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 REASON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MANUEL S. KLAUSNER
LAW OFFICES OF
MANUEL S. KLAUSNER, P.C.
One Bunker Hill Building
601 West Fifth Street,
Suite 800
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerinc.com

DOUGLAS R. COX
Counsel of Record
TYLER R. GREEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
dcox@gibsondunn.com

Counsel for Amicus Curiae

January 2, 2013

QUESTION PRESENTED

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

BRIEF FOR REASON FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Reason Foundation ("the Foundation") is a national, nonpartisan, and nonprofit public policy think tank. The Foundation's mission is to advance a free society by promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. The Foundation supports market-based public policies that allow individuals and voluntary institutions to flourish.

The Foundation advances its mission by publishing *Reason* magazine, commentary on its websites, and policy research reports. It has also participated as *amicus curiae* in significant cases involving issues of individual rights and the rule of law, including *United States Department of Health & Human Services* v. *Florida*, No. 11-398, and *Kelo* v. *City of New London*, 545 U.S. 469 (2005).

This case raises just such an issue. The Court of Appeals' holding—that the 2006 reauthorization of Section 5 of the Voting Rights Act was a valid exercise of Congress's authority to enforce the Fifteenth Amendment—relied heavily on evidence created *after* Congress reauthorized Section 5. Such

---

[1] All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk of this Court. Pursuant to this Court's Rule 37.6, counsel for *amicus* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

post-hoc rationalizing is forbidden by this Court's precedents. A judicial system that tolerates this form of post-hoc analysis would undermine the predictability necessary to the rule of law, which fosters the only conditions in which individual liberty can flourish.

STATEMENT

To ensure that the promises enshrined in the Reconstruction Amendments did not become empty words, the drafters of those Amendments granted Congress "power to enforce" their provisions "by appropriate legislation."[2] Those new founts of congressional authority "'expand[ed] federal power at the expense of state autonomy,'" thereby "'fundamentally alter[ing] the balance of state and federal power struck by the Constitution.'" *Fla. Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank*, 527 U.S. 627, 637 (1999) (quoting *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 59 (1996)). But the Reconstruction Amendments did not fundamentally alter the distinct separation of powers between Congress and the judiciary. For example, the Amendments gave Congress "the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *City of Boerne*

---

[2] These words appear in Section 2 of the Thirteenth Amendment, Section 5 of the Fourteenth Amendment, and Section 2 of the Fifteenth Amendment. Although the three provisions contain other minor textual differences, they are essentially identical, and give Congress "similar power." *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966). As discussed in Section I below, this Court has used the same framework to analyze the constitutionality of laws passed under the Fourteenth and Fifteenth Amendments' grants of congressional enforcement authority.

v. *Flores*, 521 U.S. 507, 519 (1997). The latter responsibility remains vested in Article III courts alone. *See Bd. of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2000) ("[I]t is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees.").

This Court thus must ensure that legislation Congress passes under its authority "to enforce" the Reconstruction Amendments accords with "the fundamental principle of equal sovereignty" inherent in our federal system. *Nw. Austin Mun. Util. Dist. No. 1* v. *Holder*, 129 S. Ct. 2504, 2512 (2009). This is particularly true for legislation that constitutes "federal intrusion into sensitive areas of state and local policymaking," which "imposes substantial federalism costs," *id.* at 2511 (internal quotation marks omitted), or that "differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty,'" *id*. at 2512 (quoting *United States* v. *Louisiana*, 363 U.S. 1, 16 (1960)).

This Court determines the validity of an exercise of Congress's enforcement authority by applying a three-part test. "The first step . . . is to identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U.S. at 365. Second, a court must "examine whether Congress identified a history and pattern of unconstitutional [action] by the States." *Id.* at 368. This step requires careful review of the legislative record supporting the challenged act because "[t]he charge that a State has engaged in a pattern of unconstitutional discrimination against its citizens is a most serious one. It must be supported by more than conjecture." *Nev. Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 748 (2003) (Kennedy, J., dis.). Third, upon confirming that Congress amassed evidence in the legislative record

showing a "pattern of unconstitutional discrimination," *Garrett*, 531 U.S. at 370, a court assesses whether the legislation "exhibit[s] 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,'" *id.* at 365 (quoting *City of Boerne*, 521 U.S. at 520).

