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

BRIEF OF *AMICUS CURIAE* NATIONAL LAWYERS GUILD IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Lawyers Guild, Inc. is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary national bar association, with a mandate to advocate for the protection of constitutional, human, and civil rights. As one of the non-governmental organizations selected to officially represent the American people at the founding of the United Nations in 1945, its members helped draft the Universal Declaration of Human Rights. Members have brought such cases as *Hansberry v. Lee*, 311 U.S. 32 (1940), which struck down segregationist Jim Crow laws in Chicago and *Dombrowski v. Pister*, 380 U.S. 479 (1965), halting discriminatory and retaliatory state court criminal proceedings against civil rights activists in the South.

The Lawyers Guild is also a member organization of the International Association of Democratic Lawyers, which enjoys consultative status with the United Nations Economic and Social Council. Through its International Committee, it is actively

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to S. Ct. Rule 37.6, counsel for the *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and that no person other than the *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

engaged in promoting and developing international peace and human rights through law.

SUMMARY OF ARGUMENT

Amicus National Lawyers Guild writes to underscore the obligation of this Court not to arrogate to itself the job of the legislature, especially in the face of overwhelming evidence supporting the legitimacy of Congress's decision to extend the constitutionally crucial role of Section 5 of the Voting Rights Act and the Constitutional authority of an elected Congress to evaluate evidence presented to it. Substituting its own opinion for that of elected officials who heard testimony would immeasurably harm the very system of checks and balances that are the cornerstone of our democracy and would, in fact, bring discredit on the Court and engender widespread distrust of its motives. The Court lacks the authority to substitute its judgment for the measured findings of elected officials that racism still runs rampant in this land and that covered jurisdictions remain appropriate subjects of the greater attention the Voting Rights Act imposes when that attention places minimal burdens on them.

Those burdens are particularly slight as compared to the evil they are intended to address. At stake in the issue at hand is the so-called preclearance provision of a statute—nearly half a century old—that has held jurisdictions accountable when they try to enact racist electoral practices. Such practices

effectively deprive victims of overt past discrimination equality in the exercise of the most fundamental right of citizenship.

In this case, both the district court and the court of appeals upheld the constitutionality of Section 5. In rejecting Shelby County's challenge, Judge David S. Tatel of the U.S. Court of Appeals for the District of Columbia Circuit, writing for the majority, ruled that Congress appropriately extended the protections of the preclearance requirement in 2006 for 25 more years, finding that judicial deference to Congress was warranted after an exhaustive review of the record, "given that overt racial discrimination persists in covered jurisdictions notwithstanding decades of section 5 preclearance." *Shelby County, Ala. v. Holder*, 679 F.3d 848, 873 (D.C. Cir. 2012).

This case affords the Court the opportunity to step back to acknowledge and adhere to the principles of a fair government envisioned in 1787 by the founders: three separate, distinct and coequal branches of government with overlapping but separate spheres of authority, created to prevent abuse of power and ensure the protection of individual freedoms. While the specific legal and moral imperative of eliminating racism within our society is an imposing one, members of the Court are also duty-bound to exercise judicial deference to the lawmakers whose exhaustive fact-finding formed the basis for their decision.

Moreover, *amicus* wishes to elaborate on the treaty obligations the United States has undertaken and which Congress has implemented by extending

Section 5. These obligations exist both under the norms of international law and by the mandate of Article VI of the Constitution, which makes those treaty obligations "the supreme Law of the Land." Compliance with treaty obligations constitutes an additional compelling governmental interest in enactment of this statute.

ARGUMENT

A reversal in this case would represent the Court's intervention in a way that would undermine our society's commitment to ensuring that vestiges of racism are not afforded the opportunity to blossom and grow. The record in this case indicates the enduring presence of racial discrimination in Shelby County, the very kind of prejudice that Section 5 of the Voting Rights Act has been relied upon to curtail for nearly half a century.

The district court noted the likelihood that, of the hundreds of violations of Section 5 that have taken place in recent years, many had the intent or effect of curtailing the electoral power of African-Americans and other excluded peoples. This is exemplified by the case brought by the Justice Department against the City of Calera in Shelby County, resolved by consent decree, *United States v. City of Calera, Alabama*, No. CV-08-BE-1982-S (N.D. Ala. Oct. 29, 2008), which alleged multiple Section 5 violations but did not explicitly allege racial disparity. One of the underlying facts, however, was that, following an unauthorized change in Calera's

election law, the city's lone African-American councilor lost an election. When the change was voided to redress the Section 5 violation, he was reelected. It is telling that Shelby County is seeking this remedy rather than the simpler and less costly remedy of meeting its obligations for ten years and being excused from further coverage.

