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 *AMICUS CURIAE* OF ABRAHAM LINCOLN FOUNDATION FOR PUBLIC POLICY RESEARCH, INC., AMERICA'S PRAYER NETWORK, CHRISTIANS REVIVING AMERICA'S VALUES, U.S. JUSTICE FOUNDATION, AND CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONER

GARY G. KREEP
U.S. JUSTICE FOUNDATION
932 D Street
Suite 2
Ramona, CA 92065
(760) 788-6624

**Counsel of Record*
January 2, 2013
Attorneys for Amici Curiae

HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

INTEREST OF *AMICI CURIAE*[1]

Abraham Lincoln Foundation for Public Policy Research, Inc. ("ALF") is a nonprofit social welfare organization, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). ALF conducts research, education, and advocacy concerning the status of America's Black community, disseminates such information to Americans, promoting color-blind governmental policies. America's Prayer Network, Christians Reviving America's Values, U.S. Justice Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3). Each organization is interested in the proper construction of state and federal constitutions and statutes.

SUMMARY OF ARGUMENT

Whether Congress exceeded its authority under the Fourteenth and Fifteenth Amendments in the 2006 reauthorization of the Voting Right Act of 1965 ("VRA") under the preexisting formula of Section 4(b) depends, in the first instance, on whether the 2006 preclearance amendments to Section 5 exceeded Congress's authority under the enforcement provisions of either the Fifteenth or the Fourteenth Amendment.

---

[1] It is hereby certified that the parties have filed blanket consents to the filing of *amicus* briefs, that no counsel for a party authored this brief in whole or in part, and that no person other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

According to the 2006 amendments to Section 5 of the VRA, a voting change in a Section 4(b) covered jurisdiction is impermissible if its purpose and effect "will ... diminish[] the ability of citizens of the United States ... to elect their preferred candidate of choice." Additionally, according to 2006 version of VRA, the purpose of preclearance is to "protect the ability of [minority] citizens to elect their preferred candidate of choice."

Under these amendments to VRA's Section 5, the purpose of preclearance is no longer concerned with preventing voting law changes that mask racial discrimination denying or abridging the right to vote. Therefore, it exceeds the authority vested in Congress by Section 2 of the Fifteenth Amendment.

Under these amendments to VRA's Section 5, the purpose of preclearance is now concerned with preventing voting law changes that may dilute the weight of the vote of minority groups to elect their preferred candidates to office. Therefore, it concerns the authority vested in Congress by Section 5 of the Fourteenth Amendment to enforce this Court's one-person/one-vote precedents which purportedly secure, under the Equal Protection guarantee, the right to have one's vote "equally effective" in the election of candidates to office.

Even under the one-person/one-vote rulings, this Court has not found that the equal protection guarantee secures a right that every voter is entitled to have an equal say in the outcome of an election. Furthermore, this Court has rejected the claim that

groups of voters are entitled to substantial equal positions to elect the candidate of the group's choice. Because the Court has rejected the claim that the equal protection guarantee secures a political order based on group identity, Congress has no such authority to impose such an order upon the States, the power under Section 5 of the Fourteenth Amendment being remedial only.

Not only would the 2006 amendments to VRA exceed Congress' authority to enforce this Court's one-person/one-vote rulings, but those rulings, themselves, are outside the authority of this Court under the Equal Protection Clause. Textually, contextually, and historically, the Equal Protection guarantee has nothing to do with the right to vote, a right that belongs only to persons who are citizens, members of the political community, not to persons as human beings.

Additionally, VRA's section 4(b) has put Alabama on an unequal footing in violation of the statute admitting Alabama to the Union and the Tenth Amendment. At the very heart of the independence and sovereignty of the several States is the State's authority over its own electoral system. By subjecting Shelby County, Alabama to preclearance by federal authorities in Washington, D.C. with respect to every change in its voting laws, VRA has undermined the efforts of VRA-covered jurisdictions to address voting fraud, concentrating power in unelected bureaucrats that threatens public confidence in the integrity and legitimacy of the American federal republic.

If this Court continues to sanction what has become an outmoded system of centralized preclearance of voting law changes, it will encourage Congress to implement additional voting reforms, treating state and local governments as nothing more than subordinate departments of one unitary government vested with unlimited powers over federal, state, and local elections.

ARGUMENT

I. SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED IN 2006, EXCEEDS THE POWERS VESTED IN CONGRESS BY EITHER THE FOURTEENTH OR FIFTEENTH AMENDMENT.

