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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* SOUTHEASTERN LEGAL FOUNDATION SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether Congress' 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*[1]

Southeastern Legal Foundation ("SLF"), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative

[1] All counsel of record consented to the filing of this *amicus* brief by filing blanket consents with the Clerk. *Amicus* states that no portion of this brief was authored by counsel for a party and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

models, educates the public on key policy issues and litigates regularly before the Supreme Court of the United States, including in this Court in such cases as *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989); *Northwest Austin Municipal Utility District No. One* v. *Holder*, 557 U.S. 193 (2009); and *Fisher* v. *University of Texas at Austin*, No. 11-345 (argued Oct. 10, 2012).

SLF has a direct interest in this case, as it objects to the 2006 reauthorization of Section 5 of the Voting Rights Act because it runs contrary to the principles of race neutrality to which the Act is dedicated and to the American ideal of individual equality to which SLF is profoundly committed. For these reasons, SLF respectfully submits this brief in support of Petitioner and urges the Court to reverse the judgment below.

SUMMARY OF ARGUMENT

The Fifteenth Amendment, ratified in 1870, guarantees that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. Tragically, for the next 95 years, the promise of the Fifteenth Amendment was not secured for most blacks living in the South. "[B]eginning 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." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 310 (1966). By 1965, the discriminatory application of voting tests was "the principal method used to bar Negroes from the polls." *Id.* at 312. In the 1950s, Congress tried to fight this evil by authorizing case-by-case litigation, but these laws did "little to cure the problem of voting discrimination." *Id.* at 313. Registration rates for blacks "in Alabama rose only from 14.2% to 19.4% be-

tween 1958 and 1964; in Louisiana they barely inched ahead from 31.7% to 31.8% between 1956 and 1965; and in Mississippi they increased only from 4.4% to 6.4% between 1954 and 1964." *Ibid.* In these states, "registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration." *Ibid.*

Informed by these past failures, Congress took a new approach with the Voting Rights Act of 1965, which enacted "a complex scheme of stringent remedies aimed at areas where voting discrimination had been most flagrant." *Id.* at 315. The Act's most stringent remedy was Section 5, a drastic but temporary provision that would require covered jurisdictions to obtain preapproval from a federal court or the Attorney General before making any change in voting procedures. To identify the jurisdictions to be covered, Congress constructed a formula that "was relevant to the problem of voting discrimination." *Id.* at 329. The coverage formula in Section 4(b) provided that only jurisdictions that employed voting tests or devices and had low voting rates in the 1964 presidential election would be covered. *Id.* at 330. Because these metrics were directly related to the evil Congress sought to eliminate, this Court found the formula "rational in both practice and theory," and held that is was a constitutional means for targeting Fifteenth Amendment violations. *Ibid.*

Today, "[t]he historic accomplishments of the Voting Rights Act are undeniable." *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 201 (2009). Voting tests and devices have been abolished, and disparities in registration rates for black and white voters have been largely eliminated. Indeed, in 2004, five of the seven southern states originally covered by the Voting Rights Act had registration rates for blacks that exceeded the national average. Blacks voted at a higher rate than whites in

North Carolina, Georgia, Mississippi, and Alabama. See S. Rep. No. 295, 109th Cong., 2d Sess. 11 (2006) (2006 Senate Report). By 2006, the Voting Rights Act had succeeded in fulfilling "the Fifteenth Amendment's promise of full enfranchisement." *Nw. Austin*, 557 U.S. at 229 (Thomas, J., dissenting).

In 2006, Congress itself acknowledged that Fifteenth Amendment violations of the right to vote were largely a thing of the past. See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(1), 120 Stat. 577 (2006 Reauthorization). Congress nonetheless reauthorized Section 5's preclearance requirement and Section 4(b)'s coverage formula, relying primarily on evidence of racially polarized voting and "vote dilution." See generally *id.* § 2(b). In doing so, Congress exceeded its powers under the Fifteenth Amendment in two ways. First, the reauthorization of Section 5 is unconstitutional because it "lacks * * * evidence of a pattern of state [Fifteenth Amendment] violations accompanied by a remedy drawn in narrow terms to address or prevent those violations." *Coleman* v. *Court of Appeals of Md.*, 132 S. Ct. 1327, 1334 (2012) (plurality). From its ratification, the Fifteenth Amendment has guaranteed only the right to vote, not the weight of a vote once cast; indeed, this Court has never held vote dilution to violate the Fifteenth Amendment. Evidence of alleged vote dilution in covered jurisdictions therefore does not constitute evidence of Fifteenth Amendment violations that could support the reauthorization of Section 5.

Second, the coverage formula in Section 4(b) is unconstitutional because it departs "from the fundamental principle of equal sovereignty" without showing that its "disparate geographic coverage is sufficiently related to the problem that it targets." *Nw. Austin*, 557 U.S. at

203. Although Congress in 2006 purported to target those areas of the country that were most likely to dilute the voting strength of minorities, it reauthorized the same coverage formula that was based on Fifteenth Amendment violations from 1972 and before. The Court of Appeals held that using the old formula was rational in theory because Congress identified recent violations in the covered jurisdictions. But this analysis negates the entire purpose of having a coverage formula—distinguishing the worst jurisdictions from the rest—for it makes no comparative assessment of whether recent violations in covered jurisdictions are more prevalent than those in non-covered jurisdictions.

