No. 12-96

In The
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the preexisting coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside and work in every State. MSLF and its members strongly believe that the Founders created a federal republic, in which the federal government is one of limited, enumerated powers, and that federalism and separation of powers is at the heart of the U.S. Constitution. Since its creation in 1977, MSLF has been active in

[1] Pursuant to Supreme Court Rule 37.3, all parties consent to the filing of this brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

litigation opposing legislation in which the federal government acts beyond its constitutionally delegated powers, or in derogation of the principles of federalism and separation of powers.

Especially relevant to this case, MSLF attorneys have represented clients who challenged the power of Congress to enact the 1982 Amendment to Section 2 of the Voting Rights Act ("VRA" or "Act"). *United States v. Blaine County, Mont.*, 363 F.3d 897 (9th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005); *United States v. Alamosa County, Colo.*, 306 F. Supp. 2d 1016 (D. Colo. 2004); and *Large v. Fremont County, Wyo.*, 709 F. Supp. 2d 1176 (D. Wyo. 2010). Recently, MSLF also filed an amicus curiae brief with this Court supporting a challenge to the constitutionality of the 2006 Reauthorization of Section 5 of the VRA in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009). MSLF also participated as an amicus curiae in the case below, *Shelby County, Ala. v. Holder*, 679 F.3d 848, 884 (D.C. Cir. 2012). MSLF brings a unique perspective to this case and believes that its amicus curiae brief will assist this Court in deciding this case.

SUMMARY OF ARGUMENT

Section 5 of the VRA requires that certain covered jurisdictions, determined by a formula in Section 4(b) of the Act, must seek "preclearance" from the Department of Justice before making changes to "any

voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c(a) In 2006, Congress reauthorized Section 5 of the Act. Shortly thereafter, Shelby County, a jurisdiction covered by Sections 4(b) and 5 of the Act, filed suit in the District Court for the District of Columbia arguing that Congress exceeded its Fourteenth and Fifteenth Amendment remedial powers by reauthorizing Sections 4(b) and 5 of the VRA (42 U.S.C. § 1973b(b) and 42 U.S.C. § 1973c, respectively) in the Voting Rights Act Reauthorization and Amendments Act, Pub. L. No. 109-246, 120 Stat. 577 (2006).[2] *Shelby County, Ala. v. Holder*, 811 F. Supp. 2d 424, 427 (D.D.C. 2011). In response, "[t]he Attorney General . . . argue[d] . . . that 'when Congress is legislatively enforcing the Fifteenth Amendment's prohibition on race discrimination with respect to voting, the Court reviews the appropriateness of that legislation under a deferential rationality standard,'" not congruency and proportionality, as announced in *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997). *Id*. at 448-49.

The district court rejected that argument: "*Boerne's* congruence and proportionality framework reflects a refined version of the same method of analysis utilized in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) ("*Katzenbach*"), and hence provides the appropriate standard of review to assess *Shelby*

[2] All references to "Section 5" are references to Section 5 of the VRA.

County's facial constitutional challenge to Section 5 and Section 4(b)." *Id*.[3] But the district court erroneously held that Section 5 of the VRA met the congruency and proportionality standard. *Id*. at 502-03.

The Attorney General renewed his argument on appeal: "The Attorney General insists that Congress may use 'any rational means' to enforce the Fifteenth Amendment." *Shelby County*, 679 F.3d at 859 (citing *Katzenbach*, 383 U.S. at 324).[4] The D.C. Circuit did

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[3] The Attorney General successfully made the same argument to a three-judge panel of the district court in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 573 F. Supp. 2d 221, 235-36 (D.D.C. 2008), *rev'd on other grounds by Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009). There, the three-judge panel opined that there are "two distinct standards for evaluating the constitutionality of laws enforcing the Civil War Amendments." That is, "notwithstanding the *City of Boerne* cases [under the Fourteenth Amendment], *Katzenbach*'s *rationality standard* remains fully applicable to constitutional challenges to legislation [under the Fifteenth Amendment] aimed at preventing racial discrimination in voting." *Nw. Austin*, 573 F. Supp. 2d at 235-36 (emphasis added). On writ of certiorari, this Court applied the doctrine of constitutional avoidance and declined to decide the constitutionality of Section 5. *Nw. Austin*, 557 U.S. at 205-06. This Court did, however, send a "powerful signal that congruence and proportionality is the appropriate standard of review[.]" *Shelby County*, 679 F.3d at 859 (citing *Nw. Austin*, 557 U.S. 193).

