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

## BRIEF FOR SENATE MAJORITY LEADER HARRY M. REID AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS


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## QUESTION PRESENTED

Whether Congress's decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing 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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## INTEREST OF *AMICUS CURIAE*[*]

*Amicus* is currently serving as the Senate Majority Leader and has two primary interests here. First, *Amicus* seeks to ensure that the Court does not reduce Congress's longstanding authority to combat racial discrimination in voting by adopting a constricted view of the authority granted to Congress by the Fourteenth and Fifteenth Amendments. Second, *Amicus* seeks to remind the Court that Section 5 passed the Senate unanimously, with no members from covered states voting against, and that unanimous ratification deserves great respect in light of Congress's relative institutional competence—as an elected branch, unlike the Court—to judge what is necessary to prevent racial discrimination in election practices.

## SUMMARY OF ARGUMENT

It may well be that "[t]hings have changed in the South," *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009), but that is not the central issue in this case. The words of the Fourteenth and Fifteenth Amendments have not changed, and those amendments grant *Congress* the power to enact legislation to combat racial discrimination in electoral practices. The central

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[*] No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. All parties have filed with the Clerk of the Court letters granting blanket consent to the filing of *amicus* briefs. Counsel of record for all parties received notice of *amicus*'s intention to file this brief more than 10 days before it was due.

question in this case is whether this Court will, contrary to longstanding precedent, reduce Congress's power to enforce these amendments and instead place itself in charge of deciding what measures are needed to prevent discrimination in voting.

Since the enactment of the Civil War amendments, this Court has consistently held 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." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). The Court has applied rational basis review to such enactments based on both the plain language and original intent of the amendments: "The right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of race, color, or previous condition of servitude," and "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV. By this language, "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created." *Katzenbach*, 383 U.S. at 326. "'It is the power of *Congress* which has been enlarged. *Congress* is authorized to enforce the prohibitions by appropriate legislation.'" *Id.* (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1879)) (emphasis added).

Despite this explicit grant of authority to Congress, Petitioner claims that Congress has overstepped its bounds and infringed on state

sovereignty. Such claims are nothing new, and this Court has consistently rejected them for nearly 150 years. "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce . . . . Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact." *Ex parte Virginia*, 100 U.S. at 346.

Put simply, for well over a century this Court has held—based on clear constitutional language—that Congress's power is at its apex when it seeks to "effectuate the constitutional prohibition of racial discrimination in voting." *Katzenbach*, 383 U.S. at 324. The Court has therefore consistently applied rational basis review to such enactments. If the Court follows its longstanding precedent and does the same here, it must uphold Section 5.

The Court also should uphold Section 5 based on its stated desire to show "respect for a coordinate branch of the government" and the judicial role. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012). Section 5, at its heart, aims to protect the political process from discriminatory practices. If there is one thing about which the elected branches know more than this Court, it is the political process. *See id.* ("[W]e possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders . . . ."). And when Congress

reauthorized Section 5 in 2006, the Senate passed it unanimously, with not a single member from a covered state voting against. If this Court strikes down Section 5, it will in effect be declaring that it knows better than the elected Senators from these states whether the protections of Section 5 remain necessary. There is no basis in the Constitution or in any proper conception of the judicial role for such a ruling.

## ARGUMENT

### I. The Language of the Constitution and Longstanding Precedent Require Application of Rational Basis Review

Before this Court turns to the question of whether Congress compiled a record sufficient to support the reauthorization of Section 5, it must first determine what level of scrutiny it will apply: the rational basis test or a less deferential standard? The question is critical because it impacts not only the Court's approach to this case, but also the fundamental balance of power between the judiciary and Congress. Out of respect for the Constitution's plain language, the intent of the Framers, the Court's own precedent, and a coordinate branch of government, the Court should apply rational basis review.

The Fourteenth and Fifteenth Amendments could not be clearer in two respects crucial to this case. First, they expressly limit the power of states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. "The right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV. *See also Ex parte Virginia*, 100 U.S. at 346 ("The prohibitions of the Fourteenth Amendment are directed to the States . . . .").

Second, the amendments make clear that "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV. "'It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation.'" *Katzenbach*, 383 U.S. at 326 (quoting *Ex parte Virginia*, 100 U.S. at 345).

