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 ALABAMA LEGISLATIVE BLACK CAUCUS AND ALABAMA ASSOCIATION OF BLACK COUNTY OFFICIALS, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

JAMES U. BLACKSHER
Counsel of Record
P.O. Box 636
Birmingham, Alabama 35201
(205) 591-7238
jblacksher@ns.sympatico.ca

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are organizations of African-American state and county elected officials, whose members are engaged in the day-to-day struggles to advance the interests of their constituents, particularly black Alabamians, in a social, political and legal environment that is still dominated by vestiges of official racial discrimination and still is governed by the 1901 Alabama Constitution that was adopted for the purpose of disfranchising black citizens and preserving white supremacy. Amici are certain that a decision by this Court ending Alabama's coverage under Section 5 of the Voting Rights Act would open the door for state laws that would suppress the right to vote of African Americans and Latinos and repeal the remedies black Alabamians obtained through federal litigation that provide them equal opportunities to elect members of their state, county and municipal governments. See James Blacksher, Edward Still et al., *Voting Rights in Alabama: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 249 (2008).

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the blanket consent letters from all parties, on file with this Court.

SUMMARY OF ARGUMENT

Amid the blizzard of factual and legal arguments justifying enactment of the 2006 extension of Sections 4 and 5 of the Voting Rights Act that are set out in the record before Congress and in the courts below, amici African-American elected officials in Alabama, wish to emphasize two important points:

(1) The 2006 Voting Rights Act was the first in history to be enacted with the participation of African-American members of Congress elected from all nine of the covered states in the South. The terms they helped negotiate involve the most fundamental right in American democracy, the right to vote, and their direct role in the Act's passage arguably came as close to inclusion of African Americans in an agreement of constitutional stature as has yet to occur in our history. For a nation founded on the institution of slavery, this grand compromise between the descendants of slaves and all other Americans is entitled to the greatest respect.

(2) There is a long history of decisions by this Court that disregarded the ability of the former Confederate states to suppress the votes of freedmen and their descendants. These decisions frustrated efforts of Congress to advance African Americans' rights to freedom and equality over the sovereignty claims of the Southern states. This dubious legacy should cause the Court to be especially cautious in overruling the judgment of Congress that the prophylactic measures in the 2006 Voting Rights Act are still

appropriate to enforce the Fourteenth and Fifteenth Amendment rights of African Americans. This Court is ill-equipped to assess the realities of continuing vestiges of *de jure* voting discrimination in Alabama and the rest of the South.

ARGUMENT

I. For the First Time in History, in 2006 African-American Representatives from All Nine Covered Southern States Participated in Passage of a Voting Rights Act, and the Product of Their Negotiations Is Entitled to Great Respect.

The coverage formula of Section 4(b) of the Voting Rights Act was designed as a proxy for the Southern states who had defended slavery, seceded from the Union, "redeemed" white state governments from the "black rule" of Reconstruction, mandated segregation of the races, disfranchised their black citizens, conducted all-white Democratic primary elections, and resisted federally ordered desegregation and enforcement of voting rights. *Shelby County v. Holder*, 811 F.Supp.2d 424, 432, 438 (D. D.C. 2011), aff'd, 679 F.3d 848, 855 (D.C. Cir. 2012) (The formula "served only as a proxy for identifying those 'jurisdictions that had a long, open, and notorious history of disenfranchising minority citizens and diluting their voting strength whenever they did manage to register and cast ballots.'") (citations omitted). The formula operated as intended to include all or parts of seven of the

eleven former Confederate States of America, including Alabama. Id. Two other former Confederate states, Texas and Florida, are covered by the language provisions of the 1975 Voting Rights Act.

For the first time in the history of the United States, African-American members of Congress elected from all nine covered Southern states participated in the negotiations leading to passage of a federal Voting Rights Act, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577.[2] The only African Americans elected to the House of Representatives from a covered Southern state when Congress previously extended Section 5 of the Voting Rights Act were Barbara Jordan of Texas and Andrew Young of Georgia in 1975 and Mickey Leland of Texas in 1982.[3] These circumstances show that anything approaching full participation by Southern blacks in our state and national legislatures is very recent history, not something that happened

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[2] Artur Davis, Alabama; Corrine Brown, Alcee Hastings, and Kendrick B. Meek, Florida; Sanford D. Bishop, Jr., John Lewis, Cynthia Ann McKinney, and David Scott, Georgia; William J. Jefferson, Louisiana; Bennie Thompson, Mississippi; G.K. Butterfield and Melvin L. Watt, North Carolina; James E. Clyburn, South Carolina; Al Green, Sheila Jackson Lee, and Eddie Bernice Johnson, Texas, and Robert C. Scott, Virginia. The one African-American Senator in 2006, Barack Obama, was from Illinois.

