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 OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully urges this Court to reverse the decision of the D.C. Circuit.

Justice and Freedom Fund ("JFF") is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation*, released in 2010.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In order to enact the Voting Rights Act of 1965 ("VRA"), Congress exercised the extraordinary enforcement powers granted by the Fourteenth and Fifteenth Amendments. Those powers were necessary to address the extraordinary evils of racial discrimination. But there is an inherent friction

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

between these added congressional powers and other provisions of the Constitution.

Both Congress and this Court have acknowledged the vast improvement in minority voting practices since VRA was enacted in 1965—reducing the need to continue its extreme measures and highlighting the substantial federalism costs that many Justices of this Court have observed. The time has come to reconsider the constitutionality of VRA's § 5 preclearance requirements (42 U.S.C.S. § 1973c) and celebrate the success the Act has achieved:

> Admitting that a prophylactic law as broad as § 5 is no longer constitutionally justified based on current evidence of discrimination is not a sign of defeat. It is an acknowledgment of victory.

Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 226 (2009) (Thomas, J., concurring and dissenting) ("*NAMUD*").

ARGUMENT

I. CONGRESS HAS EXCEEDED THE SCOPE OF POWERS GRANTED BY THE FOURTEENTH AND FIFTEENTH AMENDMENTS.

This Court once explained the broad sweep of the Reconstruction Amendments in terms similar to the Necessary and Proper Clause (Art. I, § 8, cl. 18):

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments

> have in view, whatever 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, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-346 (1880). But—"as broad as the congressional enforcement power is, it is not unlimited." *City of Boerne,* 521 U.S. 507, 518-519 (1997), quoting *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). The time has come for this Court to define the outer limits of that power.

A. The Voting Rights Act Was An Exercise Of Extraordinary Power To Address The Extreme Evils Of Racial Discrimination.

The people of this country had to amend the Constitution in order to grant Congress the sweeping powers underlying the VRA. Section 5 sweeps so broadly that it imposes onerous preclearance requirements for every election law change, no matter how minor or innocuous. *NAMUD*, 557 U.S. at 202; *Shelby v. Holder*, 679 F.3d 848, 861 (D.C. Cir. 2012). This Court has consistently acknowledged the extraordinary nature of these powers:

- *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 334 (1966) ("uncommon exercise of congressional power")

- *Allen v. State Bd. of Elections,* 393 U.S. 544, 566 (1969) ("The legislative history on the

whole supports the view that Congress intended to reach any state enactment, which altered the election law of a covered State in even a minor way.")

- *Presley v. Etowah Cnty. Comm'n,* 502 U.S. 491, 500-501 (1992) (describing § 5 as "an extraordinary departure from the traditional course of relations between the States and the Federal Government")

- *Shelby v. Holder*, 679 F.3d at 886 (Williams, J., dissenting) (VRA "governs many laws that likely could never "deny or abridge" a "minority group's opportunity to vote")

In order to deter unconstitutional conduct, Congress can even prohibit facially constitutional conduct. *Tennessee v. Lane,* 541 U.S. 509, 520 n. 4 (2004), citing *Fitzpatrick v. Bitzer,* 427 U.S. 445, 455 (1976); *see also Nev. Dep't of Human Res. v. Hibbs,* 538 U.S. 721, 727-728 (2003), *City of Boerne v. Flores,* 521 U.S. at 518. Moreover, the ability to prevent a state from enacting a law far exceeds the power to invalidate an existing law. *South Carolina v. Katzenbach,* 383 U.S. at 361 (Black, J., concurring and dissenting).

This unusual departure from America's governmental structure has been warranted by the "insidious and pervasive evil" of racial discrimination in voting (*id.*, at 309)—"one of the gravest evils that Congress can seek to redress." *Shelby v. Holder*, 679 F.3d at 860, citing *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886) ("[The right to vote] is regarded as a fundamental political right, because preservative of all

rights."). Although originally justified by "voluminous legislative history" (*Katzenbach,* 383 U.S. at 309), the most recent extension rests on outmoded data and exceeds the outer bounds of constitutionality.

