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 THE JUDICIAL EDUCATION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae the Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as judges' role in our democracy, how they construe the Constitution, and the impact of the judiciary on the nation. JEP's education efforts are conducted through various outlets, including print, broadcast, and internet media.

Amicus curiae submits this brief regarding the standard of review to be used by the Court in deciding this case.[1]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), the Court distilled a century of enforcement jurisprudence into a single standard of review. It

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person, other than amicus curiae, its members or its counsel, made a monetary contribution that was intended to fund preparing or submitting this brief. This brief is submitted pursuant to blanket consent letters from all parties, on file with this Court.

held that, with respect to the enforcement provision of the Fourteenth Amendment, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* Twelve years later, the Court considered whether this standard applied in the context of the preclearance provisions of the Voting Rights Act but declined to decide the question, holding only that the statute raised serious constitutional questions under any conceivable standard. *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193, 204 (2009).

Thus the Court has not directly addressed whether the "congruence and proportionality" standard explicitly articulated in *Boerne* applies in the context of the preclearance provisions of the Voting Rights Act ("VRA"). As discussed below however, the Court has applied the congruence and proportionality test in weighing the constitutionality of virtually every enforcement statute that it has examined in the wake of *Boerne*. Since the VRA is an enforcement statute, *Boerne's* congruence and proportionality standard is applicable.

Application of the congruence and proportionality doctrine in the VRA context is not a change in the law, but rather a reconfirmation of longstanding practice as embodied in this Court's seminal VRA decision in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

Applied here, the *Boerne* standard requires invalidation of Section 5 of the VRA. As petitioner has demonstrated, the most recent reauthorization of

the statute rested on outdated assumptions and data that no longer support the extraordinary incursion onto state sovereignty effected by the statute's broad and unequally applicable preclearance requirements. Given the limited record of recent unconstitutional deprivation of voting rights in covered jurisdictions, this Court should declare the original mission of Section 5 accomplished and invalidate its 2006 reauthorization.

ARGUMENT

I. CONGRESSIONAL ENFORCEMENT POWERS UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS ARE LIMITED AND SUBJECT TO JUDICIAL REVIEW.

A. The Civil War Amendments Grant Power to Congress to Enact "Appropriate" Legislation.

The history of the Fourteenth and the Fifteenth Amendments can be traced to the immediate aftermath of the Civil War as the spearheads of Republican efforts to empower the federal government to protect the rights of the newly emancipated slaves. The enforcement provisions of each amendment are virtually identical. The Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The Fifteenth Amendment likewise states: "The Congress

shall have power to enforce this article by appropriate legislation."

As this Court recounted in *Boerne*, the enforcement language of the Fourteenth Amendment was originally drafted more broadly to provide Congress

> "power to make all laws which *shall be necessary and proper* to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."

Boerne, 521 U.S. at 520 (quoting Cong. Globe, 39th Cong., 1st Sess., 1034 (1866)) (emphasis added). This original language drew considerable opposition in congressional debate as granting Congress "too much legislative power at the expense of the existing constitutional structure." *Id.* The language was subsequently revised and adopted in its present form in order to address those concerns. *Id.* at 523. It is reasonable to conclude that Congress used the identical language in the Fifteenth Amendment in order to confer the same limited power of enforcement.

In light of this historical context, and given the parallel verbiage, the Court has always evaluated the nature of the Fourteenth and Fifteenth Amendments enforcement powers by the same standards. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 373 (2001) (using same standards of review for the Fourteenth and Fifteenth Amendment); *id* at n.8 ("Section 2 of the Fifteenth Amendment is virtually

identical to § 5 of the Fourteenth Amendment."); *Boerne*, 521 U.S. at 525-26 (discussing *Katzenbach*--a Fifteenth Amendment case--to outline the limits on Congress's Fourteenth Amendment powers); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *James v. Bowman*, 190 U.S. 127, 136 (1903).

B. The Courts, And Not Congress, Ultimately Must Determine Whether Legislation Purporting To Enforce These Amendments is "Appropriate."

