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

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the "congruency and proportionality" test governs the standard of review for the constitutionality of remedial legislation enacted pursuant to both the Fourteenth and Fifteenth Amendments?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside and work in every State. MSLF and its members strongly believe that the Founders created a federal republic, in which the federal government is one of limited, enumerated powers, and that federalism and

[1] Pursuant to Supreme Court Rule 37.2(a), notice of MSLF's intent to file this amicus curiae brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this amicus curiae brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

separation of powers is at the heart of the U.S. Constitution. Since its creation in 1977, MSLF has been active in litigation opposing legislation in which the federal government acts beyond its constitutionally delegated powers, or in derogation of the principles of federalism and separation of powers.

Especially relevant to this case, MSLF has challenged the power of Congress to enact the 1982 Amendment to the constitutionality of Section 2 of the Voting Rights Act ("VRA"), arguing Congress had exceeded its powers, in three different cases: *United States v. Blaine County, Mont.*, 363 F.3d 897 (9th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005); *United States v. Alamosa County, Colo.*, 306 F. Supp. 2d 1016 (D. Colo. 2004); and *Large v. Fremont County, Wyo.*, 709 F. Supp. 2d 1176 (D. Wyo. 2010). Recently, MSLF also filed an amicus curiae brief with this Court supporting a challenge to the constitutionality of the 2006 Reauthorization of Section 5 of the Voting Rights Act in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009). MSLF also participated as an amicus curiae in the case below, *Shelby County, Ala. v. Holder*, 679 F.3d 848, 884 (D.C. Cir. 2012). MSLF brings a unique perspective to this case and believes that its amicus curiae brief will assist this Court in considering whether to grant the Petition.

STATEMENT OF THE CASE

Shelby County filed suit in the district court for the District of Columbia arguing that Congress exceeded its Fourteenth and Fifteenth Amendment remedial powers by reauthorizing Sections 4(b) and 5 of the Voting Rights Act (codified as 42 U.S.C. § 1973b(b) and 42 U.S.C. § 1973c, respectively) in the Voting Rights Act Reauthorization and Amendments Act, Pub. L. No. 109-246, 120 Stat. 577 (2006).[2] *Shelby County, Ala. v. Holder*, 811 F. Supp. 2d 424, 427 (D.D.C. 2011) "The Attorney General . . . argue[d] . . . that 'when Congress is legislatively enforcing the Fifteenth Amendment's prohibition on race discrimination with respect to voting, the Court reviews the appropriateness of that legislation under a deferential rationality standard,'" not congruency and proportionality, as announced in *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997). *Id.* at 448-49.

The district court rejected that argument: "*Boerne's* congruence and proportionality framework reflects a refined version of the same method of analysis utilized in *Katzenbach* (*State of S.C. v. Katzenbach*, 383 U.S. 301 (1966)), and hence provides the appropriate standard of review to assess *Shelby County*'s facial constitutional challenge to Section 5 and Section

[2] All references to "Section 5" are references to Section 5 of the Voting Rights Act.

4(b)." *Id.*[3] But the district court also erroneously held that Section 5 of the Voting Rights Act met the congruency and proportionality standard. *Id.* at 502-03. Shelby County appealed that holding to the D.C. Circuit.

The Attorney General renewed his argument on appeal: "The Attorney General insists that Congress may use 'any rational means' to enforce the Fifteenth Amendment (citing *Katzenbach*, 383 U.S. at 324)." *Shelby County*, 679 F.3d at 859.[4] The D.C. Circuit did

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[3] The government made the same argument successfully to a three-judge panel of the district court in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 573 F. Supp. 2d 221, 235-36 (D.D.C. 2008), *rev'd on other grounds by Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009). That court ruled that there are "two distinct standards for evaluating the constitutionality of laws enforcing the Civil War Amendments." That is, "notwithstanding the *City of Boerne* cases [under the Fourteenth Amendment], *Katzenbach*'s *rationality standard* remains fully applicable to constitutional challenges to legislation [under the Fifteenth Amendment] aimed at preventing racial discrimination in voting." *Nw. Austin*, 573 F. Supp. 2d at 235-36 (emphasis added).

