No. 12-96

In The
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF PROFESSOR PATRICIA A. BROUSSARD, SABRINA COLLINS, STACY HANE, AKUNNA OLUMBA AND NAMED STUDENTS AND ORGANIZATIONS OF FLORIDA A & M UNIVERSITY COLLEGE OF LAW AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

PATRICIA A. BROUSSARD*
FLORIDA A & M UNIVERSITY
COLLEGE OF LAW
201 Beggs Avenue
Orlando, FL 32801
(407) 254-3293
patricia.broussard@famu.edu

*Counsel of Record
Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of Amici Curiae 1

Summary of the Argument 3

Argument 5

I. CONGRESS'S 2006 REAUTHORIZATION OF SECTIONS 5 AND 4(b) OF THE VOTING RIGHTS ACT IMPLEMENTS, RATHER THAN VIOLATES, THE CONSTITUTIONAL REQUIREMENTS OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION 5

A. Section 5 was enacted to implement the Fourteenth Amendment's fundamental right of due process, the Fifteenth Amendment's right to vote, and to protect the political liberty of those who have been discriminated against and disenfranchised for centuries. Congress is within its granted powers to protect its citizens' rights and to ensure compliance with basic constitutional principles 5

B. In 2006, Congress relied upon an abundance of evidence which indicated that there was a continuing need for Section 5 preclearance protection. Relying upon this evidence, Congress reauthorized Section 5, as it had repeatedly done 12

TABLE OF CONTENTS – Continued

Page

II. CONGRESS'S 2006 REAUTHORIZATION OF SECTIONS 5 AND 4(b) OF THE VOTING RIGHTS ACT MET THE CONSTITUTIONAL REQUIREMENTS OF BOTH THE TENTH AMENDMENT AND ARTICLE IV OF THE UNITED STATES CONSTITUTION 14

A. The Section 5 preclearance requirement does not run counter to the Tenth Amendment because it does not deprive jurisdictions of the ability to make political decisions, but rather, ensures a balance of state sovereignty and constitutional accountability 14

B. The Equal Protection Clause of the Fourteenth Amendment ("No state shall") renders an Article IV – Guarantee Clause violation moot. As such, this issue of Sections 5 and 4(b) is nonjusticiable and properly in the hands of the U.S. Congress 20

Conclusion..... 25

APPENDIX

List of Amici .....App. 1

TABLE OF AUTHORITIES

Page

CASES:

Cipriano v. City of Houma, 395 U.S. 701 (1969) 7

City of Boerne v. Flores, 521 U.S. 507 (1997)....4, 7, 18, 19

City of Phoenix, Ariz. v. Kolodziejski, 399 U.S. 204 (1970) 7

Civil Rights Cases, 109 U.S. 3 (1883) 19

Crawford v. Marion County Elections Bd., 553 U.S. 181 (2008).....15

Dunn v. Blumstein, 405 U.S. 330 (1972).....15

Ex Parte Virginia, 100 U.S. 339 (1880).....25

Florida v. United States, No. 11-01428, 2012 U.S. Dist. LEXIS 115647 (D.C. Cir. Aug. 16, 2012) 13

Georgia v. Ashcroft, 539 U.S. 461 (2003) 15

Gomillion v. Lightfoot, 270 F.2d 594 (5th Cir. 1959). 14

Gregory v. Ashcroft, 539 U.S. 452 (1991) 16

Guinn v. United States, 238 U.S. 347 (1915).....15

Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).....15

Hill v. Stone, 421 U.S. 289 (1975) 7

Lopez v. Monterey County, 525 U.S. 266 (1999) 15

Luther v. Borden, 48 U.S. 1 (1849).....24

Miller v. Johnson, 515 U.S. 900 (1995).....15

TABLE OF AUTHORITIES – Continued

Page

Northwest Austin Mun. Utility Dist. No. 1 v. Holder, 557 U.S. 193 (2009).....18, 20

Northwest Austin Mun. Utility Dist. No. 1 v. Mukasey, 573 F. Supp. 2d 221 (D.D.C. Sept. 4, 2008).....23

Shelby County, Alabama v. Holder, 679 F.3d 848 (D.C. Cir. 2012).....1, 9, 10, 11

Smith v. Allwright, 321 U.S. 649 (1944).....15

S.C. v. Katzenbach, 383 U.S. 301 (1966).....7, 15, 21, 23, 25

Texas v. Holder, No. 12-cv-128-RMC-DST-RLW (D.C. Cir. Aug. 30, 2012).....13

Texas v. United States, No. 11-1303, 2012 U.S. Dist. LEXIS 121685 (D.C. Cir. Aug. 28, 2012).....13

U.S. v. Town of Lake Park, Fla., No. 09-80507-CIV, 2009 WL 3667071 (S.D. Fla. Oct. 23, 2009).....17

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 9, 24, 25

UNITED STATES CONSTITUTION:

