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

BRIEF OF THE NATIONAL BLACK CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF THE *AMICUS CURIAE*[1]

The National Black Chamber of Commerce is a nonprofit, nonpartisan organization dedicated to the economic empowerment of African American communities through entrepreneurship. Incorporated in 1993, it represents nearly 100,000 African American-owned businesses, and advocates on behalf of the 2.1 million black-owned businesses in the United States. The Chamber has 190 affiliated chapters located throughout the nation, as well as international affiliates in, among others, the Bahamas, Brazil, Colombia, Ghana, and Jamaica.

The Chamber rejects the assumption underlying Congress's reauthorization of Section 5 of the Voting Rights Act that the exceptional circumstances which justified close federal oversight of the electoral practices of many states and localities in 1965 and 1975 persist today. They do not. The Chamber and its members and affiliates work hand-in-hand with government at all levels to foster an environment in which black-owned businesses can take root and thrive. The government officials who are partners in this effort are people of good faith, and do not deserve

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[1] Pursuant to Rule 37.2(a), all parties have received at least 10 days' notice of *amicus's* intent to file and have consented to the filing of this brief. In accordance with Rule 37.6, counsel to *amicus* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

to be labeled and treated as presumptive discriminators. Federal control of elections, through the "preclearance" process, undermines these officials' authority and flexibility, to the ultimate detriment of their constituents – many of them minorities. Worse, Section 5 has been abused in some instances *to reinforce* stereotypes regarding minority voters' preferences and affiliations, preventing voters who do not embody these stereotypes from electing their candidates of choice.

The Chamber supports vigorous enforcement of those federal laws that prohibit actual voting discrimination, including the Fifteenth Amendment and Section 2 of the Voting Rights Act. By contrast, Section 5 is no longer necessary to combat widespread and persistent discrimination in voting and now, perversely, serves as an impediment to racial neutrality in voting and to the empowerment of state and local officials who represent minority constituencies.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Katzenbach upheld Section 5 of the Voting Rights Act of 1965 ("VRA") on the basis that "exceptional conditions can justify legislative measures not otherwise appropriate." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). Though the Fifteenth Amendment had barred voting discrimination over 90 years before, "registration of voting-age whites ran roughly

50 percentage points or more ahead of Negro registration" in a group of states that flouted federal law through discriminatory administration of voting requirements. *Id*. at 313. As quickly as Congress acted to prohibit particular means of discrimination by facilitating case-by-case litigation, these jurisdictions contrived new ones, exhibiting an "unremitting and ingenious defiance of the Constitution." *Id*. at 309. In the face of this massive resistance, Congress exercised its Fifteenth Amendment power in an "inventive manner" by "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims" through Section 5's temporary preclearance regime, which it confined to those specific regions where "immediate action seemed necessary." *Id*. at 327-28.

The exceptional conditions that prevailed in 1965 and justified "one of the most extraordinary remedial provisions in an Act noted for its broad remedies," *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting), no longer exist. In today's South, "[v]oter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) ("*Nw. Austin*"). Indeed, "the racial gap in voter registration and turnout is lower in the States originally covered by § 5 than it is nationwide." *Id*. at 203. The VRA's success over 45 years has been robust and durable; no longer does Section 5 remain "necessary to preserve the 'limited and fragile'

achievements of the Act." *City of Rome v. United States*, 446 U.S. 156, 182 (1980).

The logic of *Katzenbach* and *City of Rome* does not support Congress's latest 25-year reauthorization of the VRA's preclearance regime. Those cases upheld Section 5 as a temporary remedy for contemporaneous, widespread discrimination and its lingering aftereffects. *Katzenbach*, 383 U.S. at 334-35; *City of Rome*, 446 U.S. at 176. But as the record most recently compiled by Congress concludes, "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated." H.R. Rep. No. 109-478, at 12 (2006). The Court need not "check Congress's homework to make sure that it has identified sufficient constitutional violations," *Tennessee v. Lane*, 541 U.S. 509, 558 (2004) (Scalia, J., dissenting), but may instead rely on Congress's findings showing that "systematic resistance to the Fifteenth Amendment," *Katzenbach*, 383 U.S. at 328, is long past. For that reason, Section 5 is *ultra vires* and unconstitutional.

