No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC HOLDER, Attorney General of the United States, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF REPS. F. JAMES SENSENBRENNER, JR., JOHN CONYERS, JR., STEVE CHABOT, JERROLD NADLER, MELVIN L. WATT, AND ROBERT C. SCOTT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Members of the House Committee on the Judiciary and were the bipartisan leadership of the Committee and its Subcommittee having jurisdiction over constitutional and federal civil rights matters at the time of the 2006 reauthorization of the Voting Rights Act. They include: Rep. F. James Sensenbrenner, Jr. (R-WI), then Chairman of the Committee; Rep. John Conyers, Jr. (D-MI), then Ranking Member of the Committee; Rep. Steve Chabot (R-OH), then Chairman of the Subcommittee on the Constitution; Rep. Jerrold Nadler (D-NY), then Ranking Member of the Subcommittee; Rep. Melvin Watt (D-NC), then Member of the Subcommittee and Chairman of the Congressional Black Caucus; and Rep. Robert C. Scott (D-VA), then Member of the Subcommittee and Chairman of the Civil Rights Taskforce of the Congressional Asian Pacific American Caucus.

Amici played a major role in the passage of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, and are deeply interested in its continued vitality.

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. Nor did anyone other than counsel fund the preparation or submission of this brief. Letters reflecting the consent of the parties have been filed with the Clerk.

Amici represent a combined experience of over 150 years in Congress. All *amici* were directly and substantively involved in the hearings and the Committee processes that led to the 2006 reauthorization. *Amici* sought to "ensure that all aspects of the right to vote are protected, including the right to cast a meaningful ballot." H.R. REP. NO. 109-478, at 6 (2006) (Committee Statement on the Right to Vote and the Voting Rights Act of 1965).

Amici have an institutional interest in defending Congress's powers under Section 5 of the Fourteenth Amendment, Section 2 of the Fifteenth Amendment, and the Elections Clause of Article I, Section 4, to enact appropriate legislation protecting the right to vote. After conducting extensive hearings, and based on a voluminous record, *amici* concluded that a reauthorization of Section 5 was necessary to fulfill their constitutional responsibilities and to ensure that minority citizens have the "ability to fully participate in the electoral process." H.R. REP. NO. 109-478, *supra*, at 6.

SUMMARY OF ARGUMENT

The Voting Rights Act of 1965 (VRA) represents the first successful response to nearly a century of minority disenfranchisement. Congress enacted the VRA in direct response to evidence of pervasive efforts by southern states to deny blacks the right to vote. It has been the single most effective tool in combating discrimination in voting.

The 2006 reauthorization of Section 5 of the VRA continues the work of guaranteeing minority citizens the right to participate fully in the electoral process. That reauthorization is a model exercise of

Congress's unique ability to legislate in complex areas. The overwhelming, bipartisan decision to reauthorize the VRA, which drew support from covered and non-covered jurisdictions alike, should be upheld by this Court under any standard.

The extensive record before Congress demonstrates the VRA's success in rolling back a century of disenfranchisement. But it also demonstrates the continued need for Section 5 to block covered jurisdictions' implementation of new discriminatory voting rules. Congress responded by tailoring the Act to respect states' independence and to ensure that the VRA imposes no unnecessary burdens.

The sufficiency of the record is reinforced by the subject matter. This Court has recognized that Congress acts at the height of its powers when it legislates to regulate the concerns at which the VRA is aimed: racial discrimination, infringement of fundamental rights, and elections. When Congress exercises its powers at the intersection of these three concerns – as it did here – this Court should defer to Congress's considered judgment.

ARGUMENT

I. The VRA Responds To A Century Of Ineffective Protection For Minority Suffrage.

The Fourteenth and Fifteenth Amendments confer broad powers on Congress to effectuate the rights they provide. Both during Reconstruction and in passing the VRA, Congress enforced those Amendments through legislation combatting the

disenfranchisement and political exclusion of minority citizens.

As history shows, this is not the first occasion on which this Court has faced claims, like those petitioner tries to advance, *see* Petr. Br. 24-33, that times have changed. The success of Reconstruction-era legislation also led to arguments that federal protection was no longer necessary. This Court agreed, setting off a century-long campaign by southern states to disenfranchise minorities and nullify federal efforts to remedy that discrimination. The VRA has provided the only subsequent effective response to voting discrimination. Nonetheless, the work of Section 5 is not yet complete.

1. During Reconstruction, Congress successfully deployed its Fourteenth and Fifteenth Amendment powers to protect minority suffrage. Those Amendments empower Congress to pass legislation to "effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966); *see also infra* Part III (discussing the scope of congressional enforcement powers). In 1870, Congress passed the Enforcement Act, making "it a crime for public officers and private persons to obstruct exercise of the right to vote." *Katzenbach*, 383 U.S. at 310. A year later, Congress expanded the Act to provide for federal supervision of elections. *Id.*

Congress's aggressive enforcement of voting rights produced widespread black suffrage. During the early years of Reconstruction, "about two-thirds of eligible black males cast ballots in presidential and gubernatorial contests." Chandler Davidson, *The*

Voting Rights Act: A Brief History, *in* CONTROVERSIES IN MINORITY VOTING 7, 10 (Bernard Grofman & Chandler Davidson eds., 1992). Racially motivated violence during elections declined dramatically. ALEXANDER KEYSSAR, THE RIGHT TO VOTE 106 (2000).

2. Believing the same rosy assurances petitioner now offers – that there was no reason to believe that discrimination had been "hibernating for two generations," Petr. Br. 39 – this Court responded overoptimistically. Persuaded that black citizens "ha[d] shaken off the inseparable concomitants" of slavery, *The Civil Rights Cases*, 109 U.S. 3, 25 (1883), this Court construed the Enforcement Act to reach only a small subset of the conduct interfering with minority suffrage, *see, e.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Reese*, 92 U.S. 214 (1875); *United States v. Avery*, 80 U.S. 251 (1871). *See generally* CHARLES LANE, THE DAY FREEDOM DIED (2008).