The question directly presented herein is whether Congress' decision in 2006 to reauthorize the Voting Rights Act ("VRA") under the preexisting formula of Section 4(b) of the VRA exceeded its authority under the Fourteenth and Fifteenth Amendments. That question cannot be answered adequately without first addressing whether Congress exceeded its authority with respect to its amendments to Section 5 of the VRA. As Shelby County points out in its merits brief, the 2006 amendments "made the [preclearance] burden more onerous by amending Section 5...." Brief for Petitioner ("Pet. Br."), p. 10. Indeed, not only did these amendments increase the preclearance burden, but also they changed entirely the purpose of the VRA. *Id.* As Shelby County has also pointed out, the new VRA Section 5 shifted the focus of the VRA from denying minority voters "ballot access" to ensuring

minority voters "electoral success." Pet. Br., p. 41. Not only is it constitutionally "irrational" for Congress to have raised the bar to voting law changes in those jurisdictions governed by a 35-year old coverage formula, but also it is unconstitutional for Congress to have changed the VRA purpose from outlawing discriminatory "interference with the ability to cast a ballot" to prohibiting the "employ[ment of] electoral practices undermining the effectiveness of the ballot once cast." *See id.* at 42.

The purpose of this *amicus* brief, then, is to address directly the constitutionality of the 2006 version of Section 5 of the VRA. If the new Section 5 is unconstitutional, then the means employed by Congress in Section 4(b) to accomplish the purpose of amended VRA Section 5 is unconstitutional.

A. At Stake Is the Constitutionality of Section 5 of the Voting Rights Act of 1965, as Amended in 2006.

Invoking its power under section 2 of the Fifteenth Amendment to enforce the prohibition against any State denying or abridging "[t]he right of citizens of the United States to vote ... on account of race, color or previous condition of servitude," Congress enacted the Voting Rights Act of 1965 ("VRA"). *See generally* South Carolina v. Katzenbach, 383 U.S. 301 (1966). Relying exclusively on that same enumerated power, "Congress reauthorized the Act in 1970 (for 5 years), 1975 (for 7 years), and 1982 (for 25 years)." *See* Northwest Austin Mun. Utility District v. Holder, 557 U.S. 193, 200 (2009). In 2006, however, "when

reauthorizing [VRA for another 25 years], Congress expressly invoked its enforcement authority under both the Fourteenth and Fifteenth Amendments," thereby putting into play for the first time its remedial powers under section 5 of the Fourteenth Amendment to enforce the prohibition against any State "deny[ing] to any person ... equal protection of the laws" in order to protect against "vote dilution," not just "vote discrimination." *See* Shelby County, Alabama v. Holder, 679 F.3d 848, 864 (D.C. Cir. 2102). As the appellate court below noted, there is no court precedent supporting the claim that "intentional vote dilution violates the Fifteenth Amendment," but there is precedent that "the Fourteenth Amendment prohibits vote dilution intended 'invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.'" *Id.* (citing City of Mobile v. Bolden, 446 U.S. 55, 66 (1980)).

Purporting to act in furtherance of this equal protection principle against "vote dilution," the 2006 VRA reauthorization contains two significant new provisions whose constitutionality depends completely upon Congress's remedial authority under section 5 of the Fourteenth Amendment.

First, prior to 2006, VRA Section 5 provided that a "covered" state or political subdivision could be barred from making a voting law change only if the purpose or effect of the proposed change would "**worsen** the position of minority voters." *See* Reno v. Bossier Parish School Board, 528 U.S. 320, 324 (2000) (emphasis added). Under the 2006 amendments, however, a voting law change would not be approved

unless the covered jurisdiction proved the absence of "**any** discriminatory purpose." *See* 42 U.S.C. § 1973c(c) (emphasis added).

Second, prior to 2006, a voting law change in a covered jurisdiction would be barred if, after considering a variety of relevant factors, the change would have an overall **retrogressive** effect on the voting strength of a minority group. *See* Georgia v. Ashcroft, 539 U.S. 461, 479-80 (2003). After 2006, a voting law change would not meet approval if it "has the purpose or will have the effect of diminishing the **ability** of any citizens of the United States on account of race or color ... to **elect** their preferred candidates of choice." *See* 42 U.S.C. § 1973c(b) (emphasis added); *see also* § 1973c(d), which expressly states that the purpose of this specific amendment "is to **protect** the **ability** of [minority] citizens to **elect** their preferred candidates of choice." (Emphasis added.)

In short, these 2006 amendments are designed not just to provide a prophylactic approach to racial discrimination that denies or abridges the right to cast a ballot or to have one's vote counted, but rather are designed to ensure that racial minority groups' votes are sufficiently effective to elect persons responsive to the minority groups' interests. This Congressional object is outside the enumerated power of Congress under either Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment.