This blind reauthorization of the old coverage formula does violence to the careful craftsmanship of the original Voting Rights Act and ignores the reasons this Court upheld it in the past. In 1965, the coverage formula used metrics that were closely linked to the targeted harm and allowed for fair comparisons among all 50 states. The Court in *Katzenbach* upheld the coverage formula because it reliably compared states and jurisdictions based on those relevant metrics. See 383 U.S. at 330. The formula reauthorized in 2006, by contrast, serves no purpose but to "[p]unish[] for long past sins," which "is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose." *Nw. Austin*, 557 U.S. at 226 (Thomas, J., dissenting). Because there is no justification for the Act's "departure from the fundamental principle of equal sovereignty," *id.* at 203 (majority opinion), Section 4(b) is unconstitutional.

ARGUMENT

I. Section 5 Is Fifteenth Amendment Enforcement Legislation.

The Fifteenth Amendment guarantees that "[t]he right of citizens of the United States to vote shall not be

denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. "[T]he immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote." *Rice* v. *Cayetano*, 528 U.S. 495, 512 (2000). Consistent with its original meaning, the Fifteenth Amendment protects the core rights of access to voter registration and the ballot box. See *Katzenbach*, 383 U.S. at 311-312 (collecting examples of Fifteenth Amendment litigation).

The Equal Protection Clause of the Fourteenth Amendment forbids states to "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This more broadly worded Amendment protects certain voting-related rights not guaranteed by the Fifteenth Amendment, including the right for all who participate in an election to have an equally weighted vote. *Gray* v. *Sanders*, 372 U.S. 368, 379 (1963). The Fourteenth Amendment also prevents states from arranging apportionment schemes in a manner that purposefully "minimize[s] or cancel[s] out the voting potential of racial or ethnic minorities." *City of Mobile* v. *Bolden*, 446 U.S. 55, 66 (1980) (citing *White* v. *Regester*, 412 U.S. 755 (1973)).

The first step in determining whether Section 5 of the Voting Rights Act remains valid enforcement legislation is to identify precisely *which* "constitutional right [is] at issue." *Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001). The text and history of Section 5, along with this Court's interpretive precedents, reflect that Section 5 is solely Fifteenth Amendment enforcement legislation.

A. The Voting Rights Act Of 1965 Tracks The Text Of The Fifteenth Amendment And Was Supported By Evidence Of Fifteenth Amendment Violations.

In 1965, Congress enacted the Voting Rights Act to "enforce the fifteenth amendment to the Constitution of the United States." Pub. L. No. 89-110, § 1, 79 Stat. 437 (1965 Act). The Act, and Section 5 in particular, has historically been understood to enforce Fifteenth Amendment rights—the right to register to vote and the right to cast a ballot on election day.

Indeed, the statutory language of the Voting Rights Act of 1965 closely tracked the language of the Fifteenth Amendment. Section 2 forbade any state or political subdivision to impose or apply any "voting qualifications or prerequisite to voting, or standard, practice, or procedure * * * to deny or abridge the right of any citizen of the United States to vote on account of race or color." *Id.* § 2. Similarly, Section 4(a) banned certain voting tests and devices "[t]o assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color." *Id.* § 4(a). And Section 5 required certain jurisdictions to preclear any change in their voting procedures with the Department of Justice or the United States District Court for the District of Columbia to ensure that any change would "not have the effect of denying or abridging the right to vote on account of race or color." *Id.* § 5.

When South Carolina challenged the constitutionality of certain provisions of the Voting Rights Act of 1965, the Court defined "the basic question presented by the case: Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?" *Katzenbach*, 383 U.S. at 324. To answer this question, the Court reviewed the record of Fifteenth

Amendment violations on which Congress relied to craft appropriate legislation. The Court recounted that in 1890 several southern states "enacted tests still in use which were specifically designed to prevent Negroes from voting." *Id.* at 310. The Court noted that its past decisions "demonstrate[d] the variety and persistence of these and similar institutions," including grandfather clauses, white primaries, improper challenges, and racial gerrymandering. *Id.* at 311. Citing evidence from the Justice Department, the Court found that the discriminatory application of voting tests was at that time "the principal method used to bar Negroes from the polls," and that "the discrimination was pursuant to a widespread pattern or practice." *Id.* at 312. The Court recognized that "Congress ha[d] repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination," but "these new laws ha[d] done little to cure the problem of voting discrimination." *Id.* at 313. "Despite the earnest efforts of the Justice Department and of many federal judges," voter registration rates in some states remained roughly 50 percentage points higher for whites of voting age than for blacks. *Ibid.*

Congress determined that Section 5 should apply only to "areas where voting discrimination ha[d] been most flagrant." *Id.* at 315. Section 4(b) of the Voting Rights Act of 1965 laid out the formula that would sort the worst violators from the rest. Any state or political subdivision would be covered if (1) it maintained a voting test or device on November 1, 1964, and (2) fewer than 50 percent of its voting-age residents were registered on November 1, 1964, or voted in the presidential election of November 1964. 1965 Act, § 4(b). South Carolina argued that the formula violated "the doctrine of the equality of the States," *Katzenbach*, 383 U.S. at 328, but the Court held

that Congress permissibly used the formula to differentiate between the states because it "was relevant to the problem of voting discrimination," *id.* at 329. The Court explained that "[t]ests 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.* at 330. It was irrelevant that there were some non-covered jurisdictions for which there was also evidence of voting discrimination because "Congress had learned that widespread and persistent discrimination in voting during recent years ha[d] typically entailed the misuse of tests and devices, and this was the evil for which the new remedies were specifically designed." *Id.* at 331. Congress "need not deal with all phases of a problem in the same way, so long as the distinctions drawn have some basis in practical experience." *Ibid.* Because the formula's two triggers were tied to the same Fifteenth Amendment violations Congress had identified and sought to remedy, the formula was "rational in both practice and theory." *Id.* at 330. Accordingly, the Court concluded that Section 5 was "a valid means for carrying out the commands of the Fifteenth Amendment." *Id.* at 337.

