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 GABRIEL CHIN, ATIBA ELLIS, CHRISTOPHER S. ELMENDORF, JANAI S. NELSON, BERTRALL ROSS, DANIEL TOKAJI, AND FRANITA TOLSON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Gabriel J. Chin, a Professor of Law at the University of California Davis School of Law, has written extensively about the right to vote. His work includes Section 5 of the Voting Rights Act and the "Aggregate Powers" of Congress over Elections, UC Davis Legal Studies Research Paper No. 313, available at http://ssrn.com/abstract=2132158, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. CIV. RTS.-CIV. LIBS. L. REV. 65 (2008) (with Randy Wagner), *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004), and *The Voting Rights Act of 1867: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581 (2003).

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amici curiae* certifies that counsel of record for both petitioners and respondents have consented to this filing in letters on file with the Clerk's office.

disenfranchised voters. Professor Ellis attended Duke University, where he received a Bachelors of Arts, a Masters in History (focusing on voter disenfranchisement in the Jim Crow South), and a Juris Doctorate. He clerked for the Honorable Theodore A. McKee on the United States Court of Appeals for the Third Circuit and the Honorable James A. Beaty, Jr. on the United States District Court for the Middle District of North Carolina.

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Sovereignty?: Federalism as a Constraint on the Voting Rights Act, 65 Vand. L. Rev. 1195 (2012), which examines the extent of Congress' authority under the Elections Clause.

SUMMARY OF THE ARGUMENT

The Fourteenth and Fifteenth Amendments are not and have never been the *sole* source of Congress' authority for Section 5.[2] Section 5 concerns elections not only for state officials, but also for federal officials. The Elections Clause, U.S. Const. art I, § 4, cl. 1, provides distinct, clear authority for Congress to enact Section 5's pre-clearance procedures for state laws concerning federal elections.

The Elections Clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

Id. Congress' Elections Clause power is broad and plenary. *Ex parte Siebold*, 100 U.S. 371, 388 (1879). Congress enjoys "general supervisory power over the whole subject" of federal elections. *Id.* at 387. Like all other powers directly granted to Congress, Congress' legislative authority over federal elections is enhanced by the Necessary and Proper Clause, which

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[2] Professor Gabriel J. Chin explains that Congress relied upon the Fourteenth and Fifteenth Amendments and the Elections Clause as its sources of power in enacting the VRA. *See* Gabriel J. Chin, U.C. Davis Legal Studies Research Paper No. 313, *Section 5 of the Voting Rights Act and the 'Aggregate Powers' of Congress over Elections* 13 (2012), http://ssrn.com/abstract=2132158.

applies to "all . . . powers vested by [the] Constitution in the government of the United States." U.S. Const. art. I, § 8, cl. 18. In combination with the Necessary and Proper Clause, Congress has the discretion to effect "all means which are appropriate," *M'Culloch* v. *Maryland*, 17 U.S. 316, 421 (1819), to meet the legitimate goal of "protection of the integrity of elections." *United States* v. *Classic*, 313 U.S. 299, 319 (1941) (internal quotation marks omitted). Section 5 is a legitimate exercise of Congress' authority to protect the integrity of federal elections. This Court should not disturb it.

Congress' power under the Elections Clause is not qualified by the principle of state sovereignty. The Elections Clause provides a procedural role for the states in federal elections, *Cook* v. *Gralike*, 531 U.S. 510, 514 (2001), but the acknowledgement of that role is neither a recognition nor a grant of sovereign authority to the states over federal elections. In *U.S. Term Limits, Inc.* v. *Thornton*, this Court declared that concerns about federalism do not apply to the regulation of federal elections because that power is expressly delegated to Congress and not reserved to the states by the Tenth Amendment. *See* 514 U.S. 779, 804-05 (1995). The principle of dual sovereignty adopted by the Framers, which rejected the model of the Articles of Confederation, demands as much. The federal government must have the sovereign authority over the manner by which its legislators are selected if it is to have truly independent authority, as the Framers intended. Congress thus may displace state regulation over federal elections entirely, allowing states no input. *Ex parte Siebold*, 100 U.S. at 383; *Gonzalez* v. *Arizona*, 677 F.3d 383, 391 (9th Cir. 2012) (en banc) (Congress has the power to completely negate state regulation of federal

elections), *cert granted sub nom*. 133 S. Ct. 476 (2012). Likewise, a more limited assertion of Congress' authority, like requiring states to pre-clear changes to laws concerning federal elections, is no intrusion on state sovereign authority. *See* Chin, *supra*, note 1, at 15–16.