Section 4(b)'s coverage formula, based on 40-year-old data that fails to account for decades of progress, is also unconstitutional under *Katzenbach*. In 1965, Congress used "evidence of actual voting discrimination" to craft a coverage formula that the Court upheld as "rational in both practice and theory." *Id*. at 330. But in 2006, Congress rubberstamped continued application of an outdated formula in the face of "considerable evidence that it fails to account for current political conditions." *Nw. Austin*, 557 U.S. at 203. As

to theory, the most one can say in that formula's defense is that leaving it in place did not "disrupt settled expectations." Nathaniel Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 Yale L.J. 174, 208 (2007). And as to practice, the "correlation between inclusion in § 4(b)'s coverage formula and low black registration or turnout ... appears to be negative," as is the correlation between coverage and blacks' holding public office. Pet. App. 83a, 85a (Williams, J., dissenting). In other relevant respects, "the covered jurisdictions appear indistinguishable from their covered peers." *Id*. at 93a. That they are nonetheless singled out for opprobrium and federal supervision is simply irrational and, given the absence of "relevant constitutional violations," cannot be supported by the Fifteenth Amendment. *See Lane*, 541 U.S. at 564 (Scalia, J., dissenting).

To reach these conclusions, the Court need not definitively resolve the extent of Congress's Fifteenth Amendment enforcement power, *see Nw. Austin*, 557 U.S. at 204, but only apply *Katzenbach* and *City of Rome* according to their terms. Their application of the "necessary and proper" standard of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), though flexible, requires at least that Congress's ends be legitimate, its means be "plainly adapted" to those ends, and its actions comport with the letter and the spirit of the Constitution. Congress's decision to "enforce" Section 1 of the Fifteenth Amendment by invading states' power to regulate elections, in the face of evidence that any need for such a prophylactic

remedy has long passed, falls far short, particularly when the means it has chosen violate the Constitution's letter by rendering race "the predominant factor in redistricting." *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003). Of course, the result is no different under the more rigorous "congruence and proportionality" standard of *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

This case presents a question of great and recurring importance. Delaying review of the issues it raises will only exacerbate the iniquities of the preclearance regime. The Court should grant the petition for a writ of certiorari and overturn the decision of the court below.

ARGUMENT

I. THE VRA'S PRECLEARANCE REGIME EXCEEDS CONGRESS'S AUTHORITY UNDER THE FIFTEENTH AMENDMENT

The Fifteenth Amendment does not grant Congress plenary power to regulate states' electoral practices. As Congress itself recognized in the 1965 Act, suspending facially nondiscriminatory voting regulations and subjecting them to review for discriminatory purpose or effect was so novel and aggressive an exercise of its enforcement power that it applied the VRA's preclearance requirement only to those jurisdictions employing tests or devices to violate the Fifteenth Amendment's affirmative prohibition and did so only on an emergency basis, limited to five

years. Pub. L. No. 89-110, § 4, 79 Stat. 437, 438 (1965). This Court upheld that enactment as justified by "widespread resistance" to the constitutional prohibition against racial discrimination in voting: "Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner." *Katzenbach*, 383 U.S. at 337, 335. Because those unique circumstances are long in the past, and because voting discrimination is no longer concentrated in the areas singled out by its obsolete coverage formula, Section 5 no longer serves to enforce the right of citizens to vote free of race, color, or previous condition of servitude.

