

In The
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, et al.,

Appellees.

**On Appeal From The
United States District Court
For The District Of Columbia**

**AMICUS CURIAE BRIEF OF MOUNTAIN STATES
LEGAL FOUNDATION IN SUPPORT OF
APPELLANT'S JURISDICTIONAL STATEMENT**

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**AMICUS CURIAE BRIEF OF
MOUNTAIN STATES LEGAL FOUNDATION
IN SUPPORT OF APPELLANT'S
JURISDICTIONAL STATEMENT**

This amicus curiae brief is presented on behalf of Mountain States Legal Foundation, a nonprofit, public-interest law firm, in support of the Appellant, Northwest Austin Municipal Utility District Number One, and its Jurisdictional Statement.¹



INTEREST OF AMICUS CURIAE

Mountain States Legal Foundation (MSLF) is a nonprofit, public-interest law firm with 36,000 members. Among other things, MSLF and its members are dedicated to limited and ethical government, litigating in opposition to intrusive, improper, illegal, or unconstitutional legislation that infringes on the rights of individuals or unnecessarily intrudes on the sovereignty of the States, such as Section 5 of the Voting Rights Act.²

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief; all counsel have consented to the filing of this brief; and the consent letters have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

² 42 U.S.C. § 1973c.

MSLF believes strongly 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: “The powers delegated by the . . . Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.”³

MSLF has been active in litigating in opposition to legislation that violates the concept of federalism, and in cases in which the federal government acts beyond its powers. In fact, MSLF has opposed the constitutionality of Section 2 of the Voting Rights Act in three previous cases.⁴

Accordingly, MSLF brings a distinctive point of view to this case and is qualified, given its appearance before this Court in *Adarand Constructors v. Peña*,⁵ to assist this Court in its decision.



³ The Federalist No. 45 (James Madison) (Jacob E. Cooke ed., 1961).

⁴ *U.S. v. Blaine County, Montana*, 363 F.3d 897 (9th Cir. 2004); *U.S. v. Alamosa County, Colo.*, 306 F.Supp.2d 1016 (D.Colo. 2004); *Large v. Fremont County, Wyoming*, No. 05-270J (D.Wyo. filed Oct. 20, 2005, decision pending).

⁵ 515 U.S. 200 (1995).

ARGUMENT SUPPORTING PROBABLE JURISDICTION

This Court should note probable jurisdiction to correct the serious and far-reaching constitutional error of the district court panel, which held the scope of congressional power under the Fifteenth Amendment's Enforcement Clause⁶ substantially exceeds that authority under the corresponding clause of the Fourteenth Amendment.⁷

The panel held that the congruency and proportionality test, set forth in *City of Boerne v. Flores*,⁸ and cases following it, does not apply to Section 2 of the Fifteenth Amendment, holding instead that legislation enacted to enforce Section 2 of the Fifteenth Amendment need only be rational, not congruent and proportionate. The panel relied on *State of South Carolina v. Katzenbach*⁹ and the pre-*Boerne* cases following it. In doing so, the panel compounded its error by misinterpreting and eviscerating the holding of *Katzenbach*, which is entirely consistent with *Boerne*.

The consequence is that the panel allows Congress to substantively define the Fifteenth Amendment, a function that is constitutionally entrusted to the judicial branch exclusively. As a result, the panel

⁶ U.S. Const. amend. XV, sec. 2.

⁷ U.S. Const. amend. XIV.

⁸ 521 U.S. 507 (1997).

⁹ 383 U.S. 301 (1966).

incorrectly held that the 2006 reauthorization of Section 5 of the Voting Rights Act was constitutional when it is not.

I. CONGRESS'S POWER UNDER THE ENFORCEMENT CLAUSES OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS IS REMEDIAL, NOT SUBSTANTIVE.

A. CONGRESS MAY NOT DEFINE THE SUBSTANCE OF THE PROHIBITIONS IT ENFORCES.

Unlike the substantive powers conferred by Article I, which bestow on Congress the power to define the scope of substantive rights,¹⁰ the Enforcement Clauses of the Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments¹¹ are remedial, empowering Congress only to enforce the substantive right, whatever it is, not to define it: “Congress’s power under §5, however, extends only to ‘enforcing the provisions of the Fourteenth Amendment. The Court has described this power as ‘remedial.’”¹² In fact, all the Enforcement Clauses are identical in text and design. That is, each one limits States’ powers by prohibiting specific conduct. Consequently, the Enforcement Clauses of those Amendments are remedial, not substantive.

