincts with high Hispanic turnout for those with low turnout, suggesting “a deliberate, race-conscious method to manipulate not simply the Democratic vote, but more specifically the *Hispanic* vote”).

“discriminatory purpose.” 2012 WL 3671924, at \*18. The court, for example, credited evidence that substantial “surgery” was performed on each of the state’s three districts where blacks had an ability to elect a candidate of their choice even though the districts were already of ideal size. *Id.* at \*19. The court cited “unchallenged evidence” that the districts represented by the only three black members of Texas’s congressional delegation had both their key economic engines (e.g., convention centers, sports arenas, and universities) and the district offices of the representatives moved into other districts. *Id.* at \*19-\*20. Map-drawers also removed the district office and economic engines from a Hispanic ability district. *Id.* at \*19.

“No such surgery,” however, was performed on the districts of Anglo incumbents. *Id.* at \*20. “In fact, *every* Anglo member of Congress retained his or her district office.” The court concluded that these changes, even apart from the other *Arlington Heights* factors, were no mere coincidence, but reflected a pattern “unexplainable on grounds other than race.” *Id.* (quoting *Arlington Heights*, 429 U.S. at 266); *see id.* at \*21 (making findings with respect to other *Arlington Heights* factors). The court explained that “the totality of evidence” demonstrated the plan “was motivated, at least in part, by discriminatory intent.” *Id.* at \*21.<sup>13</sup>

The Texas redistricting litigation thus demonstrates that, despite the gains effected by the VRA, Congress was prescient in its judgment that “racial and language minorities remain politically vulnerable, warranting the continued protection” of Section 5. VRARAA § 2(b)(3); *see LULAC v. Perry*, 548 U.S. 399, 439-440 (2006) (“the ‘political, social, and economic legacy of past discrimination’ for Latinos in Texas

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<sup>13</sup> The court also determined that the Texas State House Plan had a retrogressive effect because it dismantled the coalition district of prominent Asian-American legislator Hubert Vo. *See Texas*, 2012 WL 3671924, at \*31-\*34.

may well ‘hinder their ability to participate effectively in the political process’” (citations omitted)).

D. Post-2006 Evidence Confirms That The Bailout Mechanism Continues To Advance The Requirement Of Proportionality

As shown in Part II.B, Congress’s decision to reauthorize Section 5 in the covered jurisdictions rested in part on its judgment that the bailout mechanism would continue to ensure that the Section 5 remedy applied only where it is needed. Congress’s judgment has proven well-founded, particularly in the wake of this Court’s broad interpretation of the scope of the bailout provision in *Northwest Austin*, 557 U.S. at 211.

Bailout has been granted in 27 cases since VRA reauthorization in 2006, with many of the bailout cases covering multiple jurisdictions. *See* [http://www.justice.gov/crt/about/vot/misc/sec\\_4.php](http://www.justice.gov/crt/about/vot/misc/sec_4.php). And it has occurred in 20 cases in the relatively short time since this Court’s decision in *Northwest Austin*. *See id.* As the Solicitor General has noted, this Court’s “expansion” of the bailout provision “has already made a material difference in the rate at which non-discriminating jurisdictions are opting out of Section 5.” U.S. BIO 24; *see* Pet. App. 62a (noting that, as of May 2012, “136 jurisdictions and subjurisdictions have bailed out, including 30 counties, 79 towns and cities, 21 school boards, and 6 utility or sanitary districts”).<sup>14</sup> Moreover, as the court of appeals found below, the Attorney General has a number of active bailout investigations pending, covering 100 jurisdictions and subjurisdictions in a number of States. Pet. App.

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<sup>14</sup> Shelby County, of course, is unable to seek bailout because it “held several special elections under a law for which it failed to seek pre-clearance and because the Attorney General had recently objected to annexations and a redistricting plan proposed by a city within Shelby County.” Pet. App. 11a.

63a. The number of bailouts, their increasing frequency, and the pending investigations all reveal the error in petitioners’ pronouncement (Br. 54) that bailout matters “only at the margin.” Instead, the post-2006 record establishes that bailout is functioning precisely as Congress expected: as an important statutory safeguard ensuring Section 5 is targeted where, and only where, it is needed. *See* H.R. Rep. No. 109-478, at 25 (“covered status has been and continues to be within the control of the jurisdiction”).<sup>15</sup>

#### IV. CONGRESS PROPERLY DETERMINED THAT SECTION 2 ALONE IS AN “INADEQUATE REMEDY”

In reauthorizing Section 5 in 2006, Congress found that, without preclearance in the covered jurisdictions, minority voters would be left only with the “inadequate remedy” of Section 2. H.R. Rep. No. 109-478, at 57. Once again, Congress’s assessment—one that this Court has consistently credited, *see Boerne*, 521 U.S. at 526; *South Carolina*, 383 U.S. at 313-314—was well-founded. In particular, the record amply supported Congress’s finding that Section 2 is an “ineffective” substitute for preclearance, H.R. Rep. No. 109-478, at 57, because case-by-case enforcement shifts the burden to the victim, permits the discriminatory voting change to go into effect, and is expensive and time consuming. *See Understanding the Benefits and Costs of Section 5 Preclearance, Hearing Before the S. Committee on the Judiciary*, 109th Congress 80 (2006).

