No. 08-322

IN THE

Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

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

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF REPS. JOHN CONYERS, JR., F. JAMES SENSENBRENNER, JR., JERROLD NADLER, AND MELVIN L. WATT, AND FORMER REP. STEVE CHABOT AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE[1]

Amici curiae are the current and former bipartisan leadership of the House Committee on the Judiciary and its Subcommittee on the Constitution, Civil Rights, and Civil Liberties. They include: Rep. John Conyers, Jr. (D-MI), Chairman of the House Committee on the Judiciary and Ranking Member of the Judiciary Committee at the time of the 2006 reauthorization of the Voting Rights Act (VRA); Rep. F. James Sensenbrenner, Jr. (R-WI), Ranking Member of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, and Chairman of the Judiciary Committee at the time of the 2006 reauthorization; Rep. Jerrold Nadler (D-NY), Chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, and Ranking Member of that Subcommittee at the time of the 2006 VRA reauthorization; Rep. Melvin Watt (D-NC), Member of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties and Chairman of the Congressional Black Caucus at the time of the 2006 reauthorization; and former Rep. Steve Chabot (R-OH), Chairman of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties at the time of the 2006 reauthorization.

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. No counsel, party, or person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters reflecting the consent of the parties have been filed with the Clerk.

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.

Amici represent a combined experience of over 115 years in Congress. All *amici* were directly and substantively involved in the hearings and the Committee processes that led to the 2006 reauthorization. In renewing and extending the VRA, *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 and Section 2 of the Fifteenth Amendment 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 of the VRA is necessary to fulfill their constitutional responsibilities and to ensure that minority citizens have the "ability to fully participate in the electoral process." *Id.*

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. The 2006 reauthorization is a model exercise of Congress's unique ability to legislate at the intersection of race, voting, and the political process. 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.

This Court has long recognized that the political branches of the federal government play an integral role in protecting voting rights. The VRA represents Congress's most deliberative and sustained effort in this area. The Act has repeatedly been reexamined and revised by Congress, and on each occasion both the House and Senate have compiled extensive records that far surpass the standard set by this Court for justifying remedial and prophylactic legislation under Congress's enforcement powers. On each occasion, Congress has renewed the Act with broad bipartisan support.

The record before Congress demonstrates the VRA's unique success in rolling back a century of disenfranchisement. However, the record also demonstrates the continued need for Section 5 to block covered jurisdictions' implementation of new discriminatory voting rules. Moreover, Congress has responded to this evidence by tailoring the Act to respect states' independence. Congress has

consistently revisited the Act's provisions to ensure that the VRA imposes no unnecessary burdens on covered jurisdictions and will not outlive its usefulness.

The sufficiency of the record is reinforced by the subject matter covered by the VRA. This Court has recognized that Congress acts at the height of its powers when it legislates to regulate the political process, to prevent or remedy racial discrimination, or to protect fundamental rights, such as the right to vote. 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 Voting Rights Act Responds To Nearly A Century Of Judicial And Congressional Inability To Protect 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 by enacting legislation to combat the disenfranchisement and political exclusion of minority citizens.

As history shows, this is not the first time this Court has faced claims, like those appellant tries to advance, that times have changed, making federal legislation protecting minority voting rights unnecessary. *See* Br. of Appellant 1-2 [hereinafter MUD Br.]. The success of the 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 this Court's and Congress's efforts to remedy that discrimination. The VRA, as extended and amended, has provided the only subsequent effective response to voting discrimination. Nonetheless, contrary to appellant's contention, 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* Section III (discussing in more detail the scope of congressional enforcement powers). Congress used this authority in 1870 to pass 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). Moreover, racially motivated violence during

elections declined dramatically. ALEXANDER KEYSSAR, THE RIGHT TO VOTE 106 (2000).