In the wake of these decisions, southern states began to "nullif[y]" the First Reconstruction. 51 CONG. REC. 6555 (1890) (statement of Rep. Jonathan Rowell).[2] States reorganized voting precincts and closed polling places to obstruct black voters. KEYSSAR, *supra*, at 105. They imposed residency requirements, poll taxes, and literacy tests, created complex voter registration systems, and strengthened criminal laws, all with the aim of disenfranchising

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[2] *Quoted in* J. MORGAN KOUSSER, COLORBIND INJUSTICE 24 (1999).

black voters. *Katzenbach*, 383 U.S. at 310-11; KEYSSAR, *supra*, at 111-12. And they redrew congressional district boundaries to minimize minority political power. KOUSSER, *supra*, at 26-31. Contrary to petitioner's view, "so-called 'second generation' tactics like intentional vote dilution are in fact decades-old forms of gamesmanship." Pet. App. 28a.

Black political participation plummeted. In Mississippi, after 1890, less than 9000 of 147,000 voting-age black citizens remained registered to vote. KEYSSAR, *supra*, at 114. In Louisiana, where blacks had once constituted 44% of the electorate, by 1920 they cast less than 1% of the votes. Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1, 2 (1965). In Georgia, as late as 1940, less than 5% of eligible black citizens were registered.

3. Although this Court attempted to defend the right to vote, it was unable to combat "the variety and persistence" of laws disenfranchising minority citizens. *Katzenbach*, 383 U.S. at 311. For instance, although this Court first struck down Texas's white primary in 1927 in *Nixon v. Herndon*, 273 U.S. 536, blacks remained excluded until this Court's decisions decades later in *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953). Similarly, in *Guinn v. United States*, 238 U.S. 347 (1915), this Court struck down Oklahoma's grandfather clause, only to see the state perpetuate the clause's effects until *Lane v. Wilson*, 307 U.S. 268 (1939).

Because the right to vote is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), minority citizens suffered discrimination in other arenas as well. In particular, this Court's inability to protect minority suffrage resulted in a "strengthening of the segregation code[s]." C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 115 (3d ed. 1974). To give one striking example, Chief Justice Warren later suggested that *Brown v. Board of Education* "would have been unnecessary" if the South had been fairly apportioned before 1954. JOHN HART ELY, ON CONSTITUTIONAL GROUND 4 (1996).

4. Recognizing its limited ability to protect minority citizens, this Court directed plaintiffs to seek relief from Congress. In *Giles v. Harris*, 189 U.S. 475 (1903), it instructed a black citizen from Alabama to seek protection not from the courts but from the "legislative and political department of the government of the United States," *id.* at 488. Years later, faced with a malapportionment claim, this Court similarly directed the plaintiffs to "invoke the ample power of Congress." *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion).

5. Congress's initial responses were ineffective. The 1957 and 1960 Civil Rights Acts empowered the Department of Justice (DOJ) to bring suit on behalf of individuals. Christopher, *supra*, at 4, 5. In response, southern states "merely switched to discriminatory devices not covered by the federal decrees." *Katzenbach*, 383 U.S. at 314.

Moreover, "case-by-case adjudication," even with the Government as plaintiff, "proved too ponderous a method to remedy voting discrimination." *City of*

Rome v. United States, 446 U.S. 156, 174 (1980); *see* H.R. REP. NO. 97-227, at 3-4 (1981); S. REP. NO. 97-417, at 5 (1982). Between 1957 and 1963, these suits secured registration for only 6000 black citizens. Christopher, *supra*, at 6.

6. The VRA successfully responded to these problems: Section 5 crafted effective prophylactic administrative and judicial relief. BRIAN K. LANDSBERG, FREE AT LAST TO VOTE 170, 180-82 (2007). Its preclearance requirement ensured that states could not perpetuate disenfranchisement through new techniques. It placed responsibility for identifying changes on jurisdictions and for overseeing the protection of voting rights within the Executive Branch, rather than placing the burden of challenging unfair practices entirely on disenfranchised and disadvantaged citizens.

The VRA's adoption of prophylactic remedies resuscitated effective enforcement of the Reconstruction Amendments. "The Justice Department estimated that in the five years after [the VRA's] passage, almost as many blacks registered [to vote] in Alabama, Mississippi, Georgia, Louisiana, North Carolina and South Carolina as in the entire century before 1965." Davidson, *supra*, at 21.

Moreover, during both the 1982 and 2006 reauthorization processes, Congress concluded that Section 5 continued to play a critical role in preventing minority disenfranchisement. Contrary to petitioner's denial that covered jurisdictions continue to engage in "gamesmanship," Petr. Br. 28, 43, Congress concluded that Section 5 has helped to

deter, detect, and prohibit a wide range of voting laws and procedures that would otherwise have deprived minorities of their voting power. *See infra* pp. 11-22 (discussing the evidence supporting these conclusions).

As this Court reaffirmed, however, "Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes." *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009). Section 5 continues to play a major role in combating discrimination.

II. The Legislative History Of The 2006 Reauthorization Shows That Congress Considered And Responded To Extensive Evidence In Deciding To Reauthorize Section 5.

Perhaps no statute in American history has been the subject of more sustained consideration by Congress than the VRA. *See* 152 CONG. REC. H5143 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner) (the House Judiciary Committee record was "one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27½ years that I have been honored to serve as a Member of this body"). Indeed, Congress "amassed a sizable record." *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 205 (2009); *see* Pet. App. 24a, 47a (Congress "heard analysis and opinions by experts on all sides of the issue" and acted only after "assembling and analyzing an extensive record."); *id.* 266a ("Congress approached its task seriously and with great care." (internal quotation marks omitted)).

This Court has recognized that Congress possesses special expertise in gathering and analyzing the large amounts of information essential to well-informed policy determinations. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) ("When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue."); *see also, e.g., Turner Broad. Sys. v. FCC*, 512 U.S. 622, 665-66 (1994) (same). This expertise stems from Congress's ability to go beyond the facts in individual lawsuits. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 502-03 (1980) (Powell, J., concurring) (Congress's "special attribute as a legislative body lies in its broader mission to investigate and consider *all* facts and opinions that may be relevant to the resolution of an issue" (emphasis added)).

