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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Four years ago, this Court expressed grave doubts about Congress' reenactment of Sections 4(b) and 5 of the Voting Rights Act ("VRA"), emphasizing preclearance's extraordinary federalism burden, departure from the principle of equal sovereignty, and substantive command to make voting changes that "would be unconstitutional" elsewhere in the country. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202-03 (2009) ("*Northwest Austin*") (citing *Georgia v. Ashcroft*, 539 U.S. 461, 491-92 (2003) (Kennedy, J., concurring)). Nevertheless, Congress and the Attorney General took no steps to address these serious constitutional concerns.

Respondent therefore is forced to make attenuated arguments to mask the statute's constitutional flaws. The government dresses up a plea for judicial abdication as deference to Congressional judgment while asking the Court to uphold preclearance based on evidence Congress never considered. It emphasizes Section 5's historic accomplishments but fails to explain how current conditions even remotely compare to the widespread intentional disenfranchisement that justified preclearance as an enforcement remedy in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *City of Rome v. United States*, 446 U.S. 156 (1980). And it concedes that Section 4(b)'s formula is irrational in theory, defending it only as rational in practice, and even then resorting to statistical manipulations.

Thus, Respondent must misconstrue precedent to vindicate its position. Notwithstanding preclearance's departure from foundational principles, this Court twice

upheld it as an emergency response to obstructionist Fifteenth Amendment violations "concentrated in the jurisdictions singled out for preclearance." *Northwest Austin*, 557 U.S. at 203. In 2006, Congress claimed to target Fourteenth Amendment vote dilution—but it never documented conditions showing Section 2 to be inadequate, crafted a coverage formula "sufficiently related to [that] problem," or confined this burdensome prior restraint to jurisdictions where vote dilution is uniquely problematic. *Id.*

This Court has a duty to ensure that Congress does not misuse its enforcement authority to undermine "vital principles necessary to maintain separation of powers and the federal balance." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Those concerns are especially pronounced in this setting as preclearance deprives covered States of that which defines them as sovereign entities—"autonomy with respect to the machinery of self-government." *Northwest Austin*, 557 U.S. at 217 (Thomas, J.). Consequently, this Court must exercise its independent judgment under Article III to determine whether the legislative record documents "relevant constitutional violations," *Tennessee v. Lane*, 541 U.S. 509, 564 (2004) (Scalia, J., dissenting), and reveals the "unique circumstances" peculiar to covered jurisdictions that could "justify legislative measures not otherwise appropriate," *Katzenbach*, 383 U.S. at 334. Because the 2006 legislative record does not meet this test, Congress' reenactment of Sections 4(b) and 5 exceeds its remedial enforcement authority under the Fourteenth and Fifteenth Amendments.

A. Respondent Cannot Avoid The Careful Judicial Review Necessary To Ensure That Congress Exercises Its Enforcement Authority Appropriately.

Respondent seeks to narrow this Court's review of Sections 4(b) and 5 by trumpeting the cardinal importance of preventing racial discrimination in voting. Brief for the Federal Respondent ("Br.") 17-19. The intersection of voting rights and anti-discrimination concerns, the government claims, places Congress at the apex of its enforcement powers, requiring the Court to give Congress "greater leeway." Br. 18. But Respondent seeks deference so comprehensive that it would fundamentally degrade this Court's ability to fulfill its Article III duty. And affording this special deference to some constitutional values—but not others—would wrongly specify a hierarchy of Fourteenth and Fifteenth Amendment rights. At base, otherwise unconstitutional enforcement legislation cannot be saved by asking this Court to accept on faith Congress' determination that prophylactic legislation does not exceed constitutional limits.

Unchecked judicial deference cannot be reconciled with the remedial scope of congressional enforcement authority. The Court has always understood that the enforcement power does not encompass "general legislation upon the rights of the citizen, but corrective legislation." *Civil Rights Cases*, 109 U.S. 3, 13-14 (1883). It is "appropriately exercised only in response to state transgressions." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001); *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970) (Black, J.). Absent this focus, remedial "legislation may become substantive in operation and effect." *Boerne*, 521 U.S. at 520; *Coleman v. Court of Appeals of Md.*, 132

S. Ct. 1327, 1333-38 (2012). The Court must independently decide whether Congress has employed its enforcement authority prophylactically to prevent future constitutional violations or has inappropriately extended a prescriptive power into areas reserved to the States under the Tenth Amendment.