[4] On appeal, the Attorney General did concede that "the terms 'enforce' and 'appropriate legislation' have the same meaning in the Fourteenth and Fifteenth Amendments." Brief of Appellee at 27, *Shelby County, Ala. v. Holder*, No. 11-626, Dkt. 1345212 (D.C. Cir. 2012). Then he argued that *Katzenbach*'s "rational basis review" applied to all legislation under the Fifteenth Amendment. *Id*. at 27. Finally, he tried to extend

(Continued on following page)

not answer this question and settle the conflict between the district court's opinion and the opinion of the three-judge panel in *Nw. Austin*. Though noting *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009), it did not decide the issue: "[I]n any event, if section 5 survives the arguably more rigorous 'congruent and proportionality' standard, it would also survive *Katzenbach's* rationality review." *Id*. Thus, the D.C. Circuit analyzed the case under congruency and proportionality, without deciding that it was required to do so, and held that Section 5 was congruent and proportionate legislation and, therefore, constitutional under both the "congruency and proportionality" standard and the "rational means" standard. *Id*. at 873.

This Court has always applied the same standard of review when analyzing the scope of Congress' Enforcement Clauses Powers, regardless of the constitutional power it enforces. The "congruency and proportionality" standard of review ensures that Congress does not exceed its remedial powers under the Fourteenth and Fifteenth Amendments. As a

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deferential review to the Fourteenth Amendment, insofar as it targeted race discrimination, by suggesting that *Boerne*'s congruence and proportionality test applied to Fourteenth Amendment legislation only when it targeted acts "outside the core prohibitions on race discrimination[.]" *Id*. at 27-28.

result, this Court should apply the congruency and proportionality standard of review in this case.[5]

The record before Congress at the time of the reauthorization demonstrates that the 2006 reauthorization of Section 5 is not a congruent and proportional means to prevent or remedy Fourteenth and Fifteenth Amendment violations by the States. When the VRA was originally passed in 1965, Congress was confronted with widespread, systematic, and intentional voter suppression by many States. *See Boerne*, 521 U.S. at 525. As a result of these extraordinary circumstances, the extraordinary remedy in Section 5 was appropriate, at that time. These widespread and systematic violations no longer exist, however, and, as a result, Section 5 is no longer a congruent and proportional remedy to protect Fourteenth and Fifteenth Amendment rights.

[5] MSLF agrees with Shelby County that the outcome of the challenge to the coverage formula under Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b), does not necessarily depend upon whether the "congruency and proportionality" standard of review is applied to Section 4(b). *See* Pet. Br. at 18 n.4.

ARGUMENT

I. THE CONGRUENCY AND PROPORTIONALITY STANDARD OF REVIEW APPLIES TO THE REVIEW OF CONGRESS' 2006 REAUTHORIZATION OF SECTION 5 OF THE VRA

A. There Is Only One Standard Of Judicial Review Of Prophylactic Legislation Enacted Pursuant To The Enforcement Clauses Of The Clauses Of The Fourteenth and Fifteenth Amendments.

The Enforcement Clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments use similar language, and give Congress the "power to enforce," each amendment "by appropriate legislation." U.S. Const. amend. XIII, § 2; U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2. These three Amendments were ratified during 1865 and 1870 following the end of the Civil War and were meant to address unequal treatment of United States citizens by the States. The similarities between the amendments demonstrate that Congress' enforcement authority is the same under all three Amendments. *See* Note, *The Times, They Are Changing: The VRA Is No Longer Constitutional*, 27 J.L. & Pol. 357, 365 (2012).

Furthermore, this Court has made it clear that analysis of any Enforcement Clause power does not depend on the nature of the constitutional prohibition it enforces. *Boerne*, 521 U.S. at 518-19. Thus, although *Boerne* dealt only with the Fourteenth Amendment, it arrived at its congruency and

proportionality standard, by relying on prior Thirteenth, Fourteenth, and Fifteenth Amendment cases, treating them as interchangeable.

Supporting its Fourteenth Amendment standard of review, *Boerne* relied on the "suspension of literacy tests and similar voting requirements [such as Section 5]" enacted pursuant to "Congress' *parallel power* to enforce the provisions of the *Fifteenth Amendment*[.]" *Id*. at 518 (citing *Katzenbach*, 383 U.S. at 308) (all emphasis added). *Boerne* also relied on the fact that this Court had "also concluded that the other measures protecting voting rights are within Congress' power to enforce the Fourteenth *and* Fifteenth Amendments[.]" *Id*. (citing *Katzenbach*, 383 U.S. at 326) (Fifteenth Amendment) (emphasis added); *see also Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) ("*Morgan*") (Thirteenth and Fourteenth Amendments); *Oregon v. Mitchell*, 400 U.S. 112, 131-34 (1970) ("*Mitchell*"), (Fourteenth *and* Fifteenth Amendments) (Black, J., announcing the judgment of the Court); *City of Rome v. United States*, 400 U.S. 156, 161 (1980) (Fifteenth Amendment). Thus, *Boerne* clearly viewed the powers conferred on Congress by any of the Enforcement Clauses to be identical and reviewable only under one standard: congruency and proportionality.[6]

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[6] As demonstrated in more detail below, congruency and proportionality require that prophylactic legislation be congruent and proportionate to the ends sought to be achieved. *See Boerne*, 521 U.S. at 530-31.