Moreover, particularly when it comes to questions involving the political process, legislation can be informed in valuable ways by Members' own extensive experiences. Members gain knowledge not only through their direct experiences in running for office, but also through wide-ranging contacts with constituents and Executive Branch officials. Finally, geographic diversity among its Members ensures that Congress is able to consider regional differences and state interests when crafting legislation. Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1179 (2001).

All these abilities are evident in Congress's consideration of whether to reauthorize Section 5. Contrary to petitioner's suggestions, the voluminous record compiled by Congress during the 2006 reauthorization fully supports Congress's decision. In addition, the reauthorization process reflects a widespread, bipartisan consensus, supported by affected jurisdictions. House Judiciary Committee Members from covered jurisdictions were active participants in shaping and supporting the 2006 reauthorization.

A. Congress Paid Careful Attention To This Court's Decisions Throughout The Reauthorization Process.

Prior to the 2006 reauthorization, House leadership and staff reviewed this Court's recent decisions regarding the appropriate scope of congressional enforcement powers. *See* H.R. REP. NO. 109-478, at 54-56 (2006). Congress was well aware of the standards articulated in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and its progeny. It understood the need both to develop a complete record before acting and to tailor its response to that record to ensure that its legislation was "congruent and proportional." Testimony from numerous witnesses about this Court's guidance helped inform the House Judiciary Committee in assembling a strong legislative record during the VRA reauthorization.

Congress correctly concluded that the record supporting reauthorization "far exceeds" the records this Court found sufficient in both *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), and *Tennessee v. Lane*, 541 U.S. 509

(2004).[3] H.R. REP. NO. 109-478, *supra*, at 57. In fact, the 2006 record includes exactly the kind of specific evidence of intentional discrimination that the dissenters found missing in those cases. *Hibbs*, 538 U.S. at 745-49 (Kennedy, J., dissenting); *Lane*, 541 U.S. at 541-44 (Rehnquist, C.J., dissenting). Moreover, the 2006 record is comparable in both its thoroughness and the quality of supporting evidence to the legislative records this Court found adequate to sustain earlier versions of the VRA. *See City of Rome v. United States*, 446 U.S. 156 (1980); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

B. The 2006 Reauthorization Rests On An Extensive Record Showing Both The Continuing Need For Section 5 And Its Effectiveness.

The 2006 reauthorization process occurred against the backdrop of Congress's forty years of experience in crafting and reconsidering the VRA. Each time Congress considered the need for Section 5 – in 1965, 1970, 1975, 1982, and 2006 – it developed and carefully studied a massive record before deciding how best to refine the Act.

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[3] The 2006 record was also far more extensive than the record this Court recently found sufficient to support the State of Indiana's decision to adopt a voter identification requirement in *Crawford v. Marion County Board of Elections*, 553 U.S. 181 (2008). There, this Court found the State's interest in enhancing the integrity of the electoral process adequate to uphold the identification requirement where "[t]he record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Id.* at 194 (opinion of Stevens, J., joined by Roberts, C.J. & Kennedy, J.).

This Court has repeatedly recognized the quality of that legislative process. In *Katzenbach*, this Court emphasized the "voluminous legislative history" underlying the VRA as a basis for upholding it. 383 U.S. at 308. Similarly, in *City of Boerne*, this Court recognized that the record of racial discrimination compiled by Congress during the reauthorizations provided detailed evidence of the continued need for the VRA. It pointed to the VRA as a model for Congress's exercise of its enforcement powers. *See City of Boerne*, 521 U.S. at 530. Congress's conclusion in 2006 that the VRA remains necessary rests on an equally careful process.

1. During the initial authorization in 1965, Congress had before it a record of more than ninety-five years of widespread racial discrimination in the electoral process. H.R. REP. NO. 109-478, *supra*, at 6-7; H.R. REP. NO. 89-439, at 7 (1965). Congress conducted nine days of hearings, with a total of sixty-seven witnesses, and held three days of floor debate in the House and twenty-six in the Senate. *Hearings on H.R. 6400 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. (1965); *Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. (1965). Testimony from Members of Congress, the Attorney General, members of the U.S. Commission on Civil Rights, state and local officials, private citizens, and representatives from voting rights organizations led Congress to conclude that "widespread violations of the 15th Amendment" provided "ample justification for congressional action." H.R. REP. NO. 89-439, *supra*, at 19. Ultimately, Congress approved the Act by wide margins in both Houses.

In 1975, in a thorough review of Section 5,[4] Congress again compiled a persuasive record showing the persistence of problems the VRA was intended to combat. During thirteen days of hearings in the House and seven in the Senate, Congress heard from a wide variety of witnesses, again including Members of Congress, the DOJ, state and local officials, private citizens, and voting rights organizations. H.R. REP. NO. 94-196, at 3-4 (1975). On the basis of evidence in the nearly 3000-page record documenting significant ongoing discrimination, Congress concluded that there were still "continuing and significant deficiencies" in minority political participation and thus voted to reauthorize Section 5 for another seven years. *Id.* at 7.

Congress's 1982 reauthorization process was equally comprehensive, again supporting its conclusion that Section 5 remained necessary and appropriate legislation. The House held eighteen days of hearings, including regional hearings in covered jurisdictions, and heard testimony from 156 witnesses, assembling a record of over 2800 pages. H.R. REP. NO. 97-227, at 2 (1981). Similarly, the Senate, during nine days of hearings, heard from fifty-one witnesses and amassed a record of over 2900

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[4] In 1970, Congress reviewed the progress that had been made under the VRA and extended Section 5's preclearance requirement for an additional five years. H.R. REP. NO. 91-397 (1969). Because covered jurisdictions had not truly begun to comply with Section 5's submission requirement until after *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the 1970 record contained a relatively limited discussion of the need for, and effectiveness of, the preclearance process.

pages. S. REP. NO. 97-417, at 3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 180. The evidence of discrimination echoed Congress's findings in 1975 that covered jurisdictions had continued to devise means to suppress effective minority participation. *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 17 (1981). Congress responded by extending Section 5 for an additional twenty-five years.