To keep Congress from crossing this line, the Court must ensure that enforcement legislation correctly identifies the constitutional violations against which it proposes to act. Because Congress has not "been given the power ... to determine what constitutes a constitutional violation," *Boerne*, 521 U.S. at 519, the Court itself must determine whether the record documents "relevant constitutional violations," *Lane*, 541 U.S. at 564 (Scalia, J., dissenting), or catalogs state action transgressing only a barrier established by Congress, *see, e.g.*, *Garrett*, 531 U.S. at 369. The Court also must determine for itself whether the prophylactic remedy is appropriately responsive or instead attempts to reshape the balance of power between the States and the federal government. *Northwest Austin*, 557 U.S. at 223-26 (Thomas, J.); *see, e.g.*, *Katzenbach*, 383 U.S. at 334 ("[E]xceptional conditions ... justify legislative measures not otherwise appropriate."); *Mitchell*, 400 U.S. at 130-34 (Black, J.) (upholding literacy-test ban but invalidating 18-year-old voting age in state elections based on same legislative record).

Moreover, no decision has held that Congress' enforcement power varies with the right safeguarded. *See, e.g.*, *Garrett*, 531 U.S. at 365, *Coleman*, 132 S. Ct. at 1333-34. In enacting RFRA, Congress sought to safeguard the free exercise of religion, *Boerne*, 521 U.S. at 519, a right entitled to no less protection than the right to vote, *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963). Yet this

Court reviewed RFRA without according "greater leeway" and explained that the differing outcomes of *Katzenbach* and *Boerne* resulted from the records on which Congress acted rather than differing review standards. *Boerne*, 521 U.S. at 530-31. Indeed, the distinctive factor that has affected the Court's scrutiny of Section 5 is not the right it enforces but its extraordinary federalism burden. *Northwest Austin*, 557 U.S. at 224-25 (Thomas, J.).

Finally, neither the size of the legislative record nor bipartisan support alters the analysis. Br. 12, 20. *Garrett* invalidated Title I of the ADA despite 17 hearings, 63 public forums, 8,000 pages of testimony, 149 Cong. Rec. S5411 (2003) (Sen. Tom Harkin), and passage by a margin of 377-28 in the House and 91-6 in the Senate, 136 Cong. Rec. 17296-97, 17376 (1990). RFRA passed the Senate 97-3 and the House by voice vote. 139 Cong. Rec. H2363, S14471 (1993). "[T]he responsibility of an independent judgment is now thrown upon this court" and the Court is "bound to exercise it." *Civil Rights Cases*, 109 U.S. at 10. Whether the Court frames its review as following from *Katzenbach*, *Boerne*, *Northwest Austin*, or any combination thereof, the outcome is the same: Congress exceeded its enforcement authority by reenacting Sections 4(b) and 5. *Compare* Judicial Education Project Am. Br. 3-22, *with* Project 21 Am. Br. 6-15.

B. Respondent Has Failed To Demonstrate That Section 4(b)'s Coverage Formula Is Rational In Theory And Practice.

A singular characteristic of Section 5 preclearance is its application only to jurisdictions falling within Section 4(b)'s formula. To survive review, that formula must target jurisdictions where Congress has found a pattern

of constitutional violations and exclude jurisdictions not having similar characteristics. Only then could it be "rational in both practice and theory." *Katzenbach*, 383 U.S. at 330. Respondent fails to show that Section 4(b) passes either test.

1. Section 4(b) is no longer rational in theory.

Respondent ignores *Northwest Austin*'s admonition that the "disparate geographic coverage formula" must be "sufficiently related to the problem that it targets," 557 U.S. at 203, offering no theoretical defense of Section 4(b). Nor could it. Pet. Br. 40-43. In *Katzenbach*, this Court found Section 4(b) rational in "theory" because its two triggers—use of discriminatory tests and devices and low registration and turnout—reliably signaled a pattern of constitutional violations. 383 U.S. at 329-31. Respondent thus wrongly claims that "those criteria were not selected because Congress was specifically focused on the voting-related concerns the criteria reflect." Br. 48. "Congress had learned that widespread and persistent discrimination in voting ... ha[d] typically entailed the misuse of tests and devices, *and this was the evil for which the new remedies were specifically designed.*" *Katzenbach*, 383 U.S. at 331 (emphasis added). Tests and devices were Congress' target; low voting rates were indicative of their discriminatory effect on minority voters.

