

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 L. FUDGE,  
MEMBER OF CONGRESS AND CHAIR OF THE  
CONGRESSIONAL BLACK CAUCUS, RUBÉN  
HINOJOSA, MEMBER OF CONGRESS AND CHAIR  
OF THE CONGRESSIONAL HISPANIC CAUCUS, AND  
JUDY CHU, MEMBER OF CONGRESS AND CHAIR OF  
THE CONGRESSIONAL ASIAN PACIFIC AMERICAN  
CAUCUS, ET AL., IN SUPPORT OF RESPONDENTS**

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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 (CBC), the Congressional Hispanic Caucus (CHC), or the Congressional Asian Pacific American Caucus (CAPAC).<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).

1. Each of the three caucuses was established to provide representation and constituency services for communities that have experienced racial discrimination and political exclusion firsthand. The CBC was formed more than forty years ago to promote racial equality in the design and content of domestic and international policies, 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 is comprised of 42 Members of Congress.

The CHC was formed in 1976 with the mission of voicing and advancing, through the legislative process, issues affecting Hispanic Americans in the United States and the insular areas. The CHC actively addresses national issues that impact the Hispanic com-

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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 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 amici is attached as an addendum to this brief.

munity and serves as a forum for Hispanic Members of Congress to coalesce around a collective legislative agenda. Today, the CHC is comprised of 27 Members of Congress.

The 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 is comprised of 38 Members of Congress.

2. Amici—many of whom voted in favor of reauthorizing Section 5 of the VRA in 2006—write to offer their perspective on why this Court should affirm the constitutionality of one of the most important pieces of civil rights legislation in the nation's history. Since its enactment in 1965, the Section 5 preclearance mechanism of the VRA, 42 U.S.C. §§ 1973 *et seq.*, has prevented state and local jurisdictions from implementing thousands of discriminatory voting procedures and practices. Congress's reauthorization of that provision in 2006 is a landmark accomplishment that serves the fundamental purpose of guaranteeing 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—among 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, César E. Chávez, Barba-

ra 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), *as amended by* Pub. L. No. 110-258, 122 Stat. 2428 (2008). 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 the VRA has led to measurable progress since 1965 in combatting racial discrimination in voting. The increasing diversity of Congress—including amici themselves—is evidence of the VRA’s effect. 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 ensuring that Congress’s considered judgment with respect to the necessity of Section 5 is implemented. Amici urge this

Court to uphold the reauthorization of Section 5 under the existing coverage scope of Section 4(b) as a proper exercise of congressional power under the enforcement provisions of the Fourteenth and Fifteenth Amendments. *See* U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2.

### 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 ensur[ing] 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(a). And on four occasions, this Court has upheld the constitutionality of the political branches’ informed judgment that the VRA and its preclearance requirement are necessary to safeguard that right. *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).

In 2006, Congress again reauthorized the VRA, exercising the broad power granted to it by the Reconstruction Amendments. Just as with prior reauthorizations, Congress acted in 2006 on the basis of a “sizable record.” *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009). Both courts below held that the record Congress compiled sufficiently demonstrated a continuing need for Section 5 that justified the continuing burden on covered jurisdictions. *See* Pet. App. 48a, 269a-270a.

The decisions below are correct. The massive legislative record includes 21 hearings before the House and

Senate Judiciary Committees; the testimony of more than 90 witnesses—including state and federal officials, litigators, and scholars—both for and against reauthorization; and 15,000 pages of supporting materials. That 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, 10 (2006). Congress found substantial evidence of voting discrimination 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 volume 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 only where it is needed.

Developments since 2006 have proven that Congress’s judgments were well-founded. The number of Section 5 objections since the reauthorization of the VRA, by itself, is powerful evidence of the continuing need for Section 5 to deter core violations of the Fourteenth and Fifteenth Amendments in the covered jurisdictions. Indeed, Section 5 recently blocked a burdensome 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 reinterpret a photo ID law to ameliorate its discriminatory effect. Recent litigation involving Texas redistricting further validates Congress’s concern that intentional racial discrimination in voting continues to pose a concrete threat to the rights of minority voters. Moreover, the post-2006 record shows that Congress rightly deter-

mined that the VRA’s bailout and bail-in mechanisms would ensure that Section 5 remains geographically tailored.