B. The Court Has Always Held Section 5 To Be Fifteenth Amendment Legislation.

The Court has reviewed various challenges to Section 5, and each time it has affirmed that Section 5 is Fifteenth Amendment legislation. See, *e.g.*, *City of Rome* v. *United States*, 446 U.S. 156, 182 (1980) ("The extension of the Act * * * was plainly a constitutional method of enforcing the Fifteenth Amendment."); *Lopez* v. *Monterey Cnty.*, 525 U.S. 266, 282 (1999) ("The Act was passed pursuant to Congress' authority under the Fifteenth Amendment."); *Nw. Austin*, 557 U.S. at 204 (discussing

what standard to apply "in deciding whether * * * Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements"). The Court twice considered facial challenges to Section 5 and rejected the challenges only after analyzing evidence of Fifteenth Amendment violations and determining that the Act rationally attempted to remedy those Fifteenth Amendment harms. See *City of Rome*, 446 U.S. at 180-182; *Katzenbach*, 383 U.S. at 337.

The Court of Appeals ignored this consistent text, history, and precedent when it conducted its analysis "irrespective of whether Section 5 is considered Fifteenth Amendment enforcement legislation, Fourteenth Amendment enforcement legislation, or a kind of hybrid legislation enacted pursuant to both amendments." *Shelby Cnty.* v. *Holder*, 679 F.3d 848, 864 (D.C. Cir. 2012). The Court of Appeals mistakenly asserted that "when reauthorizing the Act in 2006, Congress expressly invoked its enforcement authority under both the Fourteenth and Fifteenth Amendments. Accordingly, like Congress and the district court, we think it appropriate to consider evidence of unconstitutional vote dilution in evaluating section 5's validity." *Ibid.* By eliding the Fifteenth Amendment roots of Section 5, the Court of Appeals was able to uphold its reauthorization despite the absence of current Fifteenth Amendment violations in the covered jurisdictions.

The 2006 reauthorization did not amend Section 1 of the original Voting Rights Act, which declared itself "[a]n Act to enforce the fifteenth amendment to the Constitution of the United States." 1965 Act, §1. Indeed, the 2006 reauthorization reiterates the continuing need to "eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th Amendment." 2006 Reauthorization § 2(b)(7). In holding

that "Congress" invoked the Fourteenth Amendment to support the 2006 reauthorization, the Court of Appeals cited only a House Report that mentioned both the Fourteenth Amendment and Fifteenth Amendment as authority for reauthorizing the legislation. See *Shelby Cnty.*, 679 F.3d at 864 (citing H.R. Rep. No. 478, 109th Cong., 2d Sess. 53 n.136, 90 (2006) (2006 House Report)). A statement of one committee of one house of Congress, which was never voted upon by Congress or signed by the President, cannot trump the unambiguous text of the statute. *Chamber of Commerce of U.S.* v. *Whiting*, 131 S. Ct. 1968, 1980 (2011) (explaining that the "authoritative statement is the statutory text, not the legislative history"). Indeed, this Court has already acknowledged that the question in reviewing the 2006 reauthorization is "whether * * * Congress exceeded its Fifteenth Amendment enforcement power in extending the preclearance requirements." *Nw. Austin*, 557 U.S. at 204.

In any event, the 2006 House Report's reference to the Fourteenth Amendment appears to derive from the 1975 reauthorization, which invoked the Fourteenth Amendment for the first time. The 1975 reauthorization, however, cited the Fourteenth Amendment only for the purpose of expanding the Act's Fifteenth Amendment ballot-access protections to include language minorities alongside racial minorities. See Pub. L. No. 94-73, § 203, 89 Stat. 400 (1975) ("Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments * * * it is necessary to eliminate [voting] discrimination [against citizens of language minorities] by prohibiting English-only elections, and by prescribing other remedial devices."). Congress therefore sought to reinforce the Act's protection of the Fifteenth Amendment right to vote, not to identify a new constitutional right it sought to enforce. As the Senate Report on the

1975 reauthorization explains, even though the Department of Justice had taken the position that "'language minorities' are members of a 'race or color' group protected *under the Fifteenth Amendment*," "[t]he Fourteenth Amendment is added as a constitutional basis for these voting rights amendments" in order to "doubly insure the constitutional basis for the Act." S. Rep. No. 295, 94th Cong., 2d Sess. 47-48 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 814-815 (emphasis added)). In other words, Congress invoked the Fourteenth Amendment to eliminate any doubt that the Act's Fifteenth Amendment protections could constitutionally be extended to language minorities. The Act remains Fifteenth Amendment legislation that may only be justified by evidence of Fifteenth Amendment violations and a correspondingly tailored Fifteenth Amendment remedy.