That Congress has the power to enforce the provisions of the Fourteenth and Fifteenth Amendment is not in dispute. The issue is whether there is any limit to the scope of this enforcement power. As this Court has observed, "the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000).

In *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997), this Court noted that the congressional power of enforcement under § 5 was "broad" but "not unlimited." The reason is self-evident: absent defined boundaries, Congress would have *carte blanche* to enact virtually any legislation, provided only that it purported to be acting under the rubric of its enforcement power. As *Boerne* explained:

> Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress

> would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

Id. at 519 (internal citation omitted). Moreover, it is not up to Congress to define the substance of constitutional guarantees. *Id.* at 519-24. That is the province of this Court. *Id.*

Given these respective roles, the Court stressed the necessity of distinguishing permissible from impermissible exercises of power. "[R]emedial" legislation is within congressional power. *Id.* at 519 (citing *Katzenbach*, 383 U.S. at 326) "Substantive change" is not. *Id.* at 519. While the line between the two is not always easy to discern, "the distinction exists and must be observed." *Id.* at 520. Demarcation requires a cost-benefit or tradeoff analysis: "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Id.* In order to pass muster, the more expansive and intrusive an enforcement statute is, the more closely it must hew to the constitutional guarantee at stake.

This does not mean, of course, that Congress lacks the power to enact legislation to address societal problems outside the very narrow confines of the Fourteenth and Fifteenth Amendments. It means only that in order to do so, it must ground its authority in an explicit constitutional grant. Nor is this caveat necessarily fatal. For example, this Congress enacted the landmark Civil Rights Act of

1964 under its Commerce Clause powers. This Court affirmed its ability to do so. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) ("the action of the Congress in the adoption of [Civil Rights Act]... is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years.").

II. THE *BOERNE* "CONGRUENCE AND PROPORTIONALITY" TEST SHOULD BE APPLIED IN THIS CASE.

A. The Congruence And Proportionality Test Enunciated In *Boerne* Is Based Upon And Consistent With Prior Jurisprudence.

The Court did not create a new benchmark in *City of Boerne v. Flores*; it synthesized a workable standard of review from a century of enforcement jurisprudence, including this Court's decisions enforcing constitutional prohibitions on race-based discrimination. *Boerne*'s reasoning relied upon VRA jurisprudence. *Boerne* cited to this Court's seminal decision on the VRA, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) at least 11 times. Even more tellingly, it specifically based the congruence and proportionality standard on *Katzenbach*. "The appropriateness of remedial measures must be considered in light of the evil presented. ... Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Boerne*, 521 U.S. at 530 (citing *Katzenbach*, 383 U.S. at 308, 334).

In articulating the congruence and proportionality standard, this Court reasoned that its genesis stretched well beyond *Katzenbach*. The *Boerne* holding was grounded in a century of case law, drawing upon enforcement cases from a variety of contexts to articulate how the congruence and proportionality framework had developed. *See id.* at 532 ("Remedial legislation under § 5 'should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against.'") (citing *Civil Rights Cases*, 109 U.S. 3, 13 (1893)).

Nor did *Boerne* indicate that the congruence and proportionality standard would be confined to a particular realm of equal protection jurisprudence: *Boerne* drew no distinctions between the applicable standard to evaluate the race-based voting rights statute in *Katzenbach*, and the religious liberties statute in *Boerne* itself. Both had been closely scrutinized to determine the fit with Congress's remedy for and findings of unconstitutional state behavior. *See Boerne*, 521 U.S. at 530 (finding "instructive" the comparison of the constitutional rights protected and the remedies used in both Religious Freedom Restoration Act and VRA).

Katzenbach was the prototypical application of congruence and proportionality analysis. *Katzenbach* affirmed the preclearance provisions only after a comprehensive review, observing that the record showed a clear pattern of constitutional voting rights deprivation against which a panoply of

lesser measures had proved ineffective. These lesser measures included a number of Court decisions,[2] a series of incremental congressional measures,[3] and piecemeal litigation by the Justice Department and private litigants.