SUMMARY OF ARGUMENT

This Court bears the responsibility of ensuring that legislation enacted under Congress's authority "to enforce" the Reconstruction Amendments does not change constitutional rights or unduly interfere with State sovereignty. The Court historically has executed that duty by assessing challenged laws under a three-part test. This brief focuses on the second part of that test, which requires analyzing the legislative record at the time the challenged law was passed to determine whether Congress had identified a history and pattern of unconstitutional discrimination by the States. Under the Court's precedents, only a record containing such a showing can justify an exercise of Congress's enforcement authority.

The Court has applied that test to assess the constitutionality of, among other statutes, the Voting Rights Act of 1965 (and certain amendments to it), the Religious Freedom Restoration Act, and abrogations of State sovereign immunity in the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, and the Age Discrimination in Employment Act. Each case scrutinized the pre-enactment legislative record to determine whether Congress had amassed evidence of a pattern of constitutional violations by the States warranting the corresponding exercise of

enforcement authority. The Court's requirements on this issue are clear, and the federal district courts and the Executive Branch have repeatedly followed them with no apparent difficulty.

But in this case, the Court of Appeals relied in significant part on two sets of evidence created *after* 2006 to support its judgment, that the 2006 reauthorization of Section 5 of the Voting Rights Act was a constitutionally valid exercise of Congress's authority to enforce the Fifteenth Amendment. That approach cannot be reconciled with this Court's precedents requiring analysis of the evidentiary record *at the time* of legislative activity. Left unchecked, that approach may require the States—coordinate sovereigns—to endure years-long lawsuits to learn the post-hoc rationales allegedly justifying federal intrusion into their sovereign spheres. That approach also would allow repeated challenges to statutes enacted under Congress's enforcement authority any time "new" evidence emerged that could be construed to undermine Congress's reasoning.

Section I below reviews in detail this Court's precedents requiring a court to examine the evidence of discrimination that Congress compiled *before* legislating to enforce the Reconstruction Amendments. Section II examines the Court of Appeals' improper—yet crucial—reliance on post-enactment evidence to confirm the validity of Section 5's 2006 reauthorization.

This Court should reject the Court of Appeals' approach. It should assess the constitutionality of Section 5's 2006 reauthorization solely based on the record of unconstitutional State discrimination that Congress had compiled in 2006.

ARGUMENT

I. UNDER THE RECONSTRUCTION AMENDMENTS, CONGRESS'S EXERCISE OF ITS ENFORCEMENT AUTHORITY MUST BE JUSTIFIED BY THE EVIDENCE BEFORE CONGRESS AT THE TIME OF LEGISLATIVE ACTION.

A. 1. Congress passed the Voting Rights Act of 1965 under its Fifteenth Amendment enforcement authority in order "to banish the blight of racial discrimination in voting, which ha[d] infected the electoral process in parts of our country for nearly a century" before its passage. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966). "The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant." *Id.* at 315. Section 5 is one of the Act's remedies: it requires certain jurisdictions to pre-clear changes to their voting regulations through federal authorities, who are charged with ensuring that such changes do not "perpetuate voting discrimination." *Id.* at 316. Section 5 is thus "a substantial departure from . . . ordinary concepts of our federal system" that "significant[ly]" and "undeniabl[y]" encroaches "on state sovereignty." *United States* v. *Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 141 (1978) (Stevens, J., dis.) (internal quotation marks omitted).

This Court has repeatedly assessed whether Section 5 is a facially valid exercise of Congress's authority "to enforce" the Fifteenth Amendment by examining the evidence of intentional State

discrimination in voting that Congress had amassed *before* passing (or reenacting) that provision.[3]

In *Katzenbach*, this Court acknowledged that Section 5 was an "uncommon exercise of congressional power." *Id.* at 334. The Court nevertheless sustained Section 5 because its preclearance requirements "responded" to evidence in the legislative record of "exceptional conditions," *id.*, by which "Congress *knew* that some of the States covered by § 4(b) of the Act had 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," *id.* at 335 (emphasis added). Congress thus "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." *Id.* "Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner" by enacting Section 5, *id.*—a "legislative measure[] otherwise not appropriate," *id.* at 334.

---

[3] Indeed, reliance on post-enactment developments—as the Court of Appeals relied here—is inconsistent with even the most expansive approach to legislative history. *See, e.g.*, *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068, 1081–82 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation. Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law. But post-enactment legislative history by definition could have had no effect on the congressional vote." (internal quotation marks and citations omitted)).