Judge Tatel himself previously recognized as much, writing for the three-judge district court in *Northwest Austin Municipal Utility District Number One* v. *Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008). There, he acknowledged that "at its core, this is a Fifteenth Amendment case: while Congress cited the Fourteenth Amendment when it adopted the Act's protections for language minorities in 1975 and extended them in 2006, it could have relied solely on its Fifteenth Amendment authority." *Id.* at 243-244. The Solicitor General agreed, arguing before this Court in *Northwest Austin* that the Voting Rights Act is "aimed at remedying and deterring violations of the core constitutional right, explicitly set forth in the Fifteenth Amendment itself, that the right to vote not be 'denied or abridged * * * on account of race, color, or previous condition of servitude.'" Brief for Appellee at 20, *Nw. Austin*, 557 U.S. 193 (No. 08-322). The Solicitor General therefore agreed that "[t]he district court cor-

rectly concluded that VRA Section 5 is Fifteenth Amendment legislation." *Id.* at 20 n.1.

The question before the Court now is the same that was presented in *Katzenbach*: "Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?" 383 U.S. at 324. Though respondents argued below that the issue is whether the legislation was appropriate to enforce the Fourteenth and Fifteenth Amendments, Brief for Appellee at 1, *Shelby Cnty.*, 679 F.3d 846 (No. 11-5256), this position is different from the one taken by the Solicitor General in 2009. More importantly, the Solicitor General's new position diverges from the text of the Voting Rights Act and the opinions of the Court in every Section 5 case it has decided. The Court must squarely confront whether the 2006 reauthorization of Section 5 is still appropriate Fifteenth Amendment legislation.

II. The Fifteenth Amendment Guarantees The Right To Cast A Vote, Not The Weight Of That Vote.

The scope of the Fifteenth Amendment's ballot-access right is distinct from the Fourteenth Amendment's concerns with how each vote is weighted. To assess whether Section 5 rests on a valid evidentiary foundation of constitutional violations, and whether it represents an appropriately tailored response to those violations, the Court first must carefully trace "the metes and bounds of the [Fifteenth Amendment] right" that Section 5 purports to enforce. *Garrett*, 531 U.S. at 368.

A. When The Fifteenth Amendment Was Ratified, It Was Understood To Protect Only Access To The Ballot Box.

"Enacted in the wake of the Civil War, the immediate concern of the [Fifteenth] Amendment was to guarantee to the emancipated slaves the right to vote." *Rice*, 528

U.S. at 512. "'[B]y the inherent power of the Amendment the word white disappeared' from our voting laws, bringing those who had been excluded by reason of race within 'the generic grant of suffrage made by the State.'" *Ibid.* (quoting *Guinn* v. *United States*, 238 U.S. 347, 363 (1915)).

That generic grant of suffrage in 1870 did not include the right to have one's vote weighted equally with all others. See *Baker* v. *Carr*, 369 U.S. 186, 310-318 (1962) (Frankfurter, J., dissenting) (explaining that states at the end of the Civil War employed a "wide variety of apportionment methods which recognized the element of population in differing ways and degrees"). As Justice Frankfurter explained, "the basic English principle of apportioning representatives among the local governmental entities, towns or counties, rather than among units of approximately equal population, had early taken root in the colonies," *id.* at 307, and was still common among a majority of the states when they ratified the Fourteenth and Fifteenth Amendments, *id.* at 310-318. The Fifteenth Amendment did nothing to change this state of affairs. It extended the right to vote to more citizens, but did not guarantee citizens an equally weighted vote. Indeed, electoral systems that effectively assigned different weights to different localities persisted until the Court held in 1963 that the Equal Protection Clause of *the Fourteenth Amendment* demands that "all who participate in [an] election are to have an equal vote." *Gray*, 372 U.S. at 379.

B. The Court Has Never Held That Vote Dilution Violates The Fifteenth Amendment.

Consistent with vote dilution's Fourteenth Amendment roots in *Gray*, the Court has recognized that the Fourteenth Amendment prohibits vote dilution intended "invidiously to minimize or cancel out the voting potential

of racial or ethnic minorities." *Bolden*, 446 U.S. at 66 (citing *Regester*, 412 U.S. 755). But the Court "ha[s] never held that vote dilution violates the Fifteenth Amendment." *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000) ("*Bossier Parish II*"); *Voinovich* v. *Quilter*, 507 U.S. 146, 159 (1993); see also *Beer* v. *United States*, 425 U.S. 130, 142 n.14 (1976) (noting that there is no decision of the Court holding a legislative apportionment plan in violation of the Fifteenth Amendment).

A plurality of the Court in *Bolden* rejected the argument that a dilutive apportionment scheme violated black voters' Fifteenth Amendment rights:

> The answer to the appellees' argument is that * * * their freedom to vote has not been denied or abridged by anyone. The Fifteenth Amendment does not entail the right to have Negro candidates elected * * * . Having found that Negroes in Mobile "register and vote without hindrance," the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case.

446 U.S. at 65. Under this Court's holdings, vote dilution does not violate the Fifteenth Amendment. Consequently, evidence of vote dilution could not justify Fifteenth Amendment legislation such as Section 5.

