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 AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Landmark Legal Foundation is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and responsibilities. Specializing in Constitutional history and litigation, Landmark presents herein a unique perspective concerning the legal issues and national implications of the continuing implementation of Section 5 of the Voting Rights Act.

SUMMARY OF ARGUMENT

In addition to other important legal questions presented by Petitioners related to the constitutionality of certain provisions of the Voting Rights Act, this case will determine whether "temporary" federal law enforcement powers designed to address "unique" and "exceptional" circumstances that no longer exist remain appropriate to remedy undefined "second generation" barriers to minority voting. The Court must determine the propriety of the "federal courts, and indeed the Nation, [continuing] in the enterprise

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed with the Clerk of the Court letters granting blanket consent to the filing of amicus briefs.

of systematically dividing the country into electoral districts along racial lines – an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of 'political apartheid.'" *Holder v. Hall*, 512 U.S. 874, 905 (1994) (Thomas, J., concurring). Amicus Curiae Landmark Legal Foundation urges this Court to reverse the lower court's ruling, declare Section 5 of the Voting Rights Act unconstitutional, and return the supervision of elections to the States as provided in the Constitution.

ARGUMENT

I. SECTION 5 OF THE VOTING RIGHTS ACT EXCEEDS CONGRESSIONAL POWER TO ENFORCE THE FIFTEENTH AMENDMENT.

"As it was enforced in the years immediately following its enactment, the Voting Rights Act of 1965, Pub. Law 89-110, 79 Stat. 437 ("VRA"), was perceived primarily as legislation directed at eliminating literacy tests and similar devices that had been used to prevent black voter registration in the segregated South." *Holder v. Hall,* 512 U.S., at 894 (Thomas, J., concurring, citing Abigail Thernstrom, Whose Votes Count? Affirmative Action and Minority Voting Rights 17-27 (1987).

The Act was immediately and notably successful in removing barriers to registration and ensuring

access to the ballot. *Id*. Beginning with the Supreme Court's decision in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), however, the focus of Voting Rights Act cases moved away from the voting process to a more outcome-based approach applying "the broadest possible scope" to whether state laws might "dilute" the influence of minority votes. *Id.* This outcome-based federal supervision has been expanded with each VRA reauthorization.

As Justice Thomas correctly noted in *Holder v. Hall*, Section 5's application has moved from ensuring the removal of structural barriers to involving the Court in "questions of political philosophy, not questions of law. As such they are not readily subjected to any judicially manageable standards that can guide courts in attempting to select between competing theories." *Id*., at 901-02.

Amicus Curiae Landmark urges this Court not to give its imprimatur to Section 5's continuing application as a tool for achieving federally preferred election outcomes. Landmark agrees with Justice Thomas and his assessment that "[t]he assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution." *Id.* (quoting *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting) ("The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on.").

A. Section 5 of the Voting Rights Act Impedes The Traditional Role Of The States In Conducting Elections.

Section 5 of the Voting Rights Act places significant burdens on covered states and localities. It mandates that when any "covered" jurisdiction seeks "to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" said jurisdiction must seek "preclearance" to either the Attorney General or a three-judge panel in Washington, D.C. 47 U.S.C. §1973c (2012). It "sweeps broadly" and "places the burden on covered jurisdictions to demonstrate [that the proposed law is not discriminatory]." *Shelby County v. Holder*, 679 F.3d 848, 861 (D.C. Cir. 2012). Furthermore, Section 5 "is the quintessential prophylaxis." *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193, 202 (2009) ("*Northwest Austin*"). It suspends "all changes to state election law – however innocuous – until they have been precleared by federal authorities. . . ." *Northwest Austin,* 557 U.S., at 202. Originally created as a temporary federal power, the VRA established "stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition [it] strengthens existing remedies for pockets of voting discrimination elsewhere in the country." *South Carolina v. Katzenbach*, 383 U.S. 307, 308 (1966).

This significant encroachment runs counter to the Constitution's general framework that leaves to the States "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 U.S. Const. art. I, sec. 4. See also *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991) (holding that the "Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections."). Indeed, federal intrusion into the role the States play in conducting elections was intended to be the exception, not the rule. See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) where Justice Black explained, "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 . . . and the nature of their own machinery for filling local public offices."