Similarly, when the City of Rome, Georgia brought a facial challenge to Congress's 1975 decision to extend Section 5 for seven years, the Court relied on evidence before Congress in 1975—at the time of legislative action—to reject the challenge. *City of Rome* v. *United States*, 446 U.S. 156 (1980). The Court cited Congress's conclusion that "extension of the Act was warranted" because of record evidence documenting persistent disparities in voter registration among racial groups and small increases in the number of minority elected officials. *Id.* at 180–81. The Court also expressly observed that Congress had "careful[ly] consider[ed]" whether to "readopt[] § 5's preclearance requirement." *Id.* at 181. The legislative history contained Congress's finding that Section 5 had "become widely recognized as a means of promoting and preserving minority political gains in covered jurisdictions." *Id.* at 181 (internal quotation marks omitted). "After examining" the evidence before it in 1975, "Congress not only determined that § 5 should be extended for another seven years," but also concluded that the legislative record "clearly [established] the continuing need for this preclearance mechanism." *Id.* (internal quotation marks omitted).

This Court's most recent opinion addressing a facial challenge to Section 5 invoked the doctrine of constitutional avoidance and resolved the case on statutory grounds. *Nw. Austin Mun. Util. Dist. No. 1* v. *Holder*, 129 S. Ct. 2504, 2508 (2009). Nevertheless, *Northwest Austin*'s analysis comports entirely with *Katzenbach* and *City of Rome*. The Court noted "unquestionabl[e] improve[ment]" in "[s]ome of the conditions that we relied upon in upholding this statutory scheme in *Katzenbach* and *City of Rome*." 129 S. Ct. at 2511. "Voter turnout

and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels." *Id.* But the Court also left no doubt that "[p]ast success alone" could not constitute "adequate justification to retain the preclearance requirements." *Id.* Rather, because "the Act imposes current burdens," it "must be justified by current needs." *Id.* at 2512. The Court specifically highlighted "[t]he statute's coverage formula"—which "is based on data that is now more than 35 years old"—as one example where "considerable evidence" suggests that the 2006 reauthorization of the Voting Rights Act "fails to account for current political conditions." *Id.* at 2512. *Northwest Austin* thus endorses this Court's requirement that Section 5's validity be assessed in light of the "current needs" documented in the pre-enactment legislative record.

Following the Court's approach in *Katzenbach* and *City of Rome*, the three-judge district court panel in *Northwest Austin* framed the "precise questions" before it in these terms: "[H]ow do the nature and magnitude of the racial discrimination in voting *revealed in the 2006 legislative record* compare to the conditions documented by Congress in 1975, and is *the 2006 record* sufficiently comparable to the 1975 record for us to conclude that Congress again acted rationally when it extended section 5 for another twenty-five years?" *Nw. Austin Mun. Util. Dist. No. 1* v. *Mukasey*, 573 F. Supp. 2d 221, 247 (D.D.C. 2008) (emphasis added). Because the district court expressly recognized that its "review is limited to *the actual evidence Congress considered*," it refused to consider post-enactment evidence proffered by the

Attorney General when it assessed Section 5's constitutionality. *See id.* (emphasis added).[4]

2. This Court has also resolved facial challenges to the Voting Rights Act's other provisions by examining pre-enactment evidence. *Katzenbach* upheld Section 4(b)'s coverage formula because "Congress began work *with reliable evidence* of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act," 383 U.S. at 329 (emphasis added), including "the use of tests and devices for voter registration, and a voting rate in the 1964 presidential election at least 12 points below the national average," *id.* at 330. Section 4(b)'s coverage formula was thus "rational[]" because it covered all States and political subdivisions "in which *the record reveals* recent racial discrimination involving tests and devices." *Id.* at 331 (emphasis added). *See also id.* at 333–34 (upholding Section 4(a), which suspended voting-qualification tests, because "*[t]he record shows*" that "various tests and devices" had been used for discriminatory purposes) (emphasis added).

Katzenbach v. *Morgan*, 384 U.S. 641 (1966), upheld Section 4(e), which provided that any person "educated in American-flag schools in which the predominant classroom language was other than English" could vote without completing an English-

---

[4] That reasoning formed the basis for the District Court's order in this case denying the Attorney General's request for discovery into Shelby County's claim that Section 5 is facially unconstitutional. Such discovery was not warranted because the "court's analysis [was] limited to the actual evidence Congress considered." *Shelby Cnty.* v. *Holder*, 270 F.R.D. 16, 19 (D.D.C. 2010) (internal quotation marks omitted).

language literacy test. § 4(e)(1). Noting that this provision was primarily intended to protect the franchise for Puerto Rican immigrants in New York, the Court held that the legislative record "plainly" supported Congress's conclusion that Section 4(e)'s ban on literacy tests was an appropriate method of enforcing the Equal Protection Clause. *Id.* at 653.