Boerne's recognition that the same standard of review applies to both Amendments is not a departure from prior law; this Court has always treated the powers conferred by the Enforcement Clauses of the Fourteenth and Fifteenth Amendments identically. *See*, *e.g.*, *Morgan*, 384 U.S. at 651 ("Section 2 of the Fifteenth Amendment grants Congress a similar power to [that of Section 5 of the Fourteenth Amendment]."); *Lopez v. Monterey County*, 525 U.S. 266, 294 n.6 (1999) ("[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as co-extensive."); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001) ("*Garrett*") ("Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment."); *see also*, *City of Rome*, 446 U.S. at 207 n.1 (Rehnquist, J., dissenting) ("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as co-extensive.").

Thus, the district court was correct in ruling:

> Given the nearly identical language and similar origins of [the Fourteenth and Fifteenth Amendments], there would seem to be "no reason to treat the enforcement provision of the Fifteenth Amendment differently than the identical provision of the Fourteenth Amendment, and the Supreme Court has not held to the contrary."

Shelby County, 811 F.Supp.2d at 449 (quoting *Mixon v. State of Ohio*, 193 F.3d 389, 399 (6th Cir. 2006)).

The enforcement provisions of both the Fourteenth and the Fifteenth Amendments grant Congress remedial power to enforce the provisions of the respective Amendments. Although the rights protected differ between the two Amendments, the power granted to Congress by the Enforcement Clauses is the same in each Amendment. As a result, the standard of review a court applies to determine whether Congress properly exercised each Amendment's enforcement power will also be the same for both the Fourteenth and the Fifteenth Amendments. As demonstrated below, the congruency and proportionality standard is the proper standard to apply to determine whether Congress exceeded its authority under the Enforcement Clauses of both the Fourteenth and Fifteenth Amendments.

B. Both *Katzenbach* And *Boerne* Established The Congruency And Proportionality Standard Of Review.

1. *Katzenbach* ruled that what is "appropriate" and "reasonable" remedial legislation depends upon the nature of the constitutional violation to be remedied or prevented and the means adopted to achieve those ends.

In *Katzenbach*, this Court stated that "[a]s against the reserved powers of the States, Congress may use any *rational means* to effectuate the constitutional prohibition of racial discrimination in voting."

Katzenbach, 383 U.S. at 324 (emphasis added). *Katzenbach* then quoted a case construing whether Congress had the substantive power, under the Necessary and Proper Clause of Article I, to establish a national bank:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

Id. at 326 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

Katzenbach also cited to *Ex Parte Virginia*, 100 U.S. (10 Otto) 339, 340, 344 (1879), which involved enforcement of the Thirteenth and Fourteenth Amendments, and which prohibited judges from intentionally and discriminatorily disqualifying jurors on account of their race and providing penalties for doing so.[7] *Katzenbach*, 383 U.S. at 327. Importantly, *Ex Parte Virginia* "echoed [*McCulloch*'s] language in describing *each* of the Civil War Amendments." *Id.* (citing *Ex Parte Virginia*, 100 U.S. at 345-46). Accordingly, *Katzenbach* then observed that, with respect to all Civil War Amendments:

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[7] The statute at issue in *Ex Parte Virginia* was a direct prohibition and penalty, not a *prophylactic* statute. *Ex Parte Virginia*, 100 U.S. at 340.

> Whatever legislation is appropriate, that is adapted to carry out the objects the amendments have in view, . . . if not prohibited, is brought within the domain of Congressional power.

Id. (quoting *Ex Parte Virginia*, 100 U.S. at 345-46). Thus, *Ex Parte Virginia*, like *McCulloch*, required that enforcement of any of the Civil War Amendments must be "appropriate," "adapted to carry out the objects" of the constitutional prohibition it enforces, and not "prohibited" by other constitutional considerations.

The consistent lesson of *Katzenbach*, *McCulloch*, and *Ex Parte Virginia*, is that what is "rational," "appropriate," legislation, "not otherwise prohibited," depends upon the fit between the constitutional harm targeted and the means adopted to remedy it.

2. *Katzenbach* established a congruency and proportionality standard of review without expressly so stating.