Finally, Congress’s decision in 2006 that Section 2 remains an inadequate remedy in covered jurisdictions—a fact-based, predictive judgment that deserves special judicial deference—was well-founded. In reaching its conclusion, Congress credited evidence that Section 2 claims are ineffective substitutes for Section 5 because they shift the burden of proof to minority voters, occur after the fact, and require complex litigation that is costly and time-consuming. That, together with the magnitude and persistence of discrimination in covered jurisdictions, provided convincing support for Congress’s judgment 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. *Rostker 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 *Northwest Austin*, 557 U.S. at 204-205.

In reviewing any legislation, this Court defers to Congress’s fact-finding, and it “accord[s] substantial



deference” to Congress’s “predictive judgments.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (plurality opinion). That deference is accorded not simply because Congress is a co-equal branch of government, 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 attribute[s]” of Congress as a fact-finding body). Therefore, 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 Broad.*, 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 reweigh the evidence *de novo*, or to replace Congress’ factual predictions” with its own. *Id.*

In the context of the VRA, the necessity of deference to Congress’s judgments 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 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.

Second, in reauthorizing Section 5, Congress exercised the unique constitutional authority textually committed to it by the Reconstruction Amendments. The Amendments’ enforcement provisions embody “‘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); *Northwest Austin*, 557 U.S. at 205. Congress is accordingly “entitled to much deference” in “determin[ing] whether and what legislation is needed to secure th[ose] guarantees.” *City of Boerne*, 521 U.S. at 536 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)). Indeed, in reauthorizing the VRA, Congress was acting within the heartland of the Reconstruction Amendments: The VRA combats 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 Tennessee v. Lane*, 541 U.S. 509, 561-562 (2004) (Scalia, J., dissenting). Congress’s considered judgment in favor of reauthorizing Section 5 is therefore entitled to great respect.

## II. IN 2006, CONGRESS MADE A CONSIDERED AND WELL-SUPPORTED JUDGMENT THAT SECTION 5 REMAINS NECESSARY TO PROTECT MINORITY VOTING RIGHTS

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; *see id.* at 11-12. This Court in each instance approved the sufficiency of those records—both directly in *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 expansive record before Congress in 2006 made clear that our nation’s struggle to overcome a century of state-sanctioned vot-

ing discrimination in the covered jurisdictions was not yet complete and thus that there remained a “current need[]” for Section 5, *Northwest 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 against a constitutional challenge, 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 of these categories, and in several others, Congress confronted probative, unassailable evidence of a continuing need for Section 5.

#### **1. Turnout and registration**

As it had in prior reauthorizations of the VRA, Congress found that, despite progress, “[s]ignificant disparit[ies] persisted ... in at least several of the covered jurisdictions” with respect to registration and turnout. *City of Rome*, 446 U.S. at 180. Congress learned, for example, that in Texas in 2004 white voter registration exceeded Hispanic registration by 20 percentage points. S. Rep. No. 109-295, at 11. In Virginia, white voter registration exceeded black voter registra-

tion by 11 percentage points, and white turnout exceeded black turnout by 13 percentage points. *Id.*

In fact, these disparities were even more pronounced than Congress realized. The figures before Congress included Hispanics in the registration and turnout rates for whites, “reducing the true disparity between black and white voter registration and turnout (as well as [masking] 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. *Id.* 201a; *see id.* 200a-203a.

Congress also reviewed testimony and other evidence demonstrating that “there remains an enormous gap in political participation” for language minority citizens in many of the 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, Congress reasonably concluded that these disparities were comparable to those this Court found sufficient in *City of Rome* when it upheld a past 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

In deciding whether to reauthorize Section 5, 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 181, but it found 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, 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 180-181.