I. THIS COURT MUST NOT WAVER FROM THE COUNTRY'S COMMITMENT TO ERADICATE RACISM

Certain facts regarding this matter cannot be in dispute. The United States has a shameful history of discrimination against, and oppression of, African-Americans, Native peoples, and other persons of color dating back centuries prior to the adoption of the Constitution. The first enslaved Africans came to the Americas as early as 1502 and, with the establishment of a British colony in Virginia in 1607, the trade came to what is now part of the United States.[2] The contempt in which indigenous people were held by our founders is embodied in the Declaration of Independence, which lists as one of the grievances against King George III that he "endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages." Declaration of Independence (U.S. 1776).

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[2] *Amicus* trusts this history is sufficiently well documented that the Court will take judicial notice of it.

Following the Civil War and the passage of the Thirteenth Amendment, the situation for African-Americans in the deep south – the center of areas subject to section 5 – hardly improved. *See e.g.*, Douglas A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II (2008) (concentrating on the post-bellum oppression of African-Americans in Alabama, where Shelby County is located, and which persisted unabated up to World War II).

This sordid history need not be recounted at length, but it should not be forgotten and this Court must consider its present effects. Indeed, this Court has found each prior extension of the Act to be warranted. *Georgia v. United States*, 411 U.S. 526 (1973), *City of Rome v. United States*, 446 U.S. 156, 100 (1980), and *Lopez v. Monterey County*, 525 U.S. 266 (1998). The district court and the court of appeals have both detailed the extensive investigation undertaken by Congress before it passed the latest extension in addition to the mountain of evidence supporting its decision. Because others, including the two lower courts here, have thoughtfully explored why it is the province of Congress to make such a determination, *amicus* restricts itself only to brief commentary without recounting all the testimony and evidence that led Congress to its decision.

II. JUDICIAL DEFERENCE SHOULD BE AFFORDED TO LEGISLATIVE FACT-FINDING

Since this Court decided *Marbury v. Madison*, 5 U.S. 137 (1803), the federal courts have been unwilling fact finders, preferring to remain true to their constitutional jurisdiction and decide matters of law. Federal courts have deferred to Congress and state legislatures in findings of fact. And, indeed, legislatures have resources and time to dedicate to the process of collecting and evaluating information necessary to take action. Members of Congress and other legislatures may engage in a range of activities to assemble their facts, including consulting "staff, friends and constituents," and educating themselves "by reviewing past legislation or even by reading a novel or watching television." Wendy M. Rogovin, *The Politics of Facts: "The Illusion of Certainty,"* 46 Hastings L. J. 1723, 1743 (1995).

Here, testimony was presented to Congress and its Members weighed in on such issues as the credibility and persuasiveness of the witnesses it heard. Its members were popularly elected and, therefore, reflect the popular will. While this Court has the duty to determine when the popular will infringes on fundamental individual rights, it should be a rare case where it voids a law within the specific constitutional domain of Congress. Voiding a law raises the specter of the judiciary being viewed as an overtly partisan political body. The Court should make every effort to ensure that it is viewed as an independent branch of government divorced from

politics and as a neutral arbiter of constitutional interpretation.

Further, let us suppose, without acknowledging, that the dissent below reasonably interpreted the evidence before Congress. That does not mean that the majority opinion and the district court's opinion were unreasonable and, if both sides are reasonable, that necessarily means that the courts should defer to Congress. Even if the evidence before Congress admits to differing interpretations and even if Congress did not have direct proof of ongoing problems in covered jurisdictions, but only inferred the need for continuing coverage, it acted within its constitutional prerogative.

The evidence before Congress, even if only circumstantial (*amicus* would argue it is more than that) was extensive. A defendant in a criminal case can be convicted with only circumstantial evidence. *Holland v. United States*, 348 U.S. 121 (1954) ("circumstantial evidence is intrinsically no different from testimonial evidence"). Some scholars have written that circumstantial evidence is more credible than direct evidence. *See e.g.*, William Paley, *The Principles of Moral and Political Philosophy* 551 (1785) ("well-authenticated circumstances composes a stronger ground of assurance than positive testimony, unconfirmed by circumstances, usually affords. Circumstances cannot lie"). Surely Congress can implement legislation fulfilling its Constitutional duty under the Thirteenth and Fourteenth Amendments based upon similar evidence.