¹⁰ U.S. Const. art. I, § 8, cl. 18.

¹¹ U.S. Const. amend. XIII-XV, XIX, XXIV, XXVI.

¹² *Boerne*, 521 U.S. at 519 (citing *Katzenbach* at 326).

Constitutional difficulty arises when Congress forbids conduct that is not unconstitutional facially in order to prevent potentially unconstitutional conduct – so-called prophylactic legislation, such as Section 5 of the Voting Rights Act. Then the question becomes whether Congress has enforced the constitutional prohibition set forth in the Fourteenth Amendment, or whether it has unconstitutionally expanded or defined that prohibition substantively:

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.¹³

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.”¹⁴

B. THE POWER OF CONGRESS TO ENFORCE THE AMENDMENTS DOES NOT DIFFER WITH THE AMENDMENT IT ENFORCES.

Boerne recognized that analysis of any Enforcement Clause power depends, not on the nature of the

¹³ *Id.*

¹⁴ *Id.* at 524 (citing the *Civil Rights Cases*, 109 U.S. 3 (1883)) (emphasis added).

constitutional prohibition it enforces, but rather, on the remedial nature of the Enforcement Clause itself. Referring to *Katzenbach*, *Boerne* recognized that *Katzenbach* sustained the Voting Rights Act of 1965 “under Congress’ *parallel power* to enforce the provisions of the Fifteenth Amendment . . . as a measure to combat racial discrimination in voting.”¹⁵ Indeed, *Boerne*, viewing the Enforcement Clauses interchangeably, held that under certain circumstances, Congress may sometimes pass prophylactic legislation under its power to “enforce the Fourteenth *and* Fifteenth Amendments. . . .”¹⁶ In doing so, *Boerne* cited interchangeably, as examples, cases approving such legislation under both the Fourteenth and Fifteenth Amendments: *Katzenbach* (Fifteenth), *Katzenbach v. Morgan* (Fourteenth),¹⁷ *Oregon v. Mitchell* (Fourteenth and Fifteenth),¹⁸ and *City of Rome v. United States* (Fifteenth).¹⁹

¹⁵ *Boerne*, 521 U.S. 518 (emphasis added); *accord*, *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 are co-extensive); *see 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.”).

¹⁶ *Boerne*, 521 U.S. at 524 (emphasis added).

¹⁷ 384 U.S. 641 (1966).

¹⁸ 400 U.S. 112 (1970).

¹⁹ 446 U.S. 156 (1980).

C. CONGRESSIONAL LEGISLATION UNDER ANY ENFORCEMENT CLAUSE MUST ENFORCE, NOT SUBSTANTIVELY DEFINE, THE AMENDMENT IT ENFORCES.

When Congress passes prophylactic Enforcement Clause legislation, the issue a court must determine is whether that legislation is remedial or unconstitutionally crosses over into substantive legislation:

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 [Fourteenth Amendment].”²⁰

Boerne then sets out the test to determine whether a remedial statute has unconstitutionally crossed over into the substantive sphere:

[T]he line between measures that remedy or prevent unconstitutional actions, and measures that make a substantive change in the governing law, is not easy to discern. . . . [Therefore,] [t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means

²⁰ *Boerne*, 521 U.S. at 524.

adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.²¹

Thus, it is plain that the unconstitutional conduct addressed by the Amendment that an Enforcement Clause enforces is irrelevant. Therefore, legislation that seeks to enforce them must be “congruent and proportionate” to the constitutional harm addressed, irrespective of what that particular harm is.

It stretches credulity to suppose that Congress’s power to pass prophylactic legislation under any Enforcement Clause depends not on the nature of the power itself but, instead, on the nature of the constitutional prohibition that it enforces. One cannot square this proposition with the plain language of *Boerne*. The district court panel justifies its decision by remarking that *Boerne* and the cases following it dealt with the Fourteenth Amendment only. That is true. But not all the cases on which the panel relied involve the Fifteenth Amendment. In fact, some deal with the Thirteenth and Fourteenth Amendments as well, viewing the Enforcement Clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments as interchangeable. And this rationalization ignores the fact that *Boerne* itself viewed the Enforcement Clauses as “parallel” powers, and relied for its analysis not only Fourteenth Amendment cases, but also on

²¹ *Id.* at 519-20.