U.S. Const. pmbl.....7

U.S. Const. amend. X 4, 14, 20

U.S. Const. amend. XIII 3, 8

U.S. Const. amend. XIV .....*passim*

U.S. Const. amend. XV.....*passim*

U.S. Const. art. IV 14, 20, 24

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE SOURCES:

Pub. L. No. 89-110, 79 Stat. 437 (1965) 3

Pub. L. No. 91-285, 84 Stat. 314 (1970) 3

Pub. L. No. 94-73, 89 Stat. 400 (1975) 3

Pub. L. No. 97-205, 96 Stat. 131 (1982) 3

Pub. L. No. 109-246, 120 Stat. 577 (2006) 3, 12

H.R. Rep. No. 109-478 (May 22, 2006) 12, 16

OTHER SOURCES:

Brief for Intervenors-Appellees at 6, *Shelby County, Alabama v. Holder*, 679 F.3d 848, (D.C. Cir. 2012) (No. 11-5256) 21

Department of Justice, Cases Raising Claims Under Section 2 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/litigation/recent_sec2.php (last visited 01/12/2013) 17

Department of Justice, Voting Section Litigation, http://www.justice.gov/crt/about/vot/litigation/caselist.php (last visited 01/12/2013) 18

The Federalist Paper No. 45 (James Madison) 14

The History of Florida A & M College of Law, http://law.famu.edu/go.cfm/do/Page.View/pid/5/t/History 2

James Weldon Johnson, "Lift Every Voice and Sing," also known as "The Negro National Anthem" 6, 11

TABLE OF AUTHORITIES – Continued

Page

Diana Kasdan, *State Restrictions on Voter Registration Drives*, Brennan Center for Justice at New York University School of Law, http://www.brennancenter.org/content/resource/state_restrictions_on_voter_registration_drives/ (last visited 01/12/2013).....16

Garrine P. Laney, Cong. Research Serv., 95-896, *The Voting Rights Acts of 1965, As Amended: Its History and Current Issues* (2008).....7, 8, 9, 11

Martin Reed, *Debate Continues on Shelby County Voting Case Appeal*, AL.com (Nov. 16, 2012), http://blog.al.com/spotnews/2012/11/debate_continues_on_shelby_cou.html (last visited 01/12/2013).....22

Jon C. Rogowski & Cathy Cohen, *Turning Back the Clock on Voting Rights: The Impact of New Photo Identification Requirements on Young People of Color*, The African American Youth Project, http://research.AfricanAmericanyouthproject.com/files/2012/09/Youth-of-Color-and-Photo-ID-Laws.pdf (last visited 01/12/2013).....17

Greg Stohr, *Voting Rights Act Challenge Gets U.S. High Court Hearing*, Bloomberg (Nov. 10, 2012), http://www.bloomberg.com/news/2012-11-09/voting-rights-act-challenge-gets-u-s-high-court-hearing.html (last visited 01/12/2013).....22

INTEREST OF AMICI CURIAE

Professor Patricia A. Broussard submits this amicus curiae brief in support of Respondents, including the Attorney General of the United States,[1] in the name of students and organizations at Florida A & M University College of Law (*see* Appendix), urging this Honorable Court to affirm the Court of Appeals for the District of Columbia Circuit's holding that,

> Congress drew reasonable conclusions from the extensive evidence it gathered and acted pursuant to the Fourteenth and Fifteenth Amendments, which entrust Congress with ensuring that the right to vote – surely among the most important guarantees of political liberty in the Constitution – is not abridged on account of race. In this context, we owe much deference to the considered judgment of the People's elected representatives.

Shelby County, Alabama v. Holder, 679 F.3d 848 (D.C. Cir. 2012).

Florida A & M University College of Law is a Historically Black University (HBCU) which was reestablished by the Florida Legislature in 2000 for the primary purpose of ensuring that more minorities

[1] This brief is submitted with the consent of the parties Pursuant to Supreme Court Rule 37.6. Counsel represents that this brief was not authored or paid for in whole or in part by counsel for any party. Petitioners and Respondents have filed with the Clerk letters granting blanket consent to any party filing an amicus brief in support of either Petitioner or Respondents.

enter into the legal profession to the benefit of local minority communities in particular, and to the nation, generally.[2] Thus, as students of color, their interest is two-fold. First, many students are descendants of slaves and disenfranchised African Americans, and they believe it is vitally important that they advocate that the right to vote, the main source of political empowerment in this country, be preserved, protected, and closely guarded by this Court to protect against voter intimidation, dilution of the vote, or at worst abrogation of the right to vote. These students have an inter-generational stake in protecting the right to vote which was denied so many of their ancestors. This right is grounded in morality, but more importantly, this right is constitutionally guaranteed.