Just as principles of state sovereignty present no obstacle to Congress' authority under the Elections Clause, neither do principles of uniformity. The fact that the VRA imposes pre-clearance requirements on some jurisdictions, but not on others, does not mean Congress has acted beyond its Constitutional power under the Elections Clause. The Elections Clause gives Congress authority to enact national solutions to regional voting problems. The Elections Clause does not require that Congress' regulations apply with complete uniformity to all jurisdictions. Article I specifies certain Congressional powers that must be exercised uniformly, such as its powers over taxation, U.S. Const. art. I, § 8, cl. 1, naturalization, and bankruptcy, *id.* § 8, cl. 4. The Elections Clause contains no such uniformity requirement, and such a restriction would be ill-suited to the purpose of the clause. The Elections Clause contemplates variation in state laws because "each State" will adopt its own set of regulations governing federal elections. *See id.* § 4, cl. 1. Exercises of Congress' authority under the Elections Clause need not apply uniformly.

In any event, Section 5 presents a uniform, national solution to the problem of racial discrimination in voting. Its procedures apply to all jurisdictions with a history or practice of racial discrimination in voting. Furthermore, the list of covered jurisdictions is not

static.[3] It is hardly surprising that federal law concerning federal elections would have varying impact in light of the widely varying electoral history and regulations of the several states. This does not mean that the federal law is not uniform. Congress may enact uniform laws that operate differently in different states because of local laws or conditions. *See Florida* v. *Mellon*, 273 U.S. 12, 17 (1927). Even if uniformity were required, Congress designed the VRA as a uniform rule.

In the context of this case, the Elections Clause is no mere detail. Petitioner has brought a facial challenge to Section 5. *See* Compl. 1. Such a challenge asks this Court to rule that "no set of circumstances exists under which [the VRA] would be valid," *see United States* v. *Stevens*, 130 S. Ct. 1577, 1587 (2010) (internal quotation marks omitted) (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)), and that "the law is unconstitutional in all of its applications." *See Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 449 (2008). No such ruling is possible in light of the Elections Clause's broad grant of authority to Congress. Amici acknowledge that the Elections Clause does not provide Congress with the authority to reach changes to election laws that affect purely state or local elections. However, Shelby County has brought a facial challenge against Section 5, and the Elections Clause provides ample authority for the applications of Section 5 to changes that affect federal elections. As a result, petitioner's facial challenge must fail.

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[3] The statute's "bail-in" and "bail-out" provisions focus the act's application on discriminatory laws, wherever enacted, rather than on a fixed list of jurisdictions. *See* 42 U.S.C. § 1973b(a).

Indeed, this case exemplifies the wisdom of this Court's traditional reluctance to strike down federal statutes on their face. *Parker* v. *Levy*, 417 U.S. 733, 760 (1974) ("This Court has, however, repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied."). A focus on Congress' authority under the Fourteenth and Fifteenth Amendments is understandable, but too narrow. Amici are confident that the Fourteenth and Fifteenth Amendments provide ample authority to support Section 5. However, even if they did not, this Court could not overlook Congress' separate and independent authority under the Elections Clause to adopt Section 5 for federal elections. To the contrary, because a facial challenge must fail if there is any set of circumstances under which the challenged act of Congress is valid, this Court can and should begin and end its analysis with that source of Congressional power. The Elections Clause provides a narrow and clear basis for rejecting petitioner's facial challenge that renders any further consideration of Congress' authority under the Fourteenth and Fifteenth Amendments unnecessary. *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 205 (2009) (recognizing the well-established practice of this Court avoiding constitutional questions unnecessary to decide the case).