A. Section 5 Is No Longer an Appropriate Means of Enforcing the Fifteenth Amendment

1. Only "Widespread Resistance to the Fifteenth Amendment," and Its Lingering Aftereffects, May Justify this "Uncommon Exercise of Power"

The Court has always held that prophylactic exercises of Congress's Fifteenth Amendment enforcement power, and Section 5 in particular, "must be justified by current needs." *Nw. Austin*, 557 U.S. at 203. In particular, this means "widespread and persistent discrimination in voting," *Katzenbach*, 383 U.S. at 331, and its lingering effects, *City of Rome*, 446 U.S. at 176, 181-82.

"Section 5 was directed at preventing a particular set of invidious practices that had the effect of undoing or defeating the rights recently won by nonwhite voters." *Miller v. Johnson*, 515 U.S. 900, 925 (1995) (internal quotation marks and citation omitted). Through discriminatory administration of voting qualifications, and an endless procession of tests and devices, jurisdictions predominantly within the South managed to deprive black citizens of their right to vote for nearly a century following the Fifteenth Amendment's enactment.

Beginning in the 1950s, Congress "repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination." *Katzenbach*, 383 U.S. at 313. But that approach proved unequal to the Southern states' "unremitting and ingenious defiance of the Constitution." *Id*. at 309. Jurisdictions could "stay[ ] one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down." *Beer v. United States*, 425 U.S. 130, 140 (1976). Each new law "remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that [it], too, was discriminatory." *Id*.

Section 5 was directed precisely at this evil:

> Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these

> lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.

Katzenbach, 383 U.S. at 328.

And the *Katzenbach* Court upheld Section 5 on precisely that basis, reasoning that "exceptional conditions can justify legislative measures not otherwise appropriate." *Id*. at 334. The provision, it recognized, was an "inventive," and potentially problematic, assertion of Congress's Fifteenth Amendment enforcement power, in three respects. First, it automatically suspends state and local procedures, prior to any judicial review. But this was, the Court recognized, "a legitimate response to the problem" of "systematic resistance to the Fifteenth Amendment" that was unchecked by case-by-case litigation. *Id*. at 328. Second, Section 5's remedies were not uniform throughout the nation, in keeping with the principle of equal sovereignty, but confined "to a small number of States and political subdivisions" identified by formula. *Id*. This, too, was permissible in principle: Congress could appropriately "cho[o]se to limit its attention to the geographic areas where immediate action seemed necessary." *Id*.

Finally, the Court considered, and approved, Section 5's substantive effect, of suspending the operation of voting regulations pending federal review for discriminatory purpose or effect. This "uncommon

exercise of power," it explained, was justified only by the "exceptional circumstances" of the day:

> Congress knew that some of the States covered by § 4(b) of the Act had 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. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.

Id. at 334-35.

City of Rome affirmed *Katzenbach* and upheld the 1975 reauthorization of Section 5. The Court rejected the argument that a ban on electoral changes that are discriminatory in effect necessarily exceeds Congress's Fifteenth Amendment enforcement power. Under that power, Congress may "attack[ ] the perpetuation of earlier, purposeful racial discrimination, regardless of whether the practices they prohibited were discriminatory only in effect." *Id*. at 177. In this instance, Congress "could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." 446 U.S. at 177. Section 5

was therefore an appropriate means of enforcing the Fifteenth Amendment by "preventing States from undoing or defeating the rights recently won by Negroes." *Id*. at 178 (internal quotation marks omitted).

The Court also upheld Congress's seven-year reauthorization of Section 5, on the basis that it remained "necessary to preserve" what were then "the limited and fragile achievements of the Act." *Id*. at 182 (internal quotation marks omitted). Although recognizing that progress had been made, the Court deferred to Congress's finding, supported by electoral data, that the effects of a century of widespread discrimination persisted even a decade after the VRA's enactment:

> Significant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions. In addition, though the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions. Congress concluded that, because minority political progress under the Act, though "undeniable," had been "modest and spotty," extension of the Act was warranted.