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. *Id.* (quoting 2005 statement from Governor of South Carolina indicating that he “did not expect to see such an election in the foreseeable future”); *see City of Rome*, 446 U.S. at 180 (noting that minority elected officials “held only relatively minor positions, none held statewide office”). 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>3</sup> When confronted with similar ev-

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<sup>3</sup> Congress 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. No. 109-478, at 34. That finding is relevant because, as this Court has recognized, racially polarized voting provides facially neutral voting changes

idence in *City of Rome*, this Court found that an extension of Section 5 was warranted. *See* 446 U.S. at 181.

### 3. Section 5 objections

Finally, in 2006, 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* 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; *Evidence of Continued Need* 177-178 (noting a similar pattern for judicial denials of preclearance). Each fully covered state drew at least two statewide objections, with most fully covered states drawing many more. *See Evidence of Continued Need* 260. Notably, a single objection may encompass more than one voting change, and a single voting change may affect thousands of voters. Between 2000 and 2006, objections interposed by the Attorney General affected some 660,000 minority voters. *The Continuing Need for Section 5 Pre-clearance, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 58 (2006).

Petitioner (Br. 29-30) discounts the significance of Section 5 objections, arguing that “the objection rate has been declining steadily.” But the decline in the rate of objections is “a product of submissions becoming ...

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with their retrogressive force. *See City of Rome*, 446 U.S. at 183-184; *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Congress’s determination that racially polarized voting persists—and was increasing, *see* H.R. Rep. No. 109-295, at 34-35—in the covered jurisdictions thus supported its judgment that minority voters remain “vulnerable” to discriminatory voting schemes, VRARAA § 2(b)(3).

more frequent.” *Continuing Need* 58. In any event, any decline in the “rate” of objections 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, which remain significant and serious.

Of the Attorney General objections interposed between 1980 and 2000, nearly two-thirds related to voting changes enacted with racial animus. See *Voting Rights Act: Section 5 of the Act—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 14-15; Pet. App. 212a-220a (reciting record evidence); *Northwest Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 289-301 (D.D.C. 2008) (same). To recount just a few: Objections prevented the Mayor and Board of Aldermen in Kilmichael, Mississippi from cancelling an election after Census data revealed that African Americans had become a majority in the town, and an unprecedented number of African Americans 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 student participation in the same election, *Evidence of Continued Need* 185-186; 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 Be-*

fore the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 2291-2292, 2528-2530 (2005).

#### 4. Other categories of evidence

In addition to the categories of evidence on which this Court relied 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); see H.R. Rep. No. 109-478, at 52-53. More than 600 successful Section 2 cases were filed in covered jurisdictions between 1982 and 2005, affecting 825 counties. *Evidence of 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*, 39 U. Mich. J.L. Reform 643, 655-656 (2006). And a significant number of successful Section 2 suits involved intentional discrimination. See Pet. App. 232a.

Congress also found “indicia of discrimination” in the ongoing 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.” *Id.* at 45.<sup>4</sup>

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 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

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<sup>4</sup> Notwithstanding petitioner’s effort (Br. 31) to cast observers and the events they witness as mere hypotheticals or conjecture, the record before Congress demonstrated that once dispatched, federal observers witnessed harassment and racial 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 shouldn’t be allowed.” *Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program, Hearing before the Subcomm. on the Constitution of the H. Comm. 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).

their own timetables[] because the chances are good that an objection will result.” *Id.* (quoting National Commission on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work 1982-2005*, at 57 (Feb. 2006)); *see* 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; *Evidence of Continued Need* 124 (“a withdrawal suggests ... officials in the jurisdiction concluded that the change would [occasion 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. H.R. Rep. No. 109-478, at 40; *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 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 took into account the bailout and bail-in mechanisms in ensuring that the VRA would remain appropriately targeted. Although petitioner

suggests (Br. 54) that bailout is a minor provision of the VRA, in 2006 Congress understood things differently.<sup>5</sup>

Under the statutory bailout mechanism, which Congress expanded in 1982, any covered jurisdiction may terminate its Section 5 coverage by demonstrating a 10-year record of nondiscriminatory practices and a current effort to eliminate intimidation and harassment of voters. *See* 42 U.S.C. § 1973b(a). This Court has observed the importance of the bailout procedure to the constitutionality of Section 5. *See City of Boerne*, 521 U.S. at 533 (availability of bailout “reduce[s] the possibility of overbreadth” and helps “ensure Congress’ means are proportionate to [its] ends”).