ARGUMENT

I. SECTION 5 OF THE VOTING RIGHTS ACT IS VALID AS AN EXERCISE OF CONGRESS' AUTHORITY UNDER THE ELECTIONS CLAUSE.

A. Congress Has Comprehensive Power Over Federal Elections.

The federal government's existence depends on fair federal elections. *Ex parte Yarbrough*, 110 U.S. 651 (1884). It is hardly surprising, then, that "the power of Congress over the subject [of federal elections] is paramount. It may be exercised "as and when Congress sees fit to exercise it." *Ex parte Siebold*, 100 U.S. at 384. "The Clause gives Congress 'comprehensive' authority to regulate the details of elections." *Foster* v. *Love*, 522 U.S. 67, 68-70, 71 n.2 (1997).

The Framers' principal purpose in adopting the Elections Clause was to empower the federal government to prevent efforts to undermine or corrupt the elections process for federal officials. *See The Federalist No. 59* (Alexander Hamilton) (Clinton Rossiter ed., 1961). As Alexander Hamilton put it, "[the Clause's] propriety rests upon the evidence of this plain proposition, that every government ought to contain in itself the means of its own preservation." *Id.* at 362 (Alexander Hamilton). *See also U.S. Term Limits*, 514 U.S. at 808-09 (quoting *2 Records Of The Federal Convention Of 1787*, at 240 (M. Farrand ed.1911) (noting Madison's concern that "[i]t was impossible to foresee all the abuses that might be made of the [states'] discretionary power [under the Elections Clause]" and noting that because the Framers feared that "the diverse interests of the States would undermine the National Legislature,"

they "adopted provisions intended to minimize the possibility of state interference with federal elections")). Examples from recent years as well as the post-civil war period confirm both the breadth of Congress' authority under the Elections Clause and the paramount role of Congress in determining *when* federal intervention in elections procedures is necessary.

In *Foster* v. *Love*, the Court validated Congress' authority to preempt a Louisiana open primary statutory scheme that effectively changed the day on which candidates for federal office were elected. 522 U.S. at 69. The Court recognized that Congress, in selecting a single election day, was concerned about the potential "distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States." *Id.* at 73. The Court invalidated the Louisiana law in light of what it called Congress' "comprehensive" authority to implement "safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Id.* at 71 n.2 (internal quotation marks and citation omitted).

In *Ex parte Yarbrough* ("The Ku Klux Cases"), the Court upheld an act of Congress criminalizing voter intimidation and violence. 110 U.S. at 667. The act served as the basis for prosecuting a group of eight men in Georgia for threatening, intimidating, and beating Berry Saunders because Saunders, an African American, had voted in a federal election. The Court upheld the law as a valid exercise of Congress' power under the Elections Clause, finding additional support in the Fifteenth Amendment. *Id.* at 664. The Court pointed to Congress' earlier abolishment of at-large House elections because such elections "worked injustice to other states which did

not adopt that system, and gave an undue preponderance of power to the political party which ha[s] a majority of votes in the state, however small." *Id.* at 660-61.

The Court further explained that Congress must have the power to prevent corruption in its own elections. "Will it be denied that it is in the power of [Congress] to provide laws for the proper conduct of those elections? . . . Can it be doubted that [C]ongress can, by law, protect the act of voting, the place where it is done, and the man who votes from personal violence or intimidation, and the election itself from corruption or fraud?" *Id.* at 661. If the federal government "has not this power," the Court reasoned, "it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption." *Id.* at 658.

Congress relied on the Elections Clause to enact the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg. *See* Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 Ala. L. Rev. 349, 366 (2006–07). The NVRA is an act "designed to make it easier to register to vote in federal elections" which "intrudes deeply into the operation of state government." *Ass'n of Cmty. Orgs. for Reform Now* v. *Edgar*, 56 F.3d 791, 792-93 (7th Cir. 1995); *see also Ass'n of Cmty. Orgs. for Reform Now* v. *Miller*, 129 F.3d 833, 838 (6th Cir. 1997); *Voting Rights Coal.* v. *Wilson*, 60 F.3d 1411, 1413 (9th Cir. 1995). Congress felt it prudent to require states to expand the ways that eligible persons could register to vote. 42 U.S.C. § 1973gg-2. The NVRA was seen as a means "to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements." *Ass'n of Cmty. Orgs. for Reform Now*, 129 F.3d at 835. All

appeals courts that have considered the NVRA (the Sixth, Seventh and Ninth Circuits, cited above) have upheld it as a matter appropriate for Congress' judgment.