2. Believing exactly what appellant now claims – that the "emergency [of Reconstruction] no longer exist[ed] and there [was] no indication it [would] recur," MUD Br. 27 – this Court responded over-optimistically to minority citizens' progress. 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 narrowly interpreted the Enforcement Act to reach only a small subset of the conduct that interfered with minority suffrage. *See*, *e.g.*, *United States v. Cruikshank*, 92 U.S. 542, 559 (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 embarked on a campaign 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. State legislatures also imposed residency requirements, poll taxes, and literacy tests, created complex voter registration systems, and strengthened criminal laws, all with the aim of disenfranchising black voters. *Katzenbach*, 383 U.S. at 310-11; KEYSSAR, *supra*, at 111-12.

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

As a result, black political participation plummeted. In Mississippi, after 1890, less than 9,000 of the state's 147,000 voting-age black citizens remained registered to vote. KEYSSAR, *supra*, at 114. In Louisiana, where blacks had once constituted as much as 44 percent of the electorate, by 1920 they cast less than 1 percent 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 percent of eligible back citizens were registered voters. J. MORGAN KOUSSER, COLORBIND INJUSTICE 201 fig. 4.1 (1999).

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 from the primary process 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 respond with a similar attempt to circumvent the Fifteenth Amendment, which remained in place 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), for much of the twentieth century, this Court also repeatedly confronted racially discriminatory laws passed by legislatures that were able to ignore minority interests. *See United States v. Carolene*

Prods. Co., 304 U.S. 144, 152 n.4 (1938). 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 voting rights, this Court directed plaintiffs to seek relief from Congress. In *Giles v. Harris*, 189 U.S. 475, 482 (1903), for example, this Court instructed a black citizen asking to have his name added to Alabama's voting rolls 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, when 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 proved no more effective than the courts', as they too provided only *ex post* remedies for disenfranchisement. The 1957 and 1960 Civil Rights Acts empowered the Department of Justice to bring suit on behalf of individuals illegally prevented from registering to vote. Christopher, *supra*, at 4, 5. However, when voters won redress, 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 United States prosecuting the cases, "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) (same); S. REP. NO. 97-417, at 5 (1982) (same). Between 1957 and 1963, these suits secured registration for only 6,000 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). The Act's preclearance requirement froze existing voting laws in the covered jurisdictions, ensuring 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 of the federal government, rather than placing the burden of challenging unfair practices entirely on disenfranchised and disadvantaged citizens.

The VRA's shift from *ex post* to prophylactic remedies resuscitated effective enforcement of the Fourteenth and Fifteenth 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 the 1982 and 2006 reauthorization processes, Congress concluded that Section 5 of the VRA continued to play a critical role in preventing minority disenfranchisement. Contrary to appellant's assertion that there was no evidence that covered jurisdictions continue to engage in "gamesmanship," MUD Br. 13, 43, Congress concluded that Section 5 has helped to deter, detect, and prohibit a wide range of voting laws and procedures in covered jurisdictions that would otherwise have deprived minorities of their voting power. *See infra* pp. 14-23 (discussing Congress's conclusions from the 2006 reauthorization hearings and debates).

However, as this Court has just reaffirmed, "[m]uch 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. ___ (2009) (slip op. at 21). Section 5 continues to play a major role in combating discrimination. The VRA's work, particularly that of its prophylactic remedies, is not yet complete.

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

Perhaps no statute in American history has been the subject of more extensive, careful, and sustained consideration by Congress than the VRA. *See* 152 CONG. REC. H5143 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner) (describing the House Judiciary Committee record as "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"); J.S. App. 112 (noting that "Congress approached its task seriously and with great care[,….] held extensive hearings and compiled a massive legislative record documenting contemporary racial discrimination in covered states").

This Court has recognized that Congress possesses special expertise in gathering and analyzing the large amounts of information essential to making 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); Allen Schick, *Informed Legislation: Policy Research Versus Ordinary Knowledge*, *in* KNOWLEDGE, POWER & THE CONGRESS 99 (William H. Robinson & Clay H. Wellborn eds., 1991). 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) (noting that 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 though their direct experiences in running for office, but also through wide-ranging contacts with constituents and executive branch representatives. *See Schick*, *supra*, at 104-05. 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 appellant's suggestions, *see, e.g.*, MUD Br. 42-43, the voluminous record compiled by Congress during the 2006 reauthorization fully supports Congress's decision to retain Section 5. In addition, the reauthorization process reflects a widespread, bipartisan consensus, supported by affected jurisdictions. For instance, House Judiciary Committee members from covered jurisdictions were active participants in shaping and supporting the 2006 reauthorization. This Court should therefore affirm the district court's judgment that Congress had a firm basis for reauthorizing Section 5 for an additional 25 years.