Fifteenth and Thirteenth Amendment cases interchangeably.

Therefore, the panel mistakenly held *Boerne* and the post-*Boerne* line of cases irrelevant, holding itself bound only by earlier cases. Regrettably, the panel compounded its error by incorrectly interpreting those cases to be inconsistent with *Boerne*, which they are not. As a result, the panel effectively held that there is no limit on congressional enforcement power under the Fifteenth Amendment and that Section 2 of the Fifteenth Amendment gives Congress power to define and to determine what constitutes a constitutional violation under the Fifteenth Amendment.

This Court should note probable jurisdiction to correct this critical error and evaluate the constitutionality of Section 5 of the Voting Rights Act, as reauthorized in 2006, under this Court's congruency and proportionality jurisprudence, holding that it fails that test.

II. *KATZENBACH* AND *BOERNE* ARE CONSISTENT, BOTH BEING PART OF A CONTINUUM BY WHICH THIS COURT HAS REFINED ITS VIEW OF CONGRESSIONAL POWER.

A. THE PANEL MISCONSTRUED *KATZENBACH* BECAUSE IT FAILED TO RECOGNIZE THE DIFFERENCE BETWEEN CONGRESS'S SUBSTANTIVE POWERS AND ITS REMEDIAL POWERS.

Because the district court panel failed to distinguish between Congress's substantive powers and its remedial powers, it wrongly concluded that *Katzenbach* and *Boerne* are inconsistent, establishing two different standards of judicial review of congressional power – one for enforcement of the Fourteenth Amendment and one for enforcement of the Fifteenth Amendment. Moreover, the panel concluded that the Fifteenth Amendment standard is very lenient, effectively giving Congress substantive power, whereas the Fourteenth Amendment's standard does not.

The panel, though purportedly focusing on *Katzenbach*, ignored its factual findings and, instead, relied on *Katzenbach*'s use of *McCulloch v. Maryland*²² and *Ex Parte Virginia*.²³ But these cases are

²² 17 U.S. 316 (1819).

²³ 100 U.S. 339 (1879).

consistent with, and support, *Boerne*. First, *Katzenbach* recognized that “[t]he basic test to be applied in a case involving Section 2 of the Fifteenth Amendment is the same as in *all cases concerning the express powers of Congress* with relation to the reserved rights of the States.”²⁴ This requires that all the Enforcement Clauses be subject to the same standard of review. Then, *Katzenbach* relied on *McCulloch*, a case construing whether Congress had the power to establish a national bank under the Necessary and Proper Clause,²⁵ as establishing the general rule of law for all powers of Congress, including those contained in the Enforcement Clauses:²⁶

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.²⁷

The emphasis added in the text is important, because if one understands the difference between substantive powers, at issue in *McCulloch*, and remedial powers, at issue here, then one understands that *McCulloch*’s statement is consistent with *Boerne*. This is evident from examining the qualifying language

²⁴ *Katzenbach*, 383 U.S. at 326 (emphasis added).

²⁵ U.S. Const. art. I, § 8, cl. 18.

²⁶ *Id.*

²⁷ *McCulloch*, 17 U.S. at 421 (emphasis added).

emphasized. That is, what is “legitimate,” “within the scope of the constitution,” “appropriate,” “plainly adapted to [a legitimate end],” “not prohibited,” and “within the spirit of the constitution” differs for substantive powers and remedial powers, as recognized in *Boerne*. That is, what is “necessary and proper” differs for substantive and remedial legislation, particularly prophylactic legislation. But the panel failed to apprehend this distinction, which is critical to any constitutional analysis of the powers contained in the Enforcement Clauses.

The panel also focused on *Katzenbach*’s reliance on *Ex Parte Virginia*, a Thirteenth and Fourteenth Amendment enforcement case that involved a *non-prophylactic* statute penalizing a judge who disqualified jurors on account of their race. There, the issue was whether Congress had power under the Thirteenth and Fourteenth Amendments to enact that statute. Following its reference to *McCulloch*, *Katzenbach* then recognized that the “Court has subsequently echoed [*McCulloch*’s] language in describing *each* of the Civil War Amendments,”²⁸ citing the following language from *Ex Parte Virginia*:

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

²⁸ *Katzenbach*, 383 U.S. at 301 (emphasis added).