Courts have acknowledged the extraordinary federal powers imposed through Section 5 – finding that matters will "fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the states" provided said legislation "deters or remedies constitutional violations." *Lopez v. Monterey County*, 525 U.S. 266, 282-83 (1909). However, such usurpation should be used to remedy and deter "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U.S., at 309. When confronted with "exceptional

conditions" and "unique circumstances" Congress may exercise this "uncommon" power. *Id.,* at 335.

In short, the VRA "imposes substantial 'federalism costs.'" *Northwest Austin*, 557 U.S., at 202 (citing *Lopez*, 525 U.S., at 282) and "authorizes federal intrusion into sensitive areas of state and local policymaking." *Id.,* at 282. These serious federalism issues require particularized attention. Indeed, "because States still retain sovereign authority over their electoral systems, any measure enacted in furtherance of the Fifteenth Amendment must be closely examined to ensure that its encroachment on state authority in this area is limited to the appropriate enforcement of this ban on discrimination." *Northwest Austin,* 557 U.S., at 217 (Thomas, J., concurring).

B. Section 5 Was Enacted To Be A Temporary Power Limited To Combat "Exceptional" And "Unique" Circumstances.

In enacting the VRA, Congress addressed the pervasive institutionalized discrimination facing minority voters in mid-twentieth century America. Before its enactment, states and localities engaged in a myriad of practices intentionally designed to disenfranchise minorities. Congressional testimony at the time "revealed that the primary method of keeping minorities from participating in the election process was through the administration of State constitutional amendments and statutorily-authorized tests and

devices, such as literacy tests, moral character requirements, and interpretation tests." H.R. Rep. No. 109-478, p. 7 (2006).

The record before Congress was replete with grotesque and overt examples of institutionalized discrimination. For example, in noting the types of methods states and localities utilized to bypass the Fifteenth Amendment, the *Katzenbach* Court explained that "beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting." *Katzenbach*, 383 U.S., at 310. While implementing these examinations, these states used "alternate" tests "to assure that white illiterates would not be deprived [of the right to vote]." *Id.,* at 311.

Other practices utilized to disenfranchise African-American voters included "grandfather clauses," "white primaries," "racial gerrymandering" and "discriminatory application of voting tests." *Id.* (internal citations omitted). Particularly pernicious were the adaptations made by states and localities to continue to disenfranchise minority voters once their use of a specific tactic was found impermissible. The case-by-case litigation strategy adopted by the Department of Justice to combat these practices during the 1950s failed to "cure the problem of voting discrimination." As reported, "registration in Alabama rose only from 14.2% to 19.2% between 1958 and 1964; in Louisiana it barely inched ahead from 31.7%

to 31.8% between 1956 and 1965; and in Mississippi it increased only from 4.4% to 6.4% between 1954 and 1964." *Id.,* at 313. The registration of white voters "ran roughly 50 percentage points or more ahead [of minority] registration." *Id*.

Congress acted pursuant to the authority set forth in the Fifteenth Amendment to enforce the Amendment by appropriate legislation. U.S. Const. amend. XV, cl. 2. South Carolina challenged the law, but a nearly unanimous Supreme Court upheld the law in *Katzenbach.* In justifying the federal intrusion into the traditional arena of states' rights, the Court noted that these circumstances were both "exceptional" and "unique." The VRA in general and Section 5 in particular were thus necessary to "combat *widespread* and *persistent* discrimination in voting. . . ." *Id.,* at 328 (emphasis added).

C. The Widespread And Persistent Discrimination Giving Rise To The Exceptional And Unique Circumstances At The Time Section 5 Was Enacted No Longer Exist.

Section 5's broad infringement upon state power is only justified when faced with the kind of "unique" and "exceptional" circumstances present in *Katzenbach*. These conditions do not exist today. In fact, during its most recent consideration of the VRA, Congress found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters." Pub. Law 109-246,

§2(b)(1), 120 Stat. 577 (2006). Moreover, many of these "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 p. 12 (2006).

Consider voter registration rates in states under Section 5 jurisdiction. The gap between registered white citizens and registered African-American citizens narrowed from 63.2% in 1965 to 6.3% in 1988 for the state of Mississippi. H.R. Rep. No. 109-478 p. 12 (2006). In Alabama the gap between whites and African-Americans narrowed from 49.9% in 1965 to 6.6% in 1988. Further, African-American total voter registration and voter turnout has increased since 1982. H.R. Rep. No. 109-478 p. 12 (2006). African-American enfranchisement roughly parallels that of whites.