2. The 2006 reauthorization process was similarly rigorous. Congress again engaged in extensive factfinding and analysis before concluding that the VRA remains necessary today. *Voting Rights Act: Section 5 – Preclearance Standards: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 67 (2005). The House Judiciary Committee alone conducted twelve hearings and heard from forty-six witnesses representing a breadth of interests ranging from federal and state executive officials to civil rights leaders. H.R. REP. NO. 109-478, at 11-12. The Committee's record totaled over 12,000 pages. 152 CONG. REC. H5136 (daily ed. July 13, 2006) (statement of Rep. Chabot). The Senate Judiciary Committee held nine hearings and also heard from forty-six witnesses, creating a combined record of over 15,000 pages. The extensive record provides detailed evidence of Congress's thorough reconsideration of the Act and confirms the clear need for reauthorization. Congress approved the twenty-five-year extension by wide margins of 390-33 in the House and 98-0 in the Senate. 152 CONG. REC.

H5207 (daily ed. July 13, 2006); 152 CONG. REC. S8012 (daily ed. July 20, 2006).

The record confirms that although the VRA is one of the most successful civil rights statutes in American history, its "work is not yet complete." 152 CONG. REC. H5143-44 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner). The House Judiciary Committee requested, received, and incorporated into its record eleven reports documenting the continuation of discrimination after 1982 in covered jurisdictions. *See Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *H.R. Hearing* 109-103]. Each report describes numerous examples of discrimination that prompted Section 5 objections or litigation. One of the reports, for example, detailed nearly 300 cases of voting discrimination. VOTING RIGHTS PROJECT, AM. CIVIL LIBERTIES UNION, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT, (2006), *reprinted in H.R. Hearing* 109-103, *supra*, at 378 [hereinafter ACLU REPORT]. The vast evidence of ongoing discrimination in the record shows that covered jurisdictions continue to deny minority voters full and effective participation in the political process with a variety of techniques, including discriminatory annexations, de-annexations, and consolidations; redistricting plans; and polling relocations. H.R. REP. NO. 109-478, *supra*; *H.R. Hearing* 109-103, *supra*; *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *H.R. Hearing* 109-

79]; *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005) [hereinafter *H.R. Hearing* 109-70].

Petitioner's account of the reauthorization process blindly ignores the hundreds of accounts of continuing discrimination in covered jurisdictions contained in the congressional record. These numerous examples reveal both that covered jurisdictions continue to adopt discriminatory voting changes and attempt to evade enforcement of Section 5, and confirm that such attempts are more than just "fragmentary." Petr. Br. 39.

The 2006 congressional record is replete with examples of discrimination. Limited space constrains *amici* to highlighting only a few representative examples of the persistent discrimination Congress confronted.

Polling Place Changes. In 1992, Johnson County, Georgia, sought to relocate a voting precinct from the county courthouse to the private American Legion Hall, which had a well-known reputation for racial hostility and exclusion. ACLU REPORT, *supra*, at 337; Robert Kengle, VOTING RIGHTS IN GEORGIA, 1982-2006, A REPORT OF THE RENEWTHEVRA.ORG app. 1, xxviii, *reprinted in H.R. Hearing* 109-103, *supra*, at 1499. In its objection letter, the DOJ concluded that the polling place change had the effect of "discouraging black voters from turning out to vote." ACLU REPORT, *supra*, at 337.

In 1994, at the request of white voters, officials in Sunset, Louisiana, agreed to move a polling place from the community center to a different building

that had been a site of historical racial discrimination. Debo P. Adegbile, VOTING RIGHTS IN LOUISIANA 1982-2006, at 31, *reprinted in H.R. Hearing* 109-103, *supra*, at 1592. The officials held no hearings, sought no input from the black community, and did not advertise the change in any way. *Id.* Minority leaders in the town did not learn of the proposed change until notified by the DOJ during the Section 5 preclearance process. *Id.*

In 1995, Jenkins County, Georgia, attempted to relocate a polling site from a location in a predominantly black community easily accessible by foot to one in a predominantly white neighborhood outside the city limits, and not easily accessible. ACLU REPORT, *supra*, at 330-31; Kengle, *supra*, at app. 1, xxviii. The Attorney General objected to the change, noting that the county's proffered reasons for the location change were merely "pretextual" and were designed to "thwart recent black political participation." ACLU REPORT, *supra*, at 331.

Similarly, in 2003 Waller County, Texas, tried to restrict early voting at a polling site near Prairie View A&M, a historically black college, after two black students decided to run for county office. NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005, at 65-66 (2006), *reprinted in H.R. Hearing* 109-103, *supra*, at 104 [hereinafter NAT'L COMM'N REPORT]. Prairie View's students comprised 20% of the county's voting population. Thus, the county's restriction on voting directly reduced the relative voting strength of black citizens.

Discriminatory Annexations. In 1990, the city of Monroe, Louisiana, attempted to annex white suburban wards to its city court jurisdiction. Adegbile, *supra*, at 23. In its Section 5 objection letter, the DOJ noted that the wards in question had been eligible for annexation since 1970, but that there had been no interest in annexing them until the first African-American candidate ran for Monroe city court. *Id.* In 2003, the DOJ interposed an objection to a proposed annexation in the town of North, South Carolina, because the town had been racially selective in its response to both formal and informal annexation requests. John C. Ruoff & Herbert E. Buhl III, VOTING RIGHTS IN SOUTH CAROLINA: 1982-2006, at 26 (2006), *reprinted in H.R. Hearing* 109-103, *supra*, at 1928. In rejecting the proposed annexation, the Attorney General concluded that "race appears to be an overriding factor in how the town responds to annexation requests." *Id.*