B. The Constitutionality of the 2006 Amendments to VRA Section 5 Depends upon this Court's One-Person/One-Vote Rulings under the Fourteenth Amendment.

In light of Northwest Austin, expressing reservations about the continuing constitutionality of VRA under the Fifteenth Amendment, the Government has offered Section 5 of the Fourteenth Amendment as authority to enact VRA's ban on "intentional acts of vote dilution on the basis of race...." Brief for the Respondents in Opposition ("Govt. Resp. Br."), p. 19. In their brief in opposition to Shelby County's petition for a writ of certiorari, Respondents-Intervenors have taken this argument one step further, asserting that "it was entirely proper for Congress to rely on both Amendments when it acted to reauthorize Section 5 and Section 4(b) in 2006." Brief in Opposition for Respondents-Intervenors ("Intrv. Resp. Br."), p. 33.

According to the Respondents-Intervenors, the Fourteenth and Fifteenth Amendments synergistically prohibit what neither provision does alone:

> [B]eginning in the 1970's, the Supreme Court built upon its **one-person, one-vote** rulings under the Fourteenth Amendment to hold that a **different** form of vote dilution — one that denies minority voters the opportunity to elect candidates of choice — also violates the Fourteenth Amendment.... Thus, constitutional law as applied to discrimination in voting has

> progressed to including the prohibitions in both the Fourteenth and Fifteenth Amendments. [Intrv. Resp. Br., p. 34 n.22 (emphasis added).]

Indeed, there would have been no reason for Congress to have invoked the Fourteenth Amendment in support of the 2006 VRA but for the amendment to Section 5 which alters the ultimate preclearance question to be whether a voting law change "has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race or color ... to **elect** their preferred candidate of choice." *See* 42 U.S.C. § 1973c(b) (emphasis added). Having explicitly stated in 42 U.S.C. § 1973c(d) that "the **purpose** of subsection (b) is to **protect** the ability of such citizens to **elect** their preferred candidates of choice" (emphasis added), Congress relied on Section 5 of the Fourteenth Amendment, in recognition that Congress's remedial authority under the Fifteenth Amendment is confined to redress or prevent state action which abridges or denies the right to vote on the basis of race, not to redress or prevent state action that "dilutes" the weight of a vote cast. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 62-63 (1979).

As the Intervenors in their brief in response have recounted, the constitutionality of the original VRA was adequately supported by Section 2 of the Fifteenth Amendment, because in the beginning the aim of the law concerned "discrimination in voting." *See* Intrv. Resp. Br., p. 34 n.22. However, as the Intervenors also have asserted, it was not until this Court had extended the Equal Protection Clause in its "one-person, one-vote rulings [that] a different form of vote dilution —

one that denies minority voters the opportunity to **elect** candidates of choice — also violates the Fourteenth Amendment." *Id.* Thus, by stating that the purpose of the new Section 5 is to protect the ability of minority citizens to elect candidates of their choice, Congress has relied upon whatever remedial authority is allowed by the "one-person/one-vote" rulings under the Equal Protection Clause.

C. Section 5 of the VRA, as Amended in 2006, is Not Authorized by the Enforcement Provisions of Either the Fourteenth or the Fifteenth Amendment.

Congress's power to "enforce" the Equal Protection Clause of the Fourteenth Amendment is remedial in nature and purpose. City of Boerne v. Flores, 521 U.S. 507, 519 (1997). Therefore, the authority vested in Congress by Section 5 of the Fourteenth Amendment is not plenary; rather, Congress's power to "enforce" the "provisions" of the Amendment is "inconsistent with the [notion] that Congress has the power to decree [their] substance...." *Id.* Had such a power been intended, Congress would have proposed for state ratification the first version of the Amendment which was placed in 1866 before the 39th Congress and which read:

> The Congress shall have the power to make all laws which shall be necessary and proper to secure ... to all persons in the several States equal protection of life, liberty and property. [Cong. Globe, 39th Cong., 1st Sess. 813, 1034 (1866).]

As this Court recounted in Boerne, Congress rejected this proposal on the ground that "the proposed Amendment would give Congress a power to intrude into traditional areas of state responsibility, a power inconsistent with the federal design central to the Constitution." Boerne, 521 U.S. at 521. As a result of these objections, the Amendment was redrafted. In its present form, Section 1 "impose[s] self-executing limits on the States," and Section 5 "'enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation, by a formal congressional enactment.'" Boerne, 521 U.S. at 522-23.