Id. at 180-81. On that basis, "Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation

of 95 years of pervasive voting discrimination [was] both unsurprising and unassailable." *Id*. at 182.

2. The "Exceptional Conditions" Present in *Katzenbach* and Lingering After-effects Present in *City of Rome* No Longer Prevail

The same cannot be said of Congress's 2006 reauthorization of Section 5 in the face of evidence demonstrating that "[t]he extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists." *Nw. Austin*, 557 U.S. at 226 (Thomas, J., concurring).

Indeed, Congress was forced to concede that "many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA" – i.e., the very types of tests, devices, and "ingenious defiance" that Section 5 was enacted to block – "have been eliminated." H.R. Rep. No. 109-478, at 12. "Blatantly discriminatory evasions of federal decrees are rare," *Nw. Austin*, 557 U.S. at 202, and the instances of allegedly discriminatory conduct identified by Congress are few in number and widely scattered. *See Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F.Supp.2d 221, 252-54, 256-62 (D.D.C. 2008) (summarizing legislative record); Pet. App. 29a-30a (providing five examples, four involving towns or counties, over 11 years);

S. Rep. No. 109-295, at 13 (2006) (identifying a total of six published cases since 1982 where a court has found unconstitutional voting discrimination against minorities). They do not amount to anything near the kind of "widespread and persistent discrimination in voting" that *Katzenbach* held to justify Section 5. 383 U.S. at 328 (citing "a century of systematic resistance to the Fifteenth Amendment").

Reflecting this lasting progress, "the rate of DOJ objections to preclearance requests has decreased from over 4% in the first five years after the Voting Rights Act, to between 0.05% and 0.23% from 1983 to 2002," Persily, *supra*, at 199, to .05% from 1998 to 2002, Pet. App. 34a. These data on actual enforcement actions rebut any possible argument "that public officials stand ready, if given the chance, to again engage in concerted acts of violence, terror, and subterfuge in order to keep minorities from voting." *Nw. Austin*, 557 U.S. at 226 (Thomas, J., concurring).

The record is also clear that the kind of lingering aftereffects of a century of voting discrimination that the *City of Rome* Court held to support reauthorization of Section 5 are too in the past. "[T]he number of African-Americans who are registered and who turn out to cast ballots has increased significantly over the last 40 years, particularly since 1982," and "[i]n some circumstances, minorities register to vote and cast

ballots at levels that surpass those of white voters." H.R. Rep. No. 109-478, at 12. In particular:

> [I]n seven of the covered States, African-Americans are registered at a rate higher than the national average. Moreover, in California, Georgia, Mississippi, North Carolina, and Texas, black registration and turnout in the 2004 election ... was higher than that for whites. In Louisiana and South Carolina, African-American registration was 4 percentage points lower than that for whites – a rate identical to the national average.

S. Rep. No. 109-295, at 11. Even in the farthest outlier, Virginia, black voter registration in 2004 was only 7 percentage points lower than the national average, *id*., and had nowhere near the "significant disparity" between black and white voting rates that persisted through the decade following enactment of the VRA.[2] *Id*.; *see City of Rome*, 446 U.S. at 180; *cf. Katzenbach*, 383 U.S. at 313 (in several Southern states, black registration was 50 percentage points behind white registration).

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[2] Moreover, by 2008, black registration and voting rates in Virginia exceeded than those for whites. U.S. Census Bureau, Reported Voting and Registration of the Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2008, at tbl. 4b, http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/tables.html.

Similar gains are evident in the number of black elected officials:

> As of 2000, more than 9,000 African-Americans have been elected to office, an increase from the 1,469 officials who held office in 1970. As of 2004, 43 African-Americans currently serve in the United States Congress, with 42 individuals serving in the United States House of Representatives, and one serving in the United States Senate. At the State level, more than 482 African-Americans serve in State legislatures, with thousands more African-Americans serving in county, township, and other locally elected positions.