These lesser measures had been tried and had failed.[4] Their persistent failure led to a continuing deprivation of voting rights, necessitating more drastic remedies. *See Northwest Austin*, 557 U.S. at 221 (Thomas, J., concurring in the judgment in part and dissenting in part) ("the massive scale of disenfranchisement efforts made case-by-case enforcement of the Fifteenth Amendment impossible, if not Sisyphean.") Put another way, extreme exigencies demanded extreme action – the

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[2] *Katzenbach*, 383 U.S. at 311-12 ("The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote."... and citing cases involving Grandfather clauses, procedural hurdles, white primaries, improper challenges, racial gerrymandering and discriminatory application of voting tests)

[3] *Id.* at 313 ("In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination.")

[4] *Id.* at 313-14 ("Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination. ... The previous legislation has proved ineffective for a number of reasons.")

prototypical congruence and proportionality analysis.[5]

The Court in *Boerne* also relied upon its prior decision in *Oregon v. Mitchell*, 400 U.S. 112 (1970), which upheld a 5-year extension of the prohibition of literacy tests for voters, but also held that Congress exceeded its enforcement powers by mandating that the minimum voting age in state and local elections be reduced from 21 to 18. *Id.* at 117-118. As Justice Black's controlling opinion in *Mitchell* observed, in contrast to the extensive record of literacy tests being used to deny voting rights on account of race, there was no legislative record to support a conclusion that "the 21-year-old vote requirement was used by the States to disenfranchise voters on account of race." *Id.* at 130.

The Court adopted a similar approach in deciding a constitutional challenge to the 1975 extension to the VRA in *City of Rome v. United States*, 446 U.S. 156, 181 (1980). The Court identified a pattern of constitutional violations by highlighting several data points Congress had relied on. "Significant disparity

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[5] The constitutionality of the 1970 reauthorization was affirmed, without extensive discussion, in *Georgia v. United States*, 411 U.S. 526, 535 (1973). The Court summarily incorporated by reference its exhaustive congruency and proportionality analysis conducted just a few years earlier in *Katzenbach*. *See id.* ("And for the reasons stated at length in [*Katzenbach*], we reaffirm that the Act is a permissible exercise of congressional power under s 2 of the Fifteenth Amendment.")

persisted" between registration numbers of whites and minorities in "at least several of the covered jurisdictions." *Id.* at 180. More African-American officials had been elected, but they held minor posts. *Id.* In particular, none held a statewide position. *Id.* Moreover, African-American representation in the state legislatures "fell far short" of their proportion in the population. *Id.* at 181.

The Court gauged the appropriateness of the remedy in light of these concerns, giving considerable weight to the historical context – *City of Rome* involved an extension only a decade after the original 1965 Act, an Act that itself had addressed a century of African-American vote suppression persistently and defiantly perpetuated by ingenious and contrived mechanisms. *Id.* at 181-82. Progress had been made, but it was judged modest and certainly tenuous. *Id.*

Of particular importance, Congress had carefully deliberated over the necessity of the continuation of the § 5 preclearance requirement, and judged it appropriate in light of submissions by the Attorney General. Given that record in its historical context, a modest 7-year extension was an appropriately measured ameliorative device: "When viewed [in historical context,] 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. By any measure, regardless of the terminology employed, *City of Rome*

engaged in a congruence and proportionality analysis.

B. The Test of *Boerne* Has Become the Accepted Yardstick For Evaluating the Constitutionality of Enforcement Legislation.

Since *Boerne*, the Court has explicitly applied the congruence and proportionality test in every decision involving legislation enforcing the Fourteenth and Fifteenth Amendments, even when members of the Court draw different conclusions from that analysis. *See e.g.*, *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327, 1335 (2012) (plurality opinion) ("[A]s a remedy, the provision is not congruent and proportional to any identified constitutional violations"); *id.* at 1347 (Ginsburg., J., dissenting) ("The self-care provision, I would therefore hold, is congruent and proportional to the injury to be prevented."); *Tennessee v. Lane*, 541 U.S. 509, 531 (2004) ("Congress' chosen remedy for the pattern of exclusion and discrimination described above . . . is congruent and proportional to its object of enforcing the right of access to the courts."); *Nev. Dep't. of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003) ("We believe that Congress' chosen remedy, the family-care leave provision of the FMLA, is 'congruent and proportional to the targeted violation,'") (citation omitted); *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365 (2001) ("[Section] 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.") (internal quotation marks omitted); *Kimel*