Below, the Attorney General seized upon the phrase "Congress may use any *rational means* to effectuate the constitutional prohibition of racial discrimination," *Katzenbach*, 383 U.S. at 324, to argue for a "deferential standard" of review of Fifteenth Amendment enforcement legislation. *Shelby County*, 679 F.3d at 859 ("the attorney general insists that congress may use 'any rational means' to enforce

the Fifteenth Amendment"). But the Attorney General ignored *Katzenbach*'s next sentence: "We turn now to a *more detailed description of the standards* which govern our review of the Act." *Katzenbach*, 383 U.S. at 324 (emphasis added).[8]

Accordingly, this Court then detailed the egregious record of an unremitting, widespread pattern and practice of ingenious defiance of the Constitution, impervious to ordinary remedies, that it believed justified the extraordinary resort to Section 5 remedies. *Id.* at 335 ("States covered by the Act resorted to the *extraordinary* stratagem of contriving new rules of various kinds for *the sole purpose* of perpetuating *voting discrimination* in the face of adverse federal court decrees.") (emphases added). Based upon this egregious record, this Court ruled that Section 5 was, *under those circumstances*, a "rational" response. *Id.* at 334 (emphasis added). The "extraordinary stratagems" with which *Katzenbach* was confronted, and that were documented by Congress, consisted of widespread, persistent, intentionally discriminatory voting practices that prevented African-Americans from registering and voting, and which were not remediable by other, less drastic means. For example,

[8] In response to Shelby County's Petition, the Attorney General only briefly addressed the proper standard of review, instead arguing that certiorari was not appropriate because the Court of Appeals held that the 2006 reauthorization was constitutional under either standard of review. Resp. Br. in Opposition to Petition at 17 n.2.

more than half a dozen States "enacted tests . . . specifically designed to prevent [African-Americans] from voting." *Katzenbach*, 383 U.S. at 310. "At the same time, alternate tests were prescribed . . . to assure that white illiterates were not deprived of the franchise, [which] included grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matters." *Id.* at 311. Worse still, these tests were discriminatorily administered; white voters were "given easy versions, . . . received extensive help from voting officials, and [were] registered despite serious errors in their answers," while African-Americans were "required to pass difficult versions . . . without any outside assistance and without the slightest error." *Id.* at 312.

Congress had originally addressed this pattern of intentional voting discrimination by passing laws to "facilitat[e] case-by-case litigation" and this Court responded by "striking down [unconstitutional] discriminatory voting tests and devices in case after case." *Id*. at 313. But widespread voting discrimination persisted. Thus, the VRA, particularly Section 5, which targeted facially constitutional practices, was enacted to defeat these efforts to intentionally nullify the Fifteenth Amendment that had "infected the electoral process in parts of our country for nearly a century." *Id*. at 308.

Therefore, *Katzenbach* concluded that, "*under the compulsion of these unique circumstances*, Congress responded in a permissibly decisive manner

[in enacting Section 5]." *Id.* (emphasis added). *Katzenbach* held that the evidence before Congress – persistent, pervasive, and intransigent State action intentionally discriminating against African-Americans to prevent them from registering and voting, impervious to less drastic remedies – was sufficient to justify the extraordinary prophylactic exercise of remedial powers contained in Section 5:

> Two points emerge vividly from the voluminous legislative history. . . . First: Congress felt itself confronted by an *insidious and pervasive evil* which had been perpetuated in certain parts of our country through the *unremitting and ingenious defiance of the Constitution*. Second: Congress had concluded that the *unsuccessful remedies which it had prescribed in the past* would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

Id. at 809 (all emphasis added). Far from employing the relaxed, deferential standard of review advocated by the Attorney General, *Katzenbach* recognized that Section 5 is "an *uncommon exercise of congressional power*" and that only "*exceptional* conditions can justify legislative measures *not otherwise appropriate*." *Katzenbach*, 383 U.S. at 334-35 (all emphasis added). Thus, *Katzenbach* held that the extraordinary and uncommon exercise of congressional power engaged in by Congress in enacting Section 5's prophylactic provisions was "appropriate" and "rational" only because it was adopted to remedy a

widespread pattern of insidious, pervasive, unremitting, and ingenious defiance of the Constitution to deny African-Americans the right to register and to vote, which had defied previous lesser remedies.

In fact, the remedy approved by *Katzenbach* was congruent and proportionate to the nature and scope of the unremitting defiance of the Constitution presented to Congress and that it sought to remedy. *Boerne*, 521 U.S. at 519-20, 524-26. Therefore, *Katzenbach*, without expressly so stating, applied the congruency and proportionality standard that this Court would later articulate more specifically in *Boerne*. *Id.* at 530.

3. *Boerne* adopted *Katzenbach*'s Fifteenth Amendment analysis as the model for its congruency and proportionality standard of review.

In *Boerne*, this Court, quoting *Katzenbach*, ruled that "'the constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience it reflects.'" *Id.* at 525 (quoting *Katzenbach*, 383 U.S. at 308)). Indeed, *Boerne* noted that *Katzenbach* approved the severe and intrusive remedies of Section 5 only because they were necessary to "'banish the blight of racial discrimination in voting which has infected the electoral process in parts of our country for nearly a century.'" *Id.* (quoting *Katzenbach*, 383 U.S. at 308). Referring to *Katzenbach*, this Court

emphasized that "[t]he new *unprecedented remedies* were deemed necessary given the ineffectiveness of the existing voting rights law. . . ." *Id*. at 526 (emphasis added).

