No. 11-5256

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHELBY COUNTY, ALABAMA

Plaintiff-Appellant,

v.

ERIC H. HOLDER, JR. in his official capacity
as Attorney General of the United States, *et al*.,

Defendants-Appellees,

and

EARL CUNNINGHAM, *et al*., BOBBY PIERSON, *et al*.,
and BOBBY LEE HARRIS,

Intervenor-Appellees.

On Appeal from the United States District Court for the District of Columbia,
Civil Action No. 10-0651
The Honorable John D. Bates, District Judge

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF SHELBY COUNTY, ALABAMA

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 26.1 and 29(b), the undersigned hereby certifies that Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation incorporated under the laws of the State of Colorado. MSLF is not a publicly owned corporation, has issued no stock, and has no parent corporations, master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded. No publicly held corporation has a direct financial interest in the outcome of this litigation due to MSLF's participation.

MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberty, the right to own and use property, limited and ethical government, and the free enterprise system. Central to the notion of a limited and ethical government are the constitutional principles of separation of powers and federalism. When Congress exceeds its powers under the Enforcement Clauses of the Fourteenth and Fifteen Amendments, separation of powers is violated and federalism is threatened.

Dated this 8th day of November 2011.

/s/ Steven J. Lechner
Steven J. Lechner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

Page

CONSTITUTIONAL PROVISIONS

RULES

OTHER AUTHORITIES

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANT[1]

Mountain States Legal Foundation respectfully submits this amicus curiae brief in support of Shelby County, Alabama.

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, 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 liberty, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF has members in every state of the union. 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 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 and thereby violates separation of powers and threatens federalism.

[1] Pursuant to Fed. R. App. P. 29(a), the undersigned certifies that all parties have consented to MSLF's filing of this amicus curiae brief. Pursuant to Fed. R. App. P. 29(c)(5), the undersigned further certifies that no counsel for a party authored this brief in whole or in part, and that no person, party or party's counsel, other than MSLF, its members, or its counsel, contributed money that was intended to fund preparing or submitting this amicus curiae brief in whole or in part.

Especially relevant to this case, MSLF has challenged the constitutionality of Section 2 of the Voting Rights Act, alleging that Congress had exceeded its powers, in three 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 Fed. Supp. 2d 1176 (D. Wyo. 2010). Recently, MSLF filed an amicus curiae brief 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*, ___ U.S. ___, 129 S. Ct. 2504 (2009).

MSLF brings a unique perspective to this case. It will demonstrate that, although the district court erred in holding that the 2006 Reauthorization of Section 5 of the Voting Rights Act is constitutional, it correctly ruled that "congruency and proportionality" is the only standard of review for prophylactic legislation passed under either the Fourteenth or Fifteenth Amendments.

ARGUMENT

I. INTRODUCTION.

MSLF strongly disagrees with the district court's holding that the 2006 Reauthorization of Section 5 of the Voting Rights Act, Pub. L. No. 109-246, 120 Stat. 577 (2006) ("2006 Reauthorization"), is constitutional. *Shelby County, Alabama v. Holder*, ___ F. Supp. 2d ___, 2011 WL 4375001, *80 (D.D.C., 2011). Therefore, MSLF supports Shelby County's contention that the 2006 Reauthorization unconstitutionally exceeds Congress's powers under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments. U.S. Const. amend. XIV, § 5; U.S. Const. amend. XV, § 2. *See* Shelby County Opening Brief at 46–55.

Despite MSLF's opposition to the holding of the district court, MSLF fully supports the district court's important ruling that *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) ("*Katzenbach*") and *City of Boerne v. Flores*, 521 U.S. 507 (1997) are consistent with one another and both set out one, consistent standard of review for prophylactic legislation enacted pursuant to the Enforcement Clauses of either the Fourteenth and Fifteenth Amendments: the "congruency and proportionality" standard. *Shelby County,* 2011 WL at *21–22, 30. That is, "*Boerne* merely clarified and refined the one standard of review that has always

been employed with respect to reviewing legislation enacted pursuant to *both* the Fourteenth and Fifteenth Amendments." *Id*. at *22 (emphasis in original).