The fundamental purpose advanced by the Elections Clause—protection of the integrity of federal elections—has led this Court to give its text a broad construction. This Court has interpreted the Elections Clause to give Congress authority to regulate state laws affecting even those steps in the election of federal offices not explicitly mentioned in the text of the clause. For example, this Court has recognized that Congress' authority under the Elections Clause includes the drawing of district boundaries. *See Vieth* v. *Jubelirer*, 541 U.S. 267, 275 (2004) (Scalia, J., plurality) ("Article 1, §4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished."). This Court also has held that "the authority of Congress, given by § 4, includes the authority to regulate primary elections when . . . they are a step in the exercise by the people of their choice of representatives in Congress." *Classic*, 313 U.S. at 317. This Court has interpreted the scope of the phrase "times, places, and manner of holding elections" to include a broad range of activities, including "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns," *Smiley* v. *Holm*, 285 U.S. 355, 366-67 (1932). Congress may "enact . . . numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce

the fundamental right involved." *Id*. Congress' power under the Elections Clause is broad indeed.

Further, Congress' Elections Clause power enjoys the added force of the Necessary and Proper Clause. That "provision leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution." *Classic*, 313 U.S. at 320. Accordingly, Congress has available to it "all means which are appropriate," *M'Culloch*, 17 U.S. at 421, to meet the legitimate end of "insur[ing] the freedom and integrity of choice" that elections are fundamentally about, *Classic*, 313 U.S. at 319-20. "All means" includes the imposition of criminal penalties to preserve "the purity [of elections] . . . and the rights of citizens to vote . . . peaceably and without molestation." *Ex parte Siebold*, 100 U.S. at 382 (upholding statutes criminalizing an election officer's neglect or failure to perform her duties).

In sum, the breadth of Congress' authority over election law is commensurate with the stakes. The integrity of the federal government itself depends in no small measure on the integrity of the elections of those who serve as its legislators. This Court has long acknowledged the importance of Congress' Elections Clause power, and consequently provided Congress broad leeway to exercise it. It is up to Congress, finally, to determine when state laws concerning federal elections should be modified.

B. Congress Enacted Section 5 Of The Voting Rights Act Pursuant To Its Broad Elections Clause Power.

The Voting Rights Act is an exercise of Congressional judgment about when state election laws concerning federal elections should be modified. From its inception, Section 5 of the VRA has been

considered by Congress to have been enacted pursuant to its Elections Clause power. Tokaji, *supra*, at 365. To be sure, Congress was conscious of its authority under the Fourteenth and Fifteenth Amendments, but, as the House Report indicates, "[t]he bill… is also designed to enforce… article 1, section 4" of the Constitution. *See* H.R. REP. NO. 89-439 (1965); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 ("To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes."); *see also The Continuing Need for Section 5 Pre-clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Congress 5 (2006) (testimony of Professor Pamela Karlan), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-109shrg28753/pdf/CHRG-109shrg28753.pdf (Elections Clause gives Congress "absolutely plenary power over any election in which Federal officials are selected," meaning that "there is no federalism concern") (citing *Vieth* v. *Jubelirer* for the proposition that "there are cases where there is a 14th Amendment violation that the courts cannot alone deal with because there is not a manageable judicial standard… [and the Elections Clause empowers Congress to deal with such issues]").

The pre-clearance requirement for state regulation of federal elections is comfortably within the scope of the "general supervisory power over the whole subject" of elections that Congress enjoys under the Elections Clause. *Ex parte Siebold*, 100 U.S. at 387. Congress cannot be denied the authority to prevent states from manipulating or otherwise corrupting the electoral process, to safeguard against racial discrimination, improve voter access, and set the boundaries of electoral districts. The pre-clearance requirement found in Section 5 of the VRA is one of

those safeguards Congress has the authority to put in place.