Respondent denies the significance of Section 4(b)'s "criteria" because they highlight the irrationality of retaining a formula "based on data that is now more than 35 years old" and that "fails to account for current political conditions." *Northwest Austin*, 557 U.S. at 203. Tests and devices have been outlawed nationally for decades, and

"condemnation under §4(b) is a marker of higher black registration and turnout." Pet. App. 83a (Williams, J.). In renewing Section 5, Congress claimed it was targeting a different problem altogether—vote dilution—but the point of *Katzenbach* and *Northwest Austin* is that Congress must do more than train its sights on one constitutional violation or another. It must rationally tie coverage to the problem it targets. Neither Congress nor Respondent makes a colorable showing of any theoretical connection between the formula's triggers and a pattern of unconstitutional vote dilution. Pet. Br. 41-42.

Respondent nevertheless asks the Court to ignore the formula and review it only as a shorthand specification of those jurisdictions Congress wanted to cover. In the government's view, Congress sought to "reverse engineer" a formula matching its 2006 findings and serendipitously discovered that the antiquated formula was suited to the task. Br. 48-50. Respondent's fanciful reconstruction of the legislative process is not borne out by the record. Congress did not carefully survey the national landscape and learn that vote dilution was "concentrated" in the exact same 12,000 jurisdictions—not one more, not one less—covered under a formula that has not been amended since 1975. Congress asked if "Section 5 is still needed in the covered jurisdictions" when analyzed collectively, Br. 49-50, without ever considering (perhaps for political reasons) whether vote dilution was equally or more prevalent in any non-covered jurisdiction, Pet. Br. 45; Southeastern Legal Found. Am. Br. ("SLF") 24-28.

The choice between a formula and singling out covered jurisdictions via a list also is not the academic question Respondent would like it to be. Br. 48. Congress'

use of neutral criteria rationally targeting the original "evil" Section 5 was designed to remedy persuaded the *Katzenbach* Court to tolerate imperfections in coverage. Because Section 4(b)'s criteria were rational in "theory," it was "permissible" to impose preclearance in places with less evidence "of substantial voting discrimination in recent years" and to "exclude[] certain localities which [did] not employ voting tests and devices but for which there [was] evidence of voting discrimination by other means." *Katzenbach*, 383 U.S. at 330-31. Those imperfections would have been impermissible absent theoretically rational coverage criteria.

Indeed, express designation of specific jurisdictions for coverage would have required individualized statutory findings justifying the placement of each jurisdiction in federal receivership. *Mitchell*, 400 U.S. at 284 (Stewart, J.); *Lane*, 541 U.S. at 564 (Scalia, J., dissenting). Congress was not willing to bear the burden of "expressly naming" the jurisdictions it sought to cover in 1965. Br. 49. And it certainly was unwilling to do so in 2006. Congress made no finding that Shelby County or any other jurisdiction had a current record of voting discrimination distinguishing it from the rest of the country. The only thing "Congress answered overwhelmingly in the affirmative," Br. 50, was its unwillingness to revisit the formula.

Intervenors' argument—which Respondent does not join—that Petitioner cannot maintain a challenge to the formula because Section 4(b) can be upheld as applied to Shelby County even if "the record of discrimination in ... other jurisdictions ... is insufficient to justify coverage" fails for the same reason. Cunningham Br. 47-51. The formula's constitutionality raises a legal question that

cannot be answered by pretending that it is a list and then scouring the legislative record to try to prove that Congress *could have* justified preclearance as to a particular jurisdiction even though it never did. Shelby County is covered by formula—not specification—and, as in *Katzenbach*, may contest coverage by challenging the formula itself.

2. Section 4(b) is no longer rational in practice.

Respondent's arguments attempting to show that Section 4(b) is rational in practice also miss the mark. Rather than considering each State individually—the only process that would afford equal dignity to each one, Pet. Br. 49-50—Respondent relies on the Katz study of Section 2 litigation and lumps the States together in an attempt to manufacture a collective distinction between covered and non-covered jurisdictions. Petitioner already has addressed this use of the Katz study and need not repeat its arguments. Pet. Br. 50-54. But it bears repeating that the Katz study relied on "favorable outcomes for minority plaintiffs," Br. 50, a category of cases that is inherently unreliable and therefore not probative for evaluating which jurisdictions are most likely to violate the Constitution. Pet. Br. 49; Texas Am. Br. 22-23.

Respondent's only additional argument rests on artificially inflating the narrow covered versus non-covered divide by supplementing it with a study of "unreported cases for the non-covered areas" derived "from a compilation" by Peyton McCrary, Harris Br. 52 n.29, that he prepared "in the course of this litigation," and then "adjust[ed]" for population to "Section 2 cases per million residents," Br. 51-52. Mr. McCrary admitted

that evidence of unreported cases in the legislative record was "restricted to jurisdictions covered by Section 5" and his own search "may be under-inclusive." JA 43a-45a. The study thus is inherently unreliable because it is not in the legislative record, *see infra* 20, and for several other reasons, Pet. App. 93a-94a (Williams, J.).