B. The Executive Branch also has acknowledged that Voting Rights Act cases require Congress to exercise its enforcement authority based on pre-enactment evidence showing a pattern of constitutional violations. In *Northwest Austin*, the Attorney General expressly asked the three-judge district court panel to "assess the continuing validity of Section 5's preclearance mechanism *in light of the record of voting rights violations Congress amassed in support of the 2006 reauthorization*." Mem. in Supp. of Def.'s Mot. for Summ. J. at 12, *Nw. Austin Mun. Util. Dist. No. 1* v. *Mukasey*, No. 06-cv-1384 (D.D.C. May 15, 2007) (emphasis added). He also explained that "[i]n keeping with the Supreme Court's approach in *City of Rome*, this Court must determine whether the ongoing *record of voting discrimination Congress amassed in 2006* was sufficient to justify Congress's decision to extend the life of Section 5." Def.'s Mem. in Opp. to Pl.'s Mot. for Summ. J. at 14, *Nw. Austin Mun. Util. Dist. No. 1* v. *Mukasey*, No. 06-cv-1384 (D.D.C. June 15, 2007) (emphasis added).

To be sure, a different person now serves as Attorney General; and the Department of Justice now advocates a different view. *See* Opp. to Pet. for Cert. at 21 n.4, 26 n.7. But the Executive Branch's position in *Northwest Austin* accords with published Executive Branch guidance dating back at least 30 years. In 1982, for example, the Attorney General

issued an opinion on the constitutionality of proposed legislation that would have stripped federal district courts of jurisdiction to order out-of-area busing in order to remediate racial segregation in schools. *See* Constitutionality of Legislation Limiting the Remedial Powers of the Inferior Fed. Courts in Sch. Desegregation Litig., 6 Op. O.L.C. 1 (1982). In analyzing whether that bill would have been a permissible exercise of Congress's Fourteenth Amendment enforcement authority, the Attorney General cited *Katzenbach* and *City of Rome* to conclude that "Congress may enact statutes to prevent or to remedy situations which, *on the basis of legislative facts*, Congress determines to be violative of the Constitution." *Id.* at 7 (emphasis added). He further observed that "federal and state courts would probably pay considerable deference to the *congressional factfinding upon which the bill is ultimately based* in determining the scope of constitutional requirements in this area." *Id.* at 7–8 (emphasis added).

C. Congress also has invoked its Reconstruction Amendment enforcement authority to pass other statutes. This Court has resolved constitutional challenges to those statutes by applying the same three-step framework discussed above. In many instances, the Court's assessment of the challenged law's validity turned on whether Congress had amassed a sufficient pre-enactment record of unconstitutional State discrimination.

Two cases regarding different provisions in the Americans with Disabilities Act of 1990 (ADA) illustrate the point. Broadly speaking, the ADA is designed to eliminate discrimination against persons with disabilities. Title I prohibits discrimination in employment by certain employers, including the

States. *See generally* 42 U.S.C. §§ 12111–12117. Title II "prohibits any public entity from discriminating against 'qualified' persons with disabilities in the provision or operation of public services, programs, or activities." *Tennessee* v. *Lane*, 541 U.S. 509, 517 (2004) (citing 42 U.S.C. §§ 12131–12134). Both of those Titles contain provisions purporting to waive the States' immunity under the Eleventh Amendment, manifesting Congress's intent that the States should be liable for money damages if they discriminate against persons with disabilities in violation of those Titles. But because Congress cannot waive the States' Eleventh Amendment immunity using its Article I powers, *see Seminole Tribe*, 517 U.S. at 72–73, the ADA's waivers were constitutional only if they were legitimate exercises of Congress' authority to enforce Section 5 of the Fourteenth Amendment.

This Court applied *Katzenbach*'s test to hold that Title I's sovereign immunity waiver was not a valid exercise of Congress's Section 5 authority. *Bd. of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2000). *Garrett* observed that Congress had "simply fail[ed]" to "in fact identify" in "the legislative record of the ADA" a "pattern of irrational state discrimination in employment against the disabled." *Id.* at 368. Even the fact that Congress cited a "half dozen" record examples of State discrimination in employment against persons with disabilities failed to justify Title I's sovereign immunity waiver, *id.* at 369; those "incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based." *Id.* at 370. Particularly noteworthy was this Court's refusal to credit evidence cited by the dissent because it "consist[ed] not of legislative findings, but

of unexamined, anecdotal accounts of adverse, disparate treatment by state officials." *Id.* (internal quotation marks omitted).