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

Prior to the 2006 reauthorization, House leadership and staff reviewed this Court's recent decisions regarding the appropriate scope of

congressional enforcement powers under the Fourteenth Amendment. *See* H.R. REP. NO. 109-478, at 54-56 (2006). Congress was well aware of the standards articulated by this Court's decisions 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 concluded that the record supporting reauthorization "far exceeds" the records this Court found sufficient in both *Nevada Dep't 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, 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; *Lane*, 541 U.S. at 541-44. Moreover, the 2006 record is comparable in both its thoroughness and the quality

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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 Bd. of Elections*, 128 S. Ct. 1610 (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 1618-19 (emphasis added).

of supporting evidence to the legislative records this Court found adequate to support 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); *see, e.g.,* J.S. App. 112-13, 124 (making this comparison).

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

The 2006 reauthorization process occurred against the backdrop of Congress's experience over the past 40 years in crafting and reconsidering the VRA. Each time Congress considered the need for Section 5 – in 1965, 1970, 1975, 1982, and 2006 – it first developed and carefully studied a massive record before deciding how best to refine the Act.

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 the Act. 383 U.S. at 308. Similarly, in *City of Boerne*, this Court recognized that the record of "widespread and persisting" racial discrimination compiled by Congress during the reauthorizations provided detailed evidence of the continued need for the VRA. 521 U.S. at 526. It pointed to the VRA as a model for Congress's exercise of its enforcement powers. *See id.* 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 95 years

of widespread racial discrimination in the electoral process. H.R. REP. NO. 109-478, at 6-7; H.R. REP. NO. 89-439, at 7 (1965). Congress conducted 9 days of hearings, with a total of 67 witnesses, and held 3 days of floor debate in the House and 26 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, at 19. Ultimately, Congress approved the Act by wide margins in both Houses.

In 1975, in a thorough review of Section 5,[4] Congress compiled an equally persuasive record showing the persistence of many of the problems the VRA was intended to combat. During 13 days of hearings in the House and 7 in the Senate, Congress heard from a wide variety of witnesses, again including Members of Congress, the DOJ, state and

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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 5 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 this Court's decision in *Allen v. State Bd. 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.

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 3,000-page record documenting significant ongoing discrimination, Congress concluded that there were still "continuing and significant deficiencies" in minority political participation and thus voted to extend Section 5 for another 7 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 18 days of hearings, including regional hearings in covered jurisdictions, and heard testimony from 156 witnesses, assembling a record of over 2,800 pages. H.R. REP. NO. 97-227, at 2 (1981). Similarly, the Senate, during 9 days of hearings, heard from 51 witnesses and amassed a record of over 2,900 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 and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 17 (1981). Congress responded by extending Section 5 for an additional 25 years.

2. The 2006 reauthorization process was also very 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 12 hearings and heard from 46 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 9 hearings and also heard from 46 witnesses, creating a combined record of over 15,000 pages. Contrary to appellant's claim that Congress made "no serious effort" in 2006 to reexamine Section 5's continued appropriateness, MUD Br. 2, the record provides detailed evidence of Congress's thorough reconsideration of the Act. This extensive record confirmed the clear need for reauthorization, and Congress approved the 25-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 11 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. THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT, THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION (2006), *in H.R. Hearing* 109-103, 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; *H.R. Hearing* 109-103; *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].

Appellant stresses that the District Court referenced only three specific examples of discriminatory voting changes in covered jurisdictions as evidence that Congress's record does not justify the continued need for Section 5. MUD Br. 43. Contrary to appellant's assertion, the District Court describes in detail numerous examples of discrimination in covered jurisdictions. *See, e.g.,* J.S. App. 69-81, 96-106, 155-83; *id.* at 80 ("Scouring the legislative record ourselves, we have discovered many more section 5 objections based on discriminatory

intent."). Moreover, appellant 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 "isolated actions." MUD Br. 45.