Respondent's manipulation of the data according to statewide population also is troubling. Neither Congress nor this Court has ever "adjusted" Section 2 litigation data based on population to evaluate a jurisdiction's propensity to discriminate. Nor does Respondent explain why this metric is probative rather than simply conjured up to bolster its position. There is no empirically valid reason, for example, to believe that Montana (pop. 945,000; two Section 2 violations) is 38 times more likely to discriminate than California (pop. 36.1 million; two Section 2 violations). U.S. Census Population Estimates (2006), *available at* http://www.census.Gov/popest/data/state/asrh/2008/SCEST2008-03.html ("*2006 Census Report*"). Indeed, there is every reason to doubt it.

Almost every Section 2 case involves vote dilution and thus is dependent on the concentration of minorities within a local community—not the statewide population. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). It is quite likely, then, that Arkansans (black pop. 453,000; four Section 2 violations) are not different from Oklahomans and Kansans (combined black pop. 447,000; zero Section 2 violations), and that the people of Colorado (Hispanic pop. 937,000; two Section 2 violations) do not have greater propensity to discriminate than their neighbors in Utah and Nevada (combined Hispanic pop. 891,000; zero Section 2 violations). *2006 Census Report*. To determine whether any jurisdiction has a greater tendency than another to

engage in vote dilution, Congress needed to compare similar local communities with the kind of demographics making vote dilution possible. Congress, of course, made no such comparison. It did not even compile the data necessary to make such a comparison.

But even "adjusting" for population cannot help Respondent; the great majority of covered jurisdictions remain "indistinguishable from their uncovered peers." Pet. App. 93a (Williams, J.). "The five worst uncovered jurisdictions, including at least two quite populous states (Illinois and Arkansas), have worse records than eight of the covered jurisdictions." *Id.* There is thus no correlation between coverage and successful Section 2 cases per million residents. *Id.* 92a. If anything, Respondent's need to resort to such manipulations reveals the weakness of its position.

Perhaps realizing that her study undermines rather than supports the formula, Professor Katz—participating as *amicus* here—suggests another way to manufacture a disparity between covered and non-covered jurisdictions. She contends that the disparity in Section 2 litigation becomes pronounced when adjusted for the relative number of political subdivisions. Katz Am. Br. 8-9. But given that vote dilution depends on the concentration of minorities within a jurisdiction, "adjusting" for the number of political subdivisions makes no more sense than doing the same for population. It is the racial demographics of a political division—not the number of them—that matters for vote dilution purposes. In short, no matter how Respondent and its *amici* sort the data (something Congress never did), the formula is a "remarkably bad fit" to the vote-dilution problem Congress sought to remedy. Pet. App. 95a (Williams, J.).

3. Bailout and bail-in cannot save Section 4(b)'s coverage formula.

Respondent does not argue that bailout continues to ameliorate Section 4(b)'s overbreadth by terminating preclearance for jurisdictions that "should not have been covered in the first place." BIO 4. Rather, the government acknowledges that, as amended in 1982, bailout is "an incentive to [all] covered jurisdictions to end voting discrimination within their borders." Br. 54; Pierson Br. 41. Since bailout no longer performs the tailoring function that once made it constitutionally pertinent, *Katzenbach*, 383 U.S. at 331-33, it is immaterial to the issues here.

In any event, Respondent's own bailout statistics confirm its infinitesimal impact. There have been 38 successful bailout actions resulting in the termination of coverage for 196 discrete jurisdictions since 1984. Br. 54. Bailout thus affects only a tiny fraction of the 12,000 covered jurisdictions and, as Respondent concedes, Br. 55-56, is not a viable option for States—even for States with no Section 2 violations, *see* Arizona, *et. al.* Am. Br. 27-30; Alaska Am. Br. 26-33. And for jurisdictions that pursue it, bailout comes at substantial expense. Merced County Am. Br. 29 (spending "approximately $350,000" on bailout). All of this "underscores how little relationship there is between the existence of bailout and the constitutionality" of the preclearance regime under this formula. *Northwest Austin*, 557 U.S. at 215 n.1 (Thomas, J.).[1]

1. Respondent's contention that it enforces "the bailout criteria in a flexible and practical manner," Br. 56, is cause for concern given the potential for abuse, Alaska Am. Br. 13-22.