Among other mechanisms, the Voting Rights Act requires federal review of electoral districts to ensure that minority voting power is protected. The Voting Rights Act, like the NVRA, seeks to prevent the implementation of local laws and practices that impede the ability of citizens to register for and participate in federal elections. This Court and the courts of appeals have recognized that the Elections Clause gives Congress authority to draw electoral districts, to protect voter access, to combat racial discrimination and intimidation in voting, and to override attempts by state and local legislators and other actors to manipulate or corrupt elections. *See supra* p. 9-11. Section 5 of the Voting Rights Act invokes each of these recognized powers and falls well within Congress' authority under the Elections Clause.

The indisputable purpose of the Voting Rights Act is to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). The broad authority of the Elections Clause gives Congress the power to adopt the means it deems appropriate to address the problems it perceives.[4] Having perceived a problem of racial discrimination in voting, Congress acted as it deemed appropriate. There is no time limit on that

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[4] Of course the power that Congress exercises under the Elections Clause must comport with other constitutional requirements, such as the Equal Protection Clause. *See e.g.*, *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2598 (2012) ("Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution.").

action; the validity of legislation adopted pursuant to the Elections Clause does not expire. It is for Congress to decide when the election law requirements it has adopted pursuant to the Elections Clause are no longer needed, just as it is for Congress to decide when those requirements were necessary in the first place. *Ex parte Siebold*, 100 U.S. at 384 (Congress' may exercise its Elections Clause power "as and when Congress sees fit to exercise it.")

C. Principles Of State Sovereignty Provide No Limit On Congress' Elections Clause Authority.

Our Constitution "split the atom of sovereignty." *U.S. Term Limits*, 514 U.S. at 838 (Kennedy, J., concurring). Both the federal and state governments possess spheres of ultimate sovereign authority. History is full of difficult cases and heated, even bloody, disputes over where to draw the line between federal and state sovereign authority. But when it comes to the authority over the regulations and means for electing federal legislators, there is and has never been any doubt: Congress is sovereign.[5] When it acts pursuant to its Elections Clause authority, Congress is not intruding on state sovereign authority, even when it replaces or alters laws that the states, in the first instance, had the authority (in fact, obligation) to adopt. State

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[5] *See* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 Vand. L. Rev. 1195, 1207-32 (2012) (explaining that modern judicial conceptions of federalism are inapposite to the Elections Clause and that the historical background and judicial treatment of the Elections Clause demonstrate an absence of state sovereignty in the area of elections).

sovereignty provides no limit on the authority of Congress to act pursuant to the Elections Clause.

The text of the Elections Clause acknowledges that the states have the authority to legislate the "times, places, and manner of holding elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. But the authority to enact legislation regarding federal elections is not *sovereign* authority over the matter. This is clear from the text for a variety of reasons.

First, the text of the Elections Clause imposes an obligation on the states—"shall be prescribed"—rather than acknowledging a power that the states have discretion to exercise. Second, the Elections Clause requires this obligation to be fulfilled in a particular way. The rules concerning federal elections must be prescribed "by the legislature" of each state; the legislature may not delegate the authority to the state executive. Third, and most important, "Congress may at any time by Law make or alter such Regulations." *Id.* Unlike a sovereign, the states' authority in this area is subject to a higher authority that is free to act "at any time," with no textual limit on the reason why that higher authority—Congress—may choose to act. Indeed, even the sole exception to Congress' authority set forth in the Elections Clause—the *place* of choosing Senators—reflects the view that the States are not sovereign in this area. When the Constitution was adopted, the state legislatures elected Senators. So this qualification on Congress' sovereign authority merely reflects that Congress' authority was not intended to displace the states' sovereign authority over where their legislatures may meet.