Far from announcing a new standard of review for exercising remedial, prophylactic enforcement powers under the Fourteenth Amendment, *Boerne* relied heavily on *Katzenbach* to demonstrate the constitutional predicate necessary for a congruent and proportionate prophylactic remedy under *all* the Civil War Amendments. In fact, *Boerne* cited *Katzenbach* no less than eleven times to support its congruence and proportionality standard of review. *Id*. at 518, 519, 524, 525, 526, 530, 533. Accordingly, this Court, echoing *Katzenbach*, ruled that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end." *Boerne* at 519. In other words, only congruent and proportionate remedial legislation is "rational" and "appropriate."

Therefore, it was only because Congress was confronted with egregious, widespread, pervasive, unconstitutional scheming to prevent African-Americans from registering or voting in spite of lesser remedies that *Katzenbach* ruled that Section 5's exceptional, prophylactic remedy was "appropriate" legislation that was a "rational means" of addressing those extraordinary discriminatory practices. Thus, Section 5 was, when passed in 1965, congruent and proportionate to the extreme constitutional violations targeted by Congress.

C. The Congruency And Proportionality Standard Of Review Ensures That Congress Does Not Exceed Its Remedial Powers Conferred By The Fourteenth And Fifteenth Amendments.

The Fourteenth and Fifteenth Amendments are remedial and merely prohibit certain State conduct. Thus, "Congress' power under § 5 [of the Fourteenth Amendment] extends only to 'enforcing the provisions of the Fourteenth Amendment[, which] [t]his Court has described . . . as 'remedial.'" *Boerne*, 521 U.S. at 519 (quoting *Katzenbach*, 383 U.S. at 326). Congress "has been given the power 'to enforce' a constitutional right, not the power to determine what constitutes a constitutional violation." *Id.* That is, "if Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be the superior paramount law, unchangeable by ordinary means." *Id*. at 529.

Constitutional difficulty arises when Congress, in a purported attempt to prevent unconstitutional conduct, regulates conduct that is facially *constitutional*, without requiring proof of discriminatory intent – so-called "prophylactic legislation" like Section 5 of the VRA. In such a case, the question arises as to whether Congress has enforced the constitutional prohibition set forth in the Amendment, or whether it has unconstitutionally substantively defined the Amendment. *Id.* To address this, *Boerne* established the congruency and proportionality standard of review:

> There must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end. Lacking such a connection, legislation may become substantive in operation and effect.

Id. at 519-20. In other words:

> While preventive rules are sometimes appropriate remedial measures, there must be congruence between the means used and the ends to be achieved. The *appropriateness of remedial measures must be considered in light of the [degree of] evil presented*. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

Id. at 530 (emphasis added). This standard restrains Congress from unconstitutionally defining the substance of the Fourteenth and Fifteenth Amendments instead of enforcing them. *Id.* at 529. Properly restraining Congress is especially important in light of the federalism costs imposed by Section 5. *See Lopez*, 525 U.S. at 282 (Section 5 "authorizes federal intrusion into sensitive areas of state and local policymaking, [and] imposes substantial 'federalism costs.'" (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)).

Section 5 seeks to regulate a function "essential to the separate and independent existence of the States and their governments . . . the power to determine within the limits of the Constitution the qualifications of their own voters for state, county,

and municipal offices and the nature of their own machinery for filling local public offices." *Mitchell*, 400 U.S. at 125 (Black, J., announcing the judgment of the Court). Section 5 does not just regulate what States can and cannot do, it invades State sovereignty and "goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law – however innocuous – until they have been precleared by federal authorities in Washington, D.C." *Nw. Austin*, 557 U.S. at 202. Section 5 requirements are broad, *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 175-76 (1985), and apply "to every political subdivision in a covered State, no matter how small." *Nw. Austin*, 557 U.S. at 202 (citing *United States v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 117-18 (1978)).

Another important federalism cost imposed by Section 5 is the way it differentiates between the States, despite "our historic tradition that all the states enjoy 'equal sovereignty.'" *Nw. Austin*, 557 U.S. at 203 (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)). "These federalism concerns are underscored by the argument that the preclearance requirements in one State would be unconstitutional in another." *Id.* (citing *Georgia v. Ashcroft*, 539 U.S. 461, 491-92 (2003) (Kennedy, J., concurring)).

Therefore, "suspension of new voting regulations pending preclearance was an extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-01 (1992).

As a result, a court must apply the "congruency and proportionality" test to ensure that Congress does not unnecessarily invade state sovereignty.

