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 FOR PROJECT 21 AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Project 21, the National Leadership Network of Black Conservatives, is an initiative of The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil rights establishment. The National Center for Public Policy Research is a communications and research foundation supportive of the view that the principles of a free market, individual liberty and personal responsibility provide the greatest hope for meeting the challenges facing America in the 21st century. It is a Delaware 501(c)(3) corporation.

Project 21 participated as *amicus curiae* in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), *Bartlett* v. *Strickland*, 556 U.S. 1 (2009), and this Term's *Fisher* v. *University of Texas at Austin*, No. 11-345. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live and work.

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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

1. Regardless of the standard of review applied in this case, Section 5 is an improper exercise of Congress's enforcement power under either of the relevant Reconstruction Amendments. Petitioner and all judges below evaluated Section 5 using the "congruence and proportionality" standard from *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). While it seems likely this Court will apply that test in this case as well, some have suggested that a different test – based on *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and the Necessary and Proper Clause – should be applied.

Even under such an alternative standard, however, Congress does not have *carte blanche*, and must fashion its legislation in a manner that actually enforces, or carries into execution, the Reconstruction Amendments' underlying prohibitions against government denial or abridgment on account of race of the right to vote or government denial of equal protection of the laws. The test, first set out in *McCulloch* v. *Maryland* and applied in early Voting Rights Act cases, requires enforcing legislation to be directed towards a legitimate end, use "appropriate" means "plainly adapted to that end," and to be consistent with the letter and spirit of the Constitution. *McCulloch*, 17 U.S. (4 Wheat.) at 421. That test is not as lenient as some have suggested, particularly where, as here, the legislation at issue is conceded to be in significant conflict with other important constitutional provisions and principles. *See Northwest Austin Mun. Utility Dist. No. One* v. *Holder*, 557 U.S. 193, 202-03 (2009).

Even under an alternative test flowing from the Necessary and Proper Clause, therefore, the current extension and expansion of Section 5 fails for the same reasons it fails the *Boerne* test. The lack of meaningful evidence of current constitutional violations to be enforced against or remedied shows that Section 5 is no longer directed at the legitimate end of enforcing the relevant prohibitions against unconstitutional discrimination. Rather, it now serves primarily to foster alternative notions of racial proportionality in voting and electoral success not based on, and indeed in conflict with, the Constitution.

Similarly, the disconnect between the coverage formula for preclearance and the claimed evidence of discrimination that shows a lack of congruence under *Boerne* likewise shows that Section 5 is not "plainly adapted" to enforcing the Reconstruction Amendments. And finally, given that the urgency and severity of the problems that once justified the extraordinary remedy of preclearance no longer exist in our vastly improved current circumstances, the extraordinary constitutional burdens imposed by that Section can no longer be reconciled with the letter and the spirit of the Constitution.

2. In addition to failing either the *Boerne* or the *McCulloch* tests for enforcement legislation, the reauthorized Section 5 is invalid for the further reason that much of the so-called "second generation" examples of discrimination relied upon by defenders of the law are not examples of unconstitutional discrimination by the States at all – rather, they are reflections of federal racial stereotyping and institutionalized racial discrimination underlying distorted concepts of

vote dilution at the Department of Justice (DOJ) and in Congress itself. Because preclearance procedures have in fact moved beyond simply blocking intentional efforts to undermine minority voting and often demand affirmative efforts to maximize minority voting strength through concentration and segregation of minority voters, they have turned the very concept of racial discrimination on its head. That approach taints much of the claimed "evidence" of ongoing discrimination and taints the appropriateness of Section 5 as a means of enforcing prohibitions on the very type of discrimination that it now promotes.

a. Lacking sufficient examples of direct interference with the right to vote used to support earlier iterations of the Voting Rights Act, Congress, respondents, and the courts below instead rely on so-called second-generation discrimination that, while not blocking minority access to the ballot, is said to reduce the *weight* of minority votes. The evidence cited for such purported racial discrimination includes Section 2 suits and settlements, DOJ objections to preclearance applications and requests for further information regarding such applications, racial block voting, and the improved, but still less than proportional, numbers of minority office-holders, particularly at the state-wide level.