[4] The Attorney General modified his argument at the D.C. Circuit in his principal brief. He conceded that "the terms 'enforce' and 'appropriate legislation' have the same meaning in the Fourteenth and Fifteenth Amendments." Brief of Appellee at 27, *Shelby County, Ala. v. Holder*, No. 11-626, Dkt. 1345212 (D.C. Cir. 2012). Then he argued that *Katzenbach*'s "rational basis review" applied to all legislation under the Fifteenth Amendment. *Id.* at 27. Finally, he tried to extend deferential review to the Fourteenth Amendment, insofar as it targeted race discrimination, by suggesting that *Boerne*'s congruence and proportionality test applied to Fourteenth Amendment legislation only when it targeted acts "outside the core prohibitions on race discrimination[.]" *Id.* at 27-28.

not answer this question and settle the conflict of opinions from the district court. Though noting that the Supreme Court, in *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009), sent a "powerful signal that congruence and proportionality is the appropriate standard of review," *id.*, it did not decide the issue: "[I]n any event, if section 5 survives the arguably more rigorous 'congruent and proportionality' standard, it would also survive *Katzenbach's* rationality review." *Id.* So the D.C. Circuit analyzed the case under congruency and proportionality, without deciding that it was required to do so, and held that Section 5 was congruent and proportionate legislation and, therefore, constitutional under both the "congruency and proportionality" standard and the "rational means" standard. *Id.* at 873. Petitioner then filed its Petition.

This background demonstrates the Attorney General's relentless determination to establish a deferential standard of review for remedial legislation under both the Fourteenth and Fifteenth Amendments that targets racial discrimination. The matter was not decided by the D.C. Circuit and it is very likely that the Attorney General will persist in arguing that *Katzenbach* and *Boerne* are inconsistent and that they establish very different standards of review for race discrimination remedies. Therefore, it is

imperative that this Court provide a definitive decision on the proper standard of review.[5]

REASON FOR GRANTING THE PETITION

This Court should grant the Petition not only for the reasons stated in the Petition, but also to firmly establish that there is only one standard of review for constitutional challenges to remedial enforcement legislation enacted pursuant to the Fourteenth and Fifteenth Amendments – congruency and proportionality. The Attorney General will likely continue to argue to the contrary. The proper standard of review for challenges to the constitutionality of remedial enforcement legislation pursuant to the Fourteenth and Fifteenth Amendments is an important national question that this Court has not expressly decided.

[5] MSLF agrees with Petitioners that the outcome of the challenge to the coverage formula under Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b), does not necessarily depend upon whether the "congruency and proportionality" standard of review is applied to Section 4(b). *See* Petition at 29-35.

I. THE CONGRUENCY AND PROPORTIONALITY STANDARD ENSURES THAT CONGRESS DOES NOT EXCEED ITS REMEDIAL POWERS CONFERRED BY THE FOURTEENTH AND FIFTEENTH AMENDMENTS.

The Fourteenth and Fifteenth Amendments are remedial and merely prohibit certain State conduct. Thus, "Congress's power under § 5 extends only to 'enforcing the provisions of the Fourteenth Amendment[, which] [t]his Court has described . . . as 'remedial.'" *Boerne*, 521 U.S. at 519 (quoting *Katzenbach*, 383 U.S. at 326). Congress "has been given the power 'to enforce' a constitutional right, not the power to determine what constitutes a constitutional violation." *Id.* That is, "if Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be the superior paramount law, unchangeable by ordinary means." *Id.* at 529.

Constitutional difficulty arises when Congress, in a purported attempt to prevent unconstitutional conduct, legislates regulating conduct that is facially *constitutional*, without requiring proof of discriminatory intent – so-called "prophylactic legislation" like Section 5. In such a case, the question arises as to whether Congress has enforced the constitutional prohibition set forth in the Amendment, or whether it has unconstitutionally substantively defined the Amendment. To address this, *Boerne* pronounced the congruency and proportionality standard of review:

> There must be a *congruence and proportionality* between the *injury to be prevented* or remedied and the *means adapted to that end.* Lacking such a connection, legislation may become substantive in operation and effect.

Id. at 519-20 (all emphasis added). In other words:

> While *preventive* rules are *sometimes* appropriate remedial measures, there must be congruence between the means used and the ends to be achieved. The *appropriateness of remedial measures must be considered in light of the [degree of] evil presented.* Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

Id. at 530 (all emphasis added).

This standard restrains Congress from unconstitutionally defining the substance of the Fourteenth and Fifteenth Amendments instead of enforcing them.

II. BOTH *KATZENBACH* AND *BOERNE* ESTABLISHED THE CONGRUENCY AND PROPORTIONALITY STANDARD OF REVIEW.

A. *Katzenbach* Ruled That What Is "Appropriate" And "Reasonable" Remedial Legislation Depends Upon The Nature Of The Constitutional Violation To Be Remedied And The Means Adopted To Do So.