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 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 at 33-34; Robert Kengle, VOTING RIGHTS IN GEORGIA, 1982-2006, A REPORT OF THE RENEWTHEVRA.ORG app. 1, xxviii, *in H.R. Hearing* 109-103, at 1499. 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." *Id.*

In 1994, in Sunset, Louisiana, at the request of white voters, the police jury 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, *in H.R. Hearing* 109-103, at 1592. The police jury 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.* Likewise, Johnson County, Georgia, sought in 1992 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 at 337; Kengle, *supra*, at app. 1, xxviii. 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 at 337.

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), *in H.R. Hearing* 109-103, at 104 [hereinafter NAT'L COMM'N REP.]. Appellant dismissively contends that Waller County's discriminatory actions were simply "one-off occurrences" that do not justify the continued need for Section 5, MUD Br. 46. However, Prairie View A&M is a historically black college whose students comprise 20% of the county's voting population. Thus, the county's restriction on voting directly reduced the relative voting strength of black citizens.

Section 5 is designed to address not only this type of purposeful "gamesmanship," but also inadvertent or inattentive actions that have a discriminatory effect on minority voters. However, even if Section 5 were aimed only at ending intentional

"gamesmanship," Waller County's actions would still be problematic. The county's "gamesmanship" was not "highly debatable" as appellant contends, MUD Br. 46; it was undeniably discriminatory.

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 Department of Justice interposed an objection to a proposed annexation in 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, *in H.R. Hearing* 109-103, 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 9 to 7 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 objected to the change, noting 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, 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, *in H.R. Hearing* 109-103, 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 REP. 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. *Id.*

Finally, the record reveals that the risk of receiving an objection letter from the DOJ or failing to obtain a declaratory judgment from a federal district court also deters covered jurisdictions from even proposing discriminatory voting changes in the first place. *See H.R. Hearing* 109-79, 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, 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.

Appellant claims that Section 5 would not prevent the adoption of discriminatory voting practices by covered jurisdictions since officials in those jurisdictions would not submit those changes for preclearance. MUD Br. 45. Appellant's argument has only one of two implications: (1) covered jurisdictions do not implement discriminatory voting changes in the first instance because they realize the changes will not be precleared, or (2) covered jurisdictions implement discriminatory voting changes, but do not submit those changes for preclearance. The former interpretation *confirms*, rather than discredits, the deterrent effect of Section 5; the latter indicates that covered jurisdictions continue to engage in the "gamesmanship" that Section 5 is designed to address. Both implications support Congress's decision to reauthorize the VRA.

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 creating 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; *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).[5] By requiring the Attorney General to make administrative preclearance decisions within a sharply limited time frame,[6] Congress recognized 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.

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[5] Contrary to the suggestion of some *amici* that Section 5 enables DOJ to block changes "without any judicial review," Br. of Amici Thernstrom et al. at 17-18, covered jurisdictions have always been entitled to seek judicial preclearance regardless of DOJ's decision.

[6] The Attorney General has 60 days to interpose an objection to a submitted voting change, 28 C.F.R. § 51.1(a)(2) (2008), with the possibility of one 60-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.

In reauthorizing Section 5, Congress also concluded that, contrary to appellant's assertion, MUD Br. 53, Section 2 litigation alone provides an "inadequate remedy" for minority voters. H.R. REP. NO. 109-478, 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, 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 why, even if the Eleventh Amendment prevents Congress from subjecting states to suit by private parties, enforcement by the United States remains appropriate).

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.

Congress also reevaluated the need for federal examiners in covered jurisdictions and updated the VRA to fit the needs of states and localities. In response to evidence that examiners had been used only sparingly in recent years, Congress concluded that "the nature of the Federal examiner has changed" and that the federal 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, 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. Rep. Louie Gohmert (R-TX) proposed an amendment on the House floor, H. AMDT. 1184 (offered July 13, 2006), that would have limited reauthorization to 10 years. The amendment was defeated by a vote of 134-288. 152 CONG. REC. H5205 (daily ed. July 13, 2006). In opposing the amendment, Rep. 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 25-year sunset provision in the Act. 42 U.S.C. § 1973b(a)(8). Contrary to appellant's claim that the provision somehow allows Congress to "indefinitely continue exercising extraordinary powers," MUD Br. 61, 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 15 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 Rep. 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 96-318. *Id.* at H5204-05.

