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1 P R O C E E D I N G S

2 (10:13 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 08-322, Northwest Austin
5 Municipal Utility District v. Holder.

6 Mr. Coleman.

7 ORAL ARGUMENT OF GREGORY S. COLEMAN

8 ON BEHALF OF THE APPELLANT

9 MR. COLEMAN: Good morning, Mr. Chief
10 Justice, and may it please the Court:

11 After more than 20 years of steadfast
12 compliance with the Voting Rights Act, Northwest Austin
13 MUD Number One is entitled to be free from the intrusive
14 burdens of preclearance. The district is entitled to
15 seek a bailout because it is a political subdivision
16 under the Court's decisions in Sheffield and Dougherty
17 County. This natural parallelism between bailout and
18 preclearance allows bailout to serve its ameliorative
19 purposes of encouraging, recognizing, and rewarding
20 long-term compliance and progress --

21 CHIEF JUSTICE ROBERTS: It may be -- it may
22 be a political subdivision under those decisions, but
23 it's certainly not a political subdivision under the
24 statutory definition.

25 MR. COLEMAN: Well, we disagree with that,

1 Your Honor. We believe that under Dougherty County in
2 particular, the Court specifically recognized that these
3 entities such as cities and school boards and utility
4 districts are political subdivisions and that that term
5 as it's used --

6 JUSTICE GINSBURG: Bailout wasn't involved
7 in those cases. And what do you do with a statute that
8 has three categories -- the State, political
9 subdivision, and then there's "governmental unit"? The
10 district qualifies as a governmental unit. Why would
11 Congress add that third category if the district came
12 within "political subdivision"?

13 MR. COLEMAN: Justice Ginsburg, the term
14 "governmental unit" doesn't actually appear in the
15 provision that authorizes bailout. What it says is that
16 when a political subdivision seeks a bailout that, if it
17 has any governmental units within it, it must also
18 ensure that they are compliant before it can have a
19 bailout. For instance, although the district is not a
20 political subdivision of the county, it is in the
21 county, and therefore under the substantive criteria, if
22 the -- Travis County wanted to bail out, it would have
23 to demonstrate compliance of all of those governmental
24 units within it.

25 JUSTICE GINSBURG: Yes, but the -- but the

1 statute does use the term "governmental unit" to
2 encompass districts. And if they were also
3 subdivisions, why would Congress need to add an
4 additional category?

5 MR. COLEMAN: Again, I disagree with Your
6 Honor that -- that the term "governmental unit" appears
7 in the provision that defines criteria.

8 JUSTICE GINSBURG: It appears in the statute
9 twice, suggesting that Congress had in mind three
10 categories.

11 MR. COLEMAN: Again, the statute that
12 defines who's eligible to bailout says a State, a
13 political subdivision that has been separately
14 designated for coverage under 4(b), and a political
15 subdivision that has not been separately designated for
16 coverage.

17 We were never separately designated for
18 coverage. And under Sheffield and Dougherty County, we
19 have long been considered a political subdivision.
20 Indeed, we are subject to the process of preclearance
21 only because we were a political subdivision. The
22 actual requirement that you send in preclearance
23 submissions is on political subdivisions. We are
24 subject to lawsuits under section 2 because we are a
25 political subdivision. We are subject to the

1 possibility of Federal examiners because we are a
2 political subdivision.

3 At no place in this Voting Rights Act, in
4 any of the dozens of the uses of the term "political
5 subdivision" has this Court or Congress, other than the
6 designation statute, separately suggested that a
7 political subdivision such as the district would not be
8 considered a political subdivision under the terms of
9 the Voting Rights Act.

10 JUSTICE KENNEDY: Well, to the extent we
11 have some latitude in construing the Act, certainly it
12 would be a relevant factor if we concluded that it's
13 just unworkable or impractical to have an uncovered
14 jurisdiction within a county which is a covered
15 jurisdiction. They would have competing election days,
16 competing election formulae. And it would seem to me
17 that that just makes compliance with the Act much more
18 difficult.