S. Rep. No. 109-296, p. 18. No longer do the number of black elected officials in covered jurisdictions "f[a]ll far short of being representative" of the black populations of covered jurisdictions. *City of Rome*, 446 U.S. at 181.

In sum, Congress's own findings, supported by Census data, demonstrate that, far from "limited and fragile," *City of Rome*, 446 U.S. at 182, the achievements of the VRA have been robust and durable, particularly over the past three decades. There is no possibility that the jurisdictions subject to Section 5, unbridled from the preclearance requirement, could act to "perpetuate[ ] the effects of past discrimination," *id*. at 176, when those effects have long since dissipated.

Recognizing that the exceptional circumstances previously found to support Section 5 no longer

prevail, Congress based its reauthorization on evidence of so-called "second-generation barriers" quite unlike the type of purposeful discrimination that motivated Section 5's enactment. *See* Pub. L. No. 109-246, § 2(b)(4), 120 Stat. 577, 577-78 (2006). Much of this evidence concerns "racially polarized voting" (i.e., "block voting"), not any kind of state action to deny the right to vote. *See* H.R. Rep. No. 109-478, pp. 34-35. It is irrelevant. *Lane*, 541 U.S. at 564 (Scalia, J., dissenting) (requiring "an identified history of relevant constitutional violations"). The remainder consists of Section 2 vote dilution litigation. Pet. App. 26a-29a, 36a-38a. This evidence, or course, does not even suggest the kind of purposeful discrimination that the Court held to support Section 5; it does not indicate any violation of the Fifteenth Amendment, *see Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 334 n.3 (2000) ("*Bossier II*"); and, as described further below, it does not support Congress's application of Section 5 to particular jurisdictions. *See* Ellen Katz, Documenting Discrimination in Voting, Judicial Findings under Section 2 of the VRA Since 1982, 36 U. Mich. J. L. Reform 643, 677-78 (2006) (identifying all of 12 lawsuits finding intentional discrimination in covered jurisdictions, and 21 in non-covered jurisdictions, between 1982 and 2006).

Finally, absent the sort of widespread discrimination and "obstructionist tactics" that prevailed in 1965, traditional litigation, such as under Section 2, is certainly not "inadequate" to protect the right to vote. *See Katzenbach*, 383 U.S. at 328. In addition to

the Section 3 "bail-in" mechanism, which authorizes judicial preclearance of voting regulations in jurisdictions found to have engaged in discrimination, "courts may always use the standard remedy of a preliminary injunction to prevent irreparable harm caused by delay" in Section 2 litigation. Pet. App. 77a-78a (Williams, J., dissenting) (citing *Perry v. Perez*, 132 S.Ct. 934, 942 (2012)). No evidence even suggests that jurisdictions (subject to Section 5 or not) have acted to evade Section 2 judgments or otherwise stymie judicial enforcement of the right to vote. *See generally* Katz, *supra* (comprehensively surveying Section 2 litigation between 1982 and 2006).

* * *

Without question, "exceptional conditions can justify legislative measures not otherwise appropriate" under Congress's remedial authority. *Katzenbach*, 383 U.S. at 334. But for Congress to persist long past the date those conditions are remedied, as it has with its reauthorization of Section 5, is to seize for itself a new and improper power that the Constitution reserves to the states.

B. The Section 4(b) Coverage Formula Is No Longer "Rational in ... Practice and Theory"

Section 4(b)'s coverage formula comes nowhere near satisfying *Katzenbach's* bare-minimum requirement that preclearance coverage be "rational in both practice and theory." Based on 40-year-old data that "fails to account for current political conditions," *Nw.*

Austin, 557 U.S. at 203, it blatantly violates "the requirement that Congress may impose prophylactic § [2] legislation only upon those particular States in which there has been an identified history of relevant constitutional violations." *Lane*, 541 U.S. at 564 (citing cases).