A three-judge panel of the District Court for the District of Columbia came to the opposite conclusion, however. *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 573 F. Supp. 2d 221, 235–36 (D.D.C. 2008) ("*Austin I")*, *rev'd on other grounds*, *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, ___ U.S. ___, 129 S. Ct. 2504 (2009) ("*Austin II*"). In *Austin I*, the three judge panel ("*Austin* panel") ruled that there are "two distinct standards for evaluating the constitutionality of laws enforcing the Civil War Amendments. . . . [So] "notwithstanding the *City of Boerne* cases[,which apply to 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." *Austin I*, 579 F. Supp. 2d at 235–36.

The Attorney General likewise urged the district court here to adopt a deferential rational basis standard for any Civil War Amendment directed at racial discrimination. *See Shelby County*, 2011 WL 4375001 at *21. But the district court properly rejected that reasoning and the reasoning of the *Austin* panel. *Id*. at *22. Therefore, it is likely that these arguments will arise again in this Court. MSLF writes to support the district court's ruling that there is only one standard of

review for enforcement of both the Fourteenth and Fifteenth Amendments: the "congruency and proportionality" standard.

II. THERE IS ONLY ONE STANDARD OF JUDICIAL REVIEW OF PROPHYLACTIC LEGISLATION ENACTED PURSUANT TO THE ENFORCEMENT CLAUSES OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS.

The Supreme Court has made it clear that analysis of any Enforcement Clause power does not depend on the nature of the constitutional prohibition it enforces. *Boerne*, 521 U.S. at 518–19. Thus, although *Boerne* dealt only with the Fourteenth Amendment, it arrived at its congruency and proportionality standard, by relying on prior Thirteenth, Fourteenth, and Fifteenth Amendment cases, treating them as interchangeable.

Supporting its Fourteenth Amendment standard of review, *Boerne* relied on the "suspension of literacy tests and similar voting requirements [such as Section 5 of the VRA]" enacted pursuant to "Congress' *parallel power* to enforce the provisions of the *Fifteenth Amendment*[.]" *Id*. at 518 (citing *Katzenbach*, 383 U.S. at 308) (emphasis added). *Boerne* also relied on the fact that the Supreme Court had "also concluded that the other measures protecting voting rights are within Congress' power to enforce the Fourteenth *and* Fifteenth Amendments[.]" *Id*. (citing *Katzenbach*, 383 U.S. at 326) (Fifteenth Amendment) (emphasis added); *see also Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) ("*Morgan*") (Thirteenth and Fourteenth Amendments); *Oregon v. Mitchell*, 400 U.S. 112, 131–34 (1970)

("*Mitchell*"), (Fourteenth *and* Fifteenth Amendments); *City of Rome v. United States*, 400 U.S. 156, 161 (1980) (Fifteenth Amendment). Thus, *Boerne*, clearly viewed the powers conferred on Congress by any of the Enforcement Clauses to be identical and reviewable only under one standard: congruency and proportionality.[2]

Boerne's recognition that the same standard of review applies to both Amendments is not a departure from prior law; the Supreme Court has always treated the powers conferred by the Enforcement Clauses of the Fourteenth and Fifteenth Amendment identically. *See, e.g.*, *Morgan*, 384 U.S. at 651 ("Section 2 of the Fifteenth Amendment grants Congress a similar power to [that of Section 5 of the Fourteenth Amendment]."); *Lopez v. Monterey County*, 525 U.S. 266, 294 n.6 (1999) ("[W]e have always treated the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments as co-extensive."); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 n.8 (2001) ("*Garrett*") ("Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment."); s*ee also*, *City of Rome*, 446 U.S. at 207 n.1 (Rehnquist, J., dissenting) ("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as co-extensive.").

[2] As demonstrated in more detail below, congruency and proportionality require that prophylactic legislation be congruent and proportionate to the record before Congress of the identified constitutional violations it is designed to address.

Thus, the district court was correct in ruling:

> Given the nearly identical language and similar origins of [the Fourteenth and Fifteenth Amendments], there would seem to be "no reason to treat the enforcement provision of the Fifteenth Amendment differently than the identical provision of the Fourteenth Amendment, and the Supreme Court has not held to the contrary."