Finally, Respondent's argument that bail-in solves the formula's under-inclusiveness is misplaced. Br. 53. Bail-in operates nationwide and is available only after a judicial finding of unconstitutional discrimination. It does not require the bailed-in jurisdiction to seek approval from the Attorney General or to contest changes in a remote venue. And it can be terminated without satisfying elaborate bailout criteria. Alaska Am. Br. 23-26. Bail-in is the kind of targeted remedy that can complement Section 2 to ensure that minority voters throughout the nation are afforded ample protection from unconstitutional conduct. NBCC Am. Br. 23-27. It underscores rather than solves the problems with the coverage formula.

C. Respondent Has Not Shown That Current Conditions Justify Section 5's Extraordinary Preclearance Remedy.

Invalidating Section 4(b) would eliminate preclearance, but Section 5 is itself unconstitutional as Congress did not compile a record that could justify subjecting *any* jurisdiction to preclearance. Although Respondent asserts that "the same problems with case-by-case litigation" that existed when *Katzenbach* and *Rome* were decided "persist today," Br. 35, the record does not substantiate the assertion. Because "[t]hings have changed in the South," *Northwest Austin*, 557 U.S. at 202, "the extensive pattern of discrimination that led the Court to previously uphold §5 ... no longer exists," *id.* at 226 (Thomas, J.).

1. Respondent ignores Section 5's current burdens.

Respondent misconceives the standard under which the Court must evaluate Section 5 by ignoring its "current

burdens." *Northwest Austin*, 557 U.S. at 203. Federalism is not an afterthought that must give way when Congress invokes its remedial enforcement authority. Preclearance is a radical departure from the division of powers between the States and the federal government. *See, e.g.* Arizona *et. al.* Am. Br. 24-27; Alabama Am. Br. 13-21; Texas Am. Br. 5-15; Alaska Am. Br. 9-12. It imposes a sweeping prior restraint on all voting changes and places a massive financial strain on covered jurisdictions. *See, e.g.*, Merced County Am. Br. 29. Respondent even acknowledged that preclearance cost covered jurisdictions more than $1 billion over ten years. Transcript of Oral Argument 33, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, No. 08-322 (Apr, 29, 2009). And despite defending Congress' decision to overturn *Ashcroft* and *Reno v. Bossier Parish School Bd.*, 528 U.S. 320 (2000) ("*Bossier II*"), Br. 41-47, Respondent does not dispute the amendments' increase to the already significant preclearance burden. Former Officials Am. Br. 7-17; Nix Am. Br. 34-38.

Given these burdens, Congress must do more than assemble a record showing that preclearance is a "valid" or "effective means of combating voting discrimination in the covered jurisdictions." Br. 13, 15-16. A remedy that is "valid" in one circumstance may be invalid in another. *Katzenbach*, 383 U.S. at 334. And a prior restraint can be "effective," but preclearance's federalism costs also require it to be "drawn in narrow terms" in response to current political conditions. *Coleman*, 132 S. Ct. at 1334. "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Boerne*, 521 U.S. at 530 (citing *Katzenbach*, 383 U.S. at 308, 334). Whether "exceptional conditions," *Katzenbach*, 383 U.S. at 334,

continue to justify preclearance is the precise issue the Court isolated in asking whether "current needs" justify "current burdens," *Northwest Austin*, 557 U.S. at 203.

2. The 2006 record does not measure up to the records considered in *Katzenbach* and *Rome*.

Respondent does not even attempt to argue that the legislative record documents conditions resembling those that led the Court to uphold Section 5 in *Katzenbach*. Pet. Br. 27-33. It instead speculates that preclearance is the reason why obstructionist tactics are no longer employed. Br. 34-36. Even if improvements were "due in significant part to the Voting Rights Act itself, and stand as a monument to its success," *Northwest Austin*, 557 U.S. at 202; *Riley v. Kennedy*, 553 U.S. 406, 429-30 (2008) (Stevens, J., dissenting), Congress needed to document that systematic obstruction—not its absence—still permeates covered jurisdictions. Otherwise Section 5 could be reenacted in perpetuity based on "outdated assumptions about racial attitudes in the covered jurisdictions," *Northwest Austin*, 557 U.S. at 226 (Thomas, J), instead of "reliable evidence of actual voting discrimination," *Katzenbach*, 383 U.S. at 329.