In addition to its federal design, the Fourteenth Amendment was crafted in such a way as to "maintain[] the traditional separation of powers between Congress and the Judiciary." *Id.*, 521 U.S. at 523-24. In response to concerns that the original Fourteenth Amendment proposal would "vest[] in Congress primary power to interpret and elaborate on the meaning of the new Amendment through legislation" (*id.*, 521 U.S. at 524) and, thus, place the meaning of "legal equality ... in the hands of changing congressional majorities" (*id.* at 521), Congress adopted the present language which prohibits any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." *Id.* By employing language limiting Congress's enforcement to a negative check on the abuse of state power, and granting Congress power only to "enforce" that "provision," Section 5's power is "corrective or preventive, not definitional...." *Id.*, 521 U.S. at 525. Otherwise, "Congress could define its own powers by

altering the Fourteenth Amendment's meaning, [and] no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'" *Id.*, 521 U.S. at 529. Thus, patterned after the first eight Amendments to the Constitution, the first section of the Fourteenth Amendment "set[s] forth self-executing prohibitions on governmental action," affirming thereby that the Supreme Court has "primary authority to interpret those prohibitions." *Id.*, 521 U.S. at 524.

These same principles of separation of powers and federalism undergird the Fifteenth Amendment. *See* Boerne, 521 U.S. at 524, citing South Carolina v. Katzenbach, 383 U.S. at 325. As explained in Boerne, the Fifteenth Amendment, like the Fourteenth, vests in Congress only remedial powers, the substantive right of citizens to vote free of any denial or abridgment on account of race or color having been fixed by the constitutional text. *See id.*, 521 U.S. at 525-26. Until 2006, Congress abided by these limitations, adopting and reauthorizing Section 5 of VRA as a remedial tool, designed to correct state actions denying the right of American citizens the right to vote on account of race or color. *See* Northwest Austin, 557 U.S. at 197-99. The 2006 amendments, however, prompted this Court to construe the VRA "bailout" section liberally, in order to avoid the question of VRA's continuing constitutionality. *Id.*, 557 U.S. at 200-04. As Justice Thomas warned in his concurring and dissenting opinion, "[t]he Court quite properly alerts Congress that [VRA's] § 5 tests the outer boundaries of its Fifteenth Amendment

enforcement authority and may not be constitutional." *Id.*, 557 U.S. at 216.

In an effort to avoid testing these "outer boundaries," the Government has urged this Court to sustain the 2006 version of VRA as a constitutional exercise of power under the Fourteenth Amendment. *See* Govt. Resp. Br., pp. 19, 29. The Government and Congress's reliance on Congress' enforcement powers under section 5 of the Fourteenth Amendment, however, is unavailing. As noted previously, under the federalism and separation of powers principles embraced by the Fourteenth Amendment, "Congress ... has been given the power 'to enforce,' not the power to determine, what constitutes a constitutional violation." Boerne, 521 U.S. at 519. Rather, it is for this Court to "interpret the Constitution in a case or controversy...." *Id.*, 521 U.S. at 524. In City of Mobile v. Bolden, this Court ruled that the one-person/one-vote rule[2] judicially derived from the Equal Protection Clause does not encompass any "entitlement to group representation," whether by race, religion, political affiliation, ethnicity, or otherwise. *Id.*, 446 U.S. at 78-80. As Justice Stevens asserted, any such grouping of the American citizenry undermines the principle of government of the people, by the people, and for the people, "emphasizing differences between candidates and voters that are irrelevant in the constitutional sense." *Id.*, 446 U.S. at 89 (Stevens, J., concurring). Instead, Justice Stevens observed that group politics — whether racial or religious — beget "antagonisms

---

[2] The "one-person/one-vote" rule was formerly known as the "one-man/one-vote" rule.

that relate to race or to religion rather than to political issues," leading to "communities seek[ing] not the best representative but the best racial or religious partisan." *Id.* In short, rather than promoting "equality" among a diverse people, the goal of group representation would do the opposite.

The purpose of new Section 5 of the VRA — requiring disapproval of voting changes that have the effect of diminishing the ability of any citizens of the United States on account of race or color to elect their preferred candidate — squarely rests upon group identity politics rightfully rejected by this Court in City of Mobile. As this Court observed in that case, the "right to equal participation in the electoral process does not protect any 'political group' ... from electoral defeat [or] entail a right to have one's candidates prevail." *Id.*, 446 U.S. at 77 and n.24. Section 5 of the Fourteenth Amendment simply does not empower Congress in the name of "equal protection" to "protect the ability of minority citizens or any other self-identified political group to elect their preferred candidates of choice," as provided in the 2006 amendments to VRA Section 5. *See* City of Mobile, 446 U.S. at 75 n.22 and 78 n.26.