As a result of these federalism costs, many members of this Court, both current and former, have expressed "serious misgivings" about the constitutionality of Section 5. *Nw. Austin*, 557 U.S. at 202 (citing *Katzenbach*, 383 U.S. at 358-62, (Black, J., concurring and dissenting); *Allen v. State Bd. of Elections*, 393 U.S. 544, 586 n.4 (1964) (Harlan, J., concurring in part and dissenting in part); *Georgia v. United States*, 411 U.S. 526, 545 (1973) (Powell, J., dissenting); *City of Rome*, 446 U.S. at 209-21 (Rehnquist, J., dissenting); *id*, at 200-06 (Powell, J., dissenting); *Lopez*, 525 U.S. at 293-98 (Thomas, J., dissenting); *id.* at 288, 119 S.Ct. 693 (Kennedy, J., concurring in judgment)). As demonstrated below, these misgivings are warranted, as the record before Congress in 2006 did not demonstrate an "unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S. at 809.

II. THE 2006 REAUTHORIZATION OF SECTION 5 OF THE VOTING RIGHTS ACT UNDER THE PRE-EXISTING COVERAGE FORMULA OF SECTION 4(B) IS NOT A CONGRUENT AND PROPORTIONATE RESPONSE TO PREVENT OR REMEDY FIFTEENTH AMENDMENT VIOLATIONS.

The congruent and proportionality standard of review requires a court to engage in a three-step

process. First, a court must identify with some precision the scope of the constitutional right at issue. *Garrett*, 531 U.S. at 365. Second, once a court has "determined the metes and bounds of the constitutional right in question," it examines "whether Congress identified a history and pattern of unconstitutional" action by the States. *Id.* at 368. Finally, "whether Congress has exceeded its § 5 [of the Fourteenth Amendment] powers turns on whether there is a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520.

There is no minimum amount of requirements that an enforcement statute must have in order for it to be a Constitutional exercise of Congress' enforcement power. In *Boerne*, however this Court did list a number of factors of the original VRA that led it to be a congruent and proportional response to prevent intentional voting discrimination. This Court reinforced the fact that the legislative record must show a history of facially constitutional, generally applicable laws being used to violate individuals Constitutional rights. *Id.* at 530. Furthermore, while a statute does not need to have "termination dates, geographic restrictions, or egregious predicates," in order to be Constitutional, "[w]here . . . a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5." *Id.* at 533. In *City of Rome*, the

Court examined the "number and nature of [Section 5] objections interposed by the Attorney General" between 1965 and 1975 to help determine the Constitutionality of the Act. 400 U.S. at 181.

When the VRA was originally passed, Congress was confronted with an "insidious and pervasive evil which had been perpetuated in certain parts of our country through the unremitting and ingenious defiance of the Constitution." *Katzenbach*, 383 U.S. at 808. As demonstrated above, intentional voting discrimination on the basis of race was widespread and systematic. As a result, Congress passed a law that restricted those jurisdictions that were committing egregious unconstitutional acts, and proportionally limited the time that Section 5 would be in force. *See Boerne*, 521 U.S. at 533.

In 2006, the situation before Congress was vastly different. First, Congress was not confronted with egregious, intentional discrimination by the States. In fact, Congress expressly noted that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local. . . ." Pub. L. No. 109-246, § 2(b)(1) (2006). Instead, Congress relied on "second generation barriers" that only reveal "vestiges of discrimination in voting." *Id.*

Second, the record in front of Congress in 2006 did not show that the States were engaging in widespread,

systematic, and intentional voter suppression. The record did not even support the claim that there is widespread, systematic voter suppression of any kind. For example, the percentage of DOJ objections to changes in voting procedures has been in decline since the 1982 renewal. *See* S. Rep. 109-295 at 13-14 (2006); U.S. Commission on Civil Rights, *Voting Rights Enforcement and Reauthorization* 29 (May 2006), *available at* http://www.usccr.gov/pubs/051006 VRAStatReport.pdf (last visited December 28, 2012) (Hereinafter "Voting Rights Enforcement and Reauthorization"). In 1982 the DOJ objected to 2.32% of proposed changes by covered jurisdictions. S. Rep. 109-295 at 13. In 2006, however, the DOJ objected to only 0.02% of proposed changes. *Id*. at 14. The U.S. Commission on Civil Rights concluded that, over the 10 years prior to the 2006 reauthorization, "the overall objection rate was so low as to be practically negligible, at less than 0.1 percent." Voting Rights and Reauthorization at 62. While it is true that the percentage of objections increased in the early 1990s, this was primarily a result of a DOJ policy that required jurisdictions to create the maximum possible number of majority-minority districts. S. Rep. 109-295 at 14. That policy was struck down by this Court in *Miller*, and the percentage of objections by the DOJ once again declined. S. Rep. 109-295 at 13-14.