B. Congress Has Stretched Its Extraordinary Powers To The Breaking Point.

Over the years, Congress has expanded the reach of VRA in terms of both time and power. A five-year "temporary" plan now spans over six decades. Statutes that originally tracked the Constitution now cut deeply into state authority. The DOJ has refused to preclear voter identification laws in Texas and South Carolina, contrary to this Court's holding in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). Cert. Pet. 19-20. Changes to early voting in Florida require preclearance, although many states do not even offer opportunities for early voting. Cert. Pet. 20.

In connection with the Senate Judiciary Committee's recent hearing about voter identification laws, Senator Charles Grassley (R-Iowa) expressed concerns that reflect the policy issues underlying this litigation:

> It seems today that in any election or in any discussion of voting rights, the terms "suppression" and "disenfranchisement" are thrown about, sometimes in a cavalier fashion. That approach is not helpful to protecting voting rights.... Comparing common-sense voter ID requirements, which enjoy the support of three-quarters of the electorate and a majority of Democrats, to poll taxes or worse, trivializes the

> sufferings of millions of Americans who were denied the right to vote.

Statement of Ranking Member Chuck Grassley to Senate Judiciary Committee, December 19, 2012.[2] But under the current VRA, Shelby County and other jurisdictions must seek federal approval to enact even the most "common sense" voting requirements. This procedure indeed trivializes the experience of racial minorities who were truly disenfranchised in past decades.

1. The Original 5-Year Plan Has Been Stretched To 66 Years.

Congress originally intended §§ 4(b) and 5 of the VRA as a temporary five-year program. Cert. Pet. 8, citing H.R. Rep. No. 91-397 (1969). That was nearly fifty years ago. Extensions in 1970 (five years), 1975 (seven years), 1982 (twenty-five years), and 2006 (twenty-five years) have vastly expanded the time frame—from five years to sixty-six years. This Court sustained the constitutionality of the 1970, 1975, and 1982 extensions. *Shelby v. Holder*, 679 F.3d at 855-856 (citing cases). But the most recent (2006) extension continues to rely on data from 1972—forty years ago—to trigger the onerous § 5 preclearance requirements. *NAMUD*, 557 U.S. at 200. What began as a short-term plan now stretches across decades. It is no longer temporary.

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[2] http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=43669# (last visited 12/27/12).

2. The Scope Of Congressional Power Has Vastly Expanded—Stretching The Constitutional Elastic Too Far.

Key portions of VRA originally tracked constitutional language:

> In *Mobile v. Bolden,* 446 U.S. 55, 60-61 (1980), this Court held that § 2, as it then read, "no more than elaborates upon . . . the Fifteenth Amendment" and was "intended to have an effect no different from that of the Fifteenth Amendment itself."

Bartlett v. Strickland, 556 U.S. 1, 10 (2009). But after the 1982 amendments—extending the preclearance mandate another 25 years—"[t]he amended version of § 2 requires consideration of effects, as it prohibits practices 'imposed or applied . . . in a manner which results in a denial or abridgment' of the right to vote. 96 Stat. 134, 42 U.S.C. § 1973(a) (2000 ed.)." *Id*. In 2006, Congress engineered an even greater expansion of its power, overruling two of this Court's key holdings about VRA—*Georgia v. Ashcroft,* 539 U.S. 461, 479-80 (2003) and *Reno v. Bossier Parish School Board,* 528 U.S. 320, 328 (2000)—decisions that eased VRA's federalism concerns by giving the states more flexibility to maintain or even expand minority influence in the political process. *Shelby v. Holder*, 679 F.3d at 886 (Williams, J., dissenting); *see also* Brief of Former Department of Justice Officials as Amicus Curiae, Supporting Petitioner, 6-14.

II. THE VOTING RIGHTS ACT NOW THREATENS AMERICA'S FUNDAMENTAL SYSTEM OF GOVERNMENT.

The architects of the Constitution created a federal government "powerful enough to function effectively yet limited enough to preserve the hard-earned liberty fought for in the War of Independence." *Shelby v. Holder*, 679 F.3d at 853. "[A] group of formerly independent states bound themselves together under one national government," delegating some of their powers—but not all—to the newly formed federal administration. *Reynolds v. Sims*, 377 U.S. 533, 574 (1964). Power is divided vertically, between the federal and state governments, and horizontally, among the three co-equal branches at each level. This Court has long recognized the critical need to preserve this structure:

> "The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," . . . "Without the States in union, there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its

> provisions, looks to an indestructible Union, composed of indestructible States.