What such types of evidence have in common is *not* that they reflect greater racial discrimination by covered jurisdictions – the correlation with coverage is, in fact, poor – but rather that they reflect racially offensive stereotypes and policies applied by the DOJ itself. DOJ preclearance objections and information requests, for example, are largely related to redis-

tricting, and reflect efforts to *increase* minority segregation into majority-minority districts. That a covered jurisdiction *failed* to use race to segregate voters is not evidence of unconstitutional racial discrimination – it is its precise opposite. That covered jurisdictions may succumb to DOJ arm-twisting and accommodate DOJ's racial gerrymandering demands simply shows that Section 5 can be successfully abused, not that the initial application was unconstitutional. Other evidence claimed to show current discrimination likewise is tainted by the distorted policies and notions surrounding vote dilution, and the racially stereotyped assumptions underlying those policies. Notions of minority-preferred candidates and racial block voting – an apparent virtue for minority groups, but a vice for non-minorities – reflect racial stereotypes about both minority and non-minority voters that have no proper place in government policy, much less in legislation that is supposed to combat racially discriminatory conduct.

b. In addition to undermining (and in fact inverting) the rationality of much of the current evidence of "discrimination" used to support Section 5, the fact that Section 5 itself is the vehicle by which DOJ implements its racially discriminatory policies demonstrates that it is no longer "appropriate" legislation for enforcing prohibitions on government racial discrimination. That the federal government is now using its preclearance authority to compel, rather than combat, racial discrimination illustrates that the remedy exacts too high a cost, is inconsistent with both the letter and the spirit of the Constitution and

thus is not "appropriate" legislation to enforce or carry into execution the Reconstruction Amendments.

ARGUMENT

I. Section 5 Exceeds Congressional Authority Even Under Alternatives to the *Boerne* Test.

Both the majority and the dissent below applied the Fourteenth Amendment "congruence and proportionality" test from *Boerne*, 521 U.S. at 520, in evaluating whether Section 5 was a valid exercise of Congress's enforcement power under the Reconstruction Amendments. *See* Pet. App. 16a (majority below); Pet. App. 70a-71a (Williams, J., dissenting).[2] While this Court's opinion in *Northwest Austin*, 557 U.S. at 202 (2009), strongly suggests that is the standard this Court would apply here, some have suggested that a different, and supposedly more lenient, standard should apply.

The government, for example, has suggested a test allowing Congress to employ "any rational means of enforcement," citing *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966), and assuming an overly permissive reading of the Necessary and Proper Clause. *See* Pet. App. 16a (opinion below describing government's contention).

Justice Scalia also has suggested dissatisfaction with the *Boerne* test. *Tennessee v. Lane*, 541 U.S.

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[2] *Amicus* will assume, *arguendo*, that both the Fourteenth and Fifteenth Amendments are potentially available to support Section 5, without taking any position on the dispute over whether Section 5 must be justified by the Fifteenth Amendment alone.

509, 557-65 (2004) (Scalia, J., dissenting). Concluding that this Court has given too expansive a meaning to the term "enforce" in the Fourteenth Amendment, he would generally apply a much narrower scope to that word and hence to Congress's enforcement authority. *Id.* at 558-59. But within that narrowed scope, he would apply the Necessary and Proper Clause standard from *McCulloch* rather than the more malleable congruence and proportionality test from *Boerne*. *Id.* at 565. For enforcement against unconstitutional *racial* discrimination, however, Justice Scalia would accept existing precedent allowing Congress somewhat greater leeway in enforcing the central purposes of the Reconstruction Amendments, with some qualifications:

> Thus, principally for reasons of *stare decisis,* I shall henceforth apply the permissive *McCulloch* standard to congressional measures designed to remedy racial discrimination by the States. I would not, however, abandon the requirement that Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations. [Citations and footnote omitted.] I would also adhere to the requirement that the prophylactic remedy predicated upon such state violations must be directed against the States or state actors rather than the public at large. [Citation omitted.] And I would not, of course, permit any congressional measures that violate other provisions of the Constitution. When those requirements have been met, however, I

> shall leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States.

Id. at 564.

In *amicus*'s view, even assuming application of a test derived from *McCulloch*, Section 5 still fails to constitute a valid exercise of Congress's enforcement power under either of the relevant Reconstruction Amendments. *Cf. Northwest Austin*, 557 U.S. at 204 ("The Act's preclearance requirements and its coverage formula raise serious constitutional questions under either test.")