There can thus be no question that these amendments give Congress power to prevent discrimination by states; the only question is how to judge what qualifies as "appropriate legislation" to advance this purpose. For nearly 150 years, this Court has held that "legislation is appropriate" if it is "adapted to carry out the objects the amendments have in view," i.e., if it "tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion." *Ex parte Virginia*, 100 U.S. at 345-46. The Court has applied this same rational basis test countless times to laws enacted by

Congress to prevent racial discrimination in voting, repeatedly emphasizing 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. *See also City of Rome v. United States*, 446 U.S. 156, 175 (1980); *Oregon v. Mitchell*, 400 U.S. 112, 118, 217, 231 (1970); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

Under this standard, this Court does not sit as a super-legislature to decide whether Congress has appropriately respected states. The Framers of the Fourteenth and Fifteenth Amendments have already made that decision by giving Congress power to enforce them: "Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact." *Ex parte Virginia*, 100 U.S. at 346.

Instead, the Court simply asks whether "Congress could rationally have concluded" that extending Section 5 would help prevent racial discrimination in election practices. *City of Rome*, 446 U.S. at 177. As detailed in the next section, the only plausible answer to that question is yes.

Petitioner contends, however, that the Court should apply the congruence and proportionality standard from its recent Fourteenth Amendment cases rather than the rational basis test it has always applied to judge Section 5 and other laws aimed at eliminating discrimination in voting. Pet.

Br. 23 n.4. Alternatively, Petitioner contends that the Court may simply avoid this question because "Section 5 and Section 4(b) are no longer 'appropriate' enforcement legislation under any applicable standard of review." *Id.* Neither argument bears scrutiny.

There is no justification in this case to apply the congruence and proportionality standard. To begin with, the Fifteenth Amendment—on its own—provided sufficient authority for Congress to enact and extend Section 5, which aims exclusively at preventing discrimination in voting. But this Court has never applied the congruence and proportionality standard to a law enacted under Congress's Fifteenth Amendment power. *See Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003) ("[P]etitioners ask us to apply the 'congruence and proportionality' standard described in cases evaluating exercises of Congress' power under § 5 of the Fourteenth Amendment. But we have never applied that standard outside the § 5 context.") (citation omitted).

Moreover, in evaluating prior extensions of Section 5—that is, in the precedent directly on point—this Court has applied rational basis review rather than the congruence and proportionality standard. *City of Rome*, 446 U.S. at 175 (holding that Congress's authority under section 2 of the Fifteenth Amendment is "no less broad than its authority under the Necessary and Proper Clause"); *Katzenbach*, 383 U.S. at 324 ("As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional

prohibition of racial discrimination in voting."). By contrast, the Court has applied the congruence and proportionality standard in cases addressing statutes far removed from the central purpose of the Fourteenth and Fifteenth Amendments: the elimination of discrimination based on race. *See, e.g.*, *Nev. Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (applying congruence and proportionality test in upholding provision of Family and Medical Leave Act allowing recovery of money damages from states); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (applying test in invalidating provisions of the Americans with Disabilities Act subjecting state employers to money damages); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (applying test in invalidating provisions of the Patent and Plant Variety Protection Remedy Clarification Act that made states liable in federal court for patent infringement). *See also Tennessee v. Lane*, 541 U.S. 509, 563 (2004) (Scalia, J., dissenting) (noting that "racial discrimination . . . was the principal evil against which the Equal Protection Clause was directed, and the principal constitutional prohibition that some of the States stubbornly ignored").

Thus, even if the Court were to conclude that Congress had to rely on its Fourteenth Amendment power to extend Section 5, it should still apply rational basis review given that Section 5's purpose of preventing racial discrimination in voting is at the very heart of the purpose of the Fourteenth and Fifteenth Amendments. *See, e.g.*, *Lane*, 541 U.S. at 561 (Scalia, J., dissenting) ("Giving § 5 more

expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the Fourteenth Amendment a priority of attention that this Court envisioned from the beginning, and that has repeatedly been reflected in our opinions."); *id.* ("I shall leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States.").

"Respect for a coordinate branch of Government forbids striking down an Act of Congress except upon a clear showing of unconstitutionality." *Salazar v. Buono*, 130 S. Ct. 1803, 1820 (2010). The Court cannot, consistent with this rule, change its longstanding approach to evaluating congressional enactments designed "to effectuate the constitutional prohibition of racial discrimination in voting." *Katzenbach*, 383 U.S. at 324. This is doubly so because congressional power is at its apex when Congress legislates to protect rights subject to heightened scrutiny, including the right that is the singular focus of Section 5—the right to vote free from racial discrimination. *Hibbs*, 538 U.S. at 736.