Texas v. White, 74 U.S. 700, 725 (1869), quoting *County of Lane v. Oregon,* 74 U.S. 71, 76 (1869).

After the Civil War, the Reconstruction Amendments carved out an exception to America's balance of federal and state powers because "states too could threaten individual liberty." *Shelby v. Holder*, 679 F.3d at 853. These Amendments are the source of congressional authority to enact the VRA. But VRA's federalism costs—particularly the § 5 preclearance mandate—has led Members of this Court to express serious reservations. *NAMUD,* 557 U.S. at 202 (collecting cases). The Constitution "establishes a system of dual sovereignty between the States and the Federal Government" (*Gregory v. Ashcroft,* 501 U.S. 452, 567 (1991)), yet "the preclearance requirements in one State would be unconstitutional in another." *NAMUD*, 557 U.S. at 203 (*Gregory v. Ashcroft,* 501 U.S. at 491-492 (Kennedy, J., concurring)).

VRA's preclearance requirements endanger key elements of American government: the separation of powers, the sovereignty of the states, and ultimately the liberty of individuals—*the people*.

A. VRA § 5 Threatens Individual Liberty To Participate In The Political Process.

The Reconstruction Amendments were designed to protect individual liberties, including equal protection and the right to vote. Federalism also safeguards individual liberty, allowing states to "respond to the

initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Bond v. United States,* 131 S. Ct. 2355 (2011). It may seem counterintuitive, but "'freedom is enhanced by the creation of two governments, not one.' *Alden v. Maine,* 527 U.S. 706, 758 (1999)." *Id*. at 2364. As this Court recently affirmed, "'federalism secures to citizens the liberties that derive from the diffusion of sovereign power. *New York v. United States,* 505 U. S. 144, 181 (1992)." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012). "'By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.' *Bond v. United States,* 131 S. Ct. 2355, 2364 (2011))." *Id*. at 2578. This observation is not new:

> Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985), quoting *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 572 (1985) (Powell, J., dissenting).

Gregory v. Ashcroft, 501 U.S. at 458-459. The "double security" of American federalism is deeply rooted in the nation's history:

- "In the compound republic of America, the power surrendered by the people is first

> divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p. 323.

Gregory v. Ashcroft, 501 U.S. at 458-459 (quoting James Madison); *see also Printz v. United States*, 521 U.S. 898, 922 (1997).

- "If their rights are invaded by either [government], [the people] can make use of the other as the instrument of redress." The Federalist No. 28, pp. 180-181 (C. Rossiter ed. 1961).

Gregory v. Ashcroft, 501 U.S. at 458-459 (quoting Alexander Hamilton).

Federalism questions arose and generated heated debate when Congress debated the original Fourteenth Amendment test. Concerns arose that "[t]he proposed Amendment gave Congress too much legislative power at the expense of the existing constitutional structure." *City of Boerne v. Flores,* 521 U.S. at 520, citing Cong. Globe, 39th Cong., 1st Sess., 1063-1065 (1866) (statement of Rep. Hale). The Amendment passed after its language was revised to grant Congress only remedial power, rather than broad authority over life, liberty, and property that would oust state jurisdiction. *Id*. at 521.

Members of this Court have echoed the same type of apprehension in various Fourteenth Amendment cases, including some of the challenges to VRA. The "federalist structure of joint sovereigns...increases opportunity for citizen involvement in democratic processes." *Gregory v. Ashcroft,* 501 U.S. at 458. The preclearance mandate decreases those opportunities—and its interference with a community's control over its democratic process "also operates at an individual level to diminish the voting rights of residents of covered areas." *City of Rome v. United States,* 446 U.S. 156, 202 (1980) (Powell, J., dissenting).

In short, "[t]he preclearance requirement both intrudes on the prerogatives of state and local governments and abridges the voting rights of all citizens in States covered under the Act." *Id.* at 200.