Second, the students of Florida A & M University College of Law have a vested interest in protecting the United States Constitution because, as stewards of the legal system, they are bound to honor and protect the Constitution. It is their duty to serve as amici curiae in this case because they are obliged to protect the rights of those who are silenced by intimidation, by lack of funds, by disenfranchisement, and by entities who would seek to suppress their vote. The students of Florida A & M University College of Law seek to leave a legacy of social activism and have a direct stake in the outcome of this case and respectfully ask that this Court hold that both Congress's

---

[2] *See generally* The History of Florida A & M College of Law, http://law.famu.edu/go.cfm/do/Page.View/pid/5/t/History.

legislative record and its broad and general powers under the Fourteenth and Fifteenth Amendments properly established the constitutionality of reauthorizing Sections 5 and 4(b) of the Voting Rights Act.

SUMMARY OF THE ARGUMENT

The Thirteenth, Fourteenth, and Fifteenth Amendments of the U.S. Constitution grant Congress broad enforcement powers. These enforcement powers have been vetted through the Court for decades and generally found to meet Constitutional muster. The Voting Rights Act (VRA), and more specifically Section 5 of that Act, was enacted and consistently reauthorized within the scope of those powers to protect the voting rights and the political liberty of those who had been, and continue to be politically disenfranchised. Pub. L. No. 109-246, 120 Stat. 577 (2006).

Jurisdictions covered by Section 5 have proven themselves worthy of continued monitoring.[3] This monitoring does not infringe upon State sovereignty; rather, it enhances it by providing for a viable, engaged, and protected electorate.

[3] *See generally* Pub. L. No. 89-110, 79 Stat. 437 (1965); Pub. L. No. 91-285, 84 Stat. 314 (1970); Pub. L. No. 94-73, 89 Stat. 400 (1975); Pub. L. No. 97-205, 96 Stat. 131 (1982); Pub. L. No. 109-246, 120 Stat. 577 (2006), which are the several reauthorizations of the VRA which Congress has deemed necessary to prevent disenfranchisement (Sections 5 and 4(b) of the Voting Rights Act).

Moreover, Congress relied upon statistics, reports, and extensive data in reaching the conclusion that Section 5 needed reauthorization. This information provided the ballast the Court described in *City of Boerne v. Flores*, 521 U.S. 507 (1997). When applying rationality, congruence and proportionality, the Court should bend towards individual political liberties.

In addition, Section 5 does not run counter to the Tenth Amendment. The Fourteenth Amendment begins with the words, "No state shall. . . ." This prefatory language makes it abundantly clear that Congress may enact legislation which places parameters around States' behavior within the text of the Constitution without depriving jurisdictions of the ability to make reasonable political decisions.

When the Court balances the right to vote of those who have been, and continue to be, disenfranchised, against the asserted inconveniences of jurisdictions covered by Section 5, it should look at past behavior, current behavior, and the potential for future abuses. Congress, acting through the Federal District Court in DC and the Department of Justice, should have the authority to determine, prior to elections that the covered jurisdictions have not enacted laws, rules or procedures that are inconsistent with the requirements of the Act, and this can only be accomplished by Section 5 preclearance. The Court must determine which party has the incentive and is in the better position to determine compliance, those that have a history of attempting to game the

political process at the expense of minorities, or who have been found guilty of disenfranchisement, or those seeking to protect the liberties of all Americans.

ARGUMENT

I. CONGRESS'S 2006 REAUTHORIZATION OF SECTIONS 5 AND 4(b) OF THE VOTING RIGHTS ACT IMPLEMENTS, RATHER THAN VIOLATES, THE CONSTITUTIONAL REQUIREMENTS OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. Section 5 was enacted to implement the Fourteenth Amendment's fundamental right of due process, the Fifteenth Amendment's right to vote, and to protect the political liberty of those who have been discriminated against and disenfranchised for centuries. Congress is within its granted powers to protect its citizens' rights and to ensure compliance with basic constitutional principles.

Lift every voice and sing, till earth and Heaven ring,
Ring with the harmonies of liberty;
Let our rejoicing rise, high as the listening skies,
Let it resound loud as the rolling sea.
Sing a song full of the faith that the dark past has taught us,

Sing a song full of the hope that the present has brought us;
Facing the rising sun of our new day begun,
Let us march on till victory is won.[4]

This song, commonly referred to as the Negro National Anthem, speaks of freedom and liberty. It is not the actual physical liberty from the bonds of slavery, because slavery had ended some thirty-five years before it was written, but rather, the liberty of full participation in America and all she represents and offers. Liberty as defined by political liberty, meaning among other things, the ability to participate in the process of deciding who should represent one's political interest. To this end, one of the most powerful rights that the Constitution bestows upon its citizens is the right to vote. Failure to protect that right to the fullest extent possible not only disproportionately disenfranchises African Americans and other minorities, but it also diminishes the nation as a whole.