What the text strongly suggests, this Court's decisions confirm. As this Court has observed, the power to regulate federal elections is expressly

provided to Congress and is not reserved to the States under the Tenth Amendment. *U.S. Term Limits*, 514 U.S. at 804-05; *see Foster*, 522 U.S. at 72 (holding that Congress has the final say over federal elections). Furthermore, this Court has interpreted the states' power under the Elections Clause to be confined to procedural regulations, *Cook*, 531 U.S. at 514 (invalidating a Missouri constitutional amendment which attempted to induce members of the Missouri congressional delegation to vote for congressional term limits), but has not similarly limited Congress' powers derived from the Elections Clause. Indeed, "[t]he Elections Clause . . . delegates but limited power over federal elections to the States." *Id.* at 527 (Kennedy, J., concurring) (citing *U.S. Term Limits*, 514 U.S. at 804). Likewise, the Framers understood that the Elections Clause reflected Congress' supreme authority over the regulations governing federal elections because that was essential to ensure the survival and the independence of the federal government. *See* Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 Vand. L. Rev. 1195 (2012).

Alexander Hamilton, writing in Federalist 59, characterized the Elections Clause as lodging the power over federal elections "primarily in the [states] and ultimately in [the federal government]." *The Federalist No. 59*, at 362 (Alexander Hamilton). He also observed that the propriety of lodging ultimate authority over federal elections in the federal government "rests upon the evidence of this plain proposition, that *every government ought to contain in itself the means of its own preservation*." *Id.* (emphasis in original). Federal sovereignty over

federal elections was understood to be essential to the effectiveness of the federal government itself.

Accordingly, in this area of constitutional law states are autonomous; however, they are not sovereign. *See* Tolson, *supra*, at 1247 ("[T]he Elections Clause gives the states strong autonomy power over elections and leaves sovereignty with Congress."). It may be prudent for the federal government to respect the states' familiarity with local conditions. *See The Federalist No. 59*, at 363 (Alexander Hamilton). But there is no obligation to do so. *Gonzalez*, 677 F.3d at 392 ("Because states have no reserved authority over the domain of federal elections, courts deciding issues raised under the Elections Clause need not be concerned with preserving a 'delicate balance' between competing sovereigns."); Chin, *supra*, note 1, at 15–16.

Thus, section 5's federal pre-clearance requirements—which were intended to ensure that state changes in election procedures do not undermine the integrity of federal elections by weakening voting power on the basis of race—do not offend any state's sovereignty. To the extent a state law impacts federal elections, it is not an exercise of the state's sovereignty. It is, rather, an exercise of the state's autonomous responsibility to facilitate federal elections. But it is the sovereign authority of the federal government to consider whether it believes such laws should be replaced or altered. That is how Section 5 of the VRA works. And that is what the Elections Clause, and the theory and practice of the federal government's sovereignty over the regulations for elections of its officials, requires.

D. The Elections Clause Power Need Not Be Exercised Uniformly, And, In Any Event, Section 5 Is Uniform Across The Nation.

Petitioner objects to Section 5's "unequal treatment" of the jurisdictions that require pre-clearance. *See* Pet. Br. 40. But when viewed as a matter of Congress' Elections Clause power, that objection has no force. The Constitution does not require Congress to adopt laws pursuant to the Elections Clause power that are uniform in effect, and it would make no sense to do so. Moreover, to the extent some concept of uniformity could be imposed on the Elections Clause power, the procedures created by Section 5 satisfy it. Those procedures apply to every jurisdiction in the United States meeting the requirements of its coverage provision. That coverage provision is not fixed, but considers recent circumstances in determining whether to add or subtract jurisdictions from the preclearance requirements. Section 5 thus creates a "uniform rule[] for federal elections, binding on the States." *See Foster*, 522 U.S. at 69 (citing *U.S. Term Limits*, 514 U.S. at 832–33). Like the principle of state sovereignty, the principle of uniformity in federal enactments is no barrier to the continued efficacy of Section 5 as an exercise of Congress' Elections Clause power.

Article I specifies certain Congressional actions that must apply uniformly. For example, "Congress shall have the Power To lay and collect Taxes, Duties, Imposts and Excises . . .; but all Duties, Imposts and Excises shall be *uniform* throughout the United States." U.S. Const. art. I, § 8, cl. 1 (emphasis added). Likewise, Congress' power over naturalization and on the subject of bankruptcy are expressly required to be

"uniform." *Id.* § 8, cl. 4. But not all Congressional power is required to be exercised uniformly throughout the states. Indeed, it would make no sense to have required Congress to "uniformly" adopt post roads and post offices, *id.* § 8, cl. 7, or to uniformly "constitute inferior tribunals to" this Court, *id.* § 8, cl. 9. Local circumstances must be considered in determining whether to build post roads and post offices, or to constitute lower courts. The Framers did not require Congress to legislate blind to those circumstances.