v. Fla. Bd. of Regents, 528 U.S. 62, 82-83 (2000) ("Applying the ... congruence and proportionality test ... we conclude that the ADEA is not appropriate legislation under § 5 of the Fourteenth Amendment.") (internal quotation marks omitted); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637 (1999) ("[T]he legislation must... be appropriate under § 5 as that term was construed in *City of Boerne*.") (internal quotation marks omitted). Throughout its consistent application of the *Boerne* test, the Court has never noted limitations in the standard's applicability.[6]

Therefore, the *Boerne* congruence and proportionality test is the appropriate standard to apply in determining the constitutionality of measures designed to remedy the deprivation of constitutional voting rights. The Court of Appeals decision properly held as much. *Shelby Cnty. v.*

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[6] The Court did not explicitly apply the congruence and proportionality test in *Lopez v. Monterey County*, 525 U.S. 266, 283 (1999), but its Section 5 analysis nevertheless adhered to the *Boerne* standard. *Lopez* primarily involved an issue of statutory construction, with an incidental challenge to the constitutionality of the VRA. In rejecting that challenge, the Court cited *Boerne* and relied upon its previous decisions in *Katzenbach* and *City of Rome*, which, as noted above, were perfectly consistent with a congruence and proportionality analysis. *See id.* ("Moreover, we have specifically upheld the constitutionality of § 5 of the Act against a challenge that this provision usurps powers reserved to the States." (citing *Katzenbach*, 383 U.S. at 334-335 and *City of Rome*, at 178-183")).

Holder, 679 F.3d 848, 859 (D.C. Cir. 2012) ("Although the Supreme Court declined to resolve this issue in *Northwest Austin*, the questions the Court raised—whether section 5's burdens are justified by current needs and whether its disparate geographic reach is sufficiently related to that problem—seem to us the very questions one would ask to determine whether section 5 is 'congruen[t] and proportional[] [to] the injury to be prevented,'" citing *City of Boerne*, 521 U.S. at 520.) The District Court panel came to the same conclusion. *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424, 507-08 (D.D.C. 2011).

C. This Court Has Applied The *Boerne* Congruence And Proportionality Test To Require Much More Than Deferential Rational Basis Review.

In evaluating the "congruence and proportionality" of a measure, the first step is to "identify with some precision the scope of the constitutional right at issue." *Bd. of Trs. v. Garrett*, 531 U.S. 356, 365 (2001). Moreover, the evil identified in the first step must concern (i) a pattern (ii) of constitutional violations by states; even multiple isolated instances, or merely undesirable acts, however reprehensible, will not suffice. *Lane*, 541 U.S. at 528; *Hibbs*, 538 U.S., at 735-37. The second step is to review the record to determine whether there is a pattern of sufficient consistency and egregiousness of violation of that right. *Garrett*, 531 U.S. at 368. The third step is to ensure that the remedy is appropriately calibrated to the nature and magnitude of the violation.

The Court's recent decision in *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012) is a textbook illustration of this process. In *Coleman*, the Court concluded that Congress did not validly abrogate the states' sovereign immunity under the Fourteenth Amendment in enacting the Family Medical Leave Act's ("FMLA") self-care provision, 29 U.S.C.A. § 2612(a)(1)(D). In reaching its conclusion, the Court plurality[7] followed the *Boerne* test, by focusing on (i) whether the provision addressed conduct that violated the Fourteenth Amendment and (ii) whether there existed "congruence and proportionality between the injury to be prevented . . . and the means adopted to that end." *Id.* at 1334 (quoting *City of Boerne*, 521 U.S. 507, 520 (1997)).