The Due Process Clause of the Fourteenth Amendment dictates that all citizens be treated equally. The court has upheld this guarantee by prohibiting restrictions on voting based on literacy

[4] "Lift Every Voice and Sing," also known as "The Negro National Anthem," written by James Weldon Johnson to commemorate President Abraham Lincoln's birthday on February 12, 1900.

and property.[5] Additionally, Section 2 of that amendment imposes a steep price for States seeking to abridge that right by providing for a reduction in representation. U.S. Const. amend. XIV §§ 1, 2. These Sections drive home the point that the Framers intended Congress to enact legislation to implement the liberties it granted to minorities through the Reconstruction period. Garrine P. Laney, Cong. Research Serv., 95-896, *The Voting Rights Acts of 1965, As Amended: Its History and Current Issues* 3 (2008). The purpose of the Fourteenth Amendment is to ensure that the States treat their citizens equally, and the enactment of the VRA falls within Congress's expressed power granted to it by the Due Process Clause of the Fourteenth Amendment to that end.

Likewise, the right to vote is the linchpin in assuring that the Constitution has meaning. The preamble proclaims, "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility . . . to ourselves . . . do ordain and establish this Constitution." U.S. Const. pmbl. Those words are given meaning primarily through the electoral process. Voting is the

---

[5] Supreme Court cases finding that voting based on the ownership of property or the payment of taxes violates the equal protection clause of the Constitution. *See generally Hill v. Stone*, 421 U.S. 289 (1975); *City of Phoenix, Ariz. v. Kolodziejski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969). Supreme Court cases setting aside literacy test as a basis for voting. *See generally S.C. v. Katzenbach*, 383 U.S. 301 (1966); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

primary way that we, as citizens of the United States, participate in forming that more perfect union, because it is the process in which representation is chosen.

The Fifteenth Amendment provides that the right to vote shall not be denied or abridged; this prohibition applies to both the Federal government and to the States. U.S. Const. amend. XV, § 1. Moreover, it is a well-established principle that the Thirteenth, Fourteenth, and Fifteenth Amendments bestow upon Congress the right, and arguably the duty, to enact legislation that would prevent the States from enacting legislation that would deny or abridge an individual's right to vote. Congress's "duty" arises from the fact that many States have a long history of disenfranchising its African American citizenry through either discriminatory tactics, polarizing the races, or by enacting legislation that would allow them to effectively disenfranchise voters by manipulating the electoral system. Garrine P. Laney, Cong. Research Serv., 95-896, *The Voting Rights Acts of 1965, As Amended: Its History and Current Issues* 11 (2008). Those "covered jurisdictions," which fall under the authority of Section 5 of the VRA, have demonstrated in the past, and continue to demonstrate, that they are unwilling or unable to ensure that all of its citizens' votes are treated the same, and therefore, should be subject to continued preclearance under Section 5.

It is the responsibility of Congress to redress the evils of racial discrimination, and to protect the

fundamental right to vote. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). That responsibility does not wane, but the approach may change depending on the ill that needs to be addressed. The backward looking nature of a voting violation is such that a remedy could only be timely addressed through a provision such as Section 5. *Shelby County, Alabama*, 679 F.3d at 861. Section 5 preclearance is necessary because of the type of harm that the VRA seeks to prevent, because of the importance of the protected right, and because in this situation, money damages are not adequate. Most importantly, once the election has passed, adequate redress is impossible. Setting aside elections or shortening the terms of those elected is by its very nature inadequate because for a period of time, citizens will have been governed by officials that they did not choose.

The combination of potential harms requires a regulation that is forward looking, and Section 5 does so because it places the responsibility on the covered jurisdictions to prove that their proposed changes are not unreasonable manipulations of the electoral process. While Shelby County argues that the burden to them is too great, shifting the burden to the individual would create a cognizable harm, without an effective form of redress. This is a result that was not contemplated by the Framers of the Constitution. The Framers intended a government that would preserve an individual's liberties. Garrine P. Laney, Cong. Research Serv., 95-896, *The Voting Rights Acts of 1965, As Amended: Its History and Current Issues* 3

(2008). With this intent in mind, it is imperative that covered jurisdictions should shoulder the burden of proving that their actions are not manipulative of the electoral process, especially when these jurisdictions continue to attempt to enact election laws and rules and regulations that would have the purpose or effect of disenfranchising classes of voters protected by the VRA.

For those covered jurisdictions that have had a tradition of silencing or diluting the rights of its citizens, Section 5 is necessary, because history and data indicate that those jurisdictions would continue to enact laws and rules and regulations that would fail to ensure that every citizen has a right to vote. *See generally Shelby County, Alabama v. Holder*, 679 F.3d 848 (D.C. Cir. 2012). This would have the effect of denying minority citizens within that state the ability to participate in the political process; thus, dissuading candidates and elected officials from being responsive to their needs. It also denies them the ability to choose a representative who embraces their ideas, morals, and goals, and most importantly, disenfranchisement denies their ability to assist in forming a more perfect union.

While Shelby County argues that Section 5 is unnecessary, it does not propose any solution to the problem that Section 5 addresses, but instead, notwithstanding unrefuted evidence to the contrary, implies that the problem no longer exists. *Id.* Shelby County wants to be treated as a county that has not had widespread discriminatory actions, or voter

intimidation tactics. *Id.* at 871. In fact, the State of Alabama was one of the States that used its Constitution to enact literacy tests to limit African Americans' voting rights to seriously detrimental effect.[6] While there has been a reduction in those specific types of intimidation tactics, Congress has found that through the use of the More Information Request process (MIR), VRA Section 2 suits, and continued registration and turnout disparities that federal oversight is still required. *Id.* at 872.