A. The Necessary and Proper Clause Is Not a Blank Check for Claimed Exercises of Congressional Enforcement Authority.

Although the government and Justice Scalia suggest that the *McCulloch* standard under the Necessary and Proper Clause may be more lenient than the *Boerne* standard in some respects, *McCulloch* and its progeny in fact impose genuine restraints on Congress's power. The test in *McCulloch*, though flexible, requires at least that Congress's ends be legitimate, its means be "appropriate" and "plainly adapted" to those ends, and its actions comport with the letter and the spirit of the Constitution.

The Necessary and Proper Clause gives Congress authority to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Art I, sec. 8, cl. 18. To qualify under this grant of authority, a law must not merely be needful

or desirable; it must also have as its function "carrying into Execution" the enumerated power being applied. *See McCulloch*, 17 U.S. (4 Wheat.) at 412.

Here, Congress's enumerated power is the "power to enforce" the Fourteenth and Fifteenth Amendments "by appropriate legislation." U.S. CONST., AMEND. XIV, sec. 5 and AMEND. XV, sec. 2. As a practical matter, "enforc[ing]" the prohibitions of the Fourteenth and Fifteenth Amendments is the same as "carrying into Execution" those prohibitions, and hence the two related powers collapse into the same essential inquiry under *McCulloch*. *Cf. Tennessee* v. *Lane*, 541 U.S. at 559 ("The 1860 edition of Noah Webster's American Dictionary of the English Language, current when the Fourteenth Amendment was adopted, defined 'enforce' as: 'To put in execution; to cause to take effect; as, to *enforce* the laws.' *Id.,* at 396. *See also* J. Worcester, DICTIONARY OF THE ENGLISH LANGUAGE 484 (1860) ('To put in force; to cause to be applied or executed; as, "To *enforce* a law" ').").

The most essential limitation under the *McCulloch* test, therefore, is that Congress's legislation must be directed at implementing or giving effect to the Fifteenth Amendment's prohibition against "deni[al] or abridge[ment] by the United States or by any State on account of race" of the "right of citizens of the United States to vote," and the Fourteenth Amendment's prohibition against any State "deny[ing] to any person within its jurisdiction the equal protection of the laws."

> To carry a law or power into execution in its most basic sense means to provide enforce-

> ment machinery, prescribe penalties, authorize the hiring of employees, appropriate funds, and so forth to effectuate that law or power. It does *not* mean to regulate unenumerated subject areas to make the exercise of enumerated powers more efficient.[]"

Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 331 (1993) (emphasis in original; footnote omitted).

In *McCulloch*, Chief Justice Marshall set out the language that has become the accepted test under the Necessary and Proper Clause:

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

17 U.S. (4 Wheat.) at 421 (footnote omitted).[3]

Chief Justice Marshall himself later explained how actions designed merely to make an exercise of power more effective, or to accomplish a goal without undue burden, would not constitute a means of executing a given power. Concerning whether Congress could preempt state taxes in order to increase its ability to collect its own taxes without unduly burdening the populace, Marshall explained:

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[3] The "end" to which Chief Justice Marshall was referring in the above passage was, of course, the *exercise* of an enumerated power, not the policy goal of Congress.

> Now I deny that a law prohibiting the state legislatures from imposing a land tax would be an "appropriate" means, *or any means whatever*, to be employed in collecting the tax of the United States. It is not an instrument to be so employed. It is not a means "plainly adapted," or conducive to[,]" the end.

A Friend to the Union, *reprinted in John Marshall's Defense of McCulloch v. Maryland* 78, 100 (Gerald Gunther ed., 1969) (emphasis added); *see also United States* v. *DeWitt*, 76 U.S. 41, 44 (1869) (rejecting a ban on intrastate sales of certain products unsuccessfully justified as a means to increase demand for other products subject to federal taxation and thereby "aid and support" and make more "effective" the "power of laying and collecting taxes").

Distilling the essence of *McCulloch* as illustrated by the above, legislation will be necessary and proper for enforcing the Fourteenth and Fifteenth Amendments if it is:

- Directed at the "legitimate" end of implementing the prohibitions contained in those Amendments;
- Involves "appropriate" means "plainly adapted to that end";
- Those means "are not prohibited, but consistent with the letter and spirit of the constitution."