Discriminatory Reductions. In 1991, Concordia Parish, Louisiana, attempted to exclude minority voters by reducing the size of its police jury from nine to seven seats in order to eliminate one majority black district. Adegbile, *supra*, at 24. Although the parish claimed that the reduction was a cost-saving measure, the DOJ's objection noted that the parish had been unconcerned about saving money until an influx of African-American residents converted the district from a majority-white district to a majority-black district. *Id.*

3. The 2006 record also reveals that between 1982 and 2004, the rate of DOJ objections remained almost constant when compared to the period between 1965 and the 1982 reauthorization, with

more than 600 objections being interposed. *H.R. Hearing* 109-103, *supra*, at 172. Congress recognized, and this Court found in *City of Rome*, 446 U.S. at 181, that the number and nature of objections interposed by the Attorney General indicate the continued need for preclearance. J. Gerald Hebert, *An Assessment of the Bailout Provisions of the Voting Rights Act*, at 12, *reprinted in H.R. Hearing* 109-103, *supra*, at 2664. Congress also found that between 1982 and 2003, covered jurisdictions withdrew more than 200 proposed changes after initially seeking preclearance under Section 5. NAT'L COMM'N REPORT, *supra*, at 58. Jurisdictions routinely abandon proposed discriminatory voting changes when a "Request for More Information" by the Attorney General signals that preclearance is unlikely. These withdrawal letters highlight hundreds of discriminatory voting changes that *would have been* implemented in the absence of Section 5.

Finally, the record reveals that Section 5 deters covered jurisdictions from proposing discriminatory voting changes in the first place. *See H.R. Hearing* 109-79, *supra*, at 4 (statement of Rep. Chabot) (noting the "thousands of proposed plans that never came to fruition because of section 5"); *H.R. Hearing* 109-70, *supra*, at 17; *see also* Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 613-14 (2005). The preclearance requirement encourages jurisdictions to make voting choices that benefit *all* voters and helps to ensure that officials more carefully evaluate and modify voting changes that

might otherwise be retrogressive before they are submitted for preclearance.

C. Congress Has Carefully Tailored The VRA To Respect States' Interests During Each Reauthorization.

The VRA represents an appropriate congressional response to the problem of pervasive racial discrimination in the electoral process. The record shows that in creating an administrative preclearance process, modifying the "bailout" process, and enacting a clear sunset provision, Congress has taken seriously both its responsibility to enforce the Fourteenth and Fifteenth Amendments and the need to respect local autonomy.

1. Congress initially developed the administrative preclearance regime as a speedy and efficient alternative to requiring that covered jurisdictions seek declaratory judgments before implementing voting-related changes. H.R. REP. NO. 97-227, *supra*; *see also Morris v. Gressette*, 432 U.S. 491, 502-05 (1977); Mark Posner, *The Real Story Behind the Justice Department's Implementation of Section 5 of the VRA: Vigorous Enforcement, as Intended by Congress*, 1 DUKE J. CONST. L. & PUB. POL'Y 79, 154-55 (2006). By requiring the Attorney General to make administrative preclearance decisions within a sharply limited time frame,[5] Congress recognized

[5] The Attorney General has sixty days to interpose an objection to a submitted voting change, 28 C.F.R. § 51.1(a)(2), with the possibility of one sixty-day extension, *id.* § 51.37. Absent a timely objection, the change is automatically precleared. *See* 42 U.S.C. § 1973c(a); 28 C.F.R. § 51.42.

covered jurisdictions' strong interest in implementing legitimate new voting provisions quickly. *See* Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965-2007*, 86 TEX. L. REV. 667, 681-82 (2008); Posner, *supra*, at 91-92. Petitioner points to *no* evidence in the record suggesting that it has ever faced any logistical burden in seeking preclearance for a covered change.

In reauthorizing Section 5, Congress also concluded that, contrary to petitioner's assertion, Petr. Br. 33, Section 2 litigation alone provides an "inadequate remedy" for minority voters. H.R. REP. NO. 109-478, *supra*, at 57. Congress found that "case-by-case enforcement alone is not enough to combat efforts of certain States and jurisdictions to discriminate against minority citizens in the electoral process." *Id.* Recognizing that Section 2 has helped achieve important progress for minority voters in covered jurisdictions, Congress concluded that Section 5 is necessary to prevent "backsliding from the gains previously won" under both Section 2 and Section 5. *Id.* at 53. Moreover, Congress recognized that placing the burden on affected individuals to challenge discriminatory voting changes would leave many of those changes unchallenged, in part because the high costs and time constraints of litigation might discourage individuals from bringing suit. *See H.R. Hearing* 109-70, *supra*, at 42 (noting that the cost of private litigation under Section 2 may "run in the millions of dollars").

In addition, by placing the VRA's enforcement powers in the politically accountable Executive Branch, Congress took appropriate account of covered jurisdictions' interests in avoiding suits by individual

litigants. *Cf. Alden v. Maine*, 527 U.S. 706, 759-60 (1999) (explaining that enforcement by the United States does not infringe state sovereignty).

2. In 2006, Congress reassessed several provisions of the VRA to determine whether conditions within covered jurisdictions required modifications. Having already modified the "precisely tailored" bailout provision, 42 U.S.C. § 1973b(a), in 1982, Congress concluded in 2006 that that provision was effectively crafted to create incentives for covered jurisdictions to eliminate discriminatory features of their electoral systems, *see* Laughlin McDonald, *Racial Fairness: Why Shouldn't It Apply to Section 5 of the Voting Rights Act?*, 21 STETSON L. REV. 847, 851 (1992). Moreover, the provision ensured that Section 5 remains focused on those areas where oversight is necessary to prevent and respond to voting rights abuses. This Court's decision in *Northwest Austin* adopting a liberal reading of the bailout provision, *see* 557 U.S. at 211 (holding that "all political subdivisions – not only those described in § 14(c)(2) [of the Act, defining the term 'political subdivision'] – are eligible to file a bailout suit"), reinforces the flexible nature of the coverage formula.