Shelby County, 2011 WL at *23 (quoting *Mixon v. State of Ohio*, 193 F.3d 389, 399 (6th Cir. 2006)).

III. IN *BOERNE*, THE SUPREME COURT RELIED ON, REFINED, AND CLARIFIED *KATZENBACH* IN ENUNCIATING THE CONGRUENCY AND PROPORTIONALITY STANDARD.

A. Congress's Power To Enforce The Fourteenth And Fifteenth Amendments By Enacting Prophylactic Legislation Is Limited By The Separation Of Powers Doctrine.

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 19 (quoting *Katzenbach*, 383 U.S. at 326). Constitutional difficulty arises when Congress, in a purported attempt to enforce the Fourteenth or Fifteenth Amendment, affects or regulates conduct that is facially *constitutional* or has a discriminatory effect despite lack of discriminatory intent—so-called "prophylactic legislation," such as Section 5 of the Voting Rights Act ("VRA")—in order to prevent intentional, *unconstitutional* conduct in the future. 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 expanded or defined that prohibition:

> The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.

Id. Indeed, *Boerne* recognized that the "remedial and preventive power of Congress's enforcement power, *and the limitation inherent in the power*, were confirmed in our earliest cases on the Fourteenth Amendment." *Id*. at 524 (citing the *Civil Rights Cases*, 109 U.S. 3 (1883)) (emphasis added).

When Congress, relying on its Enforcement Clause authority, passes prophylactic legislation, the issue a court must determine is whether that legislation is truly enforcement of a constitutional prohibition, or whether it unconstitutionally crosses over into the realm of the judiciary by interpreting or changing the prohibition:

> Congress does not enforce [any] constitutional right by changing what the right is . . . [because] [i]t has been given [only] the power "to enforce," not the power to determine what constitutes a constitutional violation. . . . Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the provisions of [the Fourteenth Amendment].

Boerne, 521 U.S. at 524 (internal quotations omitted). *Boerne* then set out the standard of review for all prophylactic Enforcement Clause legislation to restrain it from unconstitutionally usurping the role of the Judicial Branch:

> 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. 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.

The *Austin* panel did not understand that Congress, when enacting prophylactic legislation, may no more define or interpret the substance of the Fifteenth Amendment than it may the Fourteenth Amendment. The question in both contexts is whether Congress has overstepped its authority to enforce and intruded into the judiciary's power to interpret. The Supreme Court has made clear that there can be only one standard by which this question is answered.

B. What Is "Appropriate" And "Rational" Legislation Differs For Legislation That Enforces The Fourteenth Or Fifteenth Amendment By Forbidding What The Amendments Prohibit, And Legislation That Utilizes Prophylactic Measures To Enforce The Amendments.

In *Katzenbach*, the Supreme 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 524. *Katzenbach* then referred to *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, as the general rule of law for all powers of Congress:

> "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).

The *Austin* panel seized upon the phrase "rational means" and the reference to *McCulloch* to justify what it described as a "deferential standard" of review by which Congress could "'use any rational means" to "'effectuate the constitutional prohibition of racial discrimination in voting.'" *Austin I*, 573 F. Supp. 2d at 237–38. But the *Austin* panel viewed the *Katzenbach* holding in a vacuum, without reference to context and the type of legislation involved. *Id*. It did not consider that *McCulloch* did not involve prophylactic legislation under the Enforcement Clauses, but involved substantive legislation under Article I.

Thus, the *Austin* panel did not recognize that what is "legitimate," "appropriate," "not prohibited" and "within the spirit of the Constitution," for substantive legislation enacted under Article I powers differs for remedial, prophylactic legislation, enacted to enforce the Fourteenth or Fifteenth Amendments. As demonstrated above, this misapprehension stems from the

Austin panel's failure to recognize that this distinction is required by separation of powers principles.

Katzenbach also referred to *Ex Parte Virginia*, 100 U.S. (10 Otto) 339 (1879), not discussed by the *Austin* panel, which involved enforcement of the Thirteenth and Fourteenth Amendments through a *non-prophylactic* statute that penalized judges who intentionally and discriminatorily disqualified jurors on account of their race. *Ex Parte Virginia*, 100 U.S. at 340, 344. *Katzenbach* noted that the "the Court [in *Ex Parte Virginia*] . . . echoed [*McCulloch*'s] language in describing *each* of the Civil War Amendments."[3] *Id*. at 327. *Katzenbach* observed that, with respect to the Civil War Amendments:

> "Whatever legislation is appropriate, that is adapted to carry out the objects the amendment have in view, whatever tends to enforce submission to the prohibition they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of Congressional power."