Respondents asserted below that the Court relied on evidence of vote dilution when it upheld the 1975 reauthorization of the Voting Rights Act in *City of Rome*. See Brief for Appellee at 55, *Shelby Cnty.*, 679 F.3d 848 (No. 11-5256). Read in context, this Court did no such thing. It is true that the Court quoted from a House Report that supported extending Section 5 because "other measures may be resorted to which would dilute increasing minority voting strength." *City of Rome*, 446 U.S. at 181 (quoting H.R. Rep. No. 196, 94th Cong., 1st Sess. 10-11

(1975)). But the Court first noted that significant disparities in voter registration between whites and blacks persisted in several covered jurisdictions. *Id.* at 180-181. And the Court emphasized the depth and breadth of voting discrimination that Congress had found in 1965 and the short amount of time that had since elapsed:

> It must not be forgotten that in 1965, *95 years* after ratification of the Fifteenth Amendment extended the right to vote to all citizens regardless of race or color, Congress found that racial discrimination in voting was an insidious and pervasive evil * * * . Ten years later, Congress found that a 7-year extension of the Act was necessary to preserve the "limited and fragile" achievements of the Act and to promote further amelioration of voting discrimination. When viewed in this light, 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 is both unsurprising and unassailable.

Id. at 182. In light of the surrounding context, Respondents' argument that the Court altered a century of Fifteenth Amendment jurisprudence in a lone quotation of a House Report is unpersuasive. Nor can this contention be squared with the Court's post-*City of Rome* pronouncements that it "ha[s] never held that vote dilution violates the Fifteenth Amendment." *Bossier Parish II*, 528 U.S. at 334 n.3; see also *Voinovich*, 507 U.S. at 159.

III. Congress Failed To Document A Pattern Of Fifteenth Amendment Violations Sufficient To Justify Reauthorizing Section 5.

Section 5 is Fifteenth Amendment enforcement legislation, and its coverage formula remains based upon Fifteenth Amendment triggers such as the existence of voting tests and depressed registration and turnout in 1964,

1968, and 1972. The 2006 reauthorization of Section 5, therefore, can only be justified by a record of widespread and persistent Fifteenth Amendment violations. See *Coleman*, 132 S. Ct. at 1334 (plurality) ("Legislation enacted under § [2] must be targeted at conduct transgressing the [Fifteenth] Amendment's substantive provisions.") (internal quotation marks omitted). Congress could not assemble such a record. To the contrary, the record shows that there were no significant deprivations of the right to register and cast votes.

A. Congress Found That First Generation Barriers To Voting Had Been Largely Eliminated.

When considering the 2006 reauthorization of the Voting Rights Act, Congress found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices." 2006 Reauthorization, § 2(b)(1). The record established that many of the Fifteenth Amendment violations that had obstructed voter registration and turnout "have been eliminated." 2006 House Report 12.

The most reliable data gathered by Congress revealed how dramatic this progress has been. The gap between white and black voter registration that had been as wide as 50 percentage points in covered jurisdictions in 1964 had been virtually eliminated. 2006 Senate Report 11. The Senate Report noted that "in 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." *Ibid.* Additionally, "the number of African-American elected officials serving in

the original six [covered] States * * * increased by approximately 1000 percent since 1965, increasing from 345 to 3700." 2006 House Report 18. "In Georgia, the voting age population is 27.2% African-American, and African-Americans comprise 30.7% of its delegation to the U.S. House of Representatives and 26.5% of the officials elected statewide. Black candidates in Mississippi have achieved similar success." 2006 Senate Report 9. To put it succinctly, "[t]hings have changed in the South." *Nw. Austin*, 557 U.S. at 202.

B. Congress Exceeded Its Authority When It Relied Almost Exclusively On Alleged Vote-Dilution Evidence To Justify Reauthorizing Fifteenth Amendment Legislation.

Although Congress found that Fifteenth Amendment violations had been largely eliminated, Congress expressed concern that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process." 2006 Reauthorization, § 2(b)(2). Instead of evidence that minorities were actually denied the right to vote, Congress relied on evidence of "racially polarized voting" in covered jurisdictions to conclude that minorities still needed the protection of the Voting Rights Act of 1965. *Id.* § 2(b)(3).

Congress, moreover, listed four additional categories of evidence that allegedly showed continued discrimination: (1) Section 5 actions taken by the Attorney General, including objections to voting changes, requests for more information about voting changes, and Section 5 enforcement actions against covered jurisdictions that tried to implement voting changes without preclearance; (2) the number of requests for declaratory judgment that were denied by the United States District Court for the District of Columbia; (3) the number of section 2 cases

that originated in covered jurisdictions; and (4) the litigation the Department of Justice pursued to ensure that all language-minority citizens had full access to the political process. *Id.* § 2(b)(4). As discussed below, none of these findings reflects evidence of actual Fifteenth Amendment violations.