The *Coleman* ruling distinguished the Court's prior decision in *Hibbs*. Crucially, *Hibbs* involved the family-care provision of the FMLA, while *Coleman* involved the self-care provision. This distinction proved decisive because of the nature of the harm addressed: "what the family-care provisions have to support them, the self-care provision lacks, *namely evidence of a pattern of state constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations*." *Id.* at 1334. (emphasis added)

The Court could not accept the argument that the self-care provision addressed a pattern of sex

[7] Both the plurality and the dissent in *Coleman* applied the congruence and proportionality tests, albeit with different outcomes. *Id.* at 1338 (Scalia. J., concurring).

discrimination. *Id.* at 1334-35. Considering the history of the provision, the plurality found "scant evidence" of gender-based stereotypes or discrimination in the provision of sick or disability leave by state employers. *Id.* at 1334. Accordingly, the plurality concluded that Congress sought to avoid "discrimination on the basis of illness, not sex." *Id.* at 1335. The distinction is crucial, since discrimination on the basis of illness does not generally implicate *constitutional* concerns.

Furthermore, though the Court did not dispute that the self-care provision could potentially benefit women suffering from pregnancy-related disabilities, there were other means in place to alleviate those problems. *Id.* Therefore, the FMLA self-care provision "as a remedy" was not congruent or proportional "to any identified constitutional violations." *Id.* at 1335.

As *Coleman* illustrates, the constitutionality of enforcement statutes in the wake of *Boerne* has frequently, though not invariably hinged on the second step: whether the record shows a demonstrable and consistent pattern of egregious violations of a constitutional right. If the evidence of a pattern of constitutional deprivation is insufficient, inadequate or nonexistent, this Court has held that Congress exceeded its enforcement authority.

For instance, in *Florida Prepaid v. College Savings Bank*, 527 U.S. 627 (1999), the Court was faced with the question of the constitutionality of the Patent Remedy Act (PRA). The PRA had attempted to abrogate state sovereign immunity with regard to patent infringement suits, purporting to act under §

5 of the Fourteenth Amendment. *Id.* at 630. Reviewing the record, the Court noted that "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." *Id.* at 640. Moreover, Congress had made no effort to calibrate its response in proportion to the problem, for example by limiting recourse to instances where states refused to provide their own remedies, or by setting time limits. *Id.* at 647-48. This failure to calibrate could not pass the congruence and proportionality test, dooming the abrogation provision of the PRA: "[The sweep and scope of the PRA] is particularly incongruous in light of the scant support for the predicate unconstitutional conduct that Congress intended to remedy." *Id.* at 647.

A year after *Florida Prepaid,* the Court was confronted with the constitutionality of the Age Discrimination in Employment Act (ADEA) in *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000). ADEA attempted to abrogate state sovereign immunity in cases involving age discrimination. *Id.* at 80. Once again, Congress enacted ADEA under § 5 of the Fourteenth Amendment. However, the Court noted that Congress had "never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Id.* at 89. The underlying record consisted "almost entirely of isolated sentences clipped from floor debates and legislative reports." *Id.* Moreover, the magnitude of the remedy, which made no exception for bona fide occupational requirements, was out of proportion with the constitutional evil to be remedied. *Id.* at 83; *see id.*

at 92 ("In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment.")

Finally, in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court was faced with the question of whether Congress had validly exercised its enforcement power by providing that state employees could recover damages for violations of the Americans with Disabilities Act (ADA). Once again, the Court began with the premise that "§ 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* at 363 (quoting *City of Boerne*, 521 U.S. at 520). The Court noted that the "legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled." *Id.* at 368. Moreover, the ADA also prohibited the use of criteria and means of administration that had a disproportionate impact on the disabled, and did so "without regard to whether such conduct has a rational basis." *Id.* at 372. The ADA made no provisions for such contingencies: the remedy was not carefully gauged to the nature and magnitude of the underlying problem. Consequently, it failed the "congruence and proportionality" test. *Id.* at 374.

Of course, the *Boerne* analysis is not invariably fatal to statutes designed to enforce the substantive provisions of the Fourteenth Amendment. Indeed, the contrast to the post-*Boerne* cases upholding enforcement statutes is instructive, both as to the identification of a pattern of constitutional violations, and the calibration of the responsive measure.