Through its continued unequal treatment of its citizens, Shelby County, and other similarly situated covered and noncovered jurisdictions, has demonstrated that Congress was correct in reauthorizing Section 5 of the VRA to ensure that all citizens achieve the promise found in the preamble of the U.S. Constitution and to fulfill the promise embodied in James Weldon Johnson's song.[7]

---

[6] *See generally* Garrine P. Laney, Cong. Research Serv., 95-896, *The Voting Rights Acts of 1965, As Amended: Its History and Current Issues* 4 (2008) (181,481 African American males of voting age, only 3,000 registered to vote).

[7] *Supra* Note 4.

B. In 2006, Congress relied upon an abundance of evidence which indicated that there was a continuing need for Section 5 preclearance protection. Relying upon this evidence, Congress reauthorized Section 5, as it had repeatedly done.

The reauthorization of Section 5 in 2006 was not done blindly or arbitrarily; rather, this legislation went through a "Brandeis-like" review by members of Congress, which included reliance upon statistics, judicial findings, and first-hand accounts of discriminatory actions.[8] Such review by Congress is the sort of balancing approach that is necessary to effectuate the maintenance of a State's sovereignty and still ensure Constitutional accountability.

Fear of retrogression in the covered jurisdictions was not based on conjecture nor was it the result of backward thinking. In 2006, Congress found the need to extend Section 5 for another twenty-five years on the basis of an extensive legislative record that was over 15,000 pages in length. *See* Pub. L. No. 109-246, 120 Stat. 577 (2006). Additionally, post-enactment litigation from August 2012 provides evidence of the necessity of Sections 5 and 4(b) to ensure that

---

[8] *See generally* H.R. Rep. No. 109-478 (May 22, 2006) (The continued evidence of racially polarized block voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable. . . .).

retrogression does not occur at the hands of those whose political and personal aims are detrimental to the minority vote. In *Florida v. United States*, the three-judge Court of Appeals for the District of Columbia rejected Florida's petition for Section 5 preclearance for changes to existing early voting laws, finding that those proposed changes would result in retrogression within Florida's five covered jurisdictions. *Florida v. United States*, No. 11-01428, 2012 U.S. Dist. LEXIS 115647 (D.C. Cir. Aug. 16, 2012). In *Texas v. Holder*, the three-judge court denied Section 5 preclearance to the state of Texas' addition of certain limited forms of identification for voting, finding that the imposition of the identification requirement would have a disparate impact on poor, minority and elderly voters. *Texas v. Holder*, No. 12-cv-128-RMC-DST-RLW (D.C. Cir. Aug. 30, 2012).

Additionally, in *Texas v. United States*, the court found that a congressional redistricting plan had both a retrogressive effect and a discriminatory purpose. *Texas v. United States,* No. 11-1303, 2012 U.S. Dist. LEXIS 121685 (D.C. Cir. Aug. 28, 2012). Speaking specifically about the portion of the plan proposed by the state house, the court stated that "at a minimum, the full record strongly suggests that the retrogressive effect we have found may not have been accidental." *Id.* at *131.

II. CONGRESS'S 2006 REAUTHORIZATION OF SECTIONS 5 AND 4(b) OF THE VOTING RIGHTS ACT MET THE CONSTITUTIONAL REQUIREMENTS OF BOTH THE TENTH AMENDMENT AND ARTICLE IV OF THE UNITED STATES CONSTITUTION.

A. The Section 5 preclearance requirement does not run counter to the Tenth Amendment because it does not deprive jurisdictions of the ability to make political decisions, but rather, ensures a balance of state sovereignty and constitutional accountability.

From the beginning of this Constitutional republic it was established that, "the powers delegated . . . to the federal government are few and defined, while [t]hose which are to remain in the State governments are numerous and indefinite." The Federalist No. 45 (James Madison). However, it is axiomatic that in a federal system the laws of the individual States cannot be supreme. *Gomillion v. Lightfoot*, 270 F.2d 594, 602 (5th Cir. 1959) (Brown, J., dissenting). For even in a field reserved expressly to the States or to the people it is the Constitution which assures that. *Id.*; *see also* U.S. Const. amend. X.