B. VRA Threatens The Division Of Power Between The Federal Government And The States.

The preclearance mandate holds Shelby County and other covered jurisdictions to a higher standard than the rest of the nation, jeopardizing not only citizen participation in the local political process—but also the equal sovereignty of the States.

"The allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States,* 131 S. Ct. at 2364. This Court recently reinforced the importance of maintaining "the status of the States as independent sovereigns in our federal system...[o]therwise the two-government system

established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. at 2602. In spite of VRA's importance in securing the right of all races to vote, there is a need to curb the growing power of Congress in this arena so that American federalism does not collapse.

1. The Reconstruction Amendments Grant Congress The Power To Enact Legislation At The Federal Level—Not The Power To Veto Legislation At The State Level.

In one of the earliest challenges to VRA, Justice Black sounded an alarm about the dangers of § 5's preclearance mandate:

> Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless.

South Carolina v. Katzenbach, 383 U.S. at 358-359 (Black, J., concurring and dissenting). According to Justice Black, Congress adopted "means that conflict with the most basic principles of the Constitution." *Id*. Congress strayed from the classic standard enunciated in *McCulloch*: "...all means which are not prohibited, but consist with the letter and spirit of the

constitution." *McCulloch v. Maryland,* 17 U.S. 316, 421 (1819). The power to require federal permission for the enactment of state laws clashes with the Guaranty Clause, "approach[ing] dangerously close to wiping the States out as useful and effective units in the government of our country." *South Carolina v. Katzenbach,* 383 U.S. at 359 (Black, J., concurring and dissenting). The preclearance procedure "is reminiscent of the deeply resented practices used by the English crown in dealing with the American colonies," including "the King's practice of holding legislative and judicial proceedings in inconvenient and distant places." *Id*. at 360 n. 2. Moreover, proceedings of the original Constitutional Convention "show beyond all doubt" that Congress was denied veto power over state laws, because such broad authority would render the States "helpless to function as effective governments." *Id*. at 360-361.

2. The Constitution Established A System Of Dual Sovereignty.

"It is incontestible that the Constitution established a system of 'dual sovereignty.' *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991); *Tafflin v. Levitt,* 493 U.S. 455, 458 (1990)." *Printz v. United States*, 521 U.S. at 918. The States were to "remain independent and autonomous within their proper sphere of authority." *Id*. at 928; see *Texas v. White,* 74 U.S. at 725. As this Court observed in *Printz*, the States' "residual and inviolable sovereignty" (The Federalist No. 39, at 245 (James Madison)) permeates the text of the Constitution, including Art. IV, § 3 (state territory), Art. III, § 2 (Judicial Power Clause), Art. IV, § 4 (Privileges and Immunities Clause), and Art. V

(Amendments). *Id*. at 919. In addition to these and other provisions, residual sovereignty is implicit in Art. I, § 8 (delegating enumerated powers to the federal government) and explicit in the Tenth Amendment (reserving all other powers to the States and people). *Id.* at 919; *see also United States v. Cruikshank,* 92 U.S. 542, 551 (1876); *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 848 (1995) (Thomas, J., dissenting).

Moreover, "state legislatures are *not* subject to federal direction. *New York v. United States,* 505 U.S. 144 (1992)." *Printz*, 521 U.S. at 912. The Framers crafted a system where federal and state governments would "exercise concurrent authority over the people"—"reject[ing] the concept of a central government that would act upon and through the States." *Id*. at 919-920. VRA's preclearance scheme subjects the States to federal direction. That is contrary to this Court's direction, particularly in light of the undeniable progress achieved over the past few decades.

3. The Constitution Grants The States Primary Authority To Regulate Elections.

The States "have broad powers to determine the conditions under which the right of suffrage may be exercised." *Carrington v. Rash,* 380 U.S. 89, 91 (1965). *See also White v. Weiser,* 412 U.S. 783, 795 (1973); *Burns v. Richardson,* 384 U.S. 73, 84-85 (1966). The Framers reserved this important power to the States. *Gregory v. Ashcroft*, 501 U.S. at 461-462.

> No function is more essential to the separate and independent existence of the States and their governments than 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.

Oregon v. Mitchell, 400 U.S. at 125.