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<sup>15</sup> Petitioner discounts bailout (Br. 54) because “only a tiny percentage of ... covered jurisdictions have bailed out of coverage.” But many jurisdictions view preclearance positively, and have no desire to bail out. *See Reauthorizing the Voting Rights Act’s Temporary Provisions, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 313-314 (2006). Indeed, as discussed *supra* p. X, every jurisdiction that has sought bailout has succeeded.

*First*, Congress appropriately declined to “reverse the burden of proof” in covered jurisdictions by forcing minority voters to rely on Section 2 litigation. H.R. Rep. No. 109-478, at 66. Rather than shift the burden of “time and inertia” onto minority voters, *South Carolina*, 383 U.S. at 328, Congress decided that the burden should rest with jurisdictions with an established historical record of racial discrimination in voting.

The record amassed by Congress supported that judgment. In particular, Congress learned that mounting Section 2 litigation is particularly troublesome for voters in local and rural communities, who often experience discrimination but lack access to the resources and expertise necessary to pursue successful Section 2 suits. *See History Scope & Purpose* 79, 84; *Modern Enforcement of the Voting Rights Act, Hearing Before the S. Committee on the Judiciary*, 109th Congress 96 (2006) (without Section 5, “discriminatory voting changes ... will not be adequately or evenly addressed by private litigation under Section 2”); Pet. App. 45a-46a; Pitts, *Let’s Not Call the Whole Thing Off Just Yet*, 84 Neb. L. Rev. 605, 612-613, 616 (2005). Congress sensibly concluded that continuing to place the burden on covered jurisdictions, where it is most efficiently borne—particularly given the pervasiveness of discrimination Congress documented—would enable “the Federal Government and court[s] to stay one step ahead of ... jurisdictions that have a documented history of denying minorities the protections guaranteed by the Constitution,” H.R. Rep. No. 109-478, at 65.

*Second*, Congress reasonably determined that Section 2 lacked the “vital prophylactic” effect essential in covered jurisdictions. H.R. Rep. No. 109-478, at 21. Unlike Section 5 measures, Section 2 suits are typically brought only after the voting change has gone into effect. *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 59 (1980) (challenged method of election “enacted in 1911”). Specifically, Congress learned that it may take several election cycles before enough evi-

dence is available to mount a successful Section 2 challenge, and even then, Section 2 suits can take years to litigate, during which time the challenged practice remains in place and incumbents may reap the rewards of a discriminatory scheme. *See History, Scope, & Purpose* 92; *id.* 101 (“2 to 5 years” to litigate a Section 2 suit a “rough average”); *Reauthorizing the Voting Rights Act’s Temporary Provisions, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 120 (2006) (“several years ... exclusive of any appeals”). This Court is familiar with this concern: When the Court struck down Texas’s 2003 congressional redistricting plan as “bear[ing] the mark of discrimination” against Latino voters in violation of Section 2, *LULAC v. Perry*, 548 U.S. 399, 440 (2006), the 2004 congressional elections had already taken place.<sup>16</sup>

*Finally*, Congress reasonably concluded that Section 2 litigation imposes a substantial financial burden on minority voters. *See History, Scope, & Purpose* 92, 97. Those burdens include not only attorney’s fees and other routine litiga-

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<sup>16</sup> Plaintiffs in *LULAC* applied to this Court for a stay, which was denied. *See Jackson v. Perry*, No. 03A581, 124 S. Ct. 1143 (Jan. 16, 2004). *LULAC* thus illustrates why the possibility of injunctive relief is a “heavy burden ... insufficient to alleviate [Congress’s] concerns about the inadequacy of section 2 actions.” Pet. App. 47a; *see, e.g., Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (“general equitable principles” may counsel against injunctive relief where an “election is imminent and a State’s election machinery is already in progress”); *Favors v. Cuomo*, No. 11-cv-5632, 2012 WL 1802073, at \*9-10 (E.D.N.Y. May 16, 2012) (denying preliminary injunction in part for failure to establish likelihood of success because Section 2 claims are “factually and legally complex” and “typically require substantial expert testimony and analysis”). For the contrary position, petitioner and its amici rely on Judge Williams’ dissent, which in turn relies on *Perry v. Perez*, 132 S. Ct. 934, 942 (2012). *See* Pet. App. 78a. But *Perry* did not suggest preliminary relief for Section 2 plaintiffs was “standard.” *Id.* Rather, it addressed the proper parameters of a plan drawn by the district court to replace a state-drawn plan challenged under Section 2. *See Perry*, 132 S. Ct. at 942.

tion costs, but also fees for experts, such as demographers, statisticians, and political scientists. *Id.* at 97; *see An Introduction to the Expiring Provisions of the Voting Rights Act, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 141 (2006). Indeed, “much of the burden associated with either proving or defending a Section 2 vote dilution claim is established by information that only an expert can prepare,” H.R. Rep. No. 109-478, at 64.<sup>17</sup> Congress learned, moreover, that voting cases rank near the top of all civil cases in complexity, *Benefits & Costs* 20, 80, and that the cost of litigation routinely approaches “millions of dollars,” *Impact & Effectiveness* 42. *See also Benefits & Costs* 20 (Section 2 suit “took over 3 years” and cost “\$2 million”); *Continued Need* 175-176. Section 5, by contrast, appropriately relieves minority voters of the burden of bankrolling large-scale litigation while placing on covered jurisdictions the comparatively small financial burden associated with administrative preclearance. *See History Scope & Purpose* 79.