Katzenbach recognized that Section 4(b) was unusual, and potentially problematic, because it confines its remedies (and those of Section 5) to a discrete set of states and political subdivisions. 383 U.S. at 328. It therefore required that Congress distinguish between covered and non-covered jurisdictions in a rational manner, so as "to justify the application to [covered] areas of Congress' express powers under the Fifteenth Amendment." *Id*. at 329. The Section 4(b) formula was rational in practice, because it applied two characteristics routinely shared by jurisdictions that had engaged in actual voting discrimination – "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average." *Id*. at 330. And it was rational in theory, because those characteristics are logically probative of discrimination: "Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil; a low voting rate is pertinent for the obvious reason that widespread disenfranchisement must inevitably affect the number of actual voters." *Id*. Overall, the coverage formula's rationality was "confirm[ed]" by the fact that it exempted no state or jurisdiction that

had engaged in recent discrimination involving tests or devices – in other words, coverage could be justified on both an absolute and relative basis. *Id*. at 331.

By contrast, attempting to identify present-day vote discrimination by reference to 40-year-old data is not rational in either respect. It is certainly not rational in theory. "[T]he misuse of tests and devices ... was the evil for which the new remedies were specifically designed," *id*., but voting practices in place at the time President Richard Nixon was reelected are not probative of any current discrimination. Ending "widespread and persistent discrimination in voting" was Congress's broader objective, *id*., but obstinate refusal to consider more recent experience guarantees that, even if met, that objective will have no legal consequence whatsoever. "In identifying past evils, Congress obviously may avail itself of information from any probative source," *id*. at 330, but it may not bury its head in the sand. And the Court has never suggested that political expedience is sufficient to sustain an otherwise irrational exercise of enforcement power. *See* Persily, *supra*, at 208-09 (altering the coverage formula "would likely have led to the complete unraveling of the bill"); *id*. at 210 (expanding coverage to "large and politically powerful states ... would have sunk the bill"); *id*. at 211 ("Whatever its drawbacks, the current coverage formula had the virtue of already having been upheld by the Supreme Court," decades prior.).

Even more stunning is Section 4(b)'s complete failure in practice to identify current vote discrimination. Voter registration and turnout data, which were central to *Katzenbach*, actually undermine any argument for the formula's current rationality:

> There appears to be no positive correlation between inclusion in § 4(b)'s coverage formula and low black registration or turnout. Quite the opposite. To the extent that any correlation exists, it appears to be negative – condemnation under § 4(b) is a marker of higher black registration and turnout. Most of the worst offenders – states where in 2004 whites turned out or were registered in significantly higher proportion than African-Americans – are not covered. These include, for example, the three worst – Massachusetts, Washington, and Colorado. And in Alabama and Mississippi, often thought of as two of the worst offenders, African-Americans turned out in greater proportion than whites.

Pet. App. 83a (Williams, J., dissenting) (citing Census Bureau voting data).

Data on black elected officials also demonstrates the formula's completely arbitrary pattern of coverage:

> Covered jurisdictions have *far more* black officeholders as a proportion of the black population than do uncovered ones. Of the ten states with the highest proportion of black elected officials relative to population, eight

> are covered states, with the top five all being fully covered states (Virginia, Louisiana, South Carolina, Mississippi, and Alabama). Nor can the poor scores achieved by some uncovered states be chalked up to small black populations. Illinois, Missouri, Delaware and Michigan, where African-Americans comprise at least 10% of the [citizen voting-age population], all [score worse than] every one of the states fully covered by § 4(b).

Pet. App. 85a (Williams, J., dissenting) (citing Census Bureau and election data). Based on data from recent decades, "no one could credibly argue that the [black officeholder] numbers are proof of the coverage scheme's continued rationality." *Id*.