When Congress concluded that a particular component of the VRA was no longer necessary, it did not hesitate to repeal that provision. As part of the same reauthorization process that extended preclearance, Congress also reevaluated the need for federal examiners in covered jurisdictions. In response to evidence that examiners had been used only sparingly in recent years, Congress concluded that the examiner provisions had outlived their

usefulness. *See Voting Rights Act: Sections 6 & 8 – The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 5 (2005) (statement of Rep. Scott). Accordingly, Congress repealed Sections 6, 7, and 9 of the VRA in their entirety. *See* Pub. L. No. 109-246 § 3(c), 120 Stat. 580 (2006); *see also* H.R. REP. NO. 109-478, *supra*, at 91-92.

Finally, during each reauthorization, Congress has included a sunset provision for Section 5, 42 U.S.C. § 1973b(a)(8) rather than making it permanent. This decision ensures that Congress will periodically reevaluate the need for the VRA. *See* Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745, 1817 (2004).

The 2006 legislative record shows that Congress carefully considered what would constitute an appropriate reauthorization period. Representative Louie Gohmert (R-TX) proposed an amendment on the House floor, H. AMDT. 1184 (offered July 13, 2006), that would have limited reauthorization to ten years. The amendment was defeated by a vote of 288-134. 152 CONG. REC. H5205 (daily ed. July 13, 2006). In opposing the amendment, Representative Sensenbrenner emphasized the importance of capturing more than one redistricting cycle to provide Congress with sufficient evidence to reassess Section 5. *Id.* at H5187. Thus, Congress decided to include a twenty-five-year sunset provision in the Act. 42 U.S.C. § 1973b(a)(8). Contrary to petitioner's claim that the provision somehow allows Congress to retain preclearance until "the crack of doom," Petr. Br. 39

(quoting Pet. App. 94a), the very purpose of a sunset provision is to confine Congress's power to a defined and limited time period. Both the record and this Court's guidance support the conclusion that eliminating the vestiges of historical racial discrimination may well take this amount of time. *See Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). Just as significantly, Congress expressly declared that it would reconsider Section 5 in fifteen years to ensure that the provision was still both necessary and effective. 42 U.S.C. § 1973b(a)(7).

3. In addition to carefully fine-tuning Section 5, Congress also considered but rejected proposed amendments to the VRA that would have altered Section 5's coverage formula and bailout procedures. Congress's consideration of each of these proposed amendments shows its thorough and deliberative examination of Section 5 during the 2006 reauthorization.

An amendment offered by Representative Charles Norwood (R-GA), H. AMDT. 1183 (offered July 13, 2006), would have replaced Section 5's "very carefully" crafted coverage formula, *see* 152 CONG. REC. H5185 (daily ed. July 13, 2006) (statement of Rep. Conyers), with a rolling test for Section 5 coverage. Opponents of the amendment explained that the existing coverage formula, combined with the context-sensitive bailout process, struck a more appropriate balance between remedying and deterring discrimination in jurisdictions with a pervasive history of discrimination on the one hand

and releasing jurisdictions from coverage if Section 5 was no longer necessary on the other. The amendment was defeated by a vote of 318-96. *Id.* at H5204-05.

Another amendment proposed by Representative Lynn Westmoreland (R-GA), H. AMDT. 1186 (offered July 13, 2006), would have provided for an expedited, proactive bailout procedure placing a significant new burden on the DOJ. Representative Sensenbrenner explained that the amendment would require DOJ officials to travel to nearly 900 jurisdictions each year to review voluminous voting records and interview thousands of individuals to determine whether all of the jurisdiction's voting changes were submitted for preclearance and that all other bailout criteria had been met. *See* 152 CONG. REC. H5199 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner). Such a regime would make the VRA administratively ineffective and ultimately disadvantage minority voters by frustrating Congress's goal of continuing to target those jurisdictions with a history of entrenched voting discrimination. *See id.* at H5199-200. The amendment was defeated by a vote of 302-118. *Id.* at H5206-07.

Congress's thorough consideration of these amendments underscores the careful attention that Congress has given to Section 5 during each reauthorization to ensure that it remains properly tailored to protect minority voting rights while respecting the interests of covered jurisdictions.

D. The 2006 Reauthorization Reflected A Bipartisan Consensus And Received Significant Support From Covered Jurisdictions.

1. The Voting Rights Act has enjoyed strong bipartisan support throughout its history, including reauthorization under four Republican Presidents and with both Democratic and Republican majorities in Congress.[6] As Representative Mel Watt (D-NC) observed in introducing the 2006 reauthorization bill: "It is not a Republican bill, it is not a Democratic bill .... [It] is a bipartisan, bicameral bill that unites us as a country." *Rep. Watt Comments on Introduction of Bicameral/Bipartisan Voting Rights Act Reauthorization Bill,* U.S. FED. NEWS, May 2, 2006, *available at* 2006 WLNR 8232980.

As discussed earlier, in 2006 Congress responded to the overwhelming evidence of continuing discrimination in the record by considering, but ultimately rejecting, several proposed amendments that would have weakened the VRA's protections.

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[6] The 1970 reauthorization occurred under President Nixon (Pub. L. No. 91-285, 84 Stat. 314 (signed June 22, 1970)) (Democratic majorities in both Houses); the 1975 reauthorization occurred under President Ford (Pub. L. No. 94-73, 89 Stat. 402 (signed Aug. 6, 1975)) (Democratic majorities in both Houses); the 1982 reauthorization occurred under President Reagan (Pub. L. No. 97-205, 96 Stat. 131 (signed June 29, 1982)) (Democratic majority in House and Republican majority in Senate); and the 2006 reauthorization occurred under President George W. Bush (Pub. L. No. 109-246, 120 Stat. 577 (signed July 27, 2006)) (Republican majorities in both Houses).

The VRA was ultimately reauthorized with strong support from both parties. Former Speaker of the House Dennis Hastert (R-IL) praised Congress's bipartisan effort to protect minority voters: "Today, Republicans and Democrats have united in a historic vote to preserve and protect one of America's most important fundamental rights – the right to vote." *Speaker Hastert Comments on Reauthorization of Voting Rights Act*, U.S. FED. NEWS, July 13, 2006, *available at* 2006 WLNR 12133683. The 390-33 vote for passage of the VRA in the House is the largest number of votes in favor of passage in the history of VRA reauthorization.