Additionally, Congress found that there has been a significant increase in the number of African-American elected officials. H.R. Rep. No. 109-478 p. 18 (2006). "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." H.R. Rep. No. 109-478 p. 18 (2006). In states covered by the VRA the number of African-Americans serving as elected officials "increased by approximately *1000 percent* since 1965." H.R. Rep. No. 109-478 p. 18 (2006) (emphasis added).

Poll taxes have been prohibited by Constitutional Amendment. U.S. Const. amend. XXIV. Literacy tests are no longer permitted. See *Oregon v. Mitchell,* 400

U.S. 112 (1970). In sum, Congress concluded during the 2006 VRA debate that Section 5's provisions had accomplished its purposes to ensure all voters could: (1) register to vote unchallenged; (2) cast ballots unhindered; and (3) cast meaningful votes. H.R. Rep. No. 109-478 p. 21 (2006). In other words, Section 5's original purpose has been fulfilled.

D. Congressional Findings Of "Second Generation" Barriers Do Not Satisfy Katzenbach's Requirement Of "Unique" and "Exceptional" Circumstances.

Despite having fulfilled its purpose, Congress did not allow Section 5 to expire, instead shifting the justification for Section 5 from eradicating "first generation barriers experienced by minority voters" to attacking "second generation barriers." 109 Pub. Law 246, 120 Stat. 577 (2006). These vaguely, if at all, defined barriers are purportedly evidenced by "racially polarized voting in each of the jurisdictions [covered by Section 5]." 109 Pub. Law 246, 120 Stat. 577 (2006). Second generational barriers are not specified in the statute, but have been characterized by "activists" as "broad" and include: "annexations and cancelled elections"; "abandonment of electoral structures"; and "discriminatory redistricting plans." See Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 Saint Louis Univ. Pub. L. Rev. 77, 86-88 (2010).

These second generational barriers do not constitute the "unique" and "exceptional" circumstances contemplated by the Court in *Katzenbach*. Importantly, they are not evidence of purposeful or intentional discrimination. See *Rodgers v. Lodge*, 458 U.S. 613, 618 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 62-65 (1980) (plurality opinion) ("[The Fifteenth] Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color, or previous condition or servitude.'"). Further, this "evidence is not probative of the type of purposeful discrimination that prompted Congress to enact § 5 in 1965." *Northwest Austin*, 557 U.S., at 228 (Thomas, J., concurring). Moreover, many of the examples of second generation barriers relied upon by Congress occurred decades ago. Reliance on these examples to justify the massive intrusion into the traditional state prerogative to administer elections should not be condoned by the Court.

1. Evidence of Racially Polarized Voting Is Constitutionally Insufficient To Justify Section 5.

According to Congress, racially polarized voting represents the "clearest and strongest evidence" of "the continued resistance within covered jurisdiction to fully accept minority citizens and their preferred candidates into the electoral process." H.R. Rep. No. 109-478 p. 34 (2006). This type of voting "occurs when voting blocs within the minority and white communities

cast ballots along racial lines. . . .” H.R. Rep. No. 109-478 p. 34 (2006). Congress further concluded that “in elections characterized by racially polarized voting, *minority voters alone* are powerless to elect their candidates.” H.R. Rep. No. 109-478 p. 34 (2006) (emphasis added).

Evidence of “racially polarized voting” is not sufficient to justify Section 5’s mandates. First, it is not evidence of denial of voting. It discounts the contention that polarization is the result of differences in political opinion rather than race. Roger Clegg and Linda Chavez, *An Analysis of the Reauthorized Section 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 Geo. J.L. & Pub. Pol’y 561, 568 (2007). Moreover, it bears stating the obvious deficiency with Congress’s conclusion – in a democracy the candidate who receives the majority of the votes in a given election will win. A candidate can receive one hundred percent of a particularized subset’s vote (whether it is 100% of the Black vote, 100% of Catholic vote, or 100% of the American Indian vote) and still lose an election. Candidates are elected by forming coalitions among diverse populations to secure a majority vote. A minority voting bloc, by definition, will never alone be able to elect their preferred candidate.

Furthermore, racially polarized voting is not evidence of intentional discrimination. The Court’s decisions “have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory

purpose." *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980). Thus, "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation." *Id.* The nonexistent connection between racially polarized voting and intentional discrimination cannot justify the sweeping mandates of Section 5.