[3] In 1982, another African American, Harold Ford, represented Tennessee, one of the two former Confederate states not covered by Section 4(b).

in the distant past. They give unique, heightened weight to the argument that the issue in this appeal, whether in enacting the 2006 Voting Rights Act Congress properly exercised its express enforcement powers under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, has all the elements of the kind of political question this Court has said it should avoid deciding. Especially relevant here are a textually demonstrable constitutional commitment of the issue to Congress, a lack of judicially discoverable and manageable standards for resolving it, and an unusual need for unquestioning adherence to a political decision already made. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Speaking for African-American citizens of Alabama in particular, these amicus parties wish to emphasize the importance of giving due respect, at last, to the political voices of representatives sent to Congress by African Americans in the South.

The special significance of the role played by Congressional representatives of black Southerners in the passage of the 2006 Voting Rights Act is apparent when it is viewed in the light of three centuries of slavery and over a century of segregation, disfranchisement and the many other policies of state-sponsored white supremacy. It is not an exaggeration to say that this was the first time in the history of the United States when representatives of fully enfranchised descendants of North American slaves were not excluded, and actually sat at the table, when Congress took up legislation of such constitutional stature. The position they advanced successfully in

this national negotiation is that the vestiges of so many generations of official voting discrimination in the covered jurisdictions of the South have not been eliminated to the full extent practicable.

The government of Alabama opposed the 2006 extension of Section 5 of the Voting Rights Act and our state's continued inclusion in the 1965 coverage formula. It conceded, as it does in its amicus brief in this case, that "Alabama still grapples with race relations issues," but it argued that the effects of its racist past have "faded away," and that the issues of voting discrimination in Alabama "are the same kind of issues every State currently is endeavoring to solve." Alabama Amicus Brief at 1, 2. We and our representatives in Congress vigorously disagreed, pointing out that the culture of white supremacy does not die so easily.

Alabama still clings, for example, to racially discriminatory provisions in its white supremacist Constitution of 1901, as a federal court recently concluded. *Lynch v. Alabama*, ___ F.Supp.2d ___, CA No. 5:08-cv-00450-CLS (N.D. Ala., Nov. 7, 2011), slip op. at 775, appeal pending, Nos. 11-15464-BB & 11-15789 (11th Cir.). The Fourteenth and Fifteenth Amendments gave Congress the power to **eliminate** voting discrimination, not just to make conditions "somewhat better." The constitutional power that "We the People" gave Congress in 1868 and 1870 does not vanish just because the job is partly done. Absent the protection of Section 5 of the Voting Rights Act, we have no doubt that the efforts of majority-white state

and local governments to isolate and minimize the political influence of black Alabamians will advance rapidly and far outstrip our resources to combat them.

The point here is that black Southerners and the members of Congress they elected were able to convince the vast majority of other members of Congress that the need for the exercise of power granted Congress by Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment still outweighs the sovereignty objections of the Southern states that the Reconstruction Amendments were intended to overcome. Attempts by others to broaden Section 4(b) coverage to include jurisdictions elsewhere in the United States that have experienced voting discrimination failed. But our representatives successfully advocated for continued coverage of Alabama and other Southern states where voting discrimination against African Americans is most deeply rooted in our history and political culture. That legislative compromise is entitled to great respect.

II. The Historical Context of This Case Weighs Heavily in Favor of Rejecting Alabama's States' Rights Objections To Congress' Efforts To Defend African Americans' Right to Vote.

Section 5 of the Voting Rights Act is necessary because, throughout history, Southern states' claims of sovereignty have repeatedly stymied even the most minimal congressional efforts to protect the rights of

African Americans to freedom and equal rights. The story begins in 1810, nine years before Alabama became a state, when this Court affirmed an agreement between the slaveholding Jefferson Administration and the State of Georgia to extend slavery into the territory Georgia ceded to the United States that would become the states of Alabama and Mississippi. The question of Congress' power under Article IV, Section 3, of the Constitution either to extend or to prohibit slavery in territories belonging to the United States was a hotly contested political issue.[4] In *Fletcher v. Peck*, 10 U.S. 87 (1810), Chief Justice John Marshall affirmed *sub silentio* Congress' power **to extend** slavery into its territories. His reason for deferring to Congress' decision presaged the political question doctrine:

> The question whether the vacant lands within the United States became a joint property or belonged to the separate States was a momentous question which at one time threatened to shake the American Confederacy to its foundation. This important and dangerous contest has been compromised, and **the compromise is not now to be disturbed**.

10 U.S. at 142 (emphasis added). That compromise extended to the western territories ceded by Georgia all the rights and privileges of the 1787 Northwest

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[4] E.g., see Don E. Fehrenbacher, *The Slave Republic* 258-59 (2001); Sean Wilentz, *The Rise of American Democracy* 222-31 (2005).