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. Congress considered testimony from legal scholars, voting rights practitioners, and DOJ officials to this effect. *See, e.g., Voting Rights Act: An Examination of the Scope and Criteria for Coverage under the Special Provisions of the Act, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005). Congress also learned that between August 1984—when the 1982 amendments took effect—and the 2006 reauthorization, 10 jurisdictions successfully bailed out. *Evidence of Continued Need* 2677, 2691. No jurisdiction seeking a bailout was denied one. *Id.* at 2683. Based on this evidence, Congress reasonably concluded that: “(1) covered status is nei-

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<sup>5</sup> By contrast, 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).

ther 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 [by] 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 the pre-clearance requirement upon a finding of a Fourteenth or Fifteenth Amendment violation. *See* 42 U.S.C. § 1973a(c). Congress had before it evidence that this provision, too, 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 Evidence of Continued Need* 154; U.S. Br. App. A.

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In short, the record before Congress in 2006 amply supported 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 an informed judgment that Section 5 reauthorization was “appropriate legislation” to protect the fundamental rights guaranteed by the Reconstruction Amendments.

### III. DEVELOPMENTS SINCE 2006 CONFIRM THE REASONABLENESS OF CONGRESS'S JUDGMENT THAT THERE IS 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. Congress's conclusion—that the work of this monumental civil rights legislation was not done—was compelled by historical facts and reflected reasonable predictive judgments. Indeed, developments since 2006 confirm the wisdom of Congress's determinations 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 remains critical to achieving those goals.

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

The court of appeals correctly held that “post-enactment” evidence may bear on whether Congress properly exercised its authority under the Reconstruction Amendments in reauthorizing Section 5. Pet. App. 54a. In *Lane*, for example, this Court concluded, in part based on post-enactment evidence, that Title II of the Americans with Disabilities Act was a valid exercise of Congress's enforcement power under the Fourteenth Amendment. 541 U.S. at 524-525 & nn.6-8, 11, 13-14. Indeed, as the court of appeals 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 *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 733-734 & nn.6-9 (2003) (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 exercise of Congress’s Commerce Clause authority).

Consideration of post-enactment evidence is especially relevant here in assessing the reasonableness of Congress’s predictive judgments: “Subsequent events have borne [them] out[.]” *Wold Commc’ns, Inc. v. FCC*, 735 F.2d 1465, 1478 n.29 (D.C. Cir. 1984) (Ginsburg, R.B., J.) (considering after-the-fact evidence in assessing challenged agency decision).

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

Objections interposed through administrative and judicial preclearance are, of course, probative evidence of the need for Section 5. *See City of Rome*, 446 U.S. at 181; Pet. App. 206a. And the record of objections since the 2006 reauthorization strongly supports Congress’s judgment that Section 5 remains necessary to protect minority voting rights.

The sheer number of objections is telling. By amici’s count, covered jurisdictions have proposed 42 voting changes since 2006 that have occasioned objections. Of those, the Attorney General blocked 37 and the District Court for the District of Columbia prevented five from taking effect. Fourteen objections reflected evidence of a discriminatory purpose, as did two of the five changes blocked by the district court.<sup>6</sup>

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<sup>6</sup>This analysis is based on reported Attorney General objections since 2006, *see* DOJ, *Section 5 Objection Determinations*, [http://www.justice.gov/crt/about/vot/sec\\_5/obj\\_activ.php](http://www.justice.gov/crt/about/vot/sec_5/obj_activ.php) (last visited Jan. 31, 2013), 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.