This tension between State sovereignty and Constitutional accountability generally surfaces, especially when concerning voting rights, during periods in our history where individual rights are subject to the discriminatory devices of those elected in local

or State jurisdictions, rather than to rights guaranteed by our Federal system of governance.[9]

Initially, the Voting Rights Act of 1965 was challenged as an unconstitutional invasion of States' rights, however the Court held, "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *S.C. v. Katzenbach*, 383 U.S. 301, 324 (1966). The Court has continued to find that the VRA is not an invasion of rights held to the States, even though the Act may exact substantial federalism costs.[10] The Court has yet again been asked to address whether Section 5 of the VRA has reached its apex of rationality and is

---

[9] *See Guinn v. United States,* 238 U.S. 347 (1915) (finding State legislated grandfather clauses for voter registration unconstitutional); *Smith v. Allwright,* 321 U.S. 649 (1944) ("white primaries" in Texas a violation of Fifteenth Amendment); *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663 (1966) (State poll tax requirements to vote found unconstitutional); and *Dunn v. Blumstein*, 405 U.S. 330 (1972) (any State residency requirements over 30 days for voting found unconstitutional); *but see Crawford v. Marion County Elections Bd.*, 553 U.S. 181 (2008) (upholding Indiana State law requiring photo ID for voters casting a ballot in person).

[10] *See Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003) (the Act does not "dictate to States" methods for redistricting, it is still a flexible political function of the State); *Lopez v. Monterey County*, 525 U.S. 266, 267 (1999) ("This interpretation does not unconstitutionally tread on rights reserved to the States"); *Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("reapportionment is primarily the duty and responsibility of the State," but the Act ensures non-discriminatory basis for the reapportionment).

now in violation of States' rights. The answer is clearly a resounding no.

As the Court wrote, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 539 U.S. 452, 458 (1991). Section 5 of the VRA maintains this balance between the Federal and the State systems by requiring States to seek approval before changing any voting regulations or laws. Contrary to Shelby County's assertions, Section 5 does not deprive any jurisdiction of the ability to create new laws, that political power rests with the State or jurisdictional rule makers. As the House Report noted, "covered status has been and continues to be within the control of the jurisdiction such that those jurisdictions that have a genuinely clean record and want to terminate coverage have the ability to do so." H.R. Rep. No. 109-478, at 25 (May 22, 2006).

The political liberties truly at stake under Section 5 are those of the individual, more specifically, those of the minority voter. Between 2011 and 2012 alone, at least eight States – California, Florida, Illinois, Michigan, Mississippi, Nevada, North Carolina, and South Carolina – introduced legislation to restrict voter registration drives.[11] A September 2012

[11] Diana Kasdan, *State Restrictions on Voter Registration Drives*, Brennan Center for Justice at New York University School of Law, http://www.brennancenter.org/content/resource/state_restrictions_on_voter_registration_drives/ (last visited 01/12/2013).

report estimated that photo ID laws could prevent nearly 700,000 minority voters from registering to cast their ballots.[12]

It is not just these subversive tactics of voter suppression that require the continuance of Section 5, for many of the evils that existed in 1965 continue still today. On March 31, 2009, the Department of Justice filed a complaint against the town of Lake Park in Palm Beach County, FL for violations of Section 2 of the VRA.[13] The complaint alleges that the Town's at-large system of electing its Commissioners denies African American voters an equal opportunity to elect representatives of their choice, and although African American voting age citizens compose 38% of Lake Park's total citizen voting age population, no African American candidate ever has been elected to office since the town's founding in 1923. The Department of Justice, on its website, lists twelve cases since 2006 alone that raise claims of Section 2 or

---

[12] Jon C. Rogowski & Cathy Cohen, *Turning Back the Clock on Voting Rights: The Impact of New Photo Identification Requirements on Young People of Color*, The African American Youth Project, http://research.AfricanAmericanyouthproject.com/files/2012/09/Youth-of-Color-and-Photo-ID-Laws.pdf (last visited 01/12/2013).

[13] Department of Justice, Cases Raising Claims Under Section 2 of the Voting Rights Act, http://www.justice.gov/crt/about/vot/litigation/recent_sec2.php (last visited 01/12/2013). *See U.S. v. Town of Lake Park, Fla.*, No. 09-80507-CIV, 2009 WL 3667071 (S.D. Fla. Oct. 23, 2009) (On October 26, 2009, the Court entered a consent judgment and decree replacing the current at-large method of election with a limited voting plan providing for the election of four Commissioners with concurrent terms).

Section 5 violations under the VRA (alleging at-large, language, and redistricting violations), further evidencing the contemporaneous need for continuance of the preclearance measures employed by the VRA and perhaps expanding coverage.[14]

The Court has stated that, "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Thus to maintain the balance of individual political liberties protected through Section 5 and that of a State's sovereignty to make and enact new laws the Court has, in addition to the rationality test, employed the congruence and proportionality test. *Id.* at 520. The congruence and proportionality test used by the Court in *Boerne*, while balancing Congressional Fourteenth Amendment powers, is applicable in cases where the underlying constitutional issue is drawn from the Fifteenth Amendment. *Northwest Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 204 (2009) ("The Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test").

The Fifteenth Amendment empowers "Congress," not the Court, to determine in the first instance what legislation is needed to enforce it. *Id.* at 205.

---

[14] Department of Justice, Voting Section Litigation, http://www.justice.gov/crt/about/vot/litigation/caselist.php (last visited 01/12/2013).