19 MR. COLEMAN: Well, certainly we believe
20 that the purposes of the Act suggest that we should be
21 considered a political subdivision eligible to bail out.
22 This interaction between the county and the district --
23 we -- we exist within the county, but we are not part of
24 the county. The county, as we say, is not the boss of
25 us. They don't have any way to ensure or require us to

1 do things. And as the facts of this case demonstrate,
2 not only did the county have different political
3 interests, but we've also demonstrated that because you
4 have entities that are subject to separate designation,
5 like the county, that have dozens and perhaps in this
6 case over a hundred separate political subdivisions,
7 Travis County could never practically seek a bail out.

8 And in order to give effect to what I call
9 this ameliorative purpose to bail out, the Court should
10 interpret the statute in a way that allows these small
11 entities to bail out. These small entities --

12 JUSTICE ALITO: And how do you account for
13 the fact that if your district were located in a
14 separately covered political subdivision, you clearly
15 could not bail out.

16 MR. COLEMAN: Well, I -- I -- again, the
17 Court doesn't need to reach that question yet, but I'm
18 not sure that the answer is that we clearly couldn't if
19 we were a separately designated or -- excuse me -- if we
20 were in a separately designated county that says --
21 that's it's not in a covered State, right? There is
22 this argument, for instance, that -- that that State
23 could be covered in whole or in part. And certainly,
24 for instance, in California the State is -- is covered
25 in part. And it could be resolved in that way.

1 The statute is not exceptionally clear on
2 it, but the Court doesn't have to reach that because we
3 are in a fully covered State, and we are -- under all
4 the provisions of Voting Rights Act, have always been
5 considered political subdivisions. The district court
6 said you're a political subdivision for every purpose
7 except this one. You have to --

8 JUSTICE GINSBURG: There is -- the district
9 court had some assistance from the legislative
10 development of this latest extension. There was a
11 proposal, was there not, to allow governmental units to
12 bail out -- to allow anyone who was required to preclear
13 to bail out?

14 MR. COLEMAN: I don't know that there was a
15 specific legislative proposal, Justice Ginsburg. There
16 was certainly some discussion of that. What -- what is
17 particularly clear is --

18 JUSTICE GINSBURG: And what was the reason
19 that it was resisted?

20 MR. COLEMAN: I don't know that the record
21 actually shows that it was resisted. It was simply part
22 of the discussion during the reauthorization
23 proceedings. I'm not aware of any specific resistance
24 relating to that. There weren't any amendments to the
25 statute, but the amendments in 1982, we do believe are

1 very important to the Court's consideration of that
2 because the bailout aspects were considered in City of
3 Rome, and in City of Rome the only entities that could
4 bail out were a -- were a State or a separately covered
5 or a separately designated subdivision. And then 2
6 years after that, Congress amends the statute to add
7 this third category, which is political subdivisions
8 that have not been separately designated for coverage.

9 That amendment and that addition is clearly
10 in direct response to City of Rome and, we believe, a
11 clear indication that Congress did intend and, indeed,
12 it said it intended to expand the bailout opportunities.
13 Congress believed that many, if perhaps not most,
14 political subdivisions in 1982 would be eligible for
15 bailout, but because --

16 JUSTICE GINSBURG: The Department of Justice
17 has -- does it -- does it not have a regulation that
18 contradicts your reading? And hasn't that been out
19 there -- wasn't it out there before the 2006 extension?

20 MR. COLEMAN: Yes, Justice Ginsburg, but
21 unlike the Attorney General's regulations that relate to
22 preclearance, bailout is not something that the Attorney
23 General actually has any specific say in. The statute
24 provides for a lawsuit to seek a bailout. It's not like
25 preclearance, where can you get it from either the

1 Attorney General or the district court.

2 Now, the Attorney General may choose, as it
3 has for several of the Virginia entities, not to resist
4 that. So you can file a friendly suit once the Attorney
5 General has been convinced, but --

6 JUSTICE KENNEDY: If we find that you're not
7 covered by the bailout provision, that only the county
8 is, do you really then have standing to proceed to
9 question the workability of the bailout procedures? I
10 -- I suppose that would be a threshold argument for you
11 to question the validity of the Act.