Congress' Elections Clause power also allows Congress to consider local circumstances. It contains no express uniformity requirement. To the contrary, the text acknowledges that uniformity is not required because it makes no sense given the combination of state autonomy to enact regulations in the first instance and Congress' supervisory sovereign power. The Elections Clause gives Congress the power not only to "make" federal election law. The states have the obligation to make their own laws in the first instance, and Congress is empowered to "alter such regulations" "at any time by law." U.S. Const. art. I, § 4. That is, the Elections Clause contemplates that Congress might choose to adopt a federal law targeting a specific law in a specific state. That is one way Congress can "alter" the "regulations" of a state that Congress has concluded undermine the integrity of elections. Imposing a uniformity requirement on Congress' actions under the Elections Clause would place an ill-suited constraint on the broad supervisory authority Congress was given.

Given the nature of Congress' sovereign, supervisory authority in this area, Section 5 is "uniform" in the only way that makes sense. Even where uniformity is expressly required by the

Constitution, Congress may enact uniform laws that operate differently in different states because of local laws or conditions. "Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states, nor control the diverse conditions to be found in the various states, which necessarily work unlike results from the enforcement of the same [law.] All that the Constitution . . . requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States." *Mellon*, 273 U.S. at 17 (upholding a federal tax law); *see also Stellwagen* v. *Clum*, 245 U.S. 605, 613 (1918) (federal bankruptcy law may recognize specific state laws, although "such recognition may lead to different results in different states. . . [although] the operation of the Act is not alike in all the states.") (citing *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181, 188, 189, 190 (1902)). Of particular note, "the uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Blanchette* v. *Conn. Gen. Ins. Corps.*, 419 U.S. 102, 159 (1974); *Edye* v. *Robertson*, 112 U.S. 580 (1884) ("Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. . . . Here there is substantial uniformity within the meaning and purpose of the constitution."). Put simply, no operable concept of uniformity prohibits Congress from regulating conduct that is known to occur only in certain jurisdictions. A textually rooted concept of uniformity requires only that Congress regulate conduct uniformly "in every state *where it is found*." *Fernandez* v. *Wiener*, 326 U.S. 340, 361 (1945) (emphasis added).

The Elections Clause clearly contemplates a patchwork of regulations governing federal elections that varies from state to state. It obligates "each state" to enact laws governing the elections of federal officials. And as Hamilton observed, the Constitution expects that "each State" will take its local conditions and circumstances into account in adopting its regulations. *The Federalist No. 59* (Alexander Hamilton). Under this regime, Congress' power to "alter" the regulations adopted by the varying states will obviously have different effects on different state election law regimes. Even when Congress prescribes nationally applicable rules, the various state election laws will conflict to varying degrees with those national rules. The differential effects are not a failure of uniformity, but rather the inevitable consequence of the variation in the background against which Congress acts.

Section 5's coverage provision permissibly addresses the national problem of voter discrimination, wherever it may be found. Section 5's requirements apply to all states with a history or practice of voter discrimination. *See* 42 U.S.C. § 1973b. And the list of jurisdictions is not static. If voter discrimination is found in any "State or political subdivision," the offending jurisdiction can be subjected to Section 5's pre-clearance requirements under the "bail-in" provision. *Id.* § 1973a(c). Furthermore, jurisdictions may "bail-out" of the pre-clearance provision by establishing that they have had a clean voting rights record for ten years. *See id.* § 1973b.[6] These rules apply to every jurisdiction in

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[6] In Virginia alone, for instance, thirty one jurisdictions have already bailed-out successfully. *See* U.S. Dep't of Justice, *Section 4 of the Voting Rights Act*,

the United States. Petitioner's objections regarding "unequal treatment" stem from the unequal history that Congress plainly has the authority to address. Nothing in an operable concept of "uniformity" requires Congress to pretend that history did not exist, or that present circumstances do not justify continued coverage. Nor is there any authority in the text or theory behind the Elections Clause for this Court to place a time limit on Congress' judgment regarding the best way to deal with that history.