D. Congress Is Not Authorized Under the Fourteenth Amendment to Enforce the Equal Protection Guarantee Against Any State Law Regarding the Voting Franchise.

As noted above, the Fourteenth Amendment's Equal Protection Clause is a Johnny-come-lately to the

justification of the enactment and reauthorization of VRA. *See* I.B., *supra.* Indeed, because the Fifteenth Amendment explicitly prohibits the denial or abridgment, on account of race or color, of the right of an American citizen to vote, there would be no reason to invoke the equal protection guarantee in support of legislation designed only to enforce the constitutional ban on racial discrimination denying or abridging the right to vote. Not surprisingly, up through the 1960's, vote discrimination cases were governed generally by the Fifteenth Amendment. *See, e.g.,* Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960). Currently, however, it is assumed that the Fourteenth Amendment's Equal Protection Clause, like the Fifteenth Amendment, prohibits racial discrimination in voting. *See* Intv. Br., pp. 33-34.

However, this Court has construed the equal protection guarantee, as applied to the right to vote, to impose upon the States not only a prohibition against racial discrimination, but also an obligation to configure electoral districts in both houses of their legislatures in proportion to each district's population. Popularly known as the "one-person/one-vote rule," this Court has determined that the equal protection guarantee requires that each qualified voter's vote must be weighted equally with every other qualified voter's vote. *See* Reynolds v. Sims, 377 U.S. 533 (1964). In an opinion that waxes more poetical than analytical,[3] the Reynolds Court optimistically assumed

---

[3] *See, e.g.,* "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." *Id.*, 377 U.S. at 562.

that its new rule of one-person/one-vote would usher in a new political order in which:

> each and every citizen has an unalienable right to full and effective participation in the political processes of his State's legislative bodies.... Full and effective participation by all citizens in state government requires, therefore, that each citizen have an **equally effective** voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less. [*Id.*, 377 U.S. at 565 (emphasis added).]

Twenty-one years later, this Court addressed the equal protection claim of the Indiana Democratic Party, which asserted that a Republican Party reapportionment scheme that gerrymandered Democratic Party voters in such a way as to deny Democratic Party voters full and equal participation in the State House and Senate elections violated the one-person/one-vote rule. In particular, the Democratic Party pointed to two multi-member districts where Democratic Party candidates drew 46.6 percent of the vote, but only 3 of the 21 house seats were filled by Democrats. Davis v. Bandemer, 478 U.S. 109, 115 (1986).

In order for each voter's vote to count equally to every other voter's vote, as required by the one-person/one-vote principle, the Democratic Party argued that the number of house members elected ought to be proportionate to the number of Democrat votes counted. The Court rejected this argument on

the ground that such inequality of electoral outcomes "is inherent in winner-take-all, district-based elections." *Id.*, 478 U.S. at 130. Thus, the Court concluded that "we **cannot** hold that such a reapportionment law would violate the Equal Protection Clause because the voters in the losing party do not have representation in the legislature in proportion to the statewide vote received by their party candidates." *Id.* (emphasis added).

As for those voters who reside in districts admittedly drawn by the Republican Party "to save as many incumbent Republicans as possible" (*id.*, 478 U.S. at 117), the Court recognized that voters who are members of the minority party would not have a ghost of a chance ever to elect a person to office. *Id.*, 478 U.S. at 131. The Court offered the consolation that:

> [T]he power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually **deemed** to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district.... This is true even in a safe district where the losing group loses election after election. [*Id.*, 478 U.S. at 132 (emphasis added).]

Yet, according to Reynolds, the constitutional right "of all qualified citizens to vote ... in state ... elections ... can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Id., 377 U.S. at 554-55. Indeed, according to Reynolds, "the Equal Protection Clause of the Fourteenth Amendment ... established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." *Id.*, 377 U.S. at 560-61. In fact, however, as the entire text of the Fourteenth Amendment as well as the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments demonstrate, the Equal Protection Clause was designed to establish **no** such principle governing a citizen's right to vote and to have that vote counted regardless of whether such right is denied or abridged or limited in any other way.

In his Reynolds dissent, Justice Harlan contended that the equal protection guarantee of the first section must be read in context with the second section of the Fourteenth Amendment. As he observed, the second section specifically addressed the "right to vote," providing for a particular remedy to be imposed upon a State that "denied [or in any way abridged that right] at any election ... for the members of the Legislature ... to any of the ... inhabitants of such State, being twenty-one years of age, and citizens of the United States..., except for participation in rebellion, or other crime." And, as he explained:

> The Amendment is a single text.... It was discussed as a unit in Congress, and proposed as a unit to the States.... Whatever one might take to be the application to these cases of the Equal Protection Clause if it stood alone, I am unable

> to understand the Court's utter disregard of the second section which expressly recognizes the States' power to deny "or in any way"abridge the right of their inhabitants to vote for "the members of the [State] legislature," and its express provision of a remedy for such denial or abridgement. [*Id.*, 377 U.S. at 594.]