The legislative history contained less objective and more speculative evidence. The House Report surmised "that the existence of Section 5 deterred covered jurisdictions from even attempting to enact discriminatory voting changes." 2006 House Report 24. Accordingly, the Report counted "the number of voting changes that have never gone forward as a result of Section 5" as evidence justifying the reauthorization of Section 5. *Ibid.* Similarly, the Report opined "that indicia of discrimination are reflected in the continued need for Federal observers to monitor polling places located in covered jurisdictions." *Id.* at 44. The Report reasoned that because "observers are assigned to a polling location only when there is a reasonable belief that minority citizens are at risk of being disenfranchised," the assignment of thousands of observers to covered jurisdictions "demonstrates that the discriminatory conduct experienced by minority voters is not solely limited to tactics to dilute the voting strength of minorities but continues to include tactics to disenfranchise, such as harassment and intimidation inside polling locations." *Ibid.*

The Congressional record cannot justify reauthorizing Section 5 because it does not reflect evidence of a pattern of Fifteenth Amendment violations. See *Garrett*, 531 U.S. at 368. Racially polarized voting plainly does not demonstrate a Fifteenth Amendment violation. The House Report asserted that when white and minority voters cast ballots along racial lines it is the "clearest and strongest evidence the Committee has before it of the

continued resistance within covered jurisdictions to fully accept[ing] minority citizens * * * into the electoral process." 2006 House Report 34. Even if that were a sound statement of sociology or political science—which is doubtful[2]—it is not good constitutional law. If minorities can "register and vote without hindrance," "their freedom to vote has not been denied or abridged by anyone." *Bolden*, 446 U.S. at 65 (plurality opinion). A person's exercising his right to vote cannot be transmogrified into a denial of that right simply because he votes consistently with others of his race. The fact that Congress thought that racially polarized voting was the "clearest and strongest evidence" for reauthorization bespeaks the paucity of evidence of Fifteenth Amendment violations.

Congress's presumptions about the dispatch of election observers to covered jurisdictions and the deterrent effect of Section 5 fare little better. Congress did not identify any evidence to establish whether the Justice Department's predictions about violations were accurate enough to establish a pattern of actual Fifteenth Amendment violations. If "anecdotal," "unexamined," and "out of context" accounts of alleged discrimination are insufficient, pure conjecture on the part of Congress and Justice Department officials certainly cannot substitute for actual evidence of a pattern of constitutional violations. *Garrett*, 531 U.S. at 370-371. "As to the imputed deterrence, it is plainly unquantifiable. * * * Given much weight, the supposed deterrent effect would justify continued VRA renewals out to the crack of doom." *Shelby Cnty.*, 679 F.3d at 898 (Williams, J., dissenting). More-

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[2] For example, it is hard to comprehend why black voters' twice voting for a successful black presidential candidate at rates exceeding 90% is evidence of "resistance * * * to fully accept[ing] minority citizens * * * into the electoral process."

over, undue reliance on the speculative claim that the Act has deterred Fifteenth Amendment violations runs afoul of this Court's declaration that "[p]ast success alone * * * is not adequate justification to retain the preclearance requirements." *Nw. Austin*, 557 U.S. at 202.

The remaining categories of findings involve voting changes (or attempted changes), most of which were allegedly intended to dilute minority voting strength. See generally 2006 House Report 34, 36-43 (recounting instances of vote dilution). Evidence of alleged vote dilution cannot justify the reauthorization of Section 5. This Court has never held that vote dilution violates the Fifteenth Amendment, and Congress is not permitted to "redefine the substantive scope" of the Amendment under the guise of enforcing it. *Coleman*, 132 S. Ct. at 1333 (plurality). Unless the Court declares that vote dilution violates the Fifteenth Amendment or that the Voting Rights Act is Fourteenth Amendment legislation, Congress's findings are not relevant to support the reauthorization of Section 5. At the very least, as discussed below, Fourteenth Amendment vote-dilution evidence cannot support reauthorization of a coverage formula based upon 40-year-old Fifteenth Amendment metrics.

IV. The Section 4(b) Coverage Formula Is Unconstitutional Because It Is Based On Irrelevant, Outdated Characteristics.

Even if the Court finds that Congress identified a pattern of unconstitutional behavior, see *Garrett*, 531 U.S. at 372, Congress has failed to justify its "departure from the fundamental principle of equal sovereignty," *Nw. Austin*, 557 U.S. at 203, because it employs an irrational formula to determine which states are covered by Section 5. In questioning the coverage formula, the Court has noted that "[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for pre-

clearance." *Ibid.* Indeed, the record shows that those evils identified in 1965 have been largely eliminated. See *supra* Part III.A. In 2006, Congress targeted states based on long-past wrongs, rather than making a contemporaneous assessment whether covered jurisdictions are different from non-covered ones in any meaningful way. The nearly half-century-old coverage formula is no longer "rational in both practice and theory," *Katzenbach*, 383 U.S. at 330, and therefore must be invalidated.

A. Section 4(b)'s Coverage Formula Is Not Rational In Theory.

1. When South Carolina challenged Section 4(b)'s coverage formula on the ground that it was irrational and violated the principle of the equal sovereignty of states, the Court held that Congress could use the formula to differentiate between the states because it "was relevant to the problem of voting discrimination." *Id.* at 329. The Court explained how the formula's two metrics were clearly related to the wrong Congress was targeting:

> 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. Accordingly, the coverage formula is rational in both practice and theory.

Id. at 330.

2. The Court of Appeals failed to appreciate the centrality of a relevant coverage formula to determining whether Section 5 remains constitutional. Indeed, its holding would allow even the most arbitrary coverage formula to be found constitutional so long as Congress could find some evidence of ongoing discrimination in the covered jurisdictions. The Court of Appeals reasoned

that "[t]he triggers under section 4(b) were never selected because of something special that occurred in those years. Instead, Congress identified the jurisdictions it sought to cover—those for which it had evidence of actual voting discrimination—and then worked backward, reverse-engineering a formula to cover those jurisdictions." *Shelby Cnty.*, 679 F.3d at 878-879 (alterations, citations, and internal quotation marks omitted).