Moreover, winning the right not just to testify but to have one's experiences taken seriously by the law was a critical advance in the civil rights struggle in this country. *See e.g.*, Cong. Globe, 39th Cong., 1st Sess. 157 (1866) (report of the Judiciary Committee that Congress had the Constitutional power to allow African Americans as witnesses in state courts and recommending that the House do so). With efforts to protect racial equality finally gaining majoritarian support in the political branches, it would be cruel irony indeed if this Court were to substitute its factual beliefs for the considered judgment of Congress, informed as it was by the testimony of experts and constituents.

III. CERD AND ICCPR IMPOSE A CONSTITUTIONAL REQUIREMENT ON THE U.S. TO UNDERTAKE EFFORTS TO ELIMINATE RACISM

Given the unquestioned history of discrimination, particularly in the-states subject to the preclearance provisions of Section 5, and the embarrassment it has caused the United States around the world, principles of international and treaty law must be given due consideration in this Court's analysis. Because its treaty obligations are the "supreme Law of the Land," this is not merely a matter of international law, but of constitutional requirements as well. U.S. Const. Art. VI. In addition, It should be noted that "a decent respect for the opinions of mankind" and the submission of what we do and why to a "candid world" are integral to our history

and inscribed in one of the two foundational documents that gave birth to this nation. Declaration of Independence (U.S. 1776).

The United Nations Charter is a treaty entered into and ratified by the United States. Indeed, the United States played a leading role in establishing the United Nations. The Charter provides that one of the raisons d'être of the United Nations is "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." United Nations Charter Art. 1(3), 59 Stat. 1031, T.S. No. 993, *entered into force* Oct. 24, 1945. Congress's efforts to insure the fundamental right of African-Americans and other citizens of color to engage meaningfully in the electoral process is therefore both a response to a treaty obligation and a constitutional mandate.

Accordingly, the government has a compelling, indeed constitutionally compelling, interest in enforcing the International Convention on the Elimination of All Forms of Racial Discrimination (CERD, which states:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination,

> provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved. . . .
>
> States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969, Art 1(4), Art. 2(2). CERD's purpose is to insure "adequate advancement of certain racial or ethnic groups or individuals requiring such protection," so as to afford them "equal enjoyment or exercise of human rights and fundamental freedoms." CERD Art. 1 § 4. While it is true that special measures should only be utilized for as long as they are

needed, which is the issue here, the right to vote is "precious" and "fundamental," so such measures are particularly important and any error should be on the side of insuring equal access to the polls. See *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663, 670 (1966). As this Court has sagely observed: "Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). If there is any area in which the courts should tread carefully, it is in regard to the threat of disenfranchisement of citizens exercising this fundamental right.

The U.S. government likewise expressed its view that actions aimed at rectifying past discrimination are consistent with its treaty obligations when it ratified the International Covenant on Civil and Political Rights (ICCPR), G.A. Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976. That convention prohibits discrimination or distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Because the text of the covenant did not specifically sanction corrective measures, the United States adopted an understanding to the effect that it would make distinctions if *rationally related* to a legitimate government objective. 138 Cong. Rec. 8068 (1992). That is to say, the government's understanding of its treaty obligation under the ICCPR is that only a

rational basis is required for such corrective action.[3] And that treaty obligation is the "supreme Law of the Land." U.S. Const. Art. 6.

Although the United States adopted a number of reservations, understandings and declarations when it ratified the CERD, it never disavowed the need to take corrective action to remedy past discrimination. Congress reserved the right not to follow Article 4, which forbids racist speech, and Article 7, which requires that "States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination. . ." 140 Cong. Rec. 14326 (1994). It did not, however, preclude measures necessary to address the legacy of discrimination that has plagued the union since before its birth. It is clear that the United States has undertaken treaty obligations that endorse measures taken for the purpose of achieving genuine equality. Again, such measures are especially crucial when it comes to voting, because the failure to remedy the problem there makes it impossible to remedy the problem anywhere.

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[3] *Amicus* understands that this Court may have imposed a somewhat more rigorous standard, requiring that the law must be "congruent and proportional" to the evil sought to be corrected, perhaps without regard to the ICCPR and our government's understanding of the extent of what could be done to correct this particular evil.