Respondent's correlation of present circumstances to those confronting the Court in *Rome* also is misplaced. Br. 27, 35-38. Current conditions differ dramatically from those Congress confronted in 1975 just 10 years after passage of the VRA. At that time, "[s]ignificant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions." *Rome*, 446 U.S. at 180. As shown below, those disparities no longer exist.

	1972			2004		
	White	Black	Gap	White	Black	Gap
Alabama	80.7	57.1	23.6	73.8	72.9	0.9
Georgia	70.6	67.8	2.8	63.5	64.2	-0.7
Louisiana	80.0	59.1	20.9	75.1	71.1	4.0
Mississippi	71.6	62.2	9.4	72.3	76.1	-3.8
North Carolina	62.2	46.3	15.9	69.4	70.4	-1.0
South Carolina	51.2	48.0	3.2	74.4	71.1	3.3
Virginia	61.2	54.0	7.2	68.2	57.4	10.8

S. Rep. No. 109-295 at 11 (2006); H.R. Rep. No. 109-478 at 12 (2006); S. Rep. No. 94-295 at 14 (1975).

Respondent points to a registration gap between non-Hispanic whites and Hispanics in Virginia and Texas as supporting preclearance. Br. 33. Unlike 1975, however, such disparities do not distinguish these States from non-covered jurisdictions—let alone justify retaining the old coverage formula. The Census Report reveals that the national registration gap between white non-Hispanics and Hispanics is 39.2%, and there are huge gaps in non-covered states, such as Maryland (54.0%) and Oklahoma (52.2%). U.S. Census, Voting and Registration (2004) (Table 4a), *available at* http://www.census.gov/population/socdem/voting/cps2004/tab04a.xls. Further, the gap shrinks precipitously once citizenship is taken into account. The national registration gap between white non-Hispanic and Hispanic citizens is 17.3%. Louisiana (13.6%), Mississippi (9.9%), South Carolina (-5.0%), Texas (16.0%), and Virginia (15.2%) are better than the national

average. *See id.* Respondent notably does not claim that any disparity resulted from unconstitutional conduct.[2]

Respondent also claims that the absolute number of Section 5 objections since 1982 establishes that conditions in the covered states have not improved since 1975. Br. 22-23. But like the court of appeals, it fails to explain how the absolute number could be more relevant than the objection *rate* given the comparison of unequal periods and the post-1982 increase in submissions, Pet. Br. 35 n.7. In any case, an average of 30 objections a year across 12,000 covered jurisdictions does not suggest that case-by-case litigation would be an ineffective remedy for any change that violates Section 2 or the Constitution. It demonstrates the opposite.

Respondent also ignores the downward trend of post-1982 objections. The objection rate dropped from 1.06% in the first eight years after the 1982 reauthorization, to 0.96% over the next eight years, to 0.15% (or 57 objections out of 36,345 submissions) from 1998 until 2005. H.R. Rep. No. 109-478, at 22. An objection in 1983 is certainly less

2. Respondent claims in passing that registration and turnout disparities between non-Hispanic white and minority voting rates support preclearance, but Congress did not make this comparison. Br. 33. Nor was any historical comparison possible given that the Census did not begin reporting non-Hispanic white statistics until 1988. *Continuing Need for Section 203's Provisions for Limited English Proficient Voters, Hearing Before Senate Comm. on the Judiciary*, 109th Cong., at 147 (June 13, 2006). In any event, the 2004 Census Report shows that six fully covered States are better than the national average and better than many non-covered States.

indicative of current conditions than one in 2005.[3] The relevant issue is whether there is a "modern," *Boerne*, 521 U.S. at 530, or "current," *Northwest Austin*, 557 U.S. at 203, pattern of voting discrimination. 57 objections out of 36,345 submissions from 12,000 jurisdictions over nine years is not a pattern of anything except near-perfect compliance with Section 5.

Moreover, very few Section 5 objections are proof of "relevant constitutional violations." *Lane*, 541 U.S. at 564 (Scalia, J., dissenting). Even accepting Respondent's conclusion that any change objected to on discriminatory purpose grounds means that it had such a purpose, *but see* Former Official Am. Br. 22-24, it acknowledges that "not all Section 5 objections represent a finding of unconstitutional discrimination" and many that did were "predicated on a failure to demonstrate the absence of discriminatory purpose rather than on an affirmative finding of illicit purpose," Br. 23, 26. Objections based on discriminatory effect are even less probative, showing at most "adverse consequences for minority voters." Br. 27. Neutral laws with "incidental burdens" on minority voters cannot justify enforcement legislation claiming to remedy intentional discrimination. *Boerne*, 521 U.S. at 531. In sum, neither the "number" nor "nature" of objections since 1982 supports reauthorization. *Rome*, 446 U.S. at 181.