In the first case, *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 738 (2003), the Court upheld the Family and Medical Leave Act ("FMLA") as "narrowly targeted". It found sufficient evidence of the "[s]tates' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits." *Id.* at 742. The Court found evidence of a pattern of constitutional violations in a Bureau of Labor Statistics (BLS) study in the FMLA legislative record, testimony in congressional hearings, documentation of unequal leave policies, analysis of the policies themselves, state laws and ironically, in the Court's own previous decisions. [8] *Id.* at 729-35. "[E]ven where state laws . . . were not facially discriminatory, they were applied in discriminatory ways." *Id.* at 732. In light of this evidence, the Court determined that "[i]n sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of

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[8] *See id.* at 729 (citing *Hoyt v. Florida*, 368 U.S. 57, 62 (1961); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948), *Muller v. Oregon*, 208 U.S. 412, 419, n. 1 (1908), *Bradwell v. State*, 16 Wall. 130 (1873)).

leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation." *Id.* at 736.

Having established the constitutional violation, the Court evaluated the remedy. Perhaps most critical was the fact that the "FMLA is narrowly targeted at the fault line between work and family." *Id.* at 738. This was the crucial distinction between the FMLA and the statutes in *Boerne*, *Kimel*, and *Garrett* which "applied broadly to every aspect of state employers' operations[.]" *Id.* In addition, the FMLA itself was narrowly drawn to exclude senior, elected, and policy making officials and their staffs, applied only to unpaid leave, limited damages to actual monetary losses and capped the accrual of backpay. *Id.* at 739-40.

Juxtaposing the well documented record of a pattern of widespread constitutional violations against a carefully crafted remedy, the Court had little difficulty in concluding that the FMLA was "congruent and proportional to the targeted violation." *Id.* at 737 (citing *Garrett*, 531 U.S. at 374).

A similar analysis yielded a similar result in *Tennessee v. Lane*, 541 U.S. 509 (2004). In *Lane*, the Court upheld Title II of the Americans with Disabilities Act ("ADA"), holding that the ADA's abrogation of state sovereign immunity was a valid exercise of the enforcement power to the extent that it remedied state discrimination against disabled individuals in the "fundamental right" of access to courthouses. *Id.* at 533-34.

In evaluating the pervasiveness of the unconstitutional harm that Title II was "designed to address," the Court examined the record which

showed that Congress had acted against "a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Id.* at 524. In addition, the Court viewed an extensive record of state laws denying disabled individuals the right to vote, marry, or serve on a jury. *Id.* It cited the Court's own experience with unconstitutional treatment of disabled persons by state agents, including unjustified commitment, abuse and neglect in state mental health facilities, and irrational discrimination in zoning decisions. *Id.* It also highlighted the fact that "decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting." Given the "sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services," it had little difficulty concluding that a problem of constitutional deprivation had been established. *Id.* at 528.

The Court then turned to the pivotal question of whether the remedy fit the ailment, or congruence and proportionality. Once again, it was critical that Title II only required "'reasonable modifications' that would not fundamentally alter the nature of the service provided." *Id.* at 532. States were not required to "employ any and all means to make judicial services accessible to persons with disabilities." *Id.* at 531-32. Nor were they required to "compromise their essential eligibility criteria for public programs." *Id.* at 532. Moreover, Title II

permitted utilization of lesser measures, such as the relocation of services and the provision of aides, with expensive structural enhancements being a last resort. *Id.* In light of this, Title II met the *Boerne* test: "Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts." *Id.* at 531.

Thus, the "congruence and proportionality" standard has been the explicit measure for determining whether a challenged statute is a valid exercise of Congressional enforcement power under the Fourteenth Amendment since *Boerne.* This standard has been applied in a variety of cases with differing outcomes, but always in a careful and rigorous fashion. There has never been a suggestion that the congruence and proportionality test can be satisfied by deferential consideration of whether Congress could have had a rational basis for its action.

III. THE UNEQUAL TREATMENT OF EQUAL STATES REQUIRES PARTICULARLY EXACTING REVIEW IN THIS CASE.

The *Boerne* "congruence and proportionality" standard turns on two key issues: first, the demonstrated existence of a pattern of constitutional deprivation. The second is how closely tailored the congressional remedy is to rectifying the identified problem. Both points are analyzed extensively and ably in other briefs. Rather than repeat those arguments here, JEP will focus on one aspect of the VRA's "congruence and proportionality" as it concerns the evils of minority vote suppression.