In contrast, *Lane* concluded that the legislative history of Title II—more particularly, the legislative history regarding "the right of access to the courts at issue in this case," which was "protected by the Due Process Clause," 541 U.S. at 523—justified Title II's distinct waiver of sovereign immunity. "With respect to the particular services at issue in this case, Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities." *Id.* at 527. The specific record evidence included a "report *before Congress* show[ing] that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities," and testimony presented to "Congress itself" by "persons with disabilities who described the physical inaccessibility of local courthouses." *Id.* (emphasis added). Such evidence allowed the Court to "conclude that Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." *Id.* at 533–34.

The Court employed identical reasoning in two opinions concerning the Family and Medical Leave Act of 1993 (FMLA). The FMLA "entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons." *Nev. Dep't of Human Resources* v. *Hibbs*, 538 U.S. 721, 724 (2003). They include "the onset of a 'serious health condition' in an employee's spouse, child or parent," *id.* (quoting 29 U.S.C. § 2612(a)(1)(C)), or

the onset of "the employee's own serious health condition when the condition interferes with the employee's ability to perform at work," *Coleman* v. *Court of Appeals of Md.*, 132 S. Ct. 1327, 1332 (2012) (citing 29 U.S.C. § 2612(a)(1)(D)). The FMLA purports to abrogate the States' Eleventh Amendment immunity for State violations of § 2612(a)(1)(C)'s "family-care" provision and § 2612(a)(1)(D)'s "self-care" provision. *See* 29 U.S.C. § 2617(a)(2).

This Court held in *Hibbs* that the sovereign-immunity waiver for a State's violation of the "family-care" provision was a valid exercise of Congress's authority to enforce the Fourteenth Amendment's Equal Protection Clause. In so doing, *Hibbs* relied on "evidence that was *before Congress when it enacted the FMLA*" to show that Congress had learned that "States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits." 538 U.S. at 730 (emphasis added). Such evidence included a 1990 Bureau of Labor Statistics survey and congressional testimony showing maternity leave to be more broadly available than paternity leave, thereby reinforcing "stereotype-based beliefs about the allocation of family duties." *Id.* at 730–34.

Employing a similar analysis, the Court in *Coleman* held that Congress had not validly waived State sovereign immunity for State violations of the FMLA's self-care provision. The Court observed that the legislative record lacked "evidence of a pattern of state constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations." *Coleman*, 132 S. Ct. at 1334. For example, nothing in the record before Congress suggested that "States had facially discriminatory

self-care leave policies or that they administered neutral self-care leave policies in a discriminatory way." *Id.* Neither was the immunity waiver for the self-care provision justified as a "necessary adjunct to the family-care provisions," *id.* at 1335; indeed, "Congress made no findings and did not cite specific or detailed evidence to show how the self-care provision is necessary to the family-care provisions or how it reduces an employer's incentives to discriminate against women." *Id.* at 1336. The legislative record at the time of the FMLA's enactment thus revealed "no sufficient nexus, or indeed any demonstrated nexus, between self-care leave and gender discrimination by state employers." *Id.* at 1337.

In two other cases, this Court relied on the lack of evidence of unconstitutional discrimination in the pre-enactment legislative record to reject Congress's attempts to abrogate the States' sovereign immunity using its Reconstruction Amendment enforcement power. The Court held that the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act)—which purported to make States liable for patent infringement—was not a valid exercise of Congress's enforcement authority. *Fla. Prepaid Postsecondary Educ. Expense Bd.* v. *College Savings Bank*, 527 U.S. 627 (1999). "In enacting the Patent Remedy Act, . . . Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." *Id.* at 640. "The legislative record thus suggests that the Patent Remedy Act does not respond to a history of widespread and persisting deprivation of constitutional rights of the sort Congress has faced in enacting proper prophylactic § 5 legislation." *Id.* at 645 (internal quotation marks omitted).