3. Section 2 litigation shows a similar downward trend. Two-thirds of the Section 2 violations identified in the Katz Study occurred between 1982 and 1994, the first half of the studied time period; of the 30 Section 2 violations that occurred in the latter half, more occurred in non-covered (16) than covered jurisdictions (14). Katz, *VRI Database Master List, available at* http://sitemaker.umich.edu/votingrights/files/masterlist.xls.

Fundamentally, however, *Rome* did not rest on parsing objections or other statistical barometers. The Court upheld Section 5 in *Rome* because it did not trust that the "limited and fragile" gains observed only a decade removed from Bloody Sunday would be durable without *seven* more years of federal supervision. *Id.* at 182. But constitutional justification can no longer be found in *Katzenbach*'s wake. By any measure, the improvements of record are no longer limited and fragile. None of the factors the *Rome* Court examined suggest that restoring full sovereignty to covered States could unleash rampant discrimination. Simply put, reauthorization cannot be justified by presuming an incurable racial animus after 45 years of social change and close federal supervision.

3. Respondent's additional evidence fails to demonstrate Section 5's necessity.

Respondent attempts to fill the record gap with evidence not relied on in *Katzenbach* and *Rome* by seeking to credit the *filing* of Section 2 actions, more information requests, racially polarized voting, and federal election observers. Br. 30-32, 38-39. But none of these indicates the widespread pattern of *intentional* discrimination needed to justify preclearance. Pet. Br. 31; *Northwest Austin*, 557 U.S. at 228 (Thomas, J.); Center for Constitutional Jurisprudence Am. Br. 9-22. At least on a statistical level, these categories are not "reliable evidence of actual voting discrimination" in covered jurisdictions. *Katzenbach*, 383 U.S. at 329.

Respondent discusses isolated instances of voting discrimination to bolster the statistical relevance of "second generation" barriers. Br. 24-34. But whether there

is *some* voting discrimination in covered jurisdictions is not the question. There have been 105,433 voting changes across 12,000 jurisdictions since 1982. S. Rep. No. 109-295 at 13-14. That Respondent can identify scattered malpractices is not surprising. Had Congress closely studied non-covered jurisdictions, it would have found many examples there as well. The question is whether there is such rampant discrimination and obstruction that Section 2—although adequate protection for minority voters throughout the rest of the country—is inadequate in covered jurisdictions. Pet. Br. 31-33; Nix Am. Br. at 10-14. Anecdotal evidence cannot establish the "systematic resistance" to voting rights necessary to justify Section 5. *Katzenbach*, 383 U.S. at 328.

Respondent also tries to expand its evidence outside the legislative record. Br. 25-26, 29-30. But the relevant question is "whether *Congress* identified a history and pattern of unconstitutional" government action. *Garrett*, 531 U.S. at 368 (emphasis added). It would be paradoxical for the Court to defer to Congressional findings *and* to uphold Section 5 based on evidence Congress never considered. Review is limited to "actual evidence Congress considered." *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 247 (D.D.C. 2008); Reason Foundation Am. Br. 6-25.[4]

Moreover, Respondent's own post-enactment evidence further undermines the case for Section 5's reenactment.

4. Crediting this evidence also would thrust the Court into a broad survey of current electoral results—a task subject to conflicting views and beyond the Court's purview. SLF Am. Br. 28; Reason Foundation Am. Br. 24 & n.8.

The dispute over voter-identification laws highlights the unfairness of affording the laws of Indiana, Pennsylvania, and Wisconsin the presumption of validity to which all States are entitled while forcing South Carolina and Texas to engage in preclearance litigation in a remote venue to implement their laws. Pet. App. 71a (Williams, J.). Worse still, it shows how Section 5's mission has strayed from thwarting discriminatory tactics to providing Respondent with leverage to impose its preferred electoral system on covered jurisdictions. Officials Am. Br. 17-27; Nix Am. Br. 29-32, 38. Requiring jurisdictions to make (or refrain from making) voting changes for the benefit of certain races or ethnicities—rather than holding States to the mandate of non-discrimination—is not cause for praise. *Northwest Austin*, 557 U.S. at 203 (citing *Ashcroft*, 539 U.S. at 491-92 (Kennedy, J., concurring)).