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.²⁹

This too is consistent with *McCulloch* and *Boerne*. It merely holds that any remedial legislation, whether prophylactic or not, must be “appropriate,” and must be “adapted to carry out the objects” of the “State denial or invasion” of the constitutional rights it enforces, and must not be “prohibited” by constitutional considerations. This is certainly consistent with requiring that remedial prophylactic legislation be congruent and proportionate to the constitutional prohibition it enforces, so that it does not exceed its remedial nature and become substantive, as required by *Boerne*.

Consequently, contrary to the panel’s view, *Ex Parte Virginia* is consistent with the holding of *Boerne*. In fact, *Ex Parte Virginia* is relied on and cited with approval by *Boerne*.³⁰ But *Boerne*, unlike the panel, properly recognizes the difference between exercising non-prophylactic remedial powers to enforce an Amendment, at issue in *Ex Parte Virginia*, and exercising those powers to enact prophylactic legislation, at issue in both *Katzenbach* and *Boerne*, which held that: “[i]t is also true, however, that as broad [a]s the congressional enforcement power is, it

²⁹ *Ex Parte Virginia*, 100 U.S. at 345-46 (emphasis added).

³⁰ *Boerne*, 521 U.S. at 517-18.

is not unlimited.’ *Oregon v. Mitchell, supra.*”³¹ Thus, *Boerne* properly recognized that the Constitution requires that the Court must determine that the legislation is, in fact, enforcement of, and not a substantive definition of, the constitutional prohibition set forth in the Amendment, when considering the scope of remedial power to enforce constitutional prohibitions against State action.

Likewise, the panel mistakenly held that *Morgan, Mitchell*, and *City of Rome* are all inconsistent with *Boerne*. The panel is wrong once again due to its failure to distinguish between substantive and remedial powers, particularly in the context of remedial prophylactic legislation. Not surprisingly, *Boerne* cites to all three with approval, as does *Katzenbach*, on which *Boerne* bases its congruency and proportionality test.³² Indeed, the lesson here is that, although the Necessary and Proper Clause³³ applies to all Congressional powers, what is necessary and proper legislation under Congress’s substantive powers is not necessary and proper legislation when Congress attempts to exercise its remedial powers by enacting prophylactic legislation. These latter powers are more limited in scope.

What one observes here is the systematic progression and development of this Court’s refinement

³¹ *Id.* at 519-19 (emphasis added).

³² *Id.*

³³ U.S. Const. art. I, § 8, cl. 18.

of its understanding of Congress's limited powers as applied to the States. Thus, there is a steady progression from *McCulloch* to *Boerne* and to the post-*Boerne* cases. The earlier cases, on which the panel relies, are consistent with the later cases and are part of the continuum of the constitutional understanding of this Court. The panel gravely erred in not recognizing this.

B. KATZENBACH'S FINDINGS AND HOLDING SERVE AS THE MODEL FOR *BOERNE'S* CONGRUENCY AND PROPORTIONALITY TEST.

Boerne quoted extensively from *Katzenbach* to demonstrate when prophylactic legislation is congruent and proportionate. Far from employing a relaxed standard of review, *Katzenbach* employed a rigorous test to determine whether the factual predicate of intentional, unconstitutional actions by State actors to deny African Americans the right to vote was established, and whether the remedy adopted by Congress to fight this rampant unconstitutional discrimination was both congruent and proportionate to those violations.

Katzenbach recognized that Section 5 of the Voting Rights Act was “an *uncommon exercise of congressional power*,” and that “*exceptional conditions can justify legislative measures not otherwise appropriate*.”³⁴ The Court then set forth why exceptional

³⁴ *Katzenbach*, 383 U.S. at 334 (emphasis added).

conditions justifying measures otherwise inappropriate were proper under the unique circumstances presented to Congress:

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*. Congress had reason to suppose that these *States might try similar maneuvers in the future* in order to evade the remedies for voting discrimination contained in the Act itself.³⁵

Therefore, the Court concluded that, “under the compulsion of these *unique circumstances*, Congress responded in a permissibly decisive manner.”³⁶

Katzenbach held that the evidence before Congress – of persistent, pervasive, and intransigent State action, intentionally denying the right to vote of African Americans – was sufficient to justify the extraordinary exercise of remedial powers:

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

³⁵ *Id.* at 335 (emphasis added).