Taken as a whole, the same types of data on which the Court relied in *Katzenbach* and *City of Rome* do not show that vote discrimination is "concentrated in the jurisdictions singled out for preclearance." *Nw. Austin*, 557 U.S. at 203. In fact, they show the opposite. Congress's choice, notwithstanding that fact, to continue to subject those jurisdictions to the preclearance requirement is therefore arbitrary, irrational, and in excess of its Fifteenth Amendment enforcement power.

Again, recognizing that Section 4(b) could not be upheld under the reasoning of *Katzenbach* and *City of Rome*, Congress attempted to bolster the record by pointing to "second-generation barriers" to voting, principally Section 2 litigation, which are not necessarily probative of Fifteenth Amendment violations.

But Section 2 cases since the last reauthorization of the VRA in 1982 do not support Section 4(b)'s continued application:

> The five worst uncovered jurisdictions, including at least two quite populous states (Illinois and Arkansas), have worse records than eight of the covered jurisdictions.... Of the ten jurisdictions with the greatest number of successful § 2 lawsuits, only four are covered.

Pet. App. 93a (Williams, J., dissenting). Moreover, of those very few cases that resulted in a finding of intentional discrimination – the only result conceivably relevant to the *Katzenbach* analysis – far more arose in non-covered jurisdictions (21 cases) than in covered jurisdictions (12 cases). Katz, *supra*, at 677.

* * *

Lacking evidence of any meaningful correlation between Section 4(b)'s coverage formula and actual Fifteenth Amendment violations, and unable or unwilling to devise a formula suited to current conditions, Congress attempted to backfill the legislative record with largely irrelevant evidence of Section 2 cases, and even those data undermine the case for the formula's rationality. But reliable evidence, accepted by Congress and long held relevant by this Court, confirms that the coverage formula "fails to account for current political conditions," *Nw. Austin*, 557 U.S. at 203, and fails to confine Section 5's remedy to "those particular states" that have engaged in vote discrimination, *Lane*, 541 U.S. at 564 (Scalia, J., dissenting). It therefore exceeds Congress's authority.

II. THE COURT NEED NOT RESOLVE THE STANDARD OF REVIEW APPLICABLE TO SECTION 2 OF THE FIFTEENTH AMENDMENT

The foregoing analysis demonstrates that the Court need not resolve the difficult question of the proper standard of review for exercises of Congress's Fifteenth Amendment enforcement power. *See Nw. Austin*, 557 U.S. at 204 ("That question has been extensively briefed in this case, but we need not resolve it."). Whether under the more permissive *McCulloch* standard, which the Court claimed to apply in *Katzenbach* and *City of Rome*, or the potentially more rigorous "congruence and proportionality" standard of *Boerne*, the result is the same: the Fifteenth Amendment cannot support the VRA's arbitrary and unnecessary preclearance regime.

Though permissive, the *McCulloch* standard does not accord Congress plenary power. Instead, it requires that Congress, at the least, legislate with rationality and within the limitations of the Constitution. *McCulloch*, 17 U.S. (4 Wheat.) at 421; *accord Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring); *Nat'l Fed. Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2647 (2012) (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (concluding that insurance-coverage mandate was not plainly adapted, and therefore not "necessary," to effectuate insurance-market

reforms). As should be apparent, the preclearance regime fails on both counts.

First, it is anything but "plainly adapted" to the unarguably legitimate end of eradicating both widespread intentional discrimination in voting and the perpetuation of the effects of such discrimination. *See City of Rome*, 446 U.S. at 178. As described above, such discrimination is now rare and scattered, calling into serious question the appropriateness of any preclearance process other than one limited to particular jurisdictions' violations of the Reconstruction Amendments – in other words, the VRA's Section 3(b). And the effects of previous discrimination have long since dissipated, as demonstrated by blacks' robust voting participation rates and substantial gains in elected offices. But even more damning is the preclearance regime's perfectly arbitrary coverage, which bears no relation to any meaningful indicia of vote discrimination, much less actual acts of discrimination. Based on decades-old data, the coverage formula is plainly adapted only to Congress's political expedience, and not to any facts on the ground that might justify Section 5's extraordinary burden.