4. The record evidence shows that Section 2 is an adequate remedy in covered jurisdictions.

Ultimately, the Court must determine whether there is "a pattern of racial discrimination in voting so serious and widespread that case-by-case litigation is inadequate." Pet. App. 26a. The Court previously found that obstructionist tactics made a traditional litigation remedy insufficient to confront continued evasion. *Katzenbach*, 383 U.S. at 314-15; *Rome*, 446 U.S. at 181. Respondent does not argue that this problem still exists; yet it ignores the significance of that concession. Without that evidence, the *Katzenbach* Court never would have upheld Section 5. Pet. Br. 37-38.

Shifting the focus of the inquiry, Respondent claims that Section 2 litigation is insufficient because it is an

"after-the-fact remedy," "can take years to litigate," "places the burden of proof on minority plaintiffs," and "places a heavy financial burden on minority voters who challenge illegal election practices." Br. 39-40. But that dismal view of Section 2 suggests that Congress left minority voters in non-covered jurisdictions without an effective remedy. Respondent never suggests that Section 5 is a necessary supplement to Section 2 nationwide. By contrast, Section 5 was upheld in *Katzenbach* not because of the inherent attributes of civil litigation, but because the difference in the kind (discriminatory tests and devices) and level (systematic) of discrimination in covered States made Section 2 inadequate *in those areas. Northwest Austin*, 557 U.S. at 225 (Thomas, J.).

Moreover, Section 5 now targets vote dilution, a problem for which Section 2 affords minority plaintiffs an effective—and in some ways superior—remedy. NBCC Am. Br. 13-23. First, Section 2 provides *greater* protection against vote dilution than Section 5. Unlike Section 5, which protects against "backsliding," *Bossier II*, 528 U.S. at 335, Section 2 may "enhance the ability of the plaintiffs to elect their candidates of choice," *White v. Alabama*, 74 F.3d 1058, 1069 (11th Cir. 1996). Section 2 also includes a "results" test that permits plaintiffs to secure relief without proving discriminatory purpose. 42 U.S.C. §1973.

Second, Section 2 authorizes quick and effective injunctive relief. Preliminary injunctions are available and often granted, NBCC Am. Br. 16-17, as courts have "broad remedial authority in Section 2 cases." Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.-C.L. L. Rev. 173, 219 (1989). The fact that plaintiffs must marshal evidence to secure relief in Section 2 cases

only further highlights the "extraordinary burden-shifting procedure[]" of Section 5. *Bossier II*, 528 U.S. at 335.

Third, Section 2 litigation proceeds expeditiously, NBCC Am. Br. 14-16, often *faster* than preclearance litigation, *see Perry v. Perez*, 132 S. Ct. 934, 939-40 (2012). Indeed, it appears that Section 5's chief consequence in redistricting cases is to impose on federal courts "the unwelcome obligation of creating an interim plan" while preclearance litigation drags on. *Id.* at 940 (internal quotation omitted). Respondent favors Section 5 because changes cannot take effect during the pendency of preclearance litigation. But that radical departure from traditional federalism principles makes preclearance uniquely problematic.

Fourth, Section 2 does not impose an excessive financial burden on plaintiffs. NBCC Am. Br. 18-20. Prevailing plaintiffs are entitled to attorneys' fees and expert fees, 42 U.S.C. §1973*l*(e), *id.* §1988, and the government may assume the financial burden by intervening in or bringing its own Section 2 action, *id.* §1973j(d); Pet. App. 77a (Williams, J.). Respondent also ignores that law firms and interest groups often represent Section 2 plaintiffs—either *pro bono* or with expectation of securing a fee award at the conclusion of successful litigation. In the *Perez* litigation, for example, plaintiffs are represented by 47 attorneys from 30 different law firms, organizations, and interest groups. *Perez v. Perry*, No. 5:11-cv-360 (W.D. Tex.); *Perez*, 132 S. Ct. at 938-39 (listing appellate counsel). The idea that disadvantaged individuals bear the costs of Section 2 litigation—especially in redistricting cases—contradicts recent experience.

Finally, Section 2's nationwide operation allows the country to move beyond recrimination and cohesively respond to problems no longer concentrated in covered jurisdictions. "Nationwide application reduces the danger that federal intervention will be perceived as unreasonable discrimination against particular States or particular regions of the country" and "underlines an awareness that the problem is a national one and reflects a national commitment to its solution." *Mitchell*, 400 U.S. at 283 (Stewart, J.). The dire local conditions that once called for a selective remedy no longer exist.

CONCLUSION

For the foregoing reasons, the judgment of the D.C. Circuit should be reversed.

Respectfully submitted,

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