Amici offer only a few examples of voting changes blocked by the Attorney General on the basis of purposeful discrimination. Since 2006, Section 5 has prevented the Board of Registrars of Randolph County, Georgia from reassigning (in contravention of two court decisions) a black county official from the majority-black district he had long represented to a majority-white district, where the County could not show that the change did not have the “purpose ... of denying or abridging the right to vote on account of race.” DOJ Objection Letter 2006-3856, at 3 (Sept. 12, 2006). It has blocked a redistricting plan in Galveston County, Texas where, on the day before the final vote on the plan, the county judge and several county commissioners redrew the district of the sole minority commissioner without informing him, resulting in a “loss of the ability of minority voters to elect a candidate of choice.” DOJ Objection Letter 2011-4317/4374, at 3 (Mar. 5, 2012). Section 5 also prevented the implementation of Gonzales County, Texas’s inadequate and retrogressive plan for assigning bilingual poll workers, noting that, in addition to the county’s history of refusing to provide bilingual election materials and turning away bilingual citizens

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*See Preclearance Standards* 126-130, 180 tbl.2; *see also* McCrary et al., *The End of Preclearance As We Knew It*, 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* [429 U.S. 252 (1977)].” *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, 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. at 265-266.

who volunteered as poll workers, “[c]ounty officials have openly expressed hostility toward complying with the [VRA].” DOJ Objection Letter 2009-3078, at 5 (Mar. 12, 2010). And it has blocked a redistricting plan for Clinton, Mississippi that “unnecessarily fragment[ed]” black minority populations and was rushed through to avoid consideration of an alternative plan by the NAACP that would have allowed black voters the ability to elect a candidate of choice. DOJ Objection Letter 2012-3120, at 2 (Dec. 3, 2012).

Although the significant number of Attorney General objections and the intentionally discriminatory nature of many of the blocked changes are compelling evidence of continuing need for a prophylactic remedy, two objections—pertaining to photo ID laws in Texas and South Carolina—warrant further discussion. These cases illustrate Section 5’s central role in preventing and deterring discriminatory electoral changes and highlight that preclearance continues to block not only tactics that undermine the strength of minority votes, but also 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*, 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 state law). *See id.* at \*1. After carefully studying the law and calling for additional information from the State, the Attorney General denied preclearance. *See* DOJ Objection Letter 2011-2775, at 3 (Mar. 12, 2012) (noting 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 this identification” and that the State had provided



“no data” on African-American or Asian registered voters).

Texas also sought judicial preclearance before the District Court for the District of Columbia. After a week-long trial, the three-judge court declined preclearance, concluding that the law, if implemented, “would in fact have a retrogressive effect on Hispanic and African American voters.” *Texas*, 2012 WL 3743676, 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 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* DOJ Objection Letter 2011-2775, at 2-3; *Texas*, 2012 WL 3743676, at \*32—the example nonetheless underscores that Section 5 remains vital to preventing changes in voting laws that suppress minority turnout.<sup>7</sup> It also highlights the substantial risk of backsliding absent Section 5.

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<sup>7</sup> Had the court reached the purpose prong of Section 5, there was ample evidence demonstrating that 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

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 because “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 ... that would be necessary for in-person voting under the proposed law.” DOJ Objection Letter 2011-2495, at 3 (Dec. 23, 2011).

The District Court for the District of Columbia later precleared the law, but only after South Carolina officials offered an interpretation of the law that significantly ameliorated the burden on minority voters. *See South Carolina v. United States*, 2012 WL 4814094 (D.D.C. Oct. 10, 2012). As the litigation unfolded, South Carolina officials expansively construed the law’s “reasonable impediment” provision to “allow[] registered voters with non-photo voter registration cards to vote without photo IDs,” so long as the voters took minor administrative steps at the polling place. *Id.* at \*5. Because that interpretation would “deny *no* voters the ability to vote and have their votes counted,” *id.*, the court was able to determine that the law lacked retrogressive effect, *id.* at \*12. The court took pains to emphasize, however, that the State’s “extremely broad interpretation” was “central to [its] resolution of the

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to alleviate these burdens. *Texas*, 2012 WL 3743676, at \*33. Moreover, DOJ and intervenors presented substantial evidence of discriminatory intent. *See* Attorney General’s Proposed Findings of Fact 24-40, 58-71, Dkt. No. 223, *Texas v. Holder*, No. 12-cv-128 (D.D.C. June 25, 2012); Def.-Intervenors’ Proposed Supplemental Findings of Fact 28-40, Dkt. No. 241, *Texas v. Holder*, No. 12-cv-128 (D.D.C. June 27, 2012).

case,” *id.* at \*6, and cautioned that “[i]f South Carolina were to alter its interpretation of the reasonable impediment provision ... the State would have to obtain pre-clearance ... before applying that new interpretation,” *id.* at \*19.