Backing up his reading of the text, Justice Harlan carefully reviewed the legislative hearings, ratification process, and legislative apportionment history. He concluded that there was not a scintilla of evidence supporting the Reynolds majority's presumption that the equal protection guarantee either limited the powers of the States with respect to the voting franchise, or authorized Congress to intrude upon those powers, even if exercised to deny or abridge the right to vote on account of race or on any other ground. *See id.*, 377 U.S. at 595-611. Additionally, Justice Harlan noted that, if the equal protection guarantee prohibited the denial or abridgment of the right to vote on account of race, there would have been no need for either the Fifteenth or Nineteenth Amendment. *Id.*, 377 U.S. at 611-12. As Justice Harlan concluded: "[It] is inescapable that the Court has ... relegated the Fifteenth and the Nineteenth Amendments to the same limbo of constitutional anachronisms to which the second section of the Fourteenth Amendment has been assigned." *Id.*, 377 U.S. at 612.

The Reynolds Court paid no attention to Justice Harlan's protestations, disregarding the long-standing rule of construction that "[I]n expounding the Constitution ..., every word must have its due force

and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *See* Holmes v. Jennson, 39 U.S. (14 Peters) 540, 570-71 (1840). Instead of conforming its opinion to the written Constitution, as required by its very nature and purpose,[4] the Reynolds Court conformed the Constitution to the Court's political philosophy. Without reciting a single word in the constitutional text, the Court proclaimed:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. [Reynolds, 377 U.S. at 561-62.]

As the sole support for this statement, the Court cited Yick Wo v. Hopkins, 118 U.S. 356 (1886), a case involving a San Francisco city ordinance discriminating against Chinese laundries, as if the rule of equal protection laid down with respect to engaging in a business enterprise were applicable to the exercise of the voting franchise. But, as Yick Wo acknowledges, the equal protection guarantee applies to distinctions among "persons" — citizens and aliens alike — who are entitled "to the full and equal benefit of all laws and proceedings for the security of persons

---

[4] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-80 (1803).

and property ...." *Id.*, 118 U.S. at 369-70. In contrast, the Yick Wo Court observed that "the political franchise of voting is ... not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will ...." *Id.*, 118 U.S. at 370. Indeed, the right to vote is not even a privilege of United States citizenship protected from state abridgments by the Fourteenth Amendment. *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).

With respect to the right to vote, then, the Fourteenth Amendment equal protection guarantee does not even apply. That guarantee addresses only those rights that belong to "persons," as persons, not to "citizens," as citizens. Indeed, in each of the four Amendments to the United States Constitution limiting the power of the United States and the States respecting the right to vote, the beneficiaries of those limitations are identified as "citizens of the United States," not persons. Thus, a person who is not an American citizen may not make any claim of a constitutional right to vote under the Fifteenth, Nineteenth, Twenty-Fourth, or Twenty-Sixth Amendments.

To extend the Fourteenth Amendment's Equal Protection Clause to the right to vote disregards the fundamental difference between rights that belong to persons in America because they are citizens and rights that belong to persons because they are human beings. A citizen "means a person owing allegiance to the government, and entitled to protection from it." 2 J. Story, Commentaries on the Constitution, §1932, p. 685 (5th ed. 1891). While a citizen, qua citizen, does

not have a right to vote, a person must be at least a citizen to make any colorable constitutional claim to such a right.[5] *Id.* at 682 n.2. While States have discretion to extend the voting franchise to persons who are not citizens, such an extension would be based upon some evidence of political allegiance, such as a declaration of intent to become a citizen.[6] That is not so with regard to the equal protection of the laws, which is a right that extends to all persons regardless of one's political allegiance. *See* Oyama v. California, 332 U.S. 633, 647-79 (1948) (Black, J. Concurring) (land ownership). Thus, Congress had absolutely no authority under section 5 of the Fourteenth Amendment to enact the 2006 VRA, a law that benefits only those persons who are American citizens.

II. SECTIONS 4(B) AND 5 OF THE VRA OF 1965, AS AMENDED IN 2006, PUT ALABAMA ON AN UNEQUAL FOOTING, IN VIOLATION OF THE STATUTE ADMITTING ALABAMA TO THE UNION, AND THE TENTH AMENDMENT.