And, for these purposes, implementing the relevant prohibitions requires something more direct and immediate than merely "aiding and supporting" them or making them more "effective" through some indirect

means unrelated to remedying past constitutional violations or precluding future constitutional violations. *Tennessee* v. *Lane*, 541 U.S. at 564 (Scalia, J., dissenting) (prophylactic § 5 legislation can be imposed "only upon those particular States in which there has been an identified history of relevant constitutional violations").

Furthermore, in terms of defining the power being carried into execution for purposes of the *McCulloch* test – *i.e.*, the legitimate "end" – it would be well to keep in mind Justice Scalia's recognition that the enforcement power has already exceeded credible textual boundaries and thus should not be *expanded* beyond the bounds of previous precedent. *Tennessee* v. *Lane*, 541 U.S. at 558-59 (Scalia, J., dissenting). While *stare decisis* may be grounds for declining to retract past holdings, it is no justification for extending them to changed circumstances or more intrusive legislation, such as the 2006 revision of Section 5. *Cf. General Motors Corp.* v. *Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring) (" 'negative' Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain"; will apply *stare decisis* only "(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is *indistinguishable* from a type of law previously held unconstitutional by this Court") (emphasis added).

In addition to declining to extend past precedent beyond the unique and extreme circumstances from which they arose, Justice Scalia's accepted limits on "prophylactic" enforcement legislation, even in the racial context, are important tools for keeping Con-

gressional authority within their otherwise strained constitutional bounds. Thus, prophylactic measures such as Section 5 must be limited to "particular States in which there has been an identified history of relevant constitutional violations" and must be directed at States themselves, not at the public at large. *Tennessee* v. *Lane*, 541 U.S. at 564 (Scalia, J., dissenting).

B. Section 5 Fails to Carry into Execution Congress's Power to Enforce the Fifteenth Amendment.

Given the above description and limitations on Congress's enforcement power even under the *McCulloch* test, the same evidence and arguments raised by Petitioner to show that Section 5 is not a congruent and proportional remedy to any claimed constitutional violations likewise demonstrate that it is neither appropriate nor plainly adapted to enforcing the prohibitions of the Fourteenth and Fifteenth Amendments, and is not consistent with the letter and spirit of the Constitution.

For example, Petitioner cites ample evidence that the "unique circumstances" and extreme need for prophylactic legislation that existed in 1965, *Katzenbach*, 383 U.S. at 335, have long since passed. Pet. Br. at 9-10, 19-20, 23-33. This Court itself has recognized the dramatic change in circumstances from 1965 to today: "Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Northwest Austin*, 557 U.S. at 202. Each of these

new circumstances now place even covered jurisdictions well ahead of where non-covered jurisdictions were in 1965, and provide an ongoing political check against backsliding. The urgent necessity for extreme measures such as preclearance is thus well in the past, and such legislation is no longer appropriate even under the *McCulloch* standard. While "exceptional conditions can justify legislative measures not otherwise appropriate," *Katzenbach*, 383 U.S. at 334, when conditions cease to be exceptional, those same legislative measures cease to be appropriate.

Similarly, the coverage formula, while once plainly adapted to identifying affirmative barriers to voting, now is not even remotely adapted to that purpose. It is undisputed that first-generation barriers to voting are effectively eliminated, and the bulk of the claimed discrimination involves the alleged dilution of votes that are being cast. Pet. App. 22a-24a, 26a-27a. But such claimed dilution is not even remotely reflected in metrics such as voter registration and turnout, and consequently a remedy premised on low turnout – as measured by decades-old data – cannot be described as plainly adapted to implementing a prohibition on alleged discrimination having no relationship whatsoever to the metric. Indeed, to the extent there is a "correlation between inclusion in § 4(b)'s coverage formula and low black registration or turnout * * * [it] appears to be negative." Pet. App. 83a (Williams, J., dissenting); *see also id.* at 93a ("the covered jurisdictions appear indistinguishable from their covered peers.").

That covered jurisdictions now largely indistinguishable from uncovered peers are nonetheless the

target for intrusive federal supervision is simply irrational and, given the absence of "relevant constitutional violations," such prophylactic legislation is not plainly adapted to enforcing the Reconstruction Amendments and cannot be held to satisfy even a standard based on *McCulloch*. *Lane*, 541 U.S. at 564 (Scalia, J., dissenting); *cf. National Fed. Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2647 (2012) (Scalia, Kennedy, Thomas, Alito, JJ., dissenting) (concluding that insurance coverage mandate was not "necessary" to effectuate insurance-market reforms).