Although South Carolina’s law was ultimately pre-cleared, the example illustrates the “continuing utility” of Section 5. *South Carolina*, 2012 WL 4814094 at \*21-22 (Bates, J., concurring) (“[O]ne cannot doubt the vital function that Section 5 of the Voting Rights Act has played here.”). Absent the preclearance process, South Carolina almost certainly would have implemented a law with a substantial—and unnecessary—retrogressive effect.

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

The ongoing Texas redistricting litigation also speaks to the wisdom of Congress’s predictive judgment that intentional voting discrimination in covered jurisdictions persists and that Section 5 plays a central role in preventing it.

In 2011, after experiencing a surge in population growth (two-thirds of which occurred among Hispanics), Texas redrew and sought judicial preclearance of its redistricting plans for the U.S. House of Representatives, the Texas House of Representatives, and the Texas Senate. *See Texas v. United States*, 2012 WL 3671924, at \*1, \*17 (D.D.C. Aug. 28, 2012), *jurisdictional statement filed*, No. 12-496 (U.S. Oct. 19, 2012). Following an eight-day trial and after review of a “voluminous” record, the three-judge court, in an opinion by Judge Griffith, unanimously denied preclearance for all three plans. *Id.* at \*2. Importantly, the court detailed

substantial circumstantial evidence of intentional race-based discrimination with respect to each of the plans.<sup>8</sup>

The most damning evidence of intentional discrimination, however, related to the U.S. congressional districts. On that score, the court made specific findings of “discriminatory purpose.” *Texas*, 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 the key economic engines of their districts (e.g., convention centers, sports arenas, and universities) and the representative’s district offices 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. *Texas*, 2012 WL 3671924, at \*20. “In fact, *every* Anglo member of Congress retained his or her district office.” *Id.* The court concluded that these changes, even apart from the other *Arlington Heights* factors, were no mere coincidence

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<sup>8</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); *id.* 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”).

and 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 the evidence” demonstrated that the plan “was motivated, at least in part, by discriminatory intent.” *Id.* at \*21.<sup>9</sup>

The Texas redistricting litigation demonstrates that, despite 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 also LULAC v. Perry*, 548 U.S. 399, 440 (2006) (“the ‘political, social, and economic legacy of past discrimination’ for Latinos in Texas 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 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.

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<sup>9</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.

Bailout has been granted in 27 cases since VRA reauthorization in 2006, with many of the bailout cases covering multiple jurisdictions. *See* DOJ, *Section 4 of the Voting Rights Act*, [http://www.justice.gov/crt/about/vot/misc/sec\\_4.php](http://www.justice.gov/crt/about/vot/misc/sec_4.php) (last visited Jan. 31, 2013). And it has occurred in 20 cases in the relatively short time since this Court’s decision in *Northwest Austin*. *See id.* As the United States has noted, “the rate of successful bailouts has rapidly increased” since this Court “vastly expanded” bailout eligibility. U.S. Br. 54; *see* Pet. App. 62a (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>10</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 several states. Pet. App. 63a. The number of bailouts, their increasing frequency, and the pending investigations all reveal the error in petitioner’s claim (Br. 54) that bailout matters “only at the margin.” To the contrary, the post-2006 record establishes that bailout is functioning precisely as Congress expected: as an important statutory safeguard ensuring Section 5 applies 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>11</sup>

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<sup>10</sup> Petitioner Shelby County, of course, is unable to seek bailout because it “held several special elections under a law for which it failed to seek preclearance and because the Attorney General had recently objected to annexations and a redistricting plan proposed by a city within Shelby County.” Pet. App. 11a.

<sup>11</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

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

In reauthorizing Section 5 in 2006, Congress found that, without preclearance in covered jurisdictions, minority voters would be left only with the “inadequate remedy” of Section 2. H.R. Rep. No. 109-478, at 57. Congress’s assessment—one that this Court has consistently credited, *see City of Boerne*, 521 U.S. at 525-526; *South Carolina*, 383 U.S. at 313-314—was well-supported. In particular, the record before Congress demonstrated 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. Comm. on the Judiciary*, 109th Cong. 80 (2006).