In *Katzenbach*, this Court stated that "[a]s against the reserved powers of the States, Congress may use any *rational means* to effectuate the constitutional prohibition of racial discrimination in voting." *Katzenbach*, 383 U.S. at 324 (emphasis added). *Katzenbach* then cited *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), a case construing whether Congress had the substantive power, under the Necessary and Proper Clause of Article I, to establish a national bank:

> "Let the end be legitimate, let it be *within the scope of the constitution*, and all *means which are appropriate*, which are *adapted to that end*, which are *not prohibited*, but *consistent with the letter and spirit of the constitution*, are constitutional."

Id. (quoting *McCulloch*, 17 U.S. at 421) (all emphasis added).

Katzenbach also cited to *Ex Parte Virginia*, 100 U.S. (10 Otto) 339, 340, 344 (1879), which involved

enforcement of the Thirteenth and Fourteenth Amendments, and which prohibited judges from intentionally and discriminatorily disqualifying jurors on account of their race and providing penalties for doing so.[6] *Katzenbach*, 383 U.S. at 327. In *Katzenbach*, this Court observed that "the Court [in *Ex Parte Virginia*] . . . echoed [*McCulloch*'s] language in describing *each* of the Civil War Amendments." *Id.* at 327 (emphasis added). *Katzenbach* then observed that, with respect to all Civil War Amendments:

> "Whatever legislation is appropriate, that is adapted to carry out the objects the amendments have in view, . . . if not prohibited, is brought within the domain of Congressional power."

Id. (quoting *Ex Parte Virginia*, 100 U.S. at 345-46). Thus, *Ex Parte Virginia*, like *McCulloch*, required that enforcement of any of the Civil War Amendments must be "appropriate," "adapted to carry out the objects" of the constitutional prohibition it enforces, and not "prohibited" by other constitutional considerations.

The consistent lesson of *Katzenbach*, *McCulloch*, and *Ex Parte Virginia*, is that what is "rational," "appropriate," legislation, "not otherwise prohibited," depends upon the fit between the constitutional harm targeted and the means adopted to remedy it.

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[6] This was a direct prohibition and penalty, not a *prophylactic* statute.

B. *Katzenbach* Established A Congruency And Proportionality Standard Of Review Without Expressly So Stating.

The Attorney General seized upon the phrase "Congress may use any *rational means* to effectuate the constitutional prohibition of racial discrimination," *Katzenbach*, 383 U.S. at 324, to justify a "deferential standard" of review of Fifteenth Amendment enforcement legislation. *Shelby County*, 679 F.3d at 859 ("the attorney general insists that congress may use 'any rational means' to enforce the Fifteenth Amendment"). But the Attorney General ignored *Katzenbach*'s next sentence: "We turn now to a *more detailed description of the standards* which govern our review of the Act." *Katzenbach*, 383 U.S. at 324 (emphasis added).

This Court then detailed the egregious record of an unremitting, widespread pattern and practice of ingenious defiance of the Constitution, impervious to ordinary remedies, that it believed justified the extraordinary resort to Section 5 remedies. *Katzenbach* ruled that Section 5 was, *under those circumstances*, a "rational" response. *Id.* at 335 ("States covered by the Act resorted to the *extraordinary* stratagem of contriving new rules of various kinds for *the sole purpose* of perpetuating *voting discrimination* in the face of adverse federal court decrees.") (emphases added).

The "extraordinary stratagems" with which *Katzenbach* was confronted, and that were documented by Congress, consisted of widespread, persistent, intentionally discriminatory voting practices that prevented African-Americans from registering and voting, and which were not remediable by other, less drastic means. For example, more than half a dozen States "enacted tests . . . specifically designed to prevent [African-Americans] from voting." *Katzenbach*, 383 U.S. at 310. "At the same time, alternate tests were prescribed . . . to assure that white illiterates were not deprived of the franchise, [which] included grandfather clauses, property qualifications, 'good character' tests, and the requirement that registrants 'understand' or 'interpret' certain matters." *Id.* at 311. Worse still, these tests were discriminatorily administered; white voters were "given easy versions, . . . received extensive help from voting officials, and [were] registered despite serious errors in their answers," while African-Americans were "required to pass difficult versions . . . without any outside assistance and without the slightest error." *Id.* at 312.