On December 14, 1819, the United States Congress admitted the State of Alabama into the union, "'on an

---

[5] Indeed, this Court has withheld from aliens the equal protection of those laws that exclude them from employment by state and local governments in positions that "involve[] discretionary decision making, or execution of policy, which substantially effects members of the political community." *See* Foley v. Connelie, 435 U.S. 291 (1978) (serving in state police force).

[6] *See* Minor v. Happersett, 88 U.S. at 177.

equal footing with the original States,"[7] "in all respects whatever."[8]

As this Court observed in a case involving the powers and prerogatives of the State of Oklahoma, upon that State's admission to the Union:

> On her admission she at once became entitled to and possessed of all rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them.... Equality of constitutional right and power is the condition of all the States in the Union, old and new. [Coyle v. Smith, 221 U.S. 559, 575 (1911).]

As this Court has "consistently recognized[,] the Constitution gives the States ... authority over the structuring of electoral systems." *See* Northwest Austin, 557 U.S. at 216 (Thomas, J., concurring and dissenting). Indeed, at the beginning, the original States had unfettered power over their own electoral systems. *See* 1 J. Story, Commentaries, §§ 583-86, pp. 433-37. Additionally, Article I, Section 2 keyed the qualification of electors to the United States House of Representatives to those "of the most numerous Branch of the State Legislature," subject only to the power of Congress under Article I, Section 4 to

---

[7] Resolution for Admission of Alabama into the Union, http://www.legislature.state.al.us/misc/history/constitutions/1819/1819resolution.html.

[8] Act for the Admission of Alabama, 3 Stat. 489, Section 1.

regulate the "times, places and manner" of such elections. Even with the adoption of the Seventeenth Amendment in 1913, providing for the popular election of Senators, the States retained the power to determine "the qualifications requisite for electors of the most numerous branch of the state legislatures."

To be sure, the States today do not have the same unlimited powers under the Constitution over their own electoral systems as did the original thirteen before the adoption and ratification of the Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments. However, even when coupled with this Court's mistaken precedents extending the Fourteenth Amendment equal protection guarantee to the electoral franchise,[9] the Constitution "assume[s] that the States [have] general supervisory power over state elections." *See* Oregon v. Mitchell, 400 U.S. 112, 125-26 (1970) (opinion, Black, J.). As Justice Black observed in the Oregon case striking down a federal measure extending the voting franchise to 18-year olds in state elections, "no function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices." *Id.*, 400 U.S. 112, 125 (1970). And, as

---

[9] The Fourteenth Amendment is omitted from this list because it was not originally designed to impose any restrictions upon the voting franchise, but rather only erroneously imposed by this Court, as demonstrated above. *See* Section I.D., *supra*.

Justice Thomas recently observed, while "state authority over local elections is not absolute"[10]:

> State autonomy with respect to the machinery of self-government defines the States as sovereign entities rather than mere provincial outposts subject to every dictate of a central governing authority. [*Id.*]

In light of this historic record of state sovereignty with respect to elections, it should come as no surprise that Section 4(b) of the VRA threatens "our historic tradition that all States enjoy 'equal sovereignty,'" Northwest Austin, 557 U.S. at 203. Under that section, certain States and political subdivisions have been singled out, requiring "preclearance from federal authorities in Washington, D.C. before [they] can change anything about [their] elections." *Id.*, 557 U.S. at 196. At a minimum, such "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id.*, 557 U.S. at 203.

In addition to the obvious failure of the VRA, as amended in 2006, "to account for current political conditions," having rested its coverage formula on data "that is now more than 35 years old" (*id.*), and the continuing requirement that any voting law change, no matter how insignificant and unrelated to racial

---

[10] Northwest Austin, 557 U.S. at 217.

discrimination, must be precleared,[11] there are additional reasons to conclude that VRA Section 4(b), as amended in 2006, does not meet the Boerne test of "congruence and proportionality"[12] and is, therefore, unconstitutional.

After an extensive discussion of the fundamental importance of adhering to the principle that each and every State is admitted to the union on an equal footing, the Court in Coyle v. Smith added this insight:

> [T]he constitutional equality of the States is **essential** to the **harmonious** operation of the scheme upon which the Republic was organized. When that **equality disappears** we may remain a free people, but the Union will **not** be the Union of the Constitution. [*Id.*, 221 U.S. at 580 (emphasis added).]

In the months and weeks leading up to the 2012 elections, efforts were made in several States to enact laws requiring voters to produce photo identifications. Encouraged by the Supreme Court's decision in Crawford v. Marion County, 553 U.S. 181 (2008), upholding the constitutionality of an Indiana law, the states of South Carolina and Texas enacted similar photo ID laws, only to find them blocked by the Attorney General. Because Indiana is not a covered jurisdiction under VRA, it was free to implement its photo ID law without preclearance from Washington,

---

[11] *See* Pet. Br., pp. 17-23 .