Second, the preclearance regime stands in violation of both the letter and the spirit of the Constitution. Section 5, even prior to its 2006 amendment, was recognized to be in "tension with the Fourteenth Amendment" to the extent that it was used as a "command that States engage in presumptively unconstitutional race-based districting." *Miller*, 515 U.S. at

927. Congress's 2006 amendments, even while leaving untouched the Section 4(b) coverage formula, ignored this Court's warnings and amended Section 5 to mandate race-conscious districting. Under the new Section 5, covered jurisdictions must prove that any change will not "diminish[ ] the ability" of minorities "to elect their preferred candidates of choice," 42 U.S.C. §§ 1973c(b),(d), and is not premised on a "discriminatory purpose" of declining to adopt other changes that would have strengthened minority voting power, § 1973c(c).

As a result of these amendments, "[p]reclearance now has an exclusive focus – whether the plan diminishes the ability of minorities (always assumed to be a monolith) to 'elect their preferred candidates of choice,' irrespective of whether policymakers (including minority ones) decide that a group's long-term interests might be better served by less concentration – and thus less of the political isolation that concentration spawns." Pet. App. 75a (Williams, J., dissenting). Moreover, "[b]y inserting discriminatory purpose into § 5, and requiring covered jurisdictions affirmatively to prove its absence, Congress appears to have ... restored 'the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting.'" *Id*. at 76a (quoting *Bossier II*, 528 U.S. at 336). Section 5 now requires, in effect, that minority voters be lumped together with other persons with whom they "may have little in common ... but the color of their skin." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). This in itself perpetuates

and enforces "impermissible stereotypes" and "bears an uncomfortable resemblance to political apartheid." *Id*. And mandating that covered jurisdictions discriminate among their own citizens on the basis of race surely "exacerbate[s] the substantial federalism costs that the preclearance procedure already exacts." *Bossier II*, 528 U.S. at 336.[3]

Finally, even the most cursory analysis shows that the preclearance regime, which cannot withstand *McCulloch's* standard, surely fails "congruence and proportionality" review. Under *Boerne*, a court must "identify with some precision the scope of the constitutional right at issue," *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 365 (2001); "examine whether Congress identified a history and pattern" of constitutional violations, *id*. at 368; and then find "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520. Here, a "history and pattern" of constitutional violations is lacking, and the Court has rejected looking decades

[3] Although these issues were not argued below as *independent* grounds for invalidation of Sections 4(b) and 5, they are unquestionably implicated by the question presented, both under the *McCulloch* standard (actions must "consist with the letter and spirit of the constitution") and the *Boerne* standard (actions must be congruent and proportional), and are therefore properly raised by the petition for a writ of certiorari. *See* Pet. App. at 77a (Williams, J., dissenting) (To evaluate Section 4(b)'s constitutionality, "one must necessarily first assess the severity of the consequences of coverage under § 4(b) (i.e., subject to § 5 as it exists today.)").

into the past to take notice of conditions that fortunately no longer prevail, in support of current and substantial burdens on federalism. *Nw. Austin*, 557 U.S. at 203. Measured against current evidence of intentional discrimination in voting, the preclearance regime is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S. at 509.[4] Nor is its haphazard coverage congruent to any recent pattern of actual voting discrimination.

Of course, it is only logical that an enactment which is not "plainly adapted" to enforcement of a constitutional right, or outside the "letter and spirit of the constitution," also lacks "congruence and proportionality" with respect to violations of that right. *See generally* Evan Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 Stan. L. Rev. 1127, 1153-58 (2001). A statute that fails *McCulloch* therefore fails *Boerne*. To decide this case, the Court need not choose between the two.

[4] And this infirmity is only exacerbated by the most recent amendments to Section 5.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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AUGUST 2012