12 MR. COLEMAN: Well, with respect to our
13 constitutionality issue, Justice Kennedy, one thing
14 nobody is contesting here is that we are not subject to
15 preclearance. And so, if we are not eligible for
16 bailout, we obviously do and we believe have standing to
17 assert that the reenactment of the preclearance
18 provisions is unconstitutional because they, unlike the
19 bailout, would clearly continue to apply to us.

20 JUSTICE SCALIA: Well, has preclearance been
21 denied to you?

22 MR. COLEMAN: Well, we didn't seek a
23 preclearance --

24 JUSTICE SOUTER: Exactly. I mean, I -- if
25 -- if you're basing it simply on your subjection to

1 preclearance and there's no contest between you and the
2 government over preclearing anything, I'm not sure why
3 you would be in court.

4 MR. COLEMAN: Well, there is certainly a
5 possibility we may seek to preclear things in the
6 future, but this is primarily --

7 JUSTICE SOUTER: Then isn't -- isn't that
8 the time for litigating?

9 MR. COLEMAN: No, Justice Souter. This is
10 primarily a facial challenge to the statute. We are
11 subject to the obligations of preclearance. And we
12 believe that we --

13 JUSTICE SOUTER: But it's not affecting
14 anything you're doing on a day-to-day basis, as I
15 understand it. There's no claim that -- that your
16 district is doing anything improper. No claim is being
17 made against you. And I guess your whole argument would
18 be maybe some day we want to preclear again, and maybe
19 we wouldn't be as successful as we had been in each of
20 the instances before. But I don't see how that gets you
21 in court.

22 MR. COLEMAN: I agree with -- I disagree
23 with that as well, Justice Souter. While it has not
24 been highlighted in the briefs, there is deep in the
25 record discussion during a MUD board meeting of

1 potentially some changes, and discussion on that was
2 table pending the outcome of this lawsuit.

3 JUSTICE GINSBURG: What was the last time
4 the district applied for preclearance, the last year?

5 MR. COLEMAN: The contract in 2004 by which
6 we asked the county to actually perform the elections
7 itself, that was precleared, Your Honor.

8 JUSTICE GINSBURG: And so 2004 is the last
9 year. So between 2004 and 2009 the district has not
10 sought preclearance?

11 MR. COLEMAN: That's correct. This lawsuit
12 --

13 JUSTICE SCALIA: But you're subject to
14 preclearance and you cannot make changes without going
15 to the Attorney General and asking for his permission.

16 MR. COLEMAN: That's correct.

17 JUSTICE SCALIA: Is it any different from,
18 from a -- a Federal law prohibiting certain speech? Do
19 you have to subject yourself to the -- to the penalty
20 for that speech before you can attack the law? I don't
21 think so.

22 MR. COLEMAN: No, Justice Scalia.

23 JUSTICE SOUTER: But the suit -- correct me
24 if I'm wrong, and I may be wrong on this, but I thought
25 this suit eventuated from the fact that you had been

1 denied bailout and that your entire case was brought on
2 the refusal of bailout. I did not understand that you
3 had brought a general declaratory judgment action or
4 a -- or a facial attack in gross, as it were, on the
5 statute. Am I wrong about your pleadings?

6 MR. COLEMAN: I do think you're wrong about
7 that, Justice Souter. We had not been denied bailout.
8 The suit sought bailout. The only way to seek a bailout
9 is through the lawsuit --

10 JUSTICE SOUTER: Right.

11 MR. COLEMAN: -- and this lawsuit seeks the
12 bailout and the declaratory judgment that if we cannot
13 bail out --

14 JUSTICE SOUTER: You separately asked for
15 declaratory judgment?

16 MR. COLEMAN: Yes. There are different
17 claims in the lawsuit, Your Honor. And indeed, the
18 standing point is--

19 JUSTICE GINSBURG: You don't challenge -- if
20 you have bailout, say we accept your reading of the
21 statute, you are not contesting the constitutionality of
22 the act if it matched your obligation to preclear with
23 the right to bail out.