Finally, this Court has specifically found that evidence of racially polarized voting alone is not evidence of impermissible discrimination. *Id.,* at 64 (citing *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953)).

2. Other Forms Of Second Generational Barriers Are Not Constitutionally Sufficient To Justify Section 5.

As noted earlier, other forms of second generation barriers purportedly include "annexations and cancelled elections," "abandonment of electoral structures that provide opportunities to elect candidates of choice," and "discriminatory redistricting plans." Jenigh J. Garrett, *The Continued Need for the Voting Rights Act,* 30 Saint Louis Univ. Pub. L. Rev., at 86-88 (2010). Assuming arguendo these barriers continue to exist, there is no evidence to indicate they are established with the intention of disenfranchising minority voters.

The "annexations and cancelled elections" examples relied upon by Congress and activists as justifying the need for Section 5 are limited and unconvincing.

Many of the alleged efforts to disenfranchise minority voters occurred almost 40 years ago, hardly constituting an ongoing crisis justifying Section 5's extraordinary burdens. See *id*.

The "abandonment of electoral structures that provide opportunities to elect candidates of choice" is another second generation barrier purporting to justify continuing use of Section 5. Commentators note "changes from single-member districts to at-large or multi-member districts, which *can* be designed to eliminate opportunities to elect candidates of choice, were common in the first few years following passage of the Act." See *id*. However, as was the case with "annexations and cancelled elections" no meaningful examples are provided of such activity currently taking place.

For example, the record reports, as a current example, the reduction of "satellite voter registration locations" and "the elimination of satellite registration during 18 months of the state's two year election cycle." Voting Rights Act: Section 5 of the Act-History, Scope and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 299-301 (2006). Not considered was whether the reduction of these satellite locations and elimination of satellite registration was intended to disenfranchise minority voters or whether these changes were made for a facially neutral reason – such as budgetary concerns. This tenuous example is not similar to the conditions existing when Section 5 was originally enacted. Again, even assuming states

or localities are engaging in such activity, there is no evidence suggesting such actions are intentionally conducted to disenfranchise – or negatively affect in any fashion – minority voters.

Purportedly discriminatory "statewide legislative plans" suffer the same deficiencies as other second generation "barriers." Congress and commentators rely on no current examples of statewide legislative plans – the examples cited in the record include legislative plans written by the Alabama legislature in 1980 and 1990 respectfully. Garrett, *The Continued Need for the Voting Rights Act,* 30 Saint Louis Univ. Pub. L. Rev., at 90 (citation omitted).

Despite assertions to the contrary by proponents of Section 5, the legislative record contained scant examples of second generation barriers. Even in cases where these barriers exist, there is no evidence such measures were taken with the intent to deprive or dilute minority voting.

Contentions that legislative plans eliminating single member districts improperly "dilute" minority votes also fall short. The Court's previous determinations that the "minority's voting power is diluted by multi-member districting" discounts the importance of "swing" groups of voters in a two party system. See *Holder v. Hall*, 512 U.S. 874, 900 (1994) (Thomas, J., concurring). Moreover, minority vote dilution claims accept the "assumption that the group asserting dilution is not merely a racial or ethnic group, but a group having distinct political interests as well."

Hall, 512 U.S., at 903. This claim assumes "that members of racial and ethnic groups must all think alike on important matters of public policy and must have their own 'minority preferred' representative holding seats in elected bodies if they are to be considered at all." *Id.*

Statewide legislative plans that eliminate single member districts or establish general "at large" elections cannot be considered second generation barriers. These efforts to "segregate the races into political homelands" amount to a "system of 'political apartheid.'" *Id.* (citing *Shaw v. Reno*, 509 U.S. 630, 657 (1993)). These plans simply cannot be a legitimate basis for permitting Section 5's continuation.

CONCLUSION

Section 5 of the Voting Rights Act was enormously successful in remedying shameful systematic structures that deprived millions of citizens the right to vote. In its current iteration, however, the section represents an unconstitutional abridgment of the States' constitutional authority to supervise elections. The extraordinary powers created by Congress were once justified, but they have served their purpose and are no longer a valid exercise of federal power, particularly given the undefined and impermissibly vague nature of so-called "second generation" barriers.

Accordingly, this Court should declare Section 5 unconstitutional.

Respectfully submitted,

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