As Bradley J. Schlozman, the former Acting Assistant Attorney General for Civil Rights, testified:

> Employing this standard [whether the purpose or effect of a voting change would put

> minority voters in a position inferior to the status quo] over the last 40 years, we have found retrogression in an extremely small number of cases. Since 1965, out of the 120,868 total Section 5 submissions received by the Department of Justice, the Attorney General has interposed an objection to just 1,401. And in the [last] 10 ten [sic] years, there have been only 37 objections. In other words, the overall objection rate since 1965 is only a hair over 1 percent, while the annual objection rate since the mid-1990's has declined even more, now averaging less than 0.2 percent. This tiny objection rate reflects the overwhelming – indeed, near universal – compliance with the Voting Rights Act by covered jurisdictions.

Statement of Bradley J. Schlozman, Acting Assistant Attorney General, Civil Rights Division, Before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives 3 (October 25, 2005), *available at* http://www.justice.gov/crt/speeches/voting15.pdf.

Another purported reason cited by Congress for the continuation of Section 5 was "racially polarized voting." H.R. Rep. 109-478, 34, 2006 U.S.C.C.A.N. 618, 638 ("Racially polarized voting occurs when voting blocs within the minority and white communities cast ballots along racial lines and is the clearest and strongest evidence the Committee has before it of the continued resistance within covered jurisdictions to fully accept minority citizens and their preferred

candidates into the electoral process."). Racially polarized voting, however, is not indicative of intentional voter discrimination by the States. *See Nw. Austin*, 557 U.S. at 228 (Thomas, J., concurring in the judgment in part and dissenting in part) (racially polarized voting is not evidence of unconstitutional discrimination, is not state action, and is not a problem unique to the south (citing *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *James v. Bowman*, 190 U.S. 127, 136 (1903); and Katz, Aisenbrey, Baldwin, Cheuse, & Weisbrodt, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of The Voting Rights Act Since 1982*, 39 U. Mich. J.L. Reform 643, 665 (2006))). Furthermore, there are many reasons besides race that might lead to "racially polarized voting," and to assume that race is the only factor in voting reinforces unhealthy racial stereotypes. "If our society is to continue to progress as a multi-racial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991).

Congress also tried to justify the reauthorization on the finding that there was a continued filing of Section 2 litigation against some jurisdictions. Pub. L. No. 109-246, § 2(b)(4)(C)-(D). The evidence supporting this claim, however, does not support the finding that there was widespread and systematic voter suppression. The number of Section 2 cases were relatively few. Congress pointed to only twelve published cases

between 1982 and 2006 that found intentional voting discrimination on the basis of race, and only six of those were intentional voting discrimination against racial minorities. S. Rep. 109-295, at 13 (2006). Of all Section 2 cases filed, plaintiffs succeeded in only 72 out of 210, or 34.3%, of cases. *Id.* at 77. Furthermore, only 19 of the 72 cases occurred after 1995. *Id.* at 77-81. Importantly, the success rate of plaintiffs in covered jurisdictions was not significantly greater than plaintiffs in non-covered jurisdictions. *Id.* (showing success rate of 37.1% for plaintiffs in covered jurisdictions and 31.9% in non-covered jurisdictions). Therefore, the number of Section 2 violations does not support the claim that covered jurisdictions were significantly more likely to violate the Constitution.

The record before Congress showed that while there may be isolated incidents of intentional voting discrimination, the problem was not widespread. When Section 5 was originally passed, the extreme remedies were congruent and proportional to the Fifteenth Amendment violations because the violations were extreme. *See Katzenbach*, 383 U.S. at 330-31; *Boerne*, 521 U.S. at 530-33. The Section 5 restrictions, however, cannot be justified by a few isolated incidents. As Justice Thomas stated:

> [T]he existence of discrete and isolated incidents of interference with the right to vote has never been sufficient justification for the imposition of § 5's extraordinary requirements. From its inception, the statute was promoted as a measure needed to neutralize

> a coordinated and unrelenting campaign to deny an entire race access to the ballot. *See City of Boerne*, 521 U.S., at 526, 117 S.Ct. 2157 (concluding that *Katzenbach* confronted a "widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination"). Perfect compliance with the Fifteenth Amendment's substantive command is not now – nor has it ever been – the yardstick for determining whether Congress has the power to employ broad prophylactic legislation to enforce that Amendment. The burden remains with Congress to prove that the extreme circumstances warranting § 5's enactment persist today. A record of scattered infringement of the right to vote is not a constitutionally acceptable substitute.

Nw. Austin, 557 U.S. at 228-29 (Thomas, J., concurring in judgment in part, dissenting in part). As a result, Congress was not confronted with "egregious predicates" when it reauthorized Section 5 in 2006. *See Boerne*, 521 U.S. at 533.