24 MR. COLEMAN: Well, that's not exactly right
25 either, Justice Ginsburg. We certainly contest and

1 contend that preclearance is unconstitutional. We
2 acknowledge that if the Court were to give us bailout
3 that the Court might choose on its own not to reach the
4 constitutional issues because we would receive relief.

5 JUSTICE GINSBURG: But I -- I thought I just
6 heard you say even if you got the bailout the extension
7 for another 25 years would still be unconstitutional.
8 Is that -- or are you saying that the accommodation, the
9 modification, would suffice to make the statute
10 constitutional?

11 MR. COLEMAN: No. We do not say that the
12 modification would make the statute constitutional. Our
13 position is both that we are entitled to bailout and we
14 have an alternative claim that we have asserted that is
15 independent, it's not dependent on the first one, that
16 preclearance is unconstitutional.

17 JUSTICE SOUTER: Well Mr. Coleman, this is
18 important to me. Do you -- do you acknowledge that if
19 we find on your favor on the bailout point we need not
20 reach the constitutional point?

21 MR. COLEMAN: I do acknowledge that, Justice
22 Souter.

23 CHIEF JUSTICE ROBERTS: Well, presumably you
24 wouldn't have standing to raise it because you wouldn't
25 be subject to the preclearance requirement.

1 MR. COLEMAN: Right. But because we had all
2 the claims together in one lawsuit, we had to assert
3 them all together, and that's what we've done.

4 Getting to the heart of this preclearance
5 issue, if I may, Katzenbach recognized that preclearance
6 really was an extraordinary remedy and it recognized
7 that is a remedy that would not otherwise be appropriate
8 but for the extraordinary emergency circumstances that
9 existed at the time. Nobody has challenged that. But
10 we are in a different day. The kinds of --

11 JUSTICE SOUTER: Mr. Coleman, may I just
12 raise a basic point here. And I'll be candid with you
13 that it affects my view of your argument. I just want
14 to start with it. Your argument is largely based on the
15 assumption that things have significantly changed and
16 that therefore Congress could not by whatever test we
17 use extend the -- extend section 5.

18 But what we've got in the record in front of
19 us -- I don't have a laundry list to read, but I mean,
20 we've got I think at the present time a 6-point -- a
21 16-point registration difference on Hispanic and
22 non-Hispanic white voters in Texas. We've got a record
23 of some 600 interpositions by the -- by the Justice
24 Department on section 5 proceedings, section 5
25 objections, over a period of about 20 years. We got a

1 record that about two-thirds of them were based on the
2 Justice Department's view that it was intentional
3 discrimination. We've got something like 600 section 2
4 lawsuits over the same period of time.

5 The point that I'm getting at is I don't
6 understand, with a record like that, how you can
7 maintain as a basis for this suit that things have
8 radically changed. They may be better. But to say that
9 they have radically changed to the point that this
10 becomes an unconstitutional section 5 exercise within
11 Congress's judgment just seems to me to -- to deny the
12 empirical reality. I mean, what is your answer to that?

13 MR. COLEMAN: Our answer, Your Honor, is --
14 is a very clear one and that is there is a difference
15 between a nondiscrimination statute and a
16 noncircumvention statute. Section 2, section 203, the
17 prohibition on the uses of tests and devices, these are
18 clear nondiscrimination provisions that are textually
19 linked back to the -- to the constitutional
20 prohibitions. Section 5 was never intended to be a
21 nondiscrimination statute. Section 5 is a
22 noncircumvention statute, notwithstanding the volume --

23 JUSTICE SOUTER: Well, the evidence that
24 I've been getting into is a pretty good indication -- I
25 would have thought Congress thought so and I would have

1 thought so too -- that there is something to be
2 concerned about on the issue of circumvention; that in
3 fact the attitudes have not so radically changed as to
4 render circumvention irrelevant.