2. Petitioner places great emphasis on this Court's observation in *Northwest Austin* that a "departure from the fundamental principle of equal sovereignty" requires justification. Petr. Br. 40 (quoting 557 U.S. at 203). Tellingly, petitioner does not acknowledge this Court's qualification that the doctrine of equality among the states "does not bar . . . remedies for *local* evils which have subsequently appeared." *Nw. Austin*, 557 U.S. at 203 (internal quotation marks omitted). Nor does it acknowledge that in the 2006 reauthorization – in sharp contrast to the original passage of the Act in 1965 – Members from covered jurisdictions provided broad support for continued coverage. Of the 110 representatives from covered jurisdictions, ninety voted in favor of reauthorization. 152 CONG. REC. H5204-05 (daily ed. July 13, 2006). The 2006 reauthorization thus reflects a particularly strong example of this Court's observation in *Garcia v. San Antonio Metropolitan Transit Authority* that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards

inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. 528, 552 (1985); *cf. Georgia v. Ashcroft*, 539 U.S. 461, 484 (2003) ("And it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new [districting] plan."). The Members of Congress most attuned to the particular benefits and burdens of Section 5 struck the balance strongly in favor of reauthorization.

3. Moreover, the record contains numerous letters from covered states and local government organizations both documenting continued discrimination and expressing support for reauthorization. A coalition of organizations including the Council of State Governments, the National Conference of State Legislatures, the National Association of Secretaries of State, the National Association of Counties, the National League of Cities, and the U.S. Conference of Mayors supported reauthorization as part of the "ongoing partnership among all levels of government" needed to fully integrate minority voters into the electoral process. *See* 152 CONG. REC. H5146 (daily ed. July 13, 2006). Given the wide-ranging and diverse support for reauthorization in 2006, this Court should defer to Congress's considered judgment.

III. The VRA Regulates The Political Process, Voting, And Race – Areas Where Congress Acts At The Height Of Its Powers And Merits Special Deference From This Court.

As this Court has repeatedly recognized, Congress is due special deference when it acts to protect suspect classes, defend fundamental rights, or make inherently political determinations about the electoral process. The VRA stands at the intersection of this trio of congressional powers, which are expressed in the Enforcement Clauses of the Fourteenth and Fifteenth Amendments as well as the Elections Clause of Article I, § 4, and the Guaranty Clause of Article IV, § 4.

A. The Constitution Grants Congress Broad Powers To Pass Legislation Protecting Racial Minorities.

1. The Constitution expressly grants Congress a central role in protecting minority groups against racial discrimination. U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2. "[T]he remedy for the violation of the Fourteenth and Fifteenth Amendment was expressly not left to the courts. The remedy was legislative . . . ." CONG. GLOBE, 42D CONG., 2D SESS. 525 (1872) (statement of Sen. Oliver Morton); *see also* Michael W. McConnell, *Institutions and Interpretations: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 194-95 (1997) ("The historical record shows that the framers of [the Fourteenth Amendment] expected Congress, not the Court, to be the primary agent of its enforcement. . . . [T]he Court should give respectful attention – and probably the presumption of

constitutionality – to the interpretive judgments of Congress.").

2. Accordingly this Court has recognized that Congress's remedial and prophylactic powers are at their strongest when it legislates to remedy or prevent discrimination against historically disadvantaged groups that receive the protections of heightened judicial scrutiny. *See, e.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735-36 (2003). Racial minorities are the prototypical example of a suspect class under the Fourteenth Amendment, and this Court has consistently subjected claims of discrimination on the basis of race or ethnicity to the strictest scrutiny, even when they involve situations (such as prison administration) where this Court normally defers to state officials. *See Johnson v. California*, 543 U.S. 499, 515 (2005). Indeed, in modern times this Court has never struck down a congressional statute protecting the right to vote against racial discrimination.

3. The clear purpose of the VRA is to remedy ongoing discrimination against racial and ethnic minorities who have historically faced widespread exclusion from the political process. Despite petitioner's protestation to the contrary, the 2006 reauthorization fits squarely within Congress's "wide latitude" to enact measures to "remedy or prevent unconstitutional actions" against such groups. *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997).

B. The Constitution Grants Congress Special Authority To Safeguard Fundamental Rights.

1. Congress also has broad powers under the Reconstruction Amendments to enact legislation protecting fundamental rights. This Court has recognized that, as with protecting members of traditionally suspect classes, Congress's powers are at their greatest when it acts to safeguard fundamental liberties. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding Congress's abrogation of state sovereign immunity under Title II of the Americans with Disabilities Act with respect to access to the courts); *see also United States v. Georgia*, 546 U.S. 151 (2006) (same with respect to fundamental rights under the Eighth Amendment).

2. The right to vote is the quintessential fundamental right; indeed, the right to participate in the electoral process is a foundational right "preservative of all [other] rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969). Denial or dilution of the right to vote is subject to heightened scrutiny. *See Harper v. State Bd. of Elections*, 383 U.S. 663 (1966). Thus, Congress is acting at the height of its authority when it legislates in the VRA "to effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966).

C. The Elections Clause Recognizes An Especially Robust Role For Congress In Regulating Federal Elections And Undercuts Any Tenth Amendment-Based Facial Challenge To The Voting Rights Act.

1. The text of the Constitution envisions a special role for Congress in regulating elections and structuring the political process. The Elections Clause grants Congress the authority "at any time" to "make or alter" state law governing "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. I, § 4, cl. 1.