Congress had originally addressed this pattern of intentional voting discrimination by passing laws to "facilitat[e] case-by-case litigation" and the Supreme Court responded by "striking down [unconstitutional] discriminatory voting tests and devices in case after case." *Id.* at 313. But widespread voting discrimination persisted. Thus, the Voting Rights Act of 1965, particularly Section 5, which targeted facially

constitutional practices, was enacted to defeat these efforts to intentionally nullify the Fifteenth Amendment that had "infected the electoral process in parts of our country for nearly a century." *Id.* at 308.

Therefore, *Katzenbach* concluded that, "*under the compulsion of these unique circumstances*, Congress responded in a permissibly decisive manner [in enacting Section 5]." *Id.* (emphasis added). *Katzenbach* held that the evidence before Congress – persistent, pervasive, and intransigent State action intentionally discriminating against African-Americans to prevent them from registering and voting, impervious to less drastic remedies – was sufficient to justify the extraordinary prophylactic exercise of remedial powers contained in Section 5:

> Two points emerge vividly from the voluminous legislative history. . . . First: Congress felt itself confronted by an *insidious and pervasive evil* which had been perpetuated in certain parts of our country through the *unremitting and ingenious defiance of the Constitution*. Second: Congress had concluded that the *unsuccessful remedies which it had prescribed in the past* would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

Id. at 309 (all emphases added). Far from employing the relaxed, deferential standard of review advocated by the Attorney General, *Katzenbach* recognized that Section 5 of the Voting Rights Act is "an *uncommon*

exercise of congressional power" and that only "*exceptional* conditions can justify legislative measures *not otherwise appropriate*." *Katzenbach*, 383 U.S. at 334-35 (emphasis added).

Thus, *Katzenbach* held that the extraordinary and uncommon exercise of congressional power engaged in by Congress in enacting Section 5's prophylactic provisions was "appropriate" and "rational" only because it was adopted to remedy a widespread pattern of insidious, pervasive, unremitting, and ingenious defiance of the Constitution to deny African-Americans the right to register and to vote, which had defied previous lesser remedies.

In fact, consistent with the Supreme Court's subsequent decision in *Boerne*, the remedy approved by *Katzenbach* was congruent and proportionate to the nature and scope of the unremitting defiance of the Constitution presented to Congress and that it sought to remedy as set out in *Boerne*. *Boerne*, 521 U.S. at 519-20, 524-26. Therefore, *Katzenbach*, without expressly so stating, applied the congruency and proportionality standard that this Court would later articulate more specifically in *Boerne*.

C. *Boerne* Adopted *Katzenbach*'s Fifteenth Amendment Analysis As The Model For Its Congruency And Proportionality Standard Of Review.

In *Boerne*, this Court, quoting *Katzenbach*, ruled that "'the constitutional propriety of [legislation

adopted under the Enforcement Clause] must be judged with reference to the historical experience it reflects.'" *Id.* at 525 (quoting *Katzenbach*, 383 U.S. at 308). Indeed, *Boerne* noted that *Katzenbach* approved the severe and intrusive remedies of Section 5 only because they were necessary to "'banish the blight of racial discrimination in voting which has infected the electoral process in parts of our country for nearly a century.'" *Id.* (quoting *Katzenbach*, 383 U.S. at 308). Referring to *Katzenbach*, this Court emphasized that "[t]he new *unprecedented remedies* were deemed necessary given the ineffectiveness of the existing voting rights law. . . ." *Id.* at 526 (emphasis added).

Far from announcing a new standard of review for exercising remedial, prophylactic enforcement powers under the Fourteenth Amendment, *Boerne* relied heavily on *Katzenbach* to demonstrate the constitutional predicate necessary for a congruent and proportionate prophylactic remedy under *all* the Civil War Amendments. In fact, *Boerne* cited *Katzenbach* no less than eleven times to support its congruence and proportionality standard of review. *Id.* at 518, 519, 524, 525, 526, 530, 533. In *Boerne*, this Court, echoing *Katzenbach*, ruled that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end." *Boerne*, 521 U.S. at 519. In other words, only congruent and proportionate remedial legislation is "rational" and "appropriate."

Therefore, it was only because Congress was confronted with egregious, widespread, pervasive, unconstitutional scheming to prevent African-Americans from registering or voting in spite of lesser remedies that *Katzenbach* ruled that Section 5's exceptional, prophylactic remedy was "appropriate" legislation that adopted a "rational means" of addressing those extraordinary discriminatory practices. Thus, Section 5 was, when adopted in 1965, congruent and proportionate to the extreme constitutional violations targeted by Congress.

CONCLUSION

For the reasons set out in the Petition, and for the reason elaborated here, this Court should grant the Petition.

Dated this 23rd day of August, 2012.

Respectfully submitted,

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