Id. (quoting *Ex Parte Virginia*, 100 U.S. at 345–46). *Ex Parte Virginia* merely requires that enforcement 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. What is "appropriate" in enforcing the Civil War Amendments differs for prophylactic legislation and that

[3] This statement also reinforces that *Katzenbach* recognized there is only one standard of review for all Thirteenth, Fourteenth, and Fifteenth Amendments.

which merely prohibits or punishes what the Amendments prohibit. Indeed, the former must be congruent and proportionate. *Boerne*, 521 U.S. at 519–20, 530.

As in *Katzenbach*, the Supreme Court in *Boerne* relied on and cited *Ex Parte Virginia* with approval. 571 U.S. at 17–18. *Boerne*, unlike the *Austin* panel, properly recognized that separation of powers principles requires a court to determine whether prophylactic legislation enacted pursuant to Congress's remedial powers—as distinguished from non-prophylactic legislation involved in *Ex Parte Virginia*—constitutes enforcement or interpretation that intrudes into the sphere of the Judicial Branch. *See Boerne*, 521 U.S. at 519–20, 523–24.

Similarly, the *Austin* panel mistakenly held that *Morgan*, *Mitchell*, and *City of Rome* are all inconsistent with *Boerne*. *Austin I*, 573 F. Supp. 2d at 237–39. The *Austin* panel also erred in its failure to comprehend that what is appropriate legislation to enforce the Fourteenth and Fifteenth Amendments with direct, prohibitory legislation, differs from what is appropriate with prophylactic legislation. Indeed, *Boerne* cited all of those cases with approval to support its congruency and proportionality standard of review for prophylactic legislation. *Boerne*, 521 U.S. at 517-518.

The consistent lesson of *Katzenbach*, *Boerne*, and the Supreme Court's other cases is that what is rational, appropriate legislation differs for legislation pursuant to Congress's substantive powers under Article I, prohibitory or penalizing

legislation under the Enforcement Clauses, and prophylactic legislation under the Enforcement Clauses. The latter are reviewed under the congruency and proportionality standard to avoid separation of powers violations. Consequently, contrary to the *Austin* panel's ruling, *McCulloch*, *Katzenbach*, *Morgan*, *Mitchell*, and *City of Rome* are consistent with *Boerne*.

C. *Katzenbach*'s Holding, And Its "Exceptional" And "Unique" Facts, Served As The Model For *Boerne*'s Congruency And Proportionality Standard.

What is apparent through this series of cases is the systematic elaboration and refinement of the Supreme Court's understanding of Congress's limited power to pass prophylactic legislation under its enforcement powers. While the district court here properly recognized this fact, *Shelby County*, 2011 WL at *22, the *Austin* panel did not, and gravely erred.

The *Austin* panel paid little heed to the "exceptional" and "unique" conditions upon which *Katzenbach* relied to uphold the constitutionality of the "uncommon exercise of congressional power" contained in Section 5. Instead, the *Austin* panel seized on a single sentence in *Katzenbach*: "'As against the reserved powers of the States, Congress may use *any rational means* to effectuate the constitutional prohibition of racial discrimination in voting.'" *Austin I*, 573 F. Supp. 2d at 236 (quoting *Katzenbach*, 383 U.S. at 324.) But the *Austin* panel pointedly ignored *Katzenbach*'s next sentence: "We turn now to a *more detailed*

description of the standards which govern our review of the Act." *Id.* (emphasis added). *Katzenbach* then detailed the egregious record of an unremitting, widespread pattern and practice of ingenious defiance of the Constitution, impervious to ordinary remedies, that justified the extraordinary resort to Section 5, which was, *under those circumstances*, "rational." *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 and persistent discriminatory voting practices that prevented African-Americans from registering and voting. 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; *Lopez*, 525 U.S. at 282 ("[B]lacks were given more difficult questions, such as the number of bubbles in a soap bar, the news contained in a copy of the *Peking Daily*, the meaning of obscure passages in state constitutions, and the definition of terms such as *habeas corpus*.") (internal citations omitted).