5 MR. COLEMAN: I honestly disagree with you,
6 Justice Souter, on that. Notwithstanding --

7 JUSTICE GINSBURG: But there was -- but
8 there was -- Congress fastened on that issue and it
9 referred to second generation discrimination, which is a
10 frequent pattern with discrimination. You start with
11 the blatant overt discrimination, and then in time
12 people recognize that that's -- that won't go any more,
13 so the discrimination becomes more subtle, less easy to
14 smoke out. But it doesn't go from blatant overt
15 discrimination to everything is equal.

16 MR. COLEMAN: Justice Ginsburg, the Court in
17 Katzenbach recognized that Congress had been trying for
18 several years to try to fix this problem and it walked
19 through, as this Court has walked through innumerable
20 times, that section 5 is simply not about
21 nondiscrimination, but it was about the unremitting and
22 ingenious defiance of statutes in a way that made
23 ordinary enforcement mechanisms, including litigation,
24 simply ineffective, that no matter what the courts did,
25 in the South the enforcement mechanisms were unable to

1 allow minority individuals to register and get out and
2 vote, that no matter what happened -- preclearance put a
3 stop to that.

4 But notwithstanding this record, which I'd
5 like to speak to the volume of separately --

6 JUSTICE BREYER: No, I'll ask you that
7 question because I'd like to hear your answer to that.

8 MR. COLEMAN: Notwithstanding that record,
9 it is not the kind of record -- Congress put together
10 what it believed was a discrimination record, but not a
11 circumvention record. There is no indication, for
12 instance, in these types of examples that have been
13 offered in the briefs and were offered in the
14 congressional hearings that these aren't things that can
15 be fixed through ordinary enforcement mechanisms through
16 section 2 litigation.

17 JUSTICE GINSBURG: But if you take the
18 multiple devices -- take the one as simple as moving the
19 election day so that it will coincide with the -- with
20 the holiday of a predominantly minority college. To go
21 after every change of that order with a section 2
22 lawsuit -- of the two devices, surely section 5 is more
23 effective to smoke that out.

24 MR. COLEMAN: Two points on that, Justice
25 Ginsburg. First, with respect to the Waller County

1 issue, that was an issue that was very swiftly addressed
2 by Texas officials itself in cooperation with the NAACP.
3 The Texas secretary of state and the Texas attorney
4 general came down very swiftly on that issue. The
5 second point is --

6 JUSTICE GINSBURG: Perhaps they -- perhaps
7 they wouldn't if the only tool in the arsenal were
8 section 2, if everything had to be a Federal lawsuit.

9 MR. COLEMAN: And that gets at the heart of
10 one of our arguments, Justice Ginsburg. That is --

11 JUSTICE BREYER: Can I ask you this question
12 for a second, please? And just take 2 minutes to answer
13 it or not. You don't have to answer it, but it seems to
14 me this is the question. This whole issue depends on
15 the evidence before Congress. So, in reading the
16 briefs, I have six categories of evidence. Compared to
17 the City of Rome, the registration turnout still has two
18 States, Virginia and Texas, with significant
19 disparities.

20 As to minority officeholders, there is a big
21 improvement, but if you look at Mississippi, Louisiana,
22 and South Carolina and a couple of others, it is still
23 not great.

24 The DOJ objections: The number of DOJ
25 objections has fallen a lot, but it still exists.

1 In terms of election observers, which were
2 not mentioned in City of Rome, we have their statistics
3 that two-thirds of the observers are focused on five of
4 the six States that are covered. In terms of
5 polarized voting, not mentioned in Rome, we still have
6 testimony that the polarization is significant and
7 common in certain places.

8 And as to successful section 2, section 5
9 suits, once again not mentioned in the City of Rome, but
10 since 1982 there were at least 105 successful section 5
11 suits and 653 successful section 2 suits. All right.

12 I just summarized that because I'd like to
13 hear in a couple of minutes, or five, or whatever you
14 want to take. I'm trying to lead you to what I think is
15 the heart of the case. It seems evidentiary. That is
16 what I read. What is your response?