Regardless of the test applied, therefore, the evidence and arguments raised by Petitioner and the dissent below are more than sufficient to demonstrate that Section 5 is no longer a valid exercise of Congress's enforcement power.

II. Highly Suspect Notions of Second-Generation Discrimination Provide Poor and Often Perverse Support for Claims of Unconstitutional Conduct Said to Justify the Extreme Remedy of Preclearance.

In addition to the many other failings of the record claimed to support the extension of Section 5, Congress's critical reliance on so-called second-generation barriers to voting is particularly troublesome in that the evidence of such supposed discrimination is largely composed of claims of vote dilution asserted by the Department of Justice in the context of redistricting. Pet. App. 99a (Williams, J., dissenting) (majority of Section 5 objections concern redistricting); Pet. App. 26a-28a (majority opinion below considering evidence of vote dilution claims and objections); Pet. Br. at 32

("most of this scattered evidence relates to vote dilution"); Given the criteria applied by DOJ in order to find vote-dilution, and the overtly race-based remedies required by DOJ, such claims in fact offer little to no evidence of unconstitutional racial discrimination by the covered jurisdictions. Rather, they illustrate how Section 5 itself is now a central tool for institutionalized racial discrimination at the command of the DOJ itself.[4]

A. Vote Dilution Objections, Inquiries, and Related Matters Are Not Evidence of Unconstitutional Discrimination.

As the courts below recognized, Congress based its reauthorization on evidence of so-called "second-generation barriers" quite different from the direct voting discrimination that supported the original enactment of Section 5. *See* Pub. L. No. 109-246, § 2(b)(4), 120 Stat. 577, 577-78 (2006). Much of this evidence concerns "racially polarized voting" (*i.e.*, "block voting"), *see* H.R. REP. NO. 109-478 (2006), at 34-35, and the remainder consists of Section 2 vote dilution litigation. Pet. App. 26a-29a, 36a-38a.

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[4] Contrary to the court of appeals' suggestion that these issues are not properly in this case, Pet. App. 66a-67a, they go squarely to whether Congress has produced evidence of unconstitutional discrimination needing extraordinary remedy. The DOJ's demands, in the preclearance process, that covered jurisdictions actually engage in affirmative racial discrimination to create segregated voting districts likewise goes to the "appropriateness" of the means chosen to remedy or prevent any alleged constitutional violations by the covered jurisdictions. Pet. App. 77a (Williams, J., dissenting)

In particular, the evidence considered by the courts below included, *inter alia*, "Attorney General objections issued to block proposed voting changes," "more information requests" issued by the Attorney General in response to preclearance applications, and lawsuits brought under Section 2 of the Act. Pet. App. 24a (court of appeals opinion). The district court also considered evidence regarding, inter alia, voter turnout, electoral success, and racially polarized voting Pet. App. 11a-12a (court of appeals describing district court evidence).

As Petitioner has noted, preclearance objections, denials, and information requests are poor proxies for actual evidence of unconstitutional discrimination needing a remedy. Pet. Br. at 30. And, as Justice Thomas has noted, "second generation" evidence "bears no resemblance to the record initially supporting §5, and is plainly insufficient to sustain such an extraordinary remedy." *Northwest Austin*, 557 U.S. at 228 (Thomas, J.).

Aside from the inadequacy of such evidence, however, the fact that much of it involves a distorted notion of vote dilution also means that it is conceptually flawed. If DOJ's notion of vote dilution does not reasonably reflect unconstitutional racial discrimination, then no number of objections, information requests, suits or settlements will establish a sufficient record of constitutional violations to support Section 5. Indeed, the very foundation of modern vote dilution claims is no longer that some change is retrogressive – taking away voting power that already exists – but rather that voting changes are insufficiently progressive and fail to give minority groups *greater* voting

strength through concentration in majority-minority districts. The racial stereotypes and assumptions underlying such theories regarding what voting strength different racial groups ought to have, what candidates racial groups prefer, and what constitutes race-based electoral success on the one hand or improper block voting on the other are all deeply offensive and undermine claims of discrimination by covered jurisdictions based on their failure to toe the line of DOJ's stereotypes, assumptions, and resulting preclearance policies.