Congress had originally addressed this situation 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." *Katzenbach*, 383 U.S. at 313. Widespread voting discrimination nevertheless persisted, and the chances of defeating this campaign of discrimination case-by-case appeared dim. Thus, the Voting Rights Act of 1965, particularly Section 5, was enacted to defeat these efforts to nullify the Fifteenth Amendment that had "infected the electoral process in parts of our country for nearly a century." *Katzenbach*, 383 U.S. 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—was sufficient to justify the extraordinary 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 (emphases added). Far from employing the relaxed, deferential standard of review utilized by the *Austin* panel, *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 (emphasis added).

Thus, *Katzenbach* held that the extraordinary and uncommon exercise of congressional power in enacting Section 5 was constitutional only because it was in response to a widespread pattern or practice of insidious, pervasive, unremitting, and ingenious defiance of the Constitution to deny African-Americans the right to register and to vote, which had frustrated many conventional remedies for nearly 95 years. 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 that Congress sought to remedy. *Boerne*, 521 U.S. at 519–20, 524–26. Therefore, *Katzenbach*

applied the congruency and proportionality test the Supreme Court would later articulate in *Boerne* to approve the extraordinary remedy provided by Section 5, though it did not use those terms.

This is clearly demonstrated by the fact that *Boerne* approved of *Katzenbach's* insistence 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 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*, *Boerne* emphasized, "[t]he new *unprecedented remedies* were deemed necessary given the infectiveness of the existing voting rights law. . . ." *Id*. at 526 (emphasis added). Thus, far from announcing a new test for exercising remedial, prophylactic enforcement powers under the Fourteenth Amendment, *Boerne* relied heavily on *Katzenbach*, a Fifteenth Amendment case, in demonstrating the constitutional predicate necessary for a congruent and proportionate prophylactic remedy for constitutional violations of *all* the Civil War Amendments.

Thus, it was only because Congress was confronted with egregious, widespread, and pervasive unconstitutional scheming to prevent African Americans from registering or voting that *Katzenbach* found Section 5 to be appropriate legislation that adopted a "rational means" of addressing those extraordinary discriminatory practices, and, therefore, constitutional. Ignoring the unique facts and the holding of *Katzenbach*, the *Austin* panel cobbled together its own highly deferential "rational basis" theory of Congressional power under the Fifteenth Amendment, in direct contrast to and in conflict with the holdings of *Katzenbach* and *Boerne*.

CONCLUSION

As demonstrated above, the *Austin* panel failed to recognize the distinction between legislation pursuant to Congress's substantive powers under Article I, prohibitory or penalizing legislation under the Enforcement Clauses, and prophylactic legislation under the Enforcement Clauses. As a result, the *Austin* panel improperly and erroneously applied a highly lenient standard of judicial review to the enforcement of the Fifteenth Amendment instead of the stringent congruency and proportionality standard it should have applied to satisfy separation of powers concerns. The district court here properly rejected this approach and adopted the correct standard of review, though, it applied that standard incorrectly.

Accordingly, this Court should affirm the district court's ruling that there is only one standard of review for prophylactic legislation, such as Section 5, under the Enforcement Clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments, and that *Boerne*'s congruency and proportionality standard applies in reviewing the constitutionality of the 2006 Reauthorization of Section 5. After doing so, it will become self-evident that the district court's holding regarding the constitutionality of the 2006 Reauthorization must be reversed.

Dated this 8th day of November, 2011.

Respectfully submitted by,

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CERTIFICATE OF COMPLIANCE

This amicus curiae brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and 29(d). It contains 4,097 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), computed by the word count feature of Microsoft Word 2003. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced 14 point Times New Roman typeface.

Dated this 8th day of November, 2011.

/s/ Steven J. Lechner
Steven J. Lechner

Attorney for Amicus Curiae
Mountain States Legal Foundation

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the Appellate CM/ECF system on November 8, 2011, and that all other participants are registered with that system and service was effected through this Court's appellate CM/ECF system.

/s/ Steven J. Lechner
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