17 MR. COLEMAN: Well, I'm obviously not going
18 to have time to respond to all of that, Justice Breyer.

19 JUSTICE BREYER: Whatever you want.

20 MR. COLEMAN: But, for instance, with
21 respect to the first point that you raised, which is
22 voter registration and turnout issues, those numbers
23 don't tell the whole story. In fact -- in fact, with
24 respect to both black and Hispanic voters, the record in
25 covered jurisdictions is above the national average.

1 Massachusetts, for instance, you might be learned to
2 know, has a white-black voter registration and turnout
3 differential that is in the high 20s, far in excess of
4 any covered jurisdiction. And that's part of what
5 Congress didn't do.

6 So in addition to the argument we have that the
7 record Congress produced is really a nondiscrimination
8 record and not a circumvention record, we also have the
9 argument that we've made that it is simply irrational
10 for Congress to go back and say the Voting Rights Act of
11 1965 was intended to make sure that minority voters
12 could register and vote and that's going to be our
13 number one priority.

14 As Justice Ginsburg recognized, Congress
15 believes that that has been satisfied. But now we are
16 going to go back and in determining who's going to be
17 covered under the 2006 amendment, we are going to use
18 the same data from the 1964 election.

19 It would have been as if Congress in 1965
20 said: We anticipate that there are problems here; and,
21 in order to define coverage, we are going to look at the
22 Roosevelt-Hoover election in 1932 and registration and
23 turnout then, because we think that is the best way to
24 evaluate --

25 JUSTICE KENNEDY: Well, Justice Breyer --

1 Justice Breyer did refer you to some other more current
2 statistics, submissions, Title V suits, and so forth.
3 You might want to address those. And in that context,
4 was there any control data to compare preclearance rates
5 or preclearance events in colored -- in covered
6 jurisdictions as opposed to uncovered jurisdictions?

7 MR. COLEMAN: That's --

8 JUSTICE KENNEDY: And that -- that's part of
9 the showing, it seems to me, that the Congress has to
10 make, that these States that are now covered and that
11 were covered are markedly different from the noncovered
12 jurisdictions. Was there anything in the record before
13 the Congress or the district court to address that
14 point?

15 MR. COLEMAN: The only comparative data that
16 existed was of two kinds. There was a -- there was a --
17 some data that grouped all covered jurisdictions into
18 one lump and all noncovered jurisdictions into another
19 lump and counted up section 2 lawsuits. And the
20 difference was about 17 successful -- 17 more successful
21 section 2 suits in covered jurisdictions than in
22 noncovered jurisdictions. That's not a big difference.

23 What Congress didn't do, though, is look at
24 specific noncovered jurisdictions, for instance, the
25 ones I've cited, and say, how do these compare to

1 covered jurisdictions?

2 And the other thing it didn't do is say:

3 Among covered jurisdictions and noncovered

4 jurisdictions, let's look among -- let's separate out

5 among these jurisdictions and see where the problem

6 locations are and what areas we think might, if -- if

7 preclearance is going to be constitutional, might be

8 subject. There is absolutely no evidence in the record

9 of that. Preclearance once again is based on the

10 results -- well, whether there was a test or device in

11 the 1960s and the results of the 1964, 1968, and 1972

12 presidential elections.

13 JUSTICE GINSBURG: What kind of coverage

14 formula would be adequate? You are attacking Congress'

15 preservation of the same coverage formula. But what

16 other coverage formula could it come up with?

17 MR. COLEMAN: Well, just to give one example

18 -- and I'm not -- not recommending this -- but if, for

19 instance, the same coverage formula had been applied to

20 the 2000 and 2004 elections, equalizing for citizen

21 voting age population, the only covered State would have

22 been Hawaii. Under that formula, using modern data,

23 modern information, none of these States would have been

24 covered if you account for noncitizen voting age

25 population.

1 JUSTICE GINSBURG: There was -- and maybe
2 the government will refer to it -- I thought, quite a
3 bit of evidence comparing covered and noncovered in this
4 record.

5 MR. COLEMAN: I wouldn't say quite a bit,
6 Your Honor. What it did is it lumped all covered
7 jurisdictions together and all noncovered jurisdictions.