The problems with vote dilution claims and remedies imposed under Section 5 have been noted often. Judge Williams below, for example, cited the "racial gerrymandering" that results from such efforts, which " 'bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible stereotypes.' " Pet App. 109a (Williams, J., dissenting) (quoting *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993)).

That much of the evidence of supposed constitutional violations relies on the DOJ's application of precisely such stereotypes and racial assumptions when choosing to object to a voting procedure, seek more information, or support a Section 2 suit casts considerable doubt on the validity of such "evidence" as being probative of any actual constitutional violations by covered jurisdictions. Unlike the direct de-

nials of the right to vote that originally motivated Section 5, claiming a denial of the right to vote based on supposedly insufficient voting strength and a lack of supposedly proper voting outcomes is freighted with assumptions regarding the "proper" or non-discriminatory *outcome* of elections, the proper distribution of votes, and stereotypes as to which candidates minority voters prefer. Such discrimination claims also lump minority voters into a group rather than treating them as individuals, fail to recognize differences among minority groups, and apply equally offensive stereotypes to the voters of the majority race. In short, it is hard to imagine how one would claim to find racial discrimination in this context without engaging in precisely the same discrimination in the process and in the remedy.

Given that the premises of modern vote dilution claims virtually require the types of racial stereotyping and discrimination that it is claiming to combat, DOJ's application of such stereotypes and premises is intrinsically flawed as evidence of discrimination by others. Section 2 suits and settlements designed to force an increase in majority-minority districts – without any showing of retrogression – cannot seriously be considered probative of *existing* discrimination. Forcing a covered jurisdiction to create additional racially concentrated voting districts may be a "success" to the DOJ, but it is more correctly characterized as a failure from the perspective of combating racial discrimination.

DOJ objections and information requests are likewise tainted by the DOJ's flawed notion that the failure to segregate and concentrate minority voters con-

stitutes discrimination. Past objections in pursuit of DOJ's own discriminatory "'black-maximization' policy," *Miller* v. *Johnson*, 515 U.S. 900, 921 (1995), are evidence only of discrimination by the DOJ itself, not of discrimination by the covered jurisdiction seeking preclearance. The notion that preclearance could be denied because a jurisdiction only created two, rather than three, segregated districts to increase minority voting strength shows that such objections are better characterized as demands for unconstitutional discrimination rather than objections to discrimination. *Id.* at 924 ("The key to the Government's position, which is plain from its objection letters if not from its briefs to this court * * * , is and always has been that Georgia failed to proffer a nondiscriminatory purpose for its refusal in the first two submissions to take the steps necessary to create [an additional] majority-minority district.").

That this Court has previously relied on DOJ objections and other such matters in assessing the need for Section 5 is no justification for continuing to do so now, given the changed nature of such objections. In the early years of Section 5, objections more often involved direct, first-generation, examples of discrimination and vote denial, and even intentionally discriminatory affirmative dilution of existing voting strength, not the dubious failure to turn the tables to the DOJ's liking. That an objection raised to a restrictive test for voting is probative of discrimination is one thing – that a complaint that covered jurisdictions failed to discriminate in the manner DOJ demands is quite another matter and is no longer mean-

ingfully probative of any constitutional violations by the covered jurisdictions.

Finally, the implementation of DOJ's vote dilution agenda also undermines, or at least casts in a different light, more traditional evidence thought to show racial discrimination. Racially polarized voting, for example, was cited by Congress as the "clearest and strongest evidence" of the need to reauthorize Section 5, H.R. REPORT NO. 109-478, at 34; VRARAA, §2(b)(3), 120 STAT. at 577. Aside from the fact that such voting is not government action, and hence not a constitutional violation, *see* Pet. Br. at 31, DOJ's vote-dilution views and conduct actually treat block voting somewhat schizophrenically. Block voting by minority groups, for example, is effectively favored and encouraged, and if successful would be taken as evidence that discrimination has been *defeated*. After all, that would seem to be the entire purpose of majority-minority districts: allowing minority voters to racially block vote in order to obtain a "successful" and, in DOJ's view, non-discriminatory outcome of electing a minority office-holder. That the identical conduct by non-minority voters is deemed evidence of unconstitutional discrimination requiring Congressional remedy shows the contradictions in very premises of the evidence cited.[5]

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[5] Furthermore, the fact that DOJ's objections and compulsion of more majority-minority districts in fact creates the conditions for and encourages racially polarized voting means that the supposed remedy simply manufactures the very evidence used to justify its extension. Section 5 as it now stands is effectively self-perpetuating if such evidence is sufficient to sustain it.