Even if the Court of Appeals' account of Congress' approach in 1965 were accurate as a descriptive matter, the coverage formula was *upheld* because it "was relevant to the problem of voting discrimination," *Katzenbach*, 383 U.S. at 330, not because it was successful at describing pre-identified jurisdictions. Put differently, the 1965 coverage formula was rational in theory not because of *which states* it identified, but because of *how* it identified them. *Ibid.* By contrast, the outdated coverage formula reauthorized in 2006 has no theoretical relationship to determining which states *now* engage in actual voting discrimination. The existence of voting tests and low turnout in the midst of the LBJ-Goldwater faceoff simply has no rational capacity to determine whether a jurisdiction is likely to discriminate against voters in the midst of President Obama's successful bid for re-election. To state the proposition is to refute it.

3. If alleged evidence of vote dilution is held to support the reauthorization of Section 5 (but see *supra* at Part III.B), an additional theoretical problem with the coverage formula arises. A preclearance requirement that is reauthorized principally to address alleged vote dilution should not be governed by a coverage formula triggered by ballot-access metrics. Instead, a rational coverage formula would determine which states engage in the worst vote dilution—not which states suppressed ballot access decades ago. *Nw. Austin*, 557 U.S. at 203

(stating that Section 5's "disparate geographic coverage [must be] sufficiently related to the problem that it targets"). Thus if the Court considers Section 5 as Fourteenth Amendment legislation that can be supported by evidence of vote dilution, it must still invalidate the coverage formula because "there is no sufficient nexus" between the formula and the wrong Congress intended to remedy. *Coleman*, 132 S. Ct. at 1337 (plurality).

4. Even supporters of Section 5's extension tried to warn Congress "that the evidence in the record did not address systematic differences between the covered and the non-covered areas of the United States, and, in fact, the evidence that is in the record suggests that there is more similarity than difference." *Nw. Austin*, 557 U.S. at 204 (internal quotation marks and alterations omitted). Unfortunately, as Senators Cornyn and Coburn lamented, "the Act's language was a foregone conclusion, and [the Senate] w[as] unable to have the kind of debate and discussion and perhaps amendment process that might have been helpful to protect the act against future legal challenges." 2006 Senate Report 35 (statement of Sen. John Cornyn and Sen. Tom Coburn). The senators provided the most likely explanation for why Congress adopted such an irrational coverage formula: "We cannot help but fear that the driving force behind this rushed reauthorization process was the reality that the Voting Rights Act has evolved into a tool for political and racial gerrymandering." *Ibid.*

The political calculus that led Democrats and Republicans to overwhelmingly support the reauthorization is not difficult to work out. Republicans viewed the legislation "as largely serving their political interests. Most of them considered redistricting pursuant to aggressive enforcement of section 5 as creating inefficient Democratic districts." Nathaniel Persily, *The Promise and Pitfalls*

of the New Voting Rights Act, 117 Yale L.J. 174, 180 (2007). "On the other hand, most Democrats supported the reauthorization in principle, and those who did not considered opposition (or even amendment) to constitute political suicide." *Ibid.* And, of course, any incumbent representative who was elected in a district drawn to satisfy the demands of Section 5 had a powerful incentive to preserve a friendly constituency. Thus, Congress speedily extended the irrational formula because members of Congress stood to benefit from its extension. "The most one can say in defense of the formula is that it is the best of the politically feasible alternatives or that changing the formula would * * * disrupt settled expectations." *Id.* at 208. Such considerations plainly cannot save a formula that is wholly irrational in theory.

B. The Coverage Formula Is Irrational In Practice.

The process the 2006 Congress followed to arrive at its coverage formula highlights why the formula is irrational in practice. When Congress originally crafted Section 4(b) in 1965, it "began work with reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act. The formula eventually evolved to describe these areas was relevant to the problem of voting discrimination." *Katzenbach*, 383 U.S. at 329. The metrics it used were closely linked to the targeted harm and could be applied to assess and sort all fifty states. The 2006 Congress inverted this process in a way that made its results fundamentally unreliable. The starting point for the 2006 Congress was not contemporaneous, competent evidence of discrimination, but was the old coverage formula. While the 1965 Congress started with evidence of current needs and devised relevant metrics to draw a coverage map, the 2006 Congress started with a map from the 1970s and searched for evidence that would

allow it to color in all the familiar locations. See, *e.g.*, Persily, *supra*, at 182, 194-195.

Unsurprisingly, this *post hoc*, scattershot approach failed to produce evidence that could justify imposing substantial federalism costs on some states and not others. As Judge Williams persuasively explains in his dissent, the evidence that Congress relied on to justify maintaining a theoretically irrational coverage formula fails to establish that the formula is rational in practice. See *Shelby Cnty.*, 679 F.3d at 408-419 (Williams, J., dissenting). Much of the evidence on which Congress relied did not allow for any meaningful comparisons between covered and non-covered jurisdictions. For example, Congress noted that more federal election observers were sent to covered jurisdictions than non-covered jurisdictions, but observers could only be sent to jurisdictions covered by Section 4(b) or a court order. *Id.* at 412-413. Congress also relied on continuing Section 5 actions by the Department of Justice, but by its very nature, this evidence does not allow for any comparison between covered and non-covered jurisdictions.