In sum, the language of the Fourteenth and Fifteenth Amendments, as well as decades of precedent applying them, compel the conclusion that the Court should apply rational basis review here. The 2006 extension of Section 5 plainly survives review under that (or any) standard.

## II. The 2006 Reauthorization of Section 5 Was Approved Unanimously by the Senate Based on Extensive Evidence and Survives Any Standard of Review

Congress's conclusion that reauthorization of Section 5 was necessary was based on extensive testimony and substantial documentary evidence, as reflected by the legislative history compiled by both houses, which runs to over 15,000 pages. The decision to reauthorize was not a close question. The vote in support was bipartisan and overwhelming in both chambers. In the Senate, it was unanimous. The conclusion of the legislative branch that, on the record before it, reauthorization was justified was plainly reasonable and is entitled to substantial deference from this Court.

Not only is the legislative record in support of Congress's 2006 reauthorization of Section 5 sufficient to defeat Petitioner's attack, it is much more substantial and extensive than this Court's precedent requires. Congress's decision to reauthorize Section 5 was based on a voluminous record replete with evidence of its effectiveness and continued necessity, including evidence specific to the jurisdictions presently covered by Section 4(b)'s formula. That record easily satisfies the rational basis review that should apply, and also more than satisfies the congruence and proportionality test outlined in *City of Boerne v. Flores*, 521 U.S. 507 (1997). *Amicus* leaves a more extensive discussion of the record to Respondents, except to reiterate that the days of testimony and thousands of pages of

documentary submissions provide extensive evidence that reauthorization of Section 5 is justified by current needs, including specific and substantial evidence of continued discriminatory practices in covered jurisdictions.[1] The Court may not second guess and substitute its judgment for Congress's reasonable conclusion, made on this extensive

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[1] *See, e.g.*, *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 3-4 (2006) (statement of Anita S. Earls, Director of Advocacy, University of North Carolina Law School Center for Civil Rights) (summarizing "five main sources of evidence documenting continued intentional discrimination in voting in the covered jurisdictions" including "numerous objection letters from every covered jurisdiction [since 1982]" that "document an extensive record of local officials seeking to change dates of election, change election district boundaries, change city boundaries, and make other changes in election procedures out of a desire to suppress, diminish, or negate the effect of minority voters"; 25 declaratory judgment actions where jurisdictions were denied pre-clearance; numerous judicial findings of intentional discrimination in litigation brought under Section 2 in published and unpublished opinions; and 501 instances in which proposed changes affecting voting were withdrawn after the Department of Justice requested more information about the proposed changes); H.R. REP. NO. 109-478, at 36 (2006) (finding that "voting changes devised by covered jurisdictions [in recent years] resemble those techniques and methods used in 1965, 1970, 1975, and 1982 including: enacting discriminatory redistricting plans; switching offices from elected to appointed positions; relocating polling places; enacting discriminatory annexations and deannexations; setting numbered posts; and changing elections from single member districts to at-large voting and implementing majority vote requirements" and "[t]he Committee received testimony indicating that these changes were intentionally developed to keep minority voters and candidates from succeeding in the political process").

record, that reauthorization was necessary to remedy current discrimination and prevent backsliding on the progress that the Voting Rights Act has made possible. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("In reviewing the constitutionality of a statute, courts must accord substantial deference to the predictive judgments of Congress," which "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.") (internal quotation marks omitted).

Finally, the bicameral legislative system envisioned by the Framers and enshrined in our Constitution ensures that "[n]o law or resolution can . . . be passed without the concurrence, first, of a majority of the people [as represented by the House of Representatives], and then, of a majority of the States [as represented by the Senate]." THE FEDERALIST NO. 62 (James Madison). The 2006 reauthorization of Section 5 was approved overwhelmingly by both chambers, with not a single Senator voting against it. In other words, the 2006 reauthorization was approved unanimously by the States through their elected representatives, including those most directly affected by Section 5. That provides further reason for the Court to reject Petitioner's argument that the reauthorization violates constitutional principles of federalism.

## CONCLUSION

The question before the Court is not the wisdom of extending Section 5, although the Court is

certainly free to disagree with Congress on that question. The question is whether "Congress could rationally have concluded" that extending Section 5 would advance the cause of eradicating racial discrimination in election practices. *City of Rome*, 446 U.S. at 177. On that question, there can be no meaningful dispute, especially given the unanimous conclusion of the elected members of the United States Senate that Section 5 remains necessary.

Respectfully submitted,

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