Similarly, the Court held that Congress exceeded its enforcement authority by purporting to abrogate the States' sovereign immunity for violations of the Age Discrimination in Employment Act (ADEA). *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000). "Our examination of the ADEA's legislative record confirms" that "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Id.* at 89. The evidence that petitioners had cited to try to make that showing—which "consist[ed] almost entirely of isolated sentences clipped from floor debates and legislative reports"—fell "well short of the mark." *Id.* The Court also rejected petitioners' "reliance on a 1966 report by the State of California on age discrimination in its public agencies" because it did "not indicate that the State had engaged in any *unconstitutional* age discrimination." *Id.* at 90. Even if that report had established a pattern of unconstitutional discrimination by *California's* agencies, that "would have been insufficient to support Congress' 1974 extension of the ADEA to every State of the Union" because it did "not constitute evidence that [unconstitutional age discrimination] had become a problem of national import." *Id.* at 90 (internal quotation marks omitted). "A review of the ADEA's legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age." *Id.* at 91. "Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad

prophylactic legislation was necessary in this field." *Id.*

The Court also held that Congress had not validly exercised its enforcement authority when it enacted the Religious Freedom Restoration Act (RFRA). *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). RFRA constituted Congress's attempt to overrule this Court's holding in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne*, 521 U.S. at 514. In striking down RFRA, the Court highlighted the "instructive" comparison "between RFRA and the Voting Rights Act." *Id.* at 530. "[T]he record which confronted Congress and the Judiciary in the voting rights cases" "contrast[ed]" markedly with "RFRA's legislative record," which "lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* at 530. *See also Fla. Prepaid*, 527 U.S. at 639 ("RFRA failed to meet this test because there was little support in the record for the concerns that supposedly animated the law.").

II. THE COURT OF APPEALS ERRED BY RELYING ON POST-ENACTMENT EVIDENCE TO UPHOLD THE RENEWAL OF SECTION 5.

A. The Court of Appeals based its holding that Section 5's "disparate geographic coverage is sufficiently related to the problem that it targets," App. to Pet. for Cert. 48a (internal quotation marks omitted), in part on two pieces of post-enactment evidence. This error was critical. The Court of Appeals itself characterized the question "whether the record contains sufficient evidence to

demonstrate that the [coverage] formula continues to target jurisdictions with the most serious problems" as "a close question," *id.* at 58a—even *with* the post-enactment evidence buttressing its analysis. That acknowledgment underscores that post-enactment evidence infected the Court of Appeals' analysis on an essential part of the legal test.

First, the Court of Appeals relied on a supplemental declaration from Justice Department historian Dr. Peyton McCrary. This declaration is located in Appendix G of the Joint Appendix. *See* JA 144a–155a. The declaration purports to provide a nationwide tally—from both jurisdictions covered by Section 5 and jurisdictions not subject to its constraints—of published and unpublished "successful" cases under Section 2 of the Voting Rights Act. App. to Pet. for Cert. 51a. (Section 2 "enables individuals to bring suit against any state or jurisdiction to challenge voting practices that have a discriminatory purpose or result." *Id.* at 5a.) According to the Court of Appeals, these data show a "striking" "concentration of successful section 2 cases in the covered jurisdictions," which Dr. McCrary argued evinces a continuing need for Section 5's preclearance requirements in covered jurisdictions. *Id.* at 51a. This analysis was performed during this litigation, based in part on extra-record data gathered by different persons using unknown collection methods. *See id.* at 54a. This declaration clearly was not before Congress in 2006.

Second, the Court of Appeals reasoned that the propriety of Section 5's "disparate geographic coverage" should be assessed in light of "the statute as a whole, including its provisions for bail-in and bail-out." *Id.* at 61a. (The Voting Rights Act's "bail-out" provisions permit "jurisdictions originally

covered" to "escape section 5 preclearance by demonstrating a clean record on voting rights for ten years in a row." *Id.* at 63a (citing 42 U.S.C. § 1973b(a)(1) (listing bail-out criteria)). According to the Court of Appeals, the bail-out mechanism plays an "important role in ensuring that section 5 covers only those jurisdictions with the worst records of racial discrimination in voting" because it "reduce[s] the possibility of overbreadth and helps to ensure Congress' means are proportionate to [its] ends." *Id.* at 62a (internal quotation marks omitted). The Court of Appeals thus relied on data showing that "[a]s of May 9, 2012, having demonstrated that they no longer discriminate in voting, 136 jurisdictions and sub-jurisdictions had bailed out, including 30 counties, 79 towns and cities, 21 school boards, and 6 utility or sanitary districts." *Id.* at 62a. Critically, the Court noted that "the pace of bailout increased after *Northwest Austin*" made bail-out available to any type of covered jurisdiction: "of the successful bailout actions since 1965, 30 percent occurred in the three years after the Supreme Court issued its decision in 2009." *Id.* at 63a. These post-*Northwest Austin* bail-out data also were not before Congress in 2006.