Ordinance, "that article only excepted which forbids slavery." Articles of Cession and Agreement, April 24, 1802, *Territorial Papers*, V, 142-46. Five decades later, this Court struck down the Missouri Compromise and held that Congress lacked the power **to prohibit** slavery in its territories. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

Congress added the enforcement sections of the Fourteenth and Fifteenth Amendments directly in response to this Court's decision in *Dred Scott*.[5] But in the years following passage of the Reconstruction Amendments, this Court undermined much of Congress' efforts, reaffirming, notwithstanding Section 1 of the Fourteenth Amendment, *Dred Scott*'s holding that the power to determine the privileges, immunities, and civil rights of American citizens, including the right to vote, still belonged to the states. *Slaughter-House Cases*, 83 U.S. 36 (1873); *Minor v. Happersett*, 88 U.S. 162 (1874); *Civil Rights Cases*, 109 U.S. 3 (1883).

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[5] E.g., Robert J. Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 263 (2005) ("[T]he framers of the Fourteenth Amendment . . . understood the Fourteenth Amendment, at a minimum, as a delegation to Congress of the plenary power to define and enforce in the federal courts the substantive rights of U.S. citizens that they had just exercised in enacting the Civil Rights Act of 1866.") (cited in Alexander Tsesis, *Undermining Inalienable Rights: From Dred Scott to the Rehnquist Court*, 39 ARIZ. ST. L.J. 1179, 1235 (2007)).

At the turn of the twentieth century, this Court held that neither the Thirteenth Amendment nor the Fourteenth Amendment prohibited the states from segregating the races. *Plessy v. Ferguson*, 163 U.S. 537 (1896). Then, notwithstanding the Fourteenth and Fifteenth Amendments, it held there was no remedy in federal courts for African Americans who were disfranchised by the 1901 Alabama Constitution. *Giles v. Harris*, 189 U.S. 475 (1903).[6] Justice Holmes admonished blacks in Alabama and other Southern states: "Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States." 189 U.S. at 488.

Six decades later, the Voting Rights Act became the modern response to Justice Holmes' advice. African Americans finally obtained some relief from the political department of the United States, after many of them, including Representative John Lewis, were brutally beaten by Alabama police when they attempted to march across the Edmund Pettus Bridge in Selma. Enforcement of the Voting Rights Act of 1965 slowly led to the re-enfranchisement of Southern blacks and to the removal of many election structures that diluted their voting strength.

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[6] See also *Jones v. Montague*, 194 U.S. 147 (1904); *Giles v. Teasley*, 193 U.S. 146 (1904); *Williams v. Mississippi*, 170 U.S. 213 (1898); *Mills v. Green*, 159 U.S. 651 (1895).

This Court, however, slowed that progress by holding that Section 2 of the Voting Rights Act extended no rights beyond those prohibited by the Fifteenth Amendment, and that states were still free to retain old election schemes that denied black voters an equal opportunity to elect candidates of their choice, unless they could prove that the state laws were enacted for an invidious purpose. *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Congress countered *Bolden* by including in the 1982 Voting Rights Act a results standard for Section 2, 42 U.S.C. § 1973.

However, this Court narrowed the reach of Section 5, 42 U.S.C. § 1973c, by ruling that it did not prohibit Alabama from denying equal powers to officials who had been elected by African Americans. *Presley v. Etowah County*, 502 U.S. 491 (1992). The voting rights of black Etowah County citizens were not affected, this Court held, when white commissioners voted to give themselves continuing control over the road and bridge shops in their respective districts, while assigning Lawrence C. "Coach" Presley, the sole black commissioner, the duty of supervising the janitorial staff at the courthouse. However practices or procedures with respect to voting are defined, the Etowah County case illustrates the adverse treatment black voters in many Alabama jurisdictions can expect when Section 5 restraints on white-majority control are lifted altogether. E.g., see *Dillard v. Chilton County Comm'n*, 495 F.3d 1324 (11th Cir. 2007) (reversing, solely on grounds that the white challengers lacked standing, dissolution of a

consent decree providing election procedures that allow blacks an opportunity to elect a county commissioner of their choice).

Even this abbreviated review of the long history of decisions impacting voting rights in Alabama shows how this Court has too often disregarded the endurance and resiliency of white supremacy and its vestiges in our state. A decision by the Court in this case granting Alabama's request to strike down Section 5 of the Voting Rights Act and/or its coverage formula would once again elevate Alabama's claims of state sovereignty over Congress' efforts to enforce the constitutional rights of African Americans and would be more damaging to blacks' voting rights than any other decision since *Giles v. Harris*.

CONCLUSION

The complex question whether the descendants of American slaves are now full partners in constitutional democracy should be decided through political discourse between the representatives of African Americans and all other American citizens, not through judicial fiat. In the words of Chief Justice Marshall, "the compromise is not now to be disturbed." *Fletcher v. Peck*, 10 U.S. 87, 142 (1810). The judgment below should be affirmed.

Respectfully submitted,

JAMES U. BLACKSHER
P.O. Box 636
Birmingham, Alabama 35201
(205) 591-7238