The States determine the times, places, and manner of holding elections for Senators and Representative. Art. I, § 4, cl. 1. In today's world, that is a complex matter—"the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections." *Storer v. Brown*, 415 U.S. 724, 729-730 (1974). Preclearance is especially burdensome in today's world of increasingly complicated election law.

Redistricting is also "primarily the duty and responsibility of the State." *Perry v. Perez*, 132 S. Ct. 934, 940 (2012), quoting *Chapman v. Meier,* 420 U.S. 1, 27 (1975). Apportionment of federal congressional districts implicates state powers under Art. I, §§ 2, 4. *League of United Latin American Citizens v. Perry*, 548 U.S. 349, 414-415 (2006), citing *Growe v. Emison,* 507 U.S. 25, 34 (1993) and *Smiley v. Holm,* 285 U.S. 355, 366-367 (1932). Placing primary responsibility at the state level—and granting only secondary duties to Congress—facilitates and protects citizen participation in the political process:

> [D]rawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance. That Congress is the federal body explicitly given constitutional power over elections is also a noteworthy statement of preference for the democratic process.

LULAC, 548 U.S. at 416 (expressing preference for districts drawn by the state and federal elected branches rather than the courts).

The reserved powers of the States should never be used to circumvent federally protected rights—when that happens, federal judicial review is warranted. *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960). But the Fourteenth Amendment does not supersede all principles of federalism: "[T]his Court has never held that the Amendment may be applied in complete disregard for a State's constitutional powers." *Gregory v. Ashcroft*, 501 U.S. at 468. On the contrary, this Court applies a less demanding standard when dealing with matters normally within the States' discretion. *Id.* at 469, citing *Sugarman v. Dougall,* 413 U.S. 634, 648 (1973). One such matter is the regulation of elections.

4. The Preclearance Mandate Violates The Equal Sovereignty Of The States.

America's "historic tradition is that the States enjoy 'equal sovereignty.' *United States v. Louisiana,* 363 U.S. 1, 16 (1960) (citing *Lessee of Pollard v. Hagan,* 44 U.S. 212, 3 How. 212, 223 (1845)); see also *Texas v. White,* 74 U.S. 700, 7 Wall. 700, 725-726 (1869)."

NAMUD, 557 U.S. at 203. VRA's preclearance mandate admittedly "differentiates between the States" despite that tradition. *Shelby v. Holder*, 679 F.3d at 858.

The Fourteenth Amendment's history reveals initial criticism that it would give Congress "too much legislative power at the expense of the existing constitutional structure...a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution." *City of Boerne v. Flores,* 521 U.S. at 520-521. The Reconstruction Amendments all "by their nature contemplate some intrusion into areas traditionally reserved to the States." *Lopez v. Monterey Cnty.,* 525 U.S. 266, 282-283 (1999), citing *City of Rome v. United States,* 446 U.S. at 179; *see also Fitzpatrick v. Bitzer,* 427 U.S. at 455-456; *Miller v. Johnson,* 515 U.S. 900, 926 (1995). The invasion of state power is so sweeping that it even allows Congress to prohibit conduct which is not itself unconstitutional—in order to remedy or deter constitutional violations. *Lopez v. Monterey Cnty.,* 525 U.S. at 282-283; *City of Boerne v. Flores,* 521 U.S. at 518.

VRA's preclearance requirement is "one of the most extraordinary remedial provisions in an Act noted for its broad remedies.... [I]ts encroachment on state sovereignty is significant and undeniable." *NAMUD*, 557 U.S. at 224 (Thomas, J., dissenting in part), quoting *United States v. Sheffield Bd. of Comm'rs,* 435 U.S. 110, 141 (1978) (Stevens, J., dissenting). As Justice Powell warned, this "encroachment is especially troubling because it destroys local control of the means of self-government, one of the central values of our

polity." *City of Rome,* 521 U.S. at 201 (Powell, J., dissenting). Such a departure from the nation's commitment to equal state sovereignty requires strong justification. *NAMUD*, 557 U.S. at 203. Just months ago, this Court noted *NAMUD's* constitutional concerns and concluded that "[t]hose concerns would only be exacerbated if § 5 required a district court to wholly ignore the State's policies in drawing maps that will govern a State's elections, without any reason to believe those state policies are unlawful." *Perry v. Perez*, 132 S. Ct. at 941.