Those two data sets should have played no role in the Court of Appeals' analysis of Congress's decision to reauthorize Section 5. Under *Katzenbach* and its progeny, courts assess the constitutional validity of such exercises of Congress's authority "to enforce" the Reconstruction Amendments based on whether the legislative record on the date of enactment showed a history and pattern of unconstitutional State discrimination. As the Court of Appeals necessarily recognized, both the McCrary analysis of unpublished Section 2 litigation in

uncovered jurisdictions—and the evidence of bail-out since *Northwest Austin*—were created well after 2006. Accordingly, that information was not evidence showing a pattern of unconstitutional discrimination in 2006; thus it could not have justified Congress's 2006 reauthorization of Section 5. This evidence is legally irrelevant to the question presented, and the Court of Appeals erred. This Court should not rely on post-enactment data in resolving Shelby County's facial challenge to Section 5.[5]

B. Neither should the Court countenance the Court of Appeals' explanation for considering the McCrary data even though it was not part of the legislative record. The Court of Appeals knew that *Katzenbach* and its progeny turned on the record before Congress at the time of legislation, but sought to excuse its departure from precedent by a tortured reading of *Lane*. It reasoned that "the Supreme Court has considered post-enactment evidence to find at least one law congruent and proportional, *see Lane*, 541 U.S. at 524–25 nn. 6–9 & 13, and here a majority of the unpublished cases from non-covered jurisdictions (as well as all from covered jurisdictions) appears in the legislative record." *Id.*

---

[5] Because, as shown above, the post-enactment data should be rejected on purely legal grounds, this Court need not consider the methodological or statistical anomalies that led the Court of Appeals, for example, "to approach this [McCrary] data with caution." *Id.* at 54a; *see also id.* at 93a (Williams, J., dis.). If this Court were to consider those post-enactment materials, their anomalies provide a fact-specific basis for rejecting them. And—for the reasons discussed in Shelby County's brief—those post-enactment materials fail in any event to sustain the 2006 reauthorization of Section 5. *See* Petr.'s Br. 52–54.

at 54a (parenthetical omitted). The Court also stated that "Shelby County has identified no errors or inconsistencies in the data analyzed by McCrary." *Id.*

First, the evidence in *Lane* cited by the Court of Appeals did not concern the "particular services at issue" in *Lane*, 541 U.S. at 527—"the right of access to the courts," *id.* at 523. Rather, that evidence (and the discussion it supported) sketched a general overview of "harm that Title II [of the ADA] is designed to address."[6] *Id.* at 524. Accordingly, those portions of *Lane* are dicta that provide no basis for the Court of Appeals' departure from the uniform rule explained in Section I.[7]

---

[6] The evidence that this Court actually cited "[w]ith respect to the particular services at issue in" *Lane* consisted principally of "a report *before Congress*" and pre-enactment testimony to Congress "from persons with disabilities," both of which "described the physical inaccessibility of local courthouses." *Id.* at 527 (emphasis added). *Lane* also cited "examples of the exclusion of persons with disabilities from state judicial services and programs" that a congressional task force had compiled, and a post-enactment report that the task force prepared. *See id.* But because pre-enactment evidence supports *Lane*'s as-applied holding, its additional citations to task force materials (which may not have been necessary to its holding) are best read as secondary support for its outcome, so as to avoid making *Lane* an outlier in this Court's otherwise uniform precedent.

[7] The Attorney General's additional reliance on *Hibbs* to support the Court of Appeals' error is particularly puzzling. *See* Br. for Resps. in Opp'n 21–22 n.4 (citing *Hibbs*, 538 U.S. at 733–34 & nn.6–9). *Hibbs* made clear that its holding relied on pre-enactment evidence: "As we stated above, our holding rests on congressional findings that, *at the time the FMLA was enacted*, States 'rel[ied] on invalid gender stereotypes in the

[Footnote continued on next page]

Additionally, *Lane* limited its holding as "applie[d] to the class of cases implicating the fundamental right of access to the courts"; only in that specific application was the sovereign immunity waiver in Title II of the ADA "a valid exercise of Congress's § 5 authority to enforce the guarantees of the Fourteenth Amendment." *Id.* at 533–34. Because *Lane* adopted only an as-applied holding, it is not binding in this facial challenge to Section 5's constitutionality. *See, e.g.*, *Doe* v. *Reed*, 130 S. Ct. 2811, 2817 (2010) (explaining the more limited scope of as-applied challenges in comparison to facial challenges).