The prevalence of minority office-holders likewise takes on a different relevance when viewed in light of the stereotypes underlying current vote dilution arguments. To deem insufficient minority office-holders as evidence of discrimination requires racially stereotyped assumptions about what minority voters as a group "prefer," how many office-holders is the correct amount, and whether there needs to be proportional representation in order to demonstrate non-discrimination. Such assumptions and arguments are reminiscent of the debate over quotas in the context of affirmative action, and are offensive for much the same reasons. Looking at electoral *outcomes* rather than electoral opportunity is simply the wrong metric and one that promotes the very discrimination the Constitution seeks to eliminate.

Furthermore, there is reason to believe that the DOJ's own policies may well account for the difficulty faced by minority office-holders seeking state-wide office. If

> one thinks there has been a shortfall in the covered states, it might be caused in part by the Justice Department's policy of maximizing majority-minority districts, with the concomitant risks of "isolating minority voters from the rest of the State" and "narrowing [their] political influence to only a fraction of political districts." *Georgia v. Ashcroft*, 539 U.S. 461, 481, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003). If African-American candidates primarily face solidly African-American constituencies, and thus develop political personas pitched overwhelmingly to the Democratic side of the aisle,

> it would hardly be surprising that they might face special obstacles seeking statewide office (assuming, of course, racially-polarized voting, as § 5 does).

Pet. App. 86a (Williams, J., dissenting).

The flaws in identifying supposed unconstitutional discrimination through the lens of the DOJ's vote-dilution policies are pervasive and infect much of the evidence cited by Congress and the Courts below. Those flaws, however are conceptual, not merely matters of weight or credibility. DOJ is looking at the wrong thing and inverting the very notion of discrimination such that many of its objections very nearly mean the opposite of what the courts below have taken them to mean. Such Orwellian "proof" of discrimination cannot be sufficient to support the constitutionally extreme Section 5 remedy.

B. Federal Use of Section 5 to Compel Race-Based Redistricting Demonstrates that Section 5 Is Perversely Inappropriate to Enforce Prohibitions Against Racial Discrimination.

In addition to undermining the evidence relied upon below, DOJ's use of Section 5 to compel racial discrimination and voting segregation also shows that the supposed remedy is a severely inappropriate means of enforcing a prohibition against such discrimination, and is in conflict with the letter and spirit of the Constitution.

As this Court has often noted, the right to Equal Protection vests solely in the individual, not in a group. *See, e.g., Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948). And government use of race is always "sus-

pect" and should be viewed with "hostility." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227 (1995).

Section 5 preclearance now focuses predominately on imposing racial classifications rather than eliminating them, as this Court has recognized. Preclearance in the redistricting context now effectively requires such jurisdictions to segregate voters by race in order to concentrate minority votes and supposedly increase the weight of such votes. *See Northwest Austin*, 557 U.S. at 203 (noting preclearance requirements of using race in redistricting in a manner that would be unconstitutional in other jurisdictions); *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring) (application of Section 5 has rendered race "the predominant factor in redistricting"; "[C]onsiderations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5."); *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (Section 5 preclearance required, in effect, that minority voters be lumped together with other persons with whom they "may have little in common * * * but the color of their skin"; such redistricting perpetuates and enforces "impermissible stereotypes" and "bears an uncomfortable resemblance to political apartheid.").

While this Court has delicately suggested that Section 5 is thus in "tension with the Fourteenth Amendment" to the extent that it was used as a "command that States engage in presumptively unconstitutional race-based districting," *Miller*, 515 U.S. at 927, the reality is that it is more than "in tension" with the prohibitions against racial discrimination, it is in flagrant violation of those prohibitions.