As this Court has acknowledged, Section 5 of the VRA represents an "extraordinary departure from the traditional course of relations between the States and the Federal Government." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-01 (1992). In the words of Justice Black, "[n]o 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." *Oregon v. Mitchell,* 400 U.S. 112, 125 (1970) (Opinion of Black, J.). Section 5 exacts significant federalism costs by targeting a function of governance that the Constitution has explicitly preserved for the states: the regulation of state and local elections. That the statute requires advance blessing by the federal government of even the most minor of changes to state voting laws and procedures – for even the smallest of subdivisions of covered jurisdictions – only amplifies the intrusiveness of the statute.

The concern for the toll on federalism has been a recurring motif in VRA jurisprudence. For instance, in *Lopez v. Monterey County,* 525 U.S. 266, 282, (1999) the Court acknowledged that "the [VRA], which authorizes federal intrusion into sensitive areas of state and local policymaking, imposes substantial 'federalism costs.'" Similarly, in *City of Rome v. U. S.*, 446 U.S. 156, 179 (1980), the Court acknowledged that "principles of federalism" are "necessarily overridden" by the enforcement power.

Federalism is a significant consideration in any congruence and proportionality analysis. But the

concerns in this area are further compounded by the inequitable application of the law. The singling out of ostensibly equal states[9] for separate treatment has long been a particularly troubling aspect of the Voting Rights Act. It is axiomatic that the States of the union are equal, such equality being inherent in the very ideal of a union:

> 'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress . . . .

Coyle v. Smith, 221 U.S. 559, 567 (1911). *See also Escanaba & Lake Michigan Transp. Co. v. City of Chicago,* 107 U.S. 678, 689 (1883) ("Equality of constitutional right and power is the condition of all the states of the Union, old and new.") *C.f. U.S. v. Alaska,* 521 U.S. 1, 5 (1997) (observing that "new States are admitted to the Union on an 'equal

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[9] *See South Carolina v. Katzenbach,* 383 U.S. 301, 328-29 (1966) (referring to the "doctrine of the equality of States[.]")

footing' with the original 13 Colonies.") (internal citations omitted). The equality of states is such a fundamental bedrock principle that when circumstances necessitated deviation from the ideal, such as proportional representation in the House of Representatives, or a federal income tax, specific constitutional provisions were introduced to handle the exigency.

Against these norms, § 5 marks a virtually unprecedented departure from the fundamental constitutional compact. Apart from the VRA, there is a complete absence of post-Reconstruction legislation in which particular states or groups of states have been singled out for punitive measures. No party appears to have briefed authority that sets a precedent for such treatment. The consequent inference is that the principle of equal treatment and dignity is so sacrosanct to the nation's constitutional psyche that any conceived deviation has been unthinkable.

The VRA is the sole exception from this ideal, and this unequal treatment has raised concerns from the very outset. In the Act's very first constitutional challenge, the Court acknowledged that the preclearance requirements constituted an "uncommon exercise of congressional power," but accepted it as a temporary expedient in light of "exceptional conditions", which justified "legislative measures not otherwise appropriate." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). In other words, *Katzenbach* was prepared to countenance – for five years – what was even then an

extreme remedy only to tackle a virtually intractable problem which had defied lesser measures.

Notwithstanding these caveats, the treatment of the covered states still provoked concern, with some members of the Court sounding the alarm at the very outset. Justice Black felt compelled to partially dissent in *Katzenbach* on this very point:

> I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far-away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces.