Finally, with respect to the Court of Appeals' claim that Shelby County did not identify errors or inconsistencies in the McCrary data, nothing in *Lane* (or any other precedent) requires a party challenging legislation passed under Congress's Reconstruction Amendment enforcement authority to rebut legally irrelevant data. The Court of Appeals certainly cited no authority supporting such a requirement.

C. If allowed to stand, the Court of Appeals' deviation from this Court's uniform precedents would create several serious legal and practical problems. First, it would raise the possibility that a State would not learn until years after legislation enforcing the Reconstruction Amendments was passed—and after suing the federal government—all the reasons supporting Congress's exercise of its enforcement authority. In such cases, Congress or the Attorney General presumably could seek to

---

[Footnote continued from previous page]

employment context, *specifically in the administration of leave benefits*.'" 538 U.S. at 735 n.11 (first emphasis added).

buttress a weak legislative record with post-hoc declarations, as happened here. The resulting litigation uncertainty and gamesmanship would amount to a stark "departure from the fundamental principle of dual sovereignty" that hardly befits our federal system. *Nw. Austin*, 129 S. Ct. at 2512.

Second, it would create a new tactic in litigation challenging legislation passed under Congress's enforcement authority that must be available to all parties. If *supporters* of an exercise of Congress's enforcement authority could invoke post-enactment evidence to *justify* such legislation, there is no principled legal reason why States *challenging* such legislation should not also be able to invoke contrary post-enactment evidence to *attack* the legislation.

Under such a regime, even if Respondents were to prevail in this case, Shelby County—or other jurisdictions covered by Section 5 of the Voting Rights Act—could repeatedly challenge that law's 2006 reenactment for the next 25 years so long as they could cite new post-enactment evidence to argue that preclearance was no longer justified by this evolving view of "current needs."[8] States could again challenge the FMLA's waiver of their Eleventh Amendment immunity if new evidence showed that

---

[8] This is not a hypothetical possibility. For example, the Pew Research Center recently published a report analyzing voter turnout in the 2012 presidential election. It concluded, among other things, that "Blacks voted at a higher rate this year than other minority groups and for the first time in history may also have voted at a higher rate than whites." Paul Taylor, Pew Research Center, *The Growing Electoral Clout of Blacks Is Driven by Turnout, Not Demographics* 1 (Dec. 26, 2012), *available at* http://www.pewsocialtrends.org/files/2012/12/2012_Black_Voter_Project_v2.pdf (last visited Jan. 2, 2013).

States were no longer enforcing the FMLA's "family-care" provision in a discriminatory manner. *See Hibbs*, 538 U.S. at 730. States could also re-challenge the sovereign immunity waiver in Title II of the ADA if new evidence showed that States had eliminated the accessibility barriers to their courthouses that discriminated against individuals with disabilities. *See Lane*, 541 U.S. at 527. And religious organizations could again invoke their rights under RFRA against the States if they compiled "examples of modern instances of generally applicable laws passed because of religious bigotry." *City of Boerne*, 521 U.S. at 530.

Nothing in this Court's precedents supports such repeated post-hoc attacks on enforcement legislation that would follow from the Court of Appeals' approach. It is difficult to conclude that Congress envisioned a coordinate branch of government reviewing its legislative judgments based on facts occurring years after it acted—much less that Congress would be willing to abandon the fate of its laws to whatever social or political evidence litigants could conjure during a lawsuit. Such a system would be antithetical to the principled, reasoned decisionmaking that has long been the hallmark of this Court's jurisprudence of judicial review.

This Court should thus reject the Court of Appeals' erroneous reliance on post-enactment evidence to uphold Section 5. The Court should adhere to *Katzenbach* and assess Section 5's constitutionality solely in light of the pattern of unconstitutional State discrimination that Congress had compiled before it reauthorized Section 5 in 2006.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

MANUEL S. KLAUSNER
LAW OFFICES OF
MANUEL S. KLAUSNER, P.C.
One Bunker Hill Building
601 West Fifth Street,
Suite 800
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerinc.com

DOUGLAS R. COX
Counsel of Record
TYLER R. GREEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
dcox@gibsondunn.com

Counsel for Amicus Curiae

January 2, 2013