In speaking of the Fourteenth Amendment's Enforcement Clause, of which this brief argues also applies to the Enforcement Clause of the Fifteenth Amendment, the Court in *Boerne* stated,

> "[it] does not authorize Congress to pass general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing . . . ". *City of Boerne*, 521 U.S. at 525, citing *Civil Rights Cases*, 109 U.S. 3 (1883).

It is in the spirit of the Enforcement Clause that Section 5 legislation was written. The VRA's role has dual purpose: to correct the actions of States and jurisdictions which intentionally sought to exclude citizens from exercising their right to vote and to deter States from either deliberate attempts at future exclusion or deter legislative actions that, veiled as "fraud prevention" deny minorities their right to vote. Whether or not there exists the sort of blatant, racially motivated legislation of the early twentieth century, that the 1965 Act specifically targeted, the dilution of the minority vote still continues. To give proper effect to the VRA the actions of Congress must be given "wide latitude" to determine where the State or locality has unconstitutionally altered, or attempted to alter, laws that affect voting; Section 5 preclearance requirement does just that. *City of Boerne*, 521 U.S. at 520.

The political liberties of the State are not extinguished when a covered jurisdiction is required to seek preclearance under Section 5, for the power to legislate remains squarely in the hands of the jurisdiction. Section 5 merely uses the preclearance to prevent an individual's voice from being silenced through discriminatory election legislation. While, "the historic accomplishments of Section 5 of the VRA are undeniable," so too are the allegations of on-going discrimination and attempts at silencing minority citizens. *NW Austin*, 557 U.S. at 201. The Court is urged to continue its previous jurisprudence and hold that Section 5 is not usurping a State's sovereignty, and is not in violation of the Tenth Amendment.

B. The Equal Protection Clause of the Fourteenth Amendment ("No state shall") renders an Article IV – Guarantee Clause violation moot. As such, this issue of Sections 5 and 4(b) is non-justiciable and properly in the hands of the U.S. Congress.

As noted above, Section 5 of the VRA has served as a bastion of political liberty by ensuring one of our most revered fundamental rights, the right to vote. The preclearance requirement of Section 5 safeguards the right to vote and ensures that those who live in covered jurisdictions, those jurisdictions that have had the most egregious histories of discrimination and censorship, are afforded access to exercise the right. Contrary to the contentions of Shelby County, the repressive tactics that were aimed at diluting and

discouraging the minority vote in the past continue today in "second-generation" abuses that are usually more subtle and sophisticated, but nonetheless effective and pernicious. The power of Section 5 is perhaps best characterized by Justice Warren in *Katzenbach* when he explained that it, "shift[ed] the advantage of time and inertia from the perpetrators of the evil to its victim." *Katzenbach*, 383 U.S. at 328.

If Shelby County's challenge is successful, the discouragement and suppression of the individual political liberty that is embodied in the right to vote will be proliferated and unabated by those who forcibly and discriminatorily place their own political and personal gains above those of others, specifically minorities. The sentiment that we have arrived at a "post-racial" society, ignores contemporary realities that prove otherwise. In denying Shelby County's challenge to Section 5, the appeals court found that Congress's decision to extend the Section 5 preclearance requirement for another twenty-five years was rendered after "thoroughly scrutinizing the record" and finding "overt racial discrimination persists in covered jurisdictions notwithstanding decades of Section 5 preclearance." Brief for Intervenors-Appellees at 6, *Shelby County, Alabama v. Holder*, 679 F.3d 848, (D.C. Cir. 2012) (No. 11-5256).

Given that Shelby County is petitioning this Court to wholly invalidate Section 5, the most appropriate place to begin a consideration of the contemporary repression of minority voters is in that very jurisdiction.

While Shelby County claims that Section 5 is now unnecessary due to advancements in race relations, as recent as 2008, in a flagrant display of disregard for the Congressional mandate of Section 5, Calera, a city in Shelby County, redrew its district lines without seeking or obtaining federal preclearance.[15] This illegal change was retrogressive as it resulted in a drastic dilution of the African American vote in one particular district, reducing what had been a 70.9% African American majority to a mere 29.5%. This illegal change also resulted in the ouster of the only African American councilman, Ernest Montgomery, the second African American ever elected in Calera's history, which dates back to 1887. It is this sort of dilution and suppression that will run rampant if Shelby County's challenge is successful. Former African American Shelby County commissioner, Earl Cunningham, remembers when African Americans could not vote and expressed the need for the continuation of Section 5, "It's an insurance. We may not always have men and women of goodwill making the laws."[16] The insurance of access to the polls remains of vital importance and will be seriously undermined if Section 5, the very heart of the VRA, is repealed.

---

[15] Greg Stohr, *Voting Rights Act Challenge Gets U.S. High Court Hearing*, Bloomberg (Nov. 10, 2012), http://www.bloomberg.com/news/2012-11-09/voting-rights-act-challenge-gets-u-s-high-court-hearing.html (last visited 01/12/2013).

[16] Martin Reed, *Debate Continues on Shelby County Voting Case Appeal*, AL.com (Nov. 16, 2012), http://blog.al.com/spotnews/2012/11/debate_continues_on_shelby_cou.html (last visited 01/12/2013).