South Carolina v. Katzenbach, 383 U.S. 301, 358-60 (1966) (Black, J., dissenting).[10] Echoes of his

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[10] Justice Black later maintained that his fears in *Katzenbach* had been realized. *See Perkins v. Matthews*, 400 U.S. 379, 401 (1971) (Black, J., dissenting) (arguing that in holding that town could not change polling places without federal approval, "[t]he fears which precipitated my dissent in *Katzenbach* have been fully realized"); *Allen v. State Bd. of Elections*, 393 U.S. 544, 595 (1969) (Black, J., dissenting) (arguing about Section 5 generally, "[T]his is reminiscent of old Reconstruction days when soldiers controlled the South and when those States were compelled to make reports to military commanders of what they did."); *Gaston County v. United States*, 395 U.S. 285, 297 (1969) (Black, J., dissenting) (dissenting for "substantially the same reasons he stated" in *Katzenbach*).

"conquered provinces" warning have resonated through the years in subsequent dissents by other members of this Court. *See City of Pleasant Grove v. United States*, 479 U.S. 462, 472-80 (1987) (Powell, J., dissenting); *City of Rome v. United States*, 446 U.S. 156, 206 (1980) (Rehnquist, J., dissenting); *United States v. Bd. of Comm'rs*, 435 U.S. 110, 140 (1978) (Stevens, J., dissenting).

Of course, there is no absolute prohibition on the separate treatment of equal states. Indeed, this Court has acknowledged that distinctions are sometimes justifiable and do not prohibit "remedies for local evils which have subsequently appeared." *Northwest Austin* at 203 (quoting *Katzenbach* 383 U.S. at 328-29). However, as demonstrated in petitioner's brief, the evils the Act is aimed to address are no longer particularly local. In the absence of a close nexus between the designated problem and the solution, the specter of preclearance measures as a quasi-punitive measure – the "conquered provinces" problem – must inevitably haunt this analysis.

The sins of history are no basis for modern policy. This has been dubbed the "Bull Connor is Dead" problem: "Today, Congress would be hard-pressed to find widespread evidence of [1965-like] discrimination." [11] *See Northwest Austin*, 557 U.S. at

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[11] Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J. 177, 179 (2005) (noting that "[m]ost of the original racist elected officials are out of

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226 ("The extensive pattern of discrimination that led the Court to previously uphold § 5 as enforcing the Fifteenth Amendment no longer exists.") (Thomas, J., concurring in part in the judgment and dissenting in part). The 2006 renewal of the VRA "imposes current burdens and must be justified by current needs." *Id.*, 557 U.S. at 203 (majority op.).

More fundamentally however, it is hard to envision how a *sui generis* treatment of once-disfavored but currently compliant states demonstrates the necessary "congruence and proportionality" that the respondents need to establish. The record – to the extent there was a record at all when Congress reenacted the statute in 2006 – no longer supports disparate treatment of equal sovereigns. This Court signaled as much only two years ago in *Northwest Austin,* when it observed that "[t]he [VRA] differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.' ... But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." 557 U.S. at 203.

CONCLUSION

No one doubts that Congress has the power to protect the voting rights of any racial group. The question is whether the extraordinary remedy

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power," and the remainder have been effectively stymied in any efforts to obstruct minority voting rights).

Congress has enacted here continues to be appropriate legislation to enforce the Fifteenth Amendment.

Such "an extraordinary departure from the traditional course of relations between the States and the Federal Government" can only be constitutionally justified as a last resort. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 500-01 (1992). This Court has previously countenanced Section 5 only as an "uncommon exercise of congressional power" rendered "appropriate" only because of the "exceptional conditions" and "unique circumstances" that had proved stubbornly resistant to lesser measures at the time. *South Carolina v. Katzenbach*, 383 U.S. 301, 334-35 (1966)

Whatever else it may be, a process whose applicability hinges on electoral practices occurring more than half a century ago and statistics from the 1964, 1968 and 1972 presidential elections is not justified as a response to exigent circumstances. No longer a temporary measure, this law has now been extended till 2031. That congressional response is neither congruent not proportional to "current needs." *Northwest Austin*, 557 U.S. at 203.

Section 5 was enacted for a five year term in 1965 to address the conditions that prevailed at the time. It has ably served that purpose. It was congruent and proportional at the time; it is no longer so. Its work done, the time has come to praise its considerable accomplishments, and declare that its extraordinary requirements are no longer appropriate means to enforce the Fifteenth Amendment.

Respectfully submitted,

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