Admittedly, our jurisprudence holds that non-self-executing treaties, like the CERD, require enabling legislation to have the force of law under U.S. CONST., Art, VI. *See e.g.*, *Trans World Airlines, Inc. v. Franklin Mint Corp*., 466 U.S. 243, 252 (1984) (holding that no enabling legislation was required to give the Warsaw Convention, a self-executing treaty, the force of law); *see also*, *Cook v. United States*, 288 U.S. 102, 119 (1933). However, these cases hold ~~only~~ that non-self-executing treaties are distinct only because they need enabling legislation to be enforceable in domestic courts. Nowhere is it said that non-self-executing treaties are without meaning – a position which, if adopted, would wreak havoc with international relations as it would render any ratification of a non-self-executing treaty meaningless. At a bare minimum, these human rights treaties serve as persuasive articulation of the compelling government interest in genuine equality which clearly cannot be achieved in any area if not protected in the electoral sphere; and in turn, compliance with our declarations of commitment to these high principles is a compelling state interest. Abandonment of such principles should be inconceivable. In fact, Section 5 be would have been seen as enabling legislation enacted pursuant to the CERD had it been originally been passed by Congress prior to the United States ratifying the treaty. The latest extension of Section 5, passed after the United States ratified the CERD, in addition to the myriad other reasons articulated by the district and circuit court opinions, should be so understood.

Assuming that the extension of the Voting Rights Act should be congruent and proportional to the problem it seeks to correct, that congruence and proportionality still must balance the overriding importance of the right to vote against the relatively minimal burdens placed upon states and their subdivisions to obtain preclearance. *See* 679 F.3d at 868 (observing that the process of obtaining preclearance is "routine and efficient"); 811 F. Supp. at 501 (noting the "minimal administrative cost" related to compliance).[4]

More than overwhelming those minimal burdens, Congress (and others) have properly determined that the effects of a racist past remain with us, particularly in covered jurisdictions. Jefferson County, Alabama, which is contiguous to Shelby County,[5] has recently admitted that it has failed to abide by a 30-year-old consent decree intended to remedy race and gender discrimination in hiring of county and that discriminatory practices have continued.[6]

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[4] In fact, the burdens imposed by Sec. 5 are so minimal that the oxymoronic "retroactive preclearance" of changes is routine.

[5] In relatively recent years, many whites fled from Jefferson to Shelby County because of the increased African-American population and the concomitant increase in black electoral power.

[6] The contempt hearing took place in December 2012 and no ruling has yet been made. Reports, however, reflect the county's admissions. *See e.g.*, Kyle Whitmire, *Bowman says Jefferson County Still Has Discriminatory Hiring, Voices*

Far less has been enough to sustain legislative action in other settings. For example, there is no evidence anywhere in the country that people voting illegally in person have affected the outcome of any election, yet this Court has previously found that laws requiring voters to provide photo identification before being allowed to cast ballots are constitutional. *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). By contrast, 15,000 pages of evidence, carefully weighed by Congress led it to the conclusion that discrimination persists in the electoral arena and adversely affects people of color, particularly in the jurisdictions covered by Sec. 5. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b), 120 Stat. 577 (2006). This Court cannot consistently find that the Indiana legislature acted

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Confidence In County Manager To Fix Problem, AL.com, Dec. 10, 2012 ("Several career categories at the county still showed statistically significant bias against women and minorities, witnesses from both sides said"); Kent Faulk, *Jefferson County Commission President David Carrington Agrees County Hasn't Lived Up To Employment Practices Consent Decree*, AL.com, Dec. 5, 2012 (reporting that white County Commission president David Carrington acknowledged the failure of the county to comply with the requirements of the consent decree and needed to correct certain hiring practices); Barnett Wright, *Jefferson County Commission Warned In Memo To Follow Consent Decree*, Birmingham News, Feb. 24, 2012 (reporting on a memo written by a member of the county attorney's office warning Commissioner Jimmie Stephens that his decisions to lay off lower paid African-American employees rather than higher-paid white employees would be "very difficult to explain").

constitutionally in Crawford and that Congress exceeded its authority here.

In light of a history of hundreds of years of oppression and disenfranchisement, the continuing incidents of such disenfranchisement, the slight burden on covered jurisdictions to meet their obligations under Section 5 of the Voting Rights Act, the fundamental nature of the right involved, the constitutional burdens assumed by the United States by its treaty obligations and the international understanding of the importance of rectifying past racial discrimination, the reasons Congress has found for extending the Act are more than sufficient to justify its decision.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Honorable Court to affirm the decision below.

Dated: February 1, 2013

Respectfully submitted,

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