As one of the Civil War Amendments, the Fourteenth Amendment was originally intended to protect newly freed African Americans from discrimination by the States. While its scope has been broadened to ensure that all people within a given jurisdiction are free from abuse by any State, *Northwest Austin* explained that "against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *Northwest Austin Mun. Utility Dist. No. 1 v. Mukasey*, 573 F. Supp. 2d 221, 245-246 (D.D.C. Sept. 4, 2008) (quoting *Katzenbach*, 383 U.S. at 324).

Shelby County has argued that Section 5 threatens the time honored principle of state sovereignty and that "[d]oing so selectively, absent compelling justification, unconstitutionally departs from the historic tradition that all the States enjoy equal sovereignty." This argument is not without merit; rather it rings quite true that there should be "compelling justification" to limit state sovereignty and to do so selectively. As discussed above, contemporary attempts at minority voter suppression and dilution are rampant, and many of the violations occur within the covered jurisdictions. Since 1982, the Justice Department has used Section 5 of the VRA to object to more than 2,400 state and local voting changes for various reasons, finding that those changes could result in retrogression.[17]

---

[17] *Supra* Note 8.

While the Guarantee Clause of the United States Constitution provides to "every state in the union a republican form of government," it is silent as to the definition and/or parameters of "republican." U.S. Const. art. IV. However, it is quite possible that the silence is purposeful. The Founding Fathers, while seeking to grant powers to the States, would not have intended for those powers to be absolute and impenetrable. If so, there would be no check on the power of the States and the Fourteenth Amendment would then be null and void and no person would be safe from abuse at the hand of the respective States. This begs the question of the proper handling of challenges and assertions of States' powers. The Court has consistently held, beginning in 1849 with *Luther v. Borden,* that the power to assess the legitimacy of a state government and/or its republican nature lay with Congress. *Luther v. Borden*, 48 U.S. 1 (1849). In *Borden*, Justice Taney therefore labeled controversies arising under the Guarantee Clause as non-justiciable political questions which properly lie in the hands of Congress. *Id.* Accordingly, Congress should be granted deference in its continued support of Section 5. The fundamental right to vote, which is preservative of all other rights, lies at the foundation of our political liberty. *See Yick Wo*, 118 U.S. at 370.

However, as the Court has granted certiorari, the applicability of the Fourteenth Amendment and its charge that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws" necessitates a review that considers the rationality

of Section 5. Here, the Court is asked to consider Congress's aim of eliminating racial discrimination in voting, one of the gravest evils that Congress can seek to redress. *See Yick Wo*. The Fourteenth Amendment, which protects that right for every person who is eligible to vote, is not restrained by the Guarantee Clause, nor is it limited by the Tenth Amendment. *See Ex Parte Virginia*, 100 U.S. 339, 346 (1880); *S.C. v. Katzenbach*, 383 U.S. 301 (1966).

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court affirm the Court of Appeals and hold that Congress did not exceed its legislative authority in reauthorizing Section 5 and that Section 5 continues to be congruent and proportional to assuring the right to vote for all citizens, thereby ensuring individual political liberty.

Respectfully submitted,

PATRICIA A. BROUSSARD*
FLORIDA A & M UNIVERSITY
COLLEGE OF LAW
201 Beggs Avenue
Orlando, FL 32801
(407) 254-3293
patricia.broussard@famu.edu

**Counsel of Record*
Counsel for Amici Curiae

APPENDIX

AMICI

Professor Patricia A. Broussard

Students

Sabrina Collins
Stacy Hane
Akunna Olumba
Joshua A. Adone
Stephanie Alcalde
Erik J. Arroyo
Kenechukwu Anusionwu
Marisa Atherley
Jabari A. Bennett
Tia L. Crosby
Jeralyn Eckhoff
Mfon Etukeren
Isaiah Floyd
Ella Gilbert
Amanda Green
Monica S. Hampton
Sanquaneice Hankerson
Jasmine Hawthorne
Regine Hodge
Aleisha Hodo
Raquel Hoover
Ese Ighedosa
Imani Jackson
Jamila Luke
Tierrel M. Mathis
La Quandela Mayweather
Christopher Myers
Tracy McDuffie, Jr.
Keith Petrochko
Diane Pham
Crystal Potts
Patrick Rajasingam
Cynthia Ramkellawan
Keisha Robinson
Amber Sliger
Courtnie Swearingen
Seth Solomon
Raychelle Tasher
Kristin Taylor
Shauna J. Thomas
Janise Turner
Erika Willis
Jason Willis
Ed Wimp
Jamila Young
Darren Zeigler

Florida A & M University College of Law Advocacy Skills Board
Florida A & M University College of Law Student Animal Legal Defense Fund
Florida A & M University College of Law Asian Pacific American Law School Association
Florida A & M University College of Law Phi Alpha Delta
Florida A & M University College of Law Women's Law Caucus
Florida A & M University College of Law Hispanic American Law Student Association