C. VRA Threatens The Separation Of Powers Among Co-Equal Branches Of Government.

In addition to intruding on state sovereignty, the preclearance mandate threatens the horizontal division of power among the branches of government. The "congruence and proportionality" test highlights that danger. This test is more stringent than the "rational means" standard (*South Carolina v. Katzenbach*, 383 U.S. at 324) and has served well in the context of racial discrimination. But even in that context, the time has come to re-examine its costs to the separation of powers doctrine and refine it in light of current conditions.

"Much of the Constitution is concerned with setting forth the form of our government...[it] divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Printz v. United States*, 521 U.S. at 933, quoting *New York,* 505 U.S. 144, 187 (1992).

In light of the division of powers among coequal branches, judicial deference to Congress is the norm. Indeed, judging the constitutionality of an act of Congress is "the gravest and most delicate duty that this Court is called on to perform." *NAMUD*, 557 U.S. at 205, quoting *Blodgett v. Holden,* 275 U.S. 142, 147-148 (1927) (Holmes, J., concurring). And the Fifteenth Amendment expressly enlarges federal power, authorizing Congress to enforce its decrees by appropriate legislation. *South Carolina v. Katzenbach,* 383 U.S. at 325-326. "Some legislation is contemplated to make the [Civil War] amendments fully effective." *Id.*, quoting *Ex parte Virginia,* 100 U.S. at 345. Deference to Congress has been appropriate in the past challenges to VRA. In upholding the 1975 extension, this Court declined to overrule Congress' judgment that "at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination." *City of Rome v. United States,* 446 U.S. at 182.

1. Courts Should Respect State Legislative Judgments And Policies.

The District Court observed the normal rule that "Congress's laws are entitled to a 'presumption of validity.' *City of Boerne,* 521 U.S. at 535." *Shelby v. Holder*, 679 F.3d at 861. But while the separation-of-powers doctrine would normally warrant this Court's deference to Congress, cases challenging VRA are more complex because of the intrusion into the balance of federal and state powers. Courts should also consider the policy judgments of representatives the people have elected at the state level.

The lower court acknowledged that "given the heavy federalism costs that section 5 imposes, our job is to ensure that Congress's judgment is reasonable and rests on substantial probative evidence." *Id*. at 873. But in light of those "heavy federalism costs," courts should extend some deference to legislative judgment at the *state* level. This Court's precedents support that approach.

In *Bush v. Gore*, then Chief Justice Rehnquist cautioned this Court about deference to the role of state legislatures in selecting Presidential electors:

> [W]ith respect to a Presidential election, the court must be both mindful of the [state] legislature's role under Article II in choosing the manner of appointing electors and deferential to those bodies expressly empowered by the legislature to carry out its constitutional mandate.

Bush v. Gore, 531 U.S. 98, 114 (2000) (Rehnquist, C.J., concurring). Although Art. II, § 1, cl. 2 explicitly commits the electoral task to state legislatures—whereas the Fourteenth and Fifteenth Amendments expressly grant power to Congress—it is nonetheless vital to consider the normal responsibilities of the States and not snub their policy judgments. Redistricting, for example, "ordinarily involves criteria and standards that have been weighed and evaluated by the [state] elected branches in the exercise of their political judgment. See, *e.g.*, *Miller v. Johnson,* 515 U.S. 900, 915-916 (1995); *White v. Weiser,* 412 U.S. 783, 795-796 (1973)." *Perry v. Perez*, 132 S. Ct. at 941. In *Perry v. Perez*, the District Court erred when it

"substituted its own concept of 'the collective public good' for the Texas Legislature's determination of which policies serve 'the interests of the citizens of Texas.'" *Id*. at 943. This Court cautioned lower courts, when redrawing district lines, to "be guided by the legislative policies underlying a state plan—even one that was itself unenforceable—'to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.'" *Id*. at 941, quoting *Abrams v. Johnson,* 521 U.S. 74, 79 (1997). The state plan "serves as a starting point for the district court." *Id*. In *Upham v. Seamon*, 456 U.S. 37 (1982), this Court ordered the lower court to "defer to the unobjectionable aspects of a state's plan," even where preclearance had been denied. *Id*. at 942.