In addition, the 2006 reauthorization involved different circumstances with respect to the "geographic limitations" imposed by Section 4(b). *Boerne*, 521 U.S. at 533. While the 2006 reauthorization does contain geographic restrictions on covered jurisdictions, and nearly the same geographic restrictions as the original act, the list of covered jurisdictions is now overbroad compared to 1965. As the U.S. Commission on Civil Rights concluded:

> Congress originally intended the Section 5 formula to target states with a history of discrimination. In contemplating Section 5 extension, an analysis of objections the Justice Department interposed on covered states is instructive. Overall, the Justice Department interposed a higher rate of objection to states with smaller numbers of submitted changes and a lower rate to states with larger numbers of changes. In other words, some of the states that have been required to submit the greatest number of changes have yielded low rates of objection.

Voting Rights Enforcement & Reauthorization at 39. While the broad pre-existing coverage formula of Section 4(b) may have been necessary in 1965, it is clear that the VRA covers far more jurisdictions than necessary. *Id.* at 45. Currently, Section 5 is "geographically restricted" only in the loosest sense of the terms:

> A review of the geographic distribution of objections within covered states indicates that a large number of counties (as well as a number of parishes and independent cities) have not had a Section 5 objection since at least July 1982 (i.e., the Justice Department has not objected to changes adopted by the county, by any subjurisdiction entirely or partially in the county, or by the state on behalf of the county or any subjurisdiction).

Voting Rights Enforcement & Reauthorization at 45. Although Section 5 does not apply to every jurisdiction

in the United States, the record relied on by Congress shows that the geographic limitations were overbroad and, thus, not a congruent and proportional means to prevent or remedy Fifteenth Amendment violations. As a result, Section 5's "sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions." *Boerne*, 521 U.S. at 532 (referring to, and holding unconstitutional, the Religious Freedom Restoration Act).

Finally, the time limitation of the 2006 reauthorization is not congruent and proportional in light of the record before Congress in 2006. Although technically Section 5 of the VRA has a termination date, this termination date is far removed from the original egregious actions that made Section 5 necessary in the first place:

> The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.

Nw. Austin, 557 U.S. at 203-04. The 2006 reauthorization ensures that Section 5 will remain in effect until at least 2031, over 65 years after the act was originally passed. The Act itself was already 40 years old when Congress reauthorized Section 5, with no significant changes, in 2006. In 1965, the VRA was limited to a length of time appropriate to deal with the Constitutional violations of that time. The

circumstances, however, are significantly different 40 years later.

In 2006, there was not enough evidence to support Congress' conclusion that the extraordinary measures of Section 5 were a congruent and proportional response to remedy or prevent Fourteenth and Fifteenth Amendment violations. When Section 5 was originally passed, there was a history and pattern of widespread voter suppression by several States. *Boerne*, 521 U.S. at 508 (stating that the VRA originally remedied a "widespread and persisting racial discrimination which confronted Congress and the Judiciary in those cases."). As demonstrated above, in 1965 there were "exceptional conditions" that justified "an uncommon exercise of congressional power . . . not otherwise appropriate." *Katzenbach*, 383 U.S. at 334-35.[9]

The VRA may be "characterized accurately as one of the most successful pieces of civil rights legislation ever adopted by the Congress." Statement of Bradley J. Schlozman at 4. "Past success alone, however, is not adequate justification to retain the preclearance requirements." *Nw. Austin*, 557 U.S. at 202. While Section 5 was a congruent and proportional remedy to

[9] As Shelby County points out, that Congress expanded the substantive grounds for denying preclearance – thus increasing the burdens on state and local governments – adds further support that the 2006 reauthorization was not a congruent and proportional response to prevent or remedy Fifteenth Amendment violations. *See* Pet. Br. at 19-20.

the "evil" of the time, the times have changed. *Boerne*, 521 U.S at 530. "In part due to the success of that legislation, we are now a very different Nation." *Nw. Austin*, 557 U.S. at 211. As Justice Thomas has noted:

> [T]o accommodate the tension between the constitutional imperatives of the Fifteenth and Tenth Amendments – a balance between allowing the Federal Government to patrol state voting practices for discrimination and preserving the States' significant interest in self-determination – the constitutionality of § 5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible.

Id. at 224-25 (Thomas, J., concurring in judgment in part, dissenting in part). As a result of the successes of the VRA, the egregious conduct that originally justified the passing of Section 5 cannot justify the reauthorization of it 40 years later.

CONCLUSION

For the foregoing reasons, this Court should emphatically rule that congruency and proportionality standard of review applies to all cases examining Congress' use of its enforcement powers granted by the Fourteenth and Fifteenth Amendments. This Court should further hold that the 2006 reauthorization of Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(B) is not a

congruent and proportionate response to prevent or remedy Fifteenth Amendment violations.

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Respectfully submitted,

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