³⁶ *Id.* (emphasis added).

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.³⁷

Additionally, *Katzenbach* held that such discrimination was “pursuant to a widespread pattern or practice” and that “Congress had found that case-by-case litigation was inadequate to combat *widespread and persistent discrimination* in voting.”³⁸

Thus, *Katzenbach* found that the extraordinary and uncommon exercise of congressional power was constitutional because it was in response to a widespread pattern or practice of insidious and pervasive, unremitting, and ingenious defiance of the Constitution, which frustrated many conventional remedies tried for many years. In the language of *Boerne*, the remedy adopted was congruent and proportionate to the nature and scope of the unconstitutional acts Congress sought to remedy.

Boerne recognized that *Katzenbach* had emphasized that “the constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience it reflects.”³⁹ Indeed, *Boerne* noted that *Katzenbach*

³⁷ *Id.* at 309 (emphasis added).

³⁸ *Id.* at 328 (emphasis added).

³⁹ *Boerne*, 521 U.S. at 525, quoting *Katzenbach*, 383 U.S. at 308.

approved the severe and intrusive remedies “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.’”⁴⁰ Additionally, *Boerne* found that *Katzenbach* approved these drastic remedies due, in part, to “evidence in the record reflecting the *subsisting* and *pervasive* discriminatory . . . use of literacy tests.”⁴¹ *Boerne* emphasized, referring to *Katzenbach*, that “the new *unprecedented remedies* were deemed necessary given the ineffectiveness of the existing voting rights law. . . .”⁴²

Thus, far from announcing a new test for the Fourteenth Amendment, *Boerne* relied in considerable part on *Katzenbach*, a Fifteenth Amendment case, in demonstrating the constitutional predicate necessary for a congruent and proportionate response to constitutional violations of *any* of the Reconstruction Era Amendments. *Boerne* also relied on *Mitchell*, noting that the Court there “acknowledged the necessity of using strong remedial and preventive measures to respond to the *widespread and persisting deprivations of constitutional rights*. . . .”⁴³

The panel ignored these factual findings by Congress of “exceptional” and “unique” conditions

⁴⁰ *Id.* at 525, quoting *Katzenbach*, 383 U.S. at 308.

⁴¹ *Id.* at 525 (emphasis added).

⁴² *Id.* at 526 (emphasis added).

⁴³ *Id.* (emphasis added).

upon which *Katzenbach* justified Section 5’s “uncommon exercise of congressional power.” Instead, the panel focused on one 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.”⁴⁴ Unfortunately, the panel ignored the very next sentence: “We turn now to a more detailed description of the standards which govern our review of the Act.”⁴⁵ *Katzenbach* then detailed the egregious record of unremitting, widespread patterns and practices of ingenious defiance of the Constitution, which were impervious to ordinary remedies, that justified the extraordinary remedy adopted. Only under these circumstances did *Katzenbach* find that the extraordinary remedies were “reasonable.” Ignoring the actual holding of *Katzenbach*, the panel cobbled together its own, newly minted “rational basis” theory of constitutional power when enforcing the Fifteenth Amendment, in direct contrast to and in conflict with the congruency and proportionality test of *Boerne*.

Thus, the panel’s failure to recognize the distinction between Congress’s substantive and remedial powers, and its understanding of neither *Katzenbach* nor *Boerne*, resulted in it applying a highly lenient standard of judicial review by which it found Section 5 of the Voting Rights Act constitutional, when, under

⁴⁴ *Katzenbach*, 383 U.S. 324 (emphasis added).

⁴⁵ *Id.*

the proper constitutional analysis, it should have held Section 5 to be unconstitutional. This Court should note probable jurisdiction and rectify this clear error of the district court panel.

◆

CONCLUSION

This Court's thorough and thoughtful test for determining the constitutionality of legislation enacted by Congress pursuant its remedial Enforcement Clauses powers found in *Boerne* and the cases that followed must not be ignored as the district court panel did here. Therefore, this Court should note probable jurisdiction to correct the serious and far-reaching constitutional error of the district court panel.

Submitted October 10, 2008.

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