2. The "Congruence And Proportionality" Test Should Be Reexamined And Refined.

"Congruence and proportionality" is a "flabby test…'a standing invitation to judicial arbitrariness and policy-driven decisionmaking.' *Tennessee v. Lane,* 541 U.S. 509, 557-558 (2004) (Scalia, J., dissenting)." *Coleman v. Court of Appeals of Md.,* 132 S. Ct. 1327, 1338 (2012) (Scalia, J., concurring). The test has "no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed." *Tennessee v. Lane,* 541 U.S. at 557-558 (Scalia, J., dissenting). It is, moreover, a "grading of Congress's homework…a task [this Court] [is] ill suited to perform and ill advised to undertake." *Coleman v. Court of Appeals of Md.,* 132 S. Ct. at 1338 (Scalia, J., concurring).

This Court formulated the congruence-proportionality test in response to "Congress's inevitable expansion of the Fourteenth Amendment…beyond the field of racial discrimination." *Tennessee v. Lane,* 541 U.S. at 555 (Scalia, J., dissenting). By requiring evidence of a history of constitutional violations, the test was designed to reign in "the effective power [of Congress] to rewrite the Bill of Rights through the medium of § 5." *Id*. at 556. But it tends to bring this Court into "constant conflict with a coequal branch of Government" (*id*.) where "low walls and vague distinctions will not be judicially defensible" (*id*., quoting *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 239 (1995)). In this tug-of-war, separation-of-powers issues quickly emerge.

There are differences between the Fourteenth and Fifteenth Amendments. Unlike the Fifteenth Amendment, the Fourteenth Amendment is not limited either to denial of the franchise or denial of other rights on the basis of race. But both Amendments were drafted with an eye to combating racial discrimination, the "principal evil against which the Equal Protection Clause was directed." *Tennessee v. Lane,* 541 U.S. at 563 (Scalia, J., dissenting). Where racial discrimination is implicated, it is reasonable to grant Congress broader authority. But even in that context, it is time to place Congress on a shorter leash and apply "congruence and proportionality" with greater precision.

1. Outdated Data. VRA's most recent extension (2006) relies on severely outdated data from "conditions in November 1972—34 years before Congress extended the Act for another 25 years." *Shelby v. Holder*, 679

F.3d at 884-885 (Williams, J., dissenting). *See also NAMUD*, 557 U.S. at 203 ("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.") Shelby County thus "contends that section 5's remedy is unconstitutional because it is no longer congruent and proportional to the problem it seeks to cure." *Shelby v. Holder*, 679 F.3d at 858. The necessity for a clear historical record has been underscored in several of this Court's decisions:

- *City of Boerne v. Flores,* 521 U.S. at 530 (no history within past 40 years of generally applicable laws enacted because of religious bigotry);

- *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank,* 527 U.S. 627, 648-648 (1999) (noting the virtually complete absence of a history of unconstitutional patent infringement by the States);

- *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) ("the substantive requirements the [Age Discrimination in Employment Act] imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act");

- *United States v. Morrison,* 529 U.S. 598, 626 (2000) (Violence Against Women Act not aimed at proscribing unlawful discrimination by state officials);

- *Bd. of Trs. of Univ. of Ala. v. Garrett,* 531 U.S. 356, 372 (2001) (Americans with Disabilities Act of 1990 suffered from same concerns as *City of Boerne*).

4. Improvements. This Court and Congress have both observed the significant progress in implementing minority voting rights:

- *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. at 341 (Thomas, J., concurring) ("Ironically, while this litigation was pending, three blacks were elected from majority-white districts to serve on the Bossier Parish School Board.")

- *NAMUD,* 557 U.S. at 201, citing H. R. Rep. No. 109-478, p. 12 (2006) ("Today, the registration gap between white and black voters is in single digits in the covered States; in some of those States, blacks now register and vote at higher rates than whites.")