This Court has long recognized that the "comprehensive words" of the Elections Clause "embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932); *see Cook v. Gralike*, 531 U.S. 510, 523-24 (2001) (quoting *Smiley*).[7] Most recently, in *Vieth v. Jubelirer*, 541

[7] The list of practices that this Court has found within the scope of Congress's Election Clause power is broad indeed. *See, e.g., Roudebush v. Hartke*, 405 U.S. 15, 24-25 (1972) (election recounts); *United States v. Gradwell*, 243 U.S. 476, 483 (1917)

U.S. 267 (2004) (plurality opinion), this Court emphasized that in the Elections Clause, the Framers conferred on Congress ultimate control over even the redistricting process: although state legislatures may have "the initial power to draw districts for federal elections," the Elections Clause "permitted Congress to 'make or alter' those districts if it wished," *id.* at 275. The *Vieth* plurality's review of the history reflects that since 1842, Congress has, among other things, used its power to impose a particular theory of representation on the states, requiring the use of geographically defined single-member districts to elect Members of Congress. *See* Apportionment Act of 1842, 5 Stat. 491. And nearly a century before this Court imposed parallel restrictions as a matter of constitutional law, Congress mandated that districts contain equal numbers of inhabitants and be composed of compact territory. *See Vieth*, 541 U.S. at 276-77 (plurality opinion).

This Court has consistently understood that the Elections Clause authorizes Congress to "supplement" existing state regulations or "substitute its own." *Smiley*, 285 U.S. at 366-67. Congress "'has a general supervisory power over the whole subject.'" *Id.* at 367 (quoting *Ex parte Siebold*, 100 U.S. 371, 387 (1879)). For over a century, this Court has held that Congress's power to regulate federal elections

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(process from registration to certification of results); *Ex parte Clarke*, 100 U.S. 399, 404 (1879) (punishing state election officers for violation of state duties vis-à-vis congressional elections).

extends to all aspects of the electoral process whenever a federal candidate is on the ballot. *See In re Coy*, 127 U.S. 731, 753-54 (1888).

Finally, with respect to the regulation of federal elections, this Court has emphasized how the Elections Clause expresses "the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804 (1995); *see also Cook*, 531 U.S. at 527 (Kennedy, J., concurring) (stating that the Clause "delegates but limited power over federal elections to the States"). In other words, when it comes to their control over congressional elections, the states cannot assert the Tenth Amendment to resist congressional regulation: states have power over federal elections "but only so far as Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997). Petitioner's reliance on *Gregory v. Ashcroft*, 501 U.S. 452 (1991), a Tenth Amendment case that involved retirement ages for state-court judges, Petr. Br. 24, is thus entirely misplaced.

2. This Court recently reaffirmed the principle that "'the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598 (2012) (quoting *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)). Particularly in light of the fact that petitioner presents this Court with *only* a facial challenge against the coverage and preclearance provisions of the VRA, *see* Pet. 12; Pet. App. 11a, 65a, its challenge can succeed *only* if it proves "that no set

of circumstances exists under which the Act would be valid,' *i.e.,* that the law is unconstitutional in *all* of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (emphasis added) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). But Congress has the power, under the Elections Clause and this Court's consistent construction of that Clause, to impose a federal review process, like the preclearance requirement, with respect to all aspects of the election system related to the election of Members of Congress. As applied to *those* elections, petitioner's challenge is unavailing and its invocation of the Tenth Amendment, *see* Petr. Br. i, 17, 23-24, is mistaken. For this reason alone, its facial challenge must fail.

Moreover, the coverage formula of Section 4(b) and the preclearance requirement of Section 5 do not cover only whole states. They also cover more than fifty political subdivisions in states that are not themselves covered. *See* 28 C.F.R. pt. 51, app. As applied to *those* jurisdictions, the Voting Rights Act does not remotely implicate the "equal sovereignty" argument that petitioner invokes, Petr. Br. 40. Accordingly, petitioner has not satisfied the "heavy burden of persuasion" that plaintiffs bear when they seek "relief that would invalidate the statute in all its applications." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 200 (2008) (opinion of Stevens, J., joined by Roberts, C.J. & Kennedy, J.).

3. This Court has also recognized that Congress, not the judicial branch, bears the primary responsibility for fulfilling the promise embodied in the Guarantee Clause that "[t]he United States shall guarantee to every State in this Union a Republican

Form of Government." U.S. CONST. art. IV, § 4, cl. 1. This is because Congress is best equipped to address such matters as how to ensure political fairness in democratic elections. By contrast, this Court has found that "[i]t is hostile to a democratic system to involve the judiciary" in such determinations. *Colegrove v. Green*, 328 U.S. 549, 553-54 (1946) (plurality opinion); *see also Vieth*, 541 U.S. at 281 (plurality opinion) (treating political gerrymandering claims as nonjusticiable due to a lack of "judicially discernible and manageable standards for adjudicating" them); *Luther v. Borden*, 48 U.S. 1, 42 (1849) (stating that enforcement of the guarantee clause "rests with Congress"). Consequently, "in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring).

Deference to Congress is particularly appropriate in this context because its Members are more intimately involved with and more knowledgeable about the electoral process than are the courts. They also hail from every political subdivision in the Nation and bring to bear local knowledge of the effects of racial discrimination on their districts' electoral systems. Therefore, they are best able to make choices between competing theories of political representation. *See Colegrove*, 328 U.S. at 556 (plurality opinion).

4. The 2006 reauthorization rested on a fact-based and complex inquiry into the best way to address the lingering effects of discrimination on the electoral process. The record before Congress left no doubt that widespread voting discrimination persists

in covered jurisdictions, and the reauthorization therefore hinged upon a political judgment regarding the proper response. The VRA falls squarely within the core of Congress's unique institutional expertise in regulating the political process, and Congress properly used this expertise to provide the desired political guidance by overwhelmingly reauthorizing Section 5 for another twenty-five years.

* * *

In 2006, after meticulous and extended consideration, Congress determined that the provisions of Section 5 have not yet "outlived their usefulness." *City of Rome v. United States*, 446 U.S. 156, 180 (1980). In making this determination, Congress acted at the height of its powers in regulating the intersecting areas of voting, race, and political rights. Congress's judgment is therefore entitled to substantial deference from this Court. Accordingly, as the district court and court of appeals properly held, Congress's decision to extend the VRA passes constitutional muster.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 1, 2013

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