Congress's 2006 amendments to Section 5 have ensured that this conflict continues. Under the amended Section 5, covered jurisdictions must prove that any change will not "diminish[ ] the ability" of minorities "to elect their preferred candidates of choice," 42 U.S.C. §§ 1973c(b),(d), and is not premised on a "discriminatory purpose" of declining to adopt other changes that would have strengthened minority voting power, § 1973c(c). As Judge Williams recognized in dissent below, that revised language means that "[p]reclearance now has an exclusive focus – whether the plan diminishes the ability of minorities (always assumed to be a monolith) to 'elect their preferred candidates of choice,' irrespective of whether policymakers (including minority ones) decide that a group's long-term interests might be better served by less concentration – and thus less of the political isolation that concentration spawns." Pet. App. 75a (Williams, J., dissenting); *see also id.* at 76a ("Congress appears to have * * * restored 'the Justice Department's implicit command that States engage in presumptively unconstitutional race-based districting.' " (quoting *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000) ("*Bossier II*")).

That Section 5 has become a tool for requiring racial classifications and race-based redistricting illustrates how far this remedy has fallen from the more noble purposes that animated it in 1965. This Court has just considered the inappropriate classifications of persons based on their race in the context of college admissions, and should keep in the forefront of its considerations here the extreme offensiveness of such classifications.

"Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw* v. *Reno,* 509 U.S. at 643 (quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)). As this Court repeatedly has warned in various contexts, such classifications "carry a danger of stigmatic harm," may "promote notions of racial inferiority," and threaten "to incite racial hostility." *City of Richmond* v. *J.A.Croson Co.*, 488 U.S. 469, 493 (1989); *Shaw*, 509 U.S. at 643. Political gerrymandering of the electorate based on race also highlights the improper treatment of minority voters as fungible members of their racial group, rather than as individuals: "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities." *Rice* v. *Cayetano,* 528 U.S. 495, 517 (2000).

Any claim that such racial segregation helps minority voters by increasing the weight or strength of their votes as a group carries no constitutional weight – at least no favorable weight. Rather, it highlights the group-stereotyping that is much of what is offensive about racial discrimination. Furthermore, there is no equal protection exception for the "good motives" of a government actor and there are no "benign" racial classifications. *Adarand*, 515 U.S. at 226. Throughout history proponents of racial classifications routinely justified their restrictions with appeals to the public good and claims of the great benefits from or necessity for racial classifications.

In *Brown* v. *Board of Education,* 347 U.S. 483 (1964), this Court properly rejected arguments by state officials from Kansas, Delaware, Virginia, and South Carolina that black and white children learned better in a single-race environment, and for societal purposes could be kept separate by state mandate.

Similar claims of public interest and necessity were used by the military to justify Japanese internment during World War II, and racial segregation of the armed forces. *Korematsu* v. *United States*, 323 U.S. 214 (1944); *see Watkins* v. *United States Army*, 875 F.2d 699, 729 (CA9 1989) (Norris, J., concurring in the judgment) ("As recently as World War II both the Army chief of staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to maintain efficiency, discipline, and morale."), *cert. denied*, 498 U.S. 957 (1990). Those claims, too, proved overblown, unsupported, and inadequate to justify the racial policies of their day. *Hirabayashi* v. *United States*, 828 F.2d 591 (CA9 1987); *See Korematsu* v. *United States,* 584 F. Supp. 1406, 1416, 1420 (N.D. Cal. 1984).

This Court should recoil at the very notion of approving government authority perversely used to manufacture racially segregated majority-minority voting districts under the false flag of enforcing prohibitions on such discrimination. Substitute "schools" or "neighborhoods" for "voting districts," and there would be no question that government-manufactured segregation of minorities constituted racial discrimination of the worst sort. But in the Orwellian universe of the DOJ and Section 5, the *failure* to engage in such racial segregation is now evidence of "discrim-

ination," and coerced racial segregation for voting purposes is now the supposed remedy. Whatever the supposed benefits, virtues, or aesthetics of segregated voting districts, they no more validate such overt and express racial discrimination than did past defenses of government mandated racial segregation in schools or elsewhere. Separate-but-politically-desirable is no more compelling an argument than was separate-but-equal.

In the end, Section 5 is now less a means of preventing unconstitutional racial discrimination and more a mechanism for causing it. As such, it is now the precise antithesis of legislation "appropriate" to enforce the Reconstruction Amendments, it is not a "proper" means of executing Congress's enforcement power, and it is not consistent with the letter and spirit of the Constitution. The current reauthorization of Section 5 thus is not a valid exercise of Congress's enforcement power and should be invalidated.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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