- H. R. Rep. No. 109-478, p 12 (2006) ("The record reveals that many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated"). *See NAMUD,* 557 U.S. at 227 (Thomas, J., concurring) ("Indeed, when reenacting § 5 in 2006, Congress evidently understood that the emergency conditions which prompted § 5's original enactment no longer exist.")

"In part due to the success of that legislation [the Voting Rights Act], we are now a very different Nation." *NAMUD,* 557 U.S. at 211. That difference justifies reexamination of the applicable standard.

3. Expanded Time Frames. As this Court noted in *Boerne*, "[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 [termination dates and geographic restrictions] tend to ensure Congress' means are proportionate to ends legitimate under § 5." *City of Boerne v. Flores,* 521 U.S. at 533. The original 5-year plan enacted in 1965 has now been subjected to a second 25-year extension. Congress's power is beginning to appear unlimited.

4. Expanded Scope of Federal Power. "'[I]n 1866 the lower federal courts had no general jurisdiction of cases alleging a deprivation of rights secured by the Constitution.' R. Berger, Government By Judiciary 147 (2d ed. 1997)." *Tennessee v. Lane*, 541 U.S. at 559 (Scalia, J., dissenting). Citizens prejudiced by racially discriminatory laws had no remedy. The Civil War Amendments gave Congress the power to create a cause of action—and they have. But requiring particular states to obtain federal permission for *any* election law change, no matter how minor, goes far beyond crafting an appropriate remedy.

Section 5 of the Fourteenth Amendment grants Congress the power to *enforce* the Amendment's other provisions. Earlier decisions have stretched the word "enforce" so that it now "'embraces any measure appropriate to effectuating the performance of the

state's constitutional duty.' Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 110-111 (1966)." *Tennessee v. Lane*, 541 U.S. at 560 (Scalia, J., dissenting). But "one does not, within any normal meaning of the term, 'enforce' a prohibition by issuing a still broader prohibition directed to the same end." *Id.* at 558 (Scalia, J., dissenting). Here, VRA's preclearance requirement "pushes the outer boundaries of Congress' Fifteenth Amendment enforcement authority" because it "sweeps more broadly than the substantive command of the Fifteenth Amendment." *NAMUD*, 557 U.S. at 224 (Thomas, J., concurring and dissenting). Congress has gone well beyond "enforcement."

D. VRA Threatens To Conflict With The Fourteenth Amendment.

The preclearance mandate clashes with a broad array of basic constitutional principles, including individual liberty (Section IIA), state sovereignty (IIB), and the separation-of-powers doctrine (IIC). But as recent cases attest, there is yet another constitutional flaw, one that sets VRA on a collision course with the Fourteenth Amendment.

Amazingly, VRA § 5 at times requires the very race-conscious, discriminatory decision-making process that the Act and Reconstruction Amendments were intended to combat. In *Miller v. Johnson*, this Court affirmed a District Court ruling that Georgia's redistricting plan was racially motivated and could not be justified by VRA's preclearance demands. Note the constitutional friction:

> [T]he Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting brings the Voting Rights Act, once upheld as a proper exercise of Congress' authority under § 2 of the Fifteenth Amendment, *Katzenbach, supra,* at 327, 337, into tension with the Fourteenth Amendment.

Miller v. Johnson, 515 U.S. at 927. Justice Kennedy echoed the warning:

> [C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5.... There is a fundamental flaw, I should think, in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive.

Georgia v. Ashcroft, 539 U.S. at 491 (Kennedy, J., concurring); *see also NAMUD*, 557 U.S. at 203 ("Additional constitutional concerns are raised in saying that this tension between §§ 2 and 5 must persist in covered jurisdictions and not elsewhere.") VRA, along with the Fourteenth and Fifteenth Amendments, was intended to prevent discrimination—not perpetuate it—and "to foster our transformation to a society that is no longer fixated on race" (*Georgia v. Ashcroft*, 539 U.S. at 490).

CONCLUSION

"The historic accomplishments of the Voting Rights Act are undeniable." *NAMUD*, 557 U.S. at 201. The time has come to celebrate those accomplishments and restrain the growing power of Congress, in order to protect American federalism and individual liberty. The District Court's decision should be reversed.

Respectfully Submitted,

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