Another amendment proposed by Rep. 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. Rep. 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 118-302. *Id.* at H5206-07.

Congress's thorough consideration of these amendments underscores the careful attention that Congress has given to the individual provisions of Section 5 during each reauthorization to ensure that they remain 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 renewal under four Republican Presidents and with both Democratic and Republican majorities in Congress.[7] As Rep. Mel Watt (D-NC) observed in

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

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 *supra*, 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. 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. Appellant claims that Section 5 imposes a "scarlet letter on residents of covered jurisdictions." MUD Br. 58. However, Members from covered jurisdictions disagree, as evidenced by their broad

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577 (signed July 27, 2006)) (Republican majorities in both Houses).

support for reauthorization. Of the 110 representatives from covered jurisdictions, 90 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 Metro Transit Auth.* that "State 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 renewal.

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.

The intersection of these three areas means that Congress acted at the apogee of its authority in reauthorizing the VRA. Indeed, as appellant notes, "[W]hen Congress addresses matters involving a fundamental right or suspect class, constitutional violations by state actors are more likely to have occurred and a congressional record extensive enough to justify prophylactic legislation will generally be easier to amass." MUD Br. 35.

A. The Constitution And This Court Recognize A Robust Role For Congress In Regulating The Political Process.

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 to "at any time by Law make or alter . . . Regulations" governing "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. I, § 4, cl. 1. Thus, this Court has long recognized that

"the regulations made by Congress [addressing elections] are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." *Ex parte Siebold*, 100 U.S. 371, 384 (1879). And this Court has reaffirmed Congress's "'power to override state regulations' by establishing uniform rules" governing federal elections. *Foster v. Love*, 522 U.S. 67, 69 (1997) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995)).[8]

This Court has also recognized that the Elections Clause would empower Congress to regulate a broad swath of conduct. It has adopted the "commonsense view" that the term "Manner of holding Elections" encompasses such matters as "registration, supervision of voting, protection of votes, [and] prevention of fraud and corrupt practices." *Cook v. Gralike*, 531 U.S. 510, 523-24 (2001). Those are, of course, precisely the kinds of laws covered by Section 5.

Similarly, this Court has recognized that Congress, not the judicial branch, bears the primary responsibility for fulfilling the promises embodied in the Guarantee Clause, which provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." U.S.

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[8] This appeal does not itself implicate federal elections, but applications of the VRA involving federal contests would be independently valid under the Elections Clause. In any event, the Elections Clause reflects the Framers' recognition of Congress's special expertise with respect to the electoral process.

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 "[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 v. Jubelirer*, 541 U.S. 267, 281 (2004) (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).

2. 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 25 years.

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

1. The Constitution also 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. . . ." Statement of Sen. Oliver Morton, 42d Cong., 2d Sess. 525 (1872); *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, as this Court has recognized, 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); *accord* MUD Br. 35. 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. *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 appellant's protestation to the contrary, *see* MUD Br. 29, 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).

C. The Constitution Also 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's precedents recognize 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 the fundamental right of access to the courts); *see also United States v. Georgia*, 546 U.S. 151 (2006) (approving the abrogation of state sovereign immunity under Title II of the ADA in cases alleging violations of fundamental rights under the Eighth Amendment); *accord* MUD Br. 35.

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. Va. 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 protect voting rights. *South Carolina v. Katzenbach*, 383 U.S. 301, 325-26 (1966) ("Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.").

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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 three 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 properly

held, Congress's decision to extend the VRA passes muster under *any* constitutional test, whether rationality review under *Katzenbach* or the "congruence and proportionality" test in *City of Boerne*. *See* J.S. App.56-144 (applying each of these tests).

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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