Based on these findings, Congress concluded that if Section 2 were the sole remedy in the covered jurisdictions, “many discriminatory voting changes [would] go unchecked.” *Temporary Provisions* 120; H.R. Rep. No. 109-478 at 57 (Section 2 “ineffective ... in light of the increased activity under Sections 5 and 8 over the last 25 years”). Congress reasoned that, absent Section 5, even more discriminatory voting measures would be enacted in covered jurisdictions, but that there are insufficient resources and “not

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<sup>17</sup> In 2006, Congress amended the VRA to include “expert” fees in the category of fees and expenses that can be awarded to prevailing plaintiffs. *See VRARAA* § 6, amending 42 U.S.C. §1973(l)(e). However, “prevailing plaintiffs typically do not recover all of their costs in voting cases, and even the addition of expert witness fees [to §1973(l)(e)] will not change that.” *Temporary Provisions* 121 (response of Down Wright, General Counsel, N.C. Board of Elections); *see History Scope & Purpose* 92.

enough lawyers who specialize in this area to carry the load,” of pursuing private challenges under Section 2, *Modern Enforcement* 149. Given the magnitude and persistence of discrimination in covered jurisdictions, Congress acted reasonably in concluding that case-by-case litigation in the covered jurisdictions—slow, costly, and lacking section 5’s prophylactic effect—“would be ineffective to protect the rights of minority voters.” H.R. Rep. No. 109–478, at 57.

In short, Congress’s decision that “Section 5 ... continue[s] to be a shield that prevents backsliding from the gains previously won,” H.R. Rep. No. 109–478, at 53, is reasonable and rests on substantial evidence, *see Turner*, 520 U.S. at 195. This Court should decline petitioner’s invitation to second-guess that judgment.

#### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2013



APPENDIX A  
LISTING OF AMICUS CURIAE

Congressional Black Caucus (CBC)

Karen Bass  
Joyce Beatty  
Sanford D. Bishop, Jr.  
Corrine Brown  
G.K. Butterfield  
André Carson  
Donna M. Christensen  
Yvette Clarke  
William Lacy Clay, Jr.  
Emanuel Cleaver II  
James E. Clyburn  
John Conyers, Jr. \*  
Elijah E. Cummings  
Danny K. Davis  
Donna Edwards  
Keith Ellison  
Chaka Fattah  
Marcia L. Fudge \*  
Al Green \*  
Alcee L. Hastings  
Steven Horsford  
Sheila Jackson Lee  
Hakeem Jeffries  
Eddie Bernice Johnson  
Hank Johnson  
Barbara Lee \*  
John Lewis  
Gregory W. Meeks  
Gwendolynne Moore  
Eleanor Holmes Norton

Donald M. Payne Jr.  
Charles B. Rangel \*  
Cedric Richmond  
Bobby L. Rush  
David Scott  
Robert C. Scott \*  
Terri Sewell  
Bennie Thompson  
Marc Veasey  
Maxine Waters  
Melvin L. Watt  
Frederica Wilson

Congressional Hispanic Caucus (CHC)

Xavier Becerra \*  
Tony Cardenas  
Joaquin Castro  
Jim Costa  
Henry Cuellar  
Pete Gallego  
Joe Garcia  
Raúl Grijalva \*  
Luis Gutierrez  
Rubén Hinojosa  
Ben Ray Luján  
Michelle Luján Grisham  
Robert Menendez  
Grace Napolitano \*  
Gloria Negrete McLeod  
Ed Pastor  
Pedro Pierluisi  
Lucille Roybal-Allard \*  
Raul Ruiz  
Gregorio “Kilili” Sablan \*  
Linda Sánchez \*  
Loretta Sanchez \*

José Serrano  
Albio Sires  
Juan Vargas  
Filemon Vela  
Nydia Velázquez

Congressional Asian Pacific American Caucus  
(CAPAC)

Ami Bera  
Madeleine Bordallo  
Judy Chu  
Tammy Duckworth  
Eni F. H. Faleomavaega  
Tulsi Gabbard  
Colleen Hanabusa  
Mike Honda  
Doris O. Matsui  
Grace Meng  
Mark Takano  
Gerald E. Connolly  
Joseph Crowley  
Zoe Lofgren  
Betty McCollum  
Jerry McNerney  
Jan Schakowsky  
Brad Sherman  
Jackie Speier  
Susan Davis  
Janice Hahn  
Carolyn Maloney  
Adam Schiff  
Adam Smith  
Chris Van Hollen

\*Also a member of CAPAC