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 historical records of racial discrimination in voting.

The record amassed by Congress supported that judgment. Congress learned that mounting Section 2

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have no desire to bail out. *See Reauthorizing the Voting Rights Act’s Temporary Provisions: Policy Perspectives and Views from the Field, Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 313-314 (2006). Indeed, as discussed *supra* p. 17, every jurisdiction that has sought bailout has succeeded.

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 Section 2 suits. *See History, Scope, and 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 reasonably concluded that continuing to place the burden on covered jurisdictions, where it is most efficiently borne, 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, H.R. Rep. No. 109-478, at 21, essential in covered jurisdictions. Unlike the Section 5 process, 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) (plurality opinion) (challenged method of election “enacted in 1911”). Congress learned that it may take several election cycles before enough evidence is available to mount a successful Section 2 challenge, and, even then, these 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, and 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: Policy Perspectives and Views from*



*the Field, Hearing Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. 121 (2006) (“several years ... exclusive of any appeals”). This Court is familiar with this concern: When the Court struck down part of Texas’s 2003 congressional redistricting plan, *LULAC*, 548 U.S. at 440 (noting that it “[bore] the mark of intentional discrimination”), the 2004 congressional elections had already occurred.<sup>12</sup>

Finally, Congress reasonably concluded that Section 2 litigation imposes a substantial financial burden on minority voters. *See History, Scope, and Purpose* 92, 97. Those burdens include not only attorney’s fees and other routine litigation costs, but also fees for experts necessary in voting litigation, such as demographers, statisticians, and political scientists. *Id.* at 97; *see also An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to*

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<sup>12</sup> Plaintiffs in *LULAC* applied to this Court for a stay, which was denied. *See Jackson v. Perry*, 124 S. Ct. 1143 (2004). *LULAC* thus illustrates why seeking 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*, 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. 77a-78a. But *Perry* did not suggest that preliminary relief for Section 2 plaintiffs was “standard.” *Id.* 77a. 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.

*Reauthorization, Hearing Before the S. 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>13</sup> Congress learned that voting cases rank near the top of all civil cases in complexity, *Understanding the Benefits and Costs of Section 5 Preclearance, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 20, 80 (2006), and that the cost of litigation routinely approaches “millions of dollars,” *To Examine the Impact and Effectiveness of the Voting Rights Act, Hearing before the Subcomm. on the Constitution of the H. Judiciary Comm.*, 109th Cong. 42 (2005); see *Benefits and Costs* 20 (Section 2 suit “took over 3 years” and cost over “\$2 million”); *Evidence of 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, and 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.” *Reauthorizing the Temporary Provisions* 120; H.R. Rep. No. 109-478 at 57 (Section 2 “inef-

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<sup>13</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. § 1973l(e). However, “prevailing plaintiffs typically do not recover all of their costs in voting cases, and even the addition of expert witness fees [to § 1973l(e)] will not change th[at] result.” *Reauthorizing the Temporary Provisions* 121; see also *History, Scope, and Purpose* 92.

fective ... in light of the increased activity under Sections 5 and 8 over the last 25 years”). There are “not enough lawyers who practice in th[is] area to carry the load,” nor are there the necessary financial resources to pursue private challenges under the Act. *Modern Enforcement of the Voting Rights Act, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 149 (2006); cf. Cunningham Resp.-Intervenor Br. 42, 43 (“[no]thing in ... ‘the record to support ... speculation’ that DOJ could [adequately] scale up its Section 2 enforcement,” and noting that DOJ participates in only “a small fraction” of Section 2 suits). Given the magnitude and persistence of discrimination in covered jurisdictions, Congress reasonably determined 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—and that Section 2 standing alone was insufficient to achieve that goal—was reasonable and rested on substantial evidence, *see Turner Broad.*, 512 U.S. at 666. This Court should decline petitioner’s invitation to second-guess that legislative judgment.

**CONCLUSION**

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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