II. CONGRESS' ELECTIONS CLAUSE POWER DEFEATS PETITIONER'S FACIAL CHALLENGE.

Petitioner chose to bring a facial challenge to Section 5. Compl. 1 ("This is an action for a declaratory judgment that Section 4(b) . . . and Section 5 . . . of the Voting Rights Act ("VRA") . . . are *facially* unconstitutional."). That choice means that the Elections Clause power can and should play a dispositive role in this case. To affirm the judgment below, this Court need conclude no more than that Section 5 of the VRA is a valid exercise of Congress' Elections Clause power.

Facial challenges are categorically "disfavored" by this Court. *See Wash. State Grange*, 552 U.S. at 450. Among other reasons, facial challenges are disfavored because they "run contrary to the fundamental principle of judicial restraint that courts should… [not] 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id*. at 450 (quoting *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting in turn *Liverpool, N.Y. & Phila. S.S. Co.* v.

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http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout (last visited Jan. 22, 2013).

Comm'rs of Emigration, 113 U. S. 33, 39 (1885))). Reluctance to strike down laws on their face reflects a healthy judicial respect for the will of the people. *See id.*; *see also Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (rejecting facial challenge, in part, because "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.") (internal quotation marks omitted). This Court nullifies the will of the people *only* when the Constitution so requires.

Facial challenges are difficult to sustain precisely because of the risks they pose. Federal statutes can have broad applications and draw their authority from a variety of sources. Accordingly, this Court has required a broad showing to sustain a facial challenge. Shelby County's facial challenge means that petitioner cannot prevail merely by demonstrating (even if it could) that Section 5 is unconstitutional when applied to a specific redistricting scheme or to some other "conceivable set of circumstances." *See Salerno,* 481 U.S. at 745. Neither is it sufficient for Shelby County to argue that some provisions of the Act might violate the Constitution. *See id.* at 745 n.3. Shelby County must demonstrate that the VRA is void of all "plainly legitimate sweep." *Stevens*, 130 S. Ct. at 1587 (internal quotation marks omitted) (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in judgments)). For this reason, a facial challenge is "the most difficult challenge to mount successfully." *Salerno*, 481 U.S. at 745.

The Elections Clause power of Congress, by itself, defeats petitioner's facial challenge. Applications of Section 5 to the mechanisms and processes of federal

elections are constitutional under the Elections Clause.[7] For example, changes in district lines for federal elections or changes in voter registration rules clearly fall within the limits of Congress' power to ensure the integrity of federal elections. In general, as described in Part I above, this Court has affirmed Congress' authority under the Elections Clause to regulate the type of misconduct Section 5 is meant to address. *See Ex parte Yarbrough*, 110 U.S. at 661 (upholding an act of Congress prohibiting voter intimidation and violence).

Petitioner's facial challenge means this case does not require this Court to consider whether Congress has authority under the Fourteenth and Fifteenth Amendments to require pre-clearance for changes in state election laws that concern only state or local elections. Whatever the answer to that question, petitioner's facial challenge fails in light of the Elections Clause power. *See e.g. Katzenbach* v. *Morgan*, 384 U.S. 641, 646 n.5 (1966) (upholding part of the VRA on Fourteenth Amendment grounds, making it "unnecessary… to consider whether § 4(e) could be sustained as an exercise of power under [other clauses of the Constitution]"). This Court traditionally does not reach out to decide issues of Congress' power beyond that which is necessary to decide the case before it. *See Nw. Austin*, 557 U.S. at 205. Petitioner's facial challenge provides this Court an opportunity to reaffirm the broad power of Congress over the rules affecting federal elections.

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[7] This Court has previously evaluated exercises of congressional power on an as-applied basis. *See, e.g.*, *Tennessee* v. *Lane*, 541 U.S. 509, 531 (2004) ("Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.").

This Court should take that opportunity, and only that opportunity, as no more is necessary to decide this case.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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