[12] *Id.*, 521 U.S. at 520.

D.C., but both South Carolina and Texas were required to undergo preclearance before their changes in the law could be implemented. *See* E. Connor, "S.C. sues feds for blocked voter ID law," *USA Today* (Feb. 8, 2012)[13]; S. Horwitz, "Eric Holder vows to aggressively challenge voter ID laws," *Washington Post* (Jul. 10, 2012).[14] *See also* Shelby County, 679 F.3d at 902 (Williams, J., dissenting).

As VRA-covered jurisdictions, not only must Texas and South Carolina initiate court review of the Attorney General's denial of preclearance, but both States must satisfy the burden of proving that their voter photo ID laws actually enhance the vote of minority groups, enabling their members' votes to be more effective, before they can be implemented. On the other hand, Indiana, a jurisdiction not covered by VRA, need take no action to obtain preclearance from the Attorney General or, if denied such preclearance, to file a court action in a three-judge District Court in Washington, D.C. Instead, the Indiana law could be challenged only by the initiation of a lawsuit by an aggrieved Indiana citizen or political party.

Yet, as dissenting Circuit Judge Williams pointed out in the court of appeals below:

---

[13] http://usatoday30.usatoday.com/news/washington/story/2012-02-07/south-carolina-voter-id/53001466/1.

[14] http://articles.washingtonpost.com/2012-07-10/politics/35486272_1_voter-id-laws-harm-hispanic-voters-new-voter

> Why should voter ID laws from South Carolina and Texas be judged by different criteria (at a minimum, a different burden of persuasion which is often critical ...) from those governing Indiana? A glimpse at the charts shows that Indiana ranks "worse," than South Carolina and Texas in registration and voting rates, as well as in black elected officials. [Shelby County, 679 F.3d at 902, Williams, J., dissenting.]

Under VRA, the Attorney General may presume that a covered state's voter picture ID law would dilute the minority vote by discouraging members of minority groups from voting. *See* "Holder vows to aggressively challenge voter ID laws," *supra.* However, the Supreme Court found the Indiana photo ID law was designed to "deter[] and detect[] voter fraud." Crawford, 553 U.S. at 191, 192-97. If the Government were truly concerned about "dilution" of the weight of a minority voter's vote, as it claims to be in defending the constitutionality of VRA, it ought to be equally concerned about the "dilution" of the weight of every qualified voter's vote that occurs when there is voter fraud. *See id.*, 553 U.S. at 196-97. By treating the two voting concerns unequally, VRA sends a divisive message that the covered jurisdictions are second-class States, not "equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *See* Coyle v. Smith, 221 U.S. at 567.

Lastly, proponents of new VRA Section 5 may not have fully thought through the real world consequences of the principle they are advancing.

Should this Court sanction the disparate treatment of the states established by this pre-clearance procedure, it would establish a precedent that could encourage Congress to rely on that authority to implement other types of voting reforms. For example, if Congress found evidence of voter fraud in specific urban areas,[15] it could enact a law by which federal uniformed officers would be stationed at polling places in those specific locales where prior offenses were believed to have existed to prevent voter fraud in federal, state, or local elections.

CONCLUSION

The decision of the court of appeals should be reversed.

---

[15] *See, e.g.*, "In 59 Philadelphia voting divisions, Mitt Romney got zero votes," Philly.com (Nov. 12, 2012), http://articles.philly.com/2012-11-13/news/35069785_1_romney-supporters-_mitt-romney-voter-id-law; B. York, "When 1,099 felons vote in [Minnesota Senate] race won by 312 ballots," The Examiner (Aug. 6, 2012), http://washingtonexaminer.com/york-when-1099-felons-vote-in-race-won-by-312-ballots/article/2504163; J. Farah, "Did Voter Fraud Swing the Election?" World Net Daily (Nov. 11, 2012), http://www.wnd.com/2012/11/did-voter-fraud-swing-election/; R. Alexander, "Obama Likely Won Re-Election Through Election Fraud," Townhall.com (Nov. 11, 2012), http://townhall.com/columnists/rachelalexander/2012/11/11/obama_likely_won_reelection_through_election_fraud/page/full/.

Respectfully submitted,

GARY G. KREEP
U.S. JUSTICE FOUNDATION
932 D Street
Suite 2
Ramona, CA 92065
(760) 788-6624

HERBERT W. TITUS *
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
Robert J. Olson
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

January 2, 2013

Attorneys for Amici Curiae
**Counsel of Record*