Some of the evidence the House Report cites as support for Section 5 actually undermines the case for reauthorization and confirms the view of Senators Cornyn and Coburn that the legislative process was "rushed" and "incomplete." 2006 Senate Report 26. As evidence that substantial discrimination continued to exist in 2006, the House Report noted that in Texas only 41.5 percent of Hispanic citizens were registered to vote in 2004 compared to 61.5 percent of white citizens. 2006 House Report 29. But the House Report omitted the crucial fact that nationwide in 2004 only 34.3 percent of Hispanic citizens were registered to vote while 67.9 percent of white citizens were registered. 2006 Senate Report 11. Thus, it was sloppy if not dishonest for the House Report to as-

sert that Texas's registration gap justified imposing extraordinary burdens on the state when the nationwide registration gap was 68 percent wider.

Similarly, the House Report highlighted that Louisiana had never elected a black governor, 2006 House Report 33, but as of 2006 only one state had ever elected a black governor, and that state was Virginia, a covered jurisdiction. See DeNeen L. Brown and Pierre Thomas, *Inauguration Shaking Va. "Cloak of Racism"; Wilder's Rise to Power Heralded with Joy*, Wash. Post, Jan. 12, 1990, at A1. Similarly, the House Report pointed to a general lack of blacks elected to statewide office, 2006 House Report 33, but since Reconstruction the U.S. Senate has never had more than one black senator serving at any time. Jamelle Bouie, *The Other Glass Ceiling*, American Prospect, Mar. 14, 2012, available at http://prospect.org/article/other-glass-ceiling.

The last black candidate elected to the Senate was Barack Obama, and though his electoral successes and the successes of other minority candidates after 2006 were not before Congress, their victories highlight the irrationality of extending a 40-year-old coverage formula 25 years into a rapidly changing future. Of course, in 2008 then-Senator Obama became the nation's first black president. Notably, he won a majority of voters in the covered jurisdictions of Virginia, North Carolina, and Florida. *Election Results 2008*, N.Y. Times, Dec. 9, 2008, http://elections.nytimes.com/2008/results/president/map.html. In 2012, a majority of Virginians and Floridians again cast their ballots for Obama. Aaron Blake, *Obama Picks Up a Split in Florida*, Wash. Post, Nov. 11, 2012, at A31; Jeff Zeleny and Jim Rutenberg, *Obama's Night: Tops Romney For 2nd Term In Bruising Run; Democrats Turn Back G.O.P Bid For Senate*, N.Y. Times, Nov. 7, 2012, at A1.

The recent success of minority politicians in the South should not be surprising, as the only reliable comparative evidence that Congress gathered showed that covered jurisdictions in fact *outperformed* their non-covered peers in voter registration, voter turnout, and ratio of black elected officials to black share of the citizen voting-age population. *Shelby Cnty.*, 679 F.3d at 408-412 (Williams, J., dissenting); see also *supra* Part III.A. Unlike in 1965—when Congress had relevant and reliable metrics to sort covered jurisdictions from the rest—Congress in 2006 ignored the only reliable comparative evidence it had. Thus, it can no longer be said that Section 5 is "aimed at areas where voting discrimination has been most flagrant." *Katzenbach*, 383 U.S. at 315.

The anachronistic nature of the coverage formula was illustrated powerfully not long after this Court granted certiorari. When South Carolina Senator Jim DeMint resigned his seat, the duty to appoint a replacement fell to Governor Nikki Haley, an Indian-American. She selected U.S. Representative Tim Scott, an African American. Jeff Zeleny, *Congressman is Chosen to Succeed DeMint as South Carolina Senator*, N.Y. Times, Dec. 17, 2012, at A16. Congressman Scott reached the House in 2010 by defeating Paul Thurmond—Strom Thurmond's son—to claim the Republican nomination. *Ibid.* When Scott is sworn in as a senator this January, South Carolina—the first state to secede from the union and the first state to challenge the Voting Rights Act before this Court—will be the only state in the union represented by a black senator. *Ibid.*

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In *Northwest Austin*, this Court admonished that "a departure from the fundamental principle of equal sovereignty requires a showing that [Section 5's] disparate geographic coverage is sufficiently related to the problem

that it targets." 557 U.S. at 203. The Court pointedly noted that "there is considerable evidence" that the coverage formula "fails to account for current political conditions." *Ibid.* Congress declined to fix the problems with Section 5 that this Court identified just four Terms ago, even as recent events have confirmed the Court's observations. The Court must now take up its "duty as the bulwark of a limited constitution against legislative encroachments," *id.* at 205 (quotation omitted), and invalidate Section 5 of the Voting Rights Act and the coverage formula of Section 4(b).

CONCLUSION

The Voting Rights Act of 1965 was vital in fulfilling the promise of the Fifteenth Amendment. "Past success alone, however, is not adequate justification to retain the preclearance requirements." *Id.* at 202. There is no pattern of recent Fifteenth Amendment violations that could justify the substantial federalism costs of Section 5, and Congress ignored the changed conditions in the South when it reflexively relied on past sins as the basis for its coverage formula. The Southeastern Legal Foundation respectfully requests that the judgment of the Court of Appeals be reversed.

Respectfully submitted.

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