8 JUSTICE GINSBURG: Well, you said all that
9 there was was a number of section 2 suits, but I think
10 there was quite a bit more than that.

11 MR. COLEMAN: I -- I actually dispute that.
12 There is a lot of discussion of that information, Your
13 Honor, but it's not that much information. And, again
14 it doesn't -- it doesn't take into account any attempt
15 to say: How does the panhandle of Texas do against
16 Florida, against parts of northeast Georgia or northwest
17 Alabama? How are these -- it makes no attempt
18 whatsoever. It is simply all covered jurisdictions as a
19 lump and all noncovered jurisdictions as a lump, and
20 Congress had no basis to make that -- that declaration.

21 JUSTICE GINSBURG: In your -- in your answer
22 you said if they used the 2004 the only State would be
23 Hawaii. But I asked you what formula would pass if
24 Congress wants to get at -- wants to protect the gains
25 that have been made but are still fragile against

1 backsliding? If that's its objective, what can it
2 cover?

3 MR. COLEMAN: It needed to make an
4 evaluation of where there is an actual risk of
5 backsliding and where there is actual evidence of
6 circumvention. We don't believe that. We don't --

7 JUSTICE SOUTER: What about the evidence
8 that Justice Breyer summarized, that I alluded to? I
9 mean those -- that is simply evidence of racial attitude
10 and it seems to me in the real world that can be taken
11 as evidence that if the -- if the section 5 safeguard is
12 taken away, the pushback is going to start.

13 MR. COLEMAN: That evidence --

14 JUSTICE SOUTER: It has never stopped.

15 MR. COLEMAN: That evidence justifies strict
16 enforcement of nondiscrimination statutes, but it does
17 not justify a presumption that State and local officials
18 in these areas are so racist that they cannot be relied
19 on to pass and enforce fair voting laws.

20 JUSTICE SOUTER: They couldn't -- they
21 couldn't be relied upon apparently in the some 200 cases
22 in which the voting change was withdrawn after DOJ
23 objection.

24 MR. COLEMAN: Again, this -- this
25 information that goes out over 30 years and across

1 thousands upon thousands of jurisdictions --

2 JUSTICE SOUTER: This wasn't information
3 over 30 years. My recollection -- and I could be wrong
4 on this, but my recollection is that those were
5 statistics from about 20 years prior to the
6 reauthorization.

7 MR. COLEMAN: From -- from 1982 forward.

8 JUSTICE SOUTER: Yes, that's correct.

9 MR. COLEMAN: So you have 25 years across
10 thousands of jurisdictions. But the objection rate is
11 on the order of single digits per 10,000 submissions.
12 It simply as a matter of comparison with 1965 doesn't
13 work.

14 May I reserve the rest of my time, Your
15 Honor.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 Mr. Coleman.

18 Mr. Katyal.

19 ORAL ARGUMENT OF NEAL K. KATYAL
20 ON BEHALF OF THE APPELLEE HOLDER

21 MR. KATYAL: Thank you, Mr. Chief Justice,
22 and may it please the Court:

23 And let me begin where Mr. Coleman left off,
24 because I don't think that his argument adequately
25 grapples either with this Court's consistent upholding

1 of the provision at issue 4 times over 4 decades or with
2 Congress's action in 2006. Congress's reauthorization
3 in 2006 was the paradigmatic attempt of what to do in
4 Congress. It didn't redefine a rate, nor did it cast
5 aspersions at Supreme Court doctrine. Rather, it took
6 that doctrine seriously, both this Court's teachings
7 with respect to the Voting Rights Act specifically, as
8 well as the -- as the scope of the Congress's
9 Reconstruction enforcement powers, and arrived at a
10 considered judgment.

11 After 16,000 pages of testimony, 21
12 different hearings over 10 months, Congress looked at
13 the evidence and determined that their work was not
14 done.

15 CHIEF JUSTICE ROBERTS: Counsel, the -- the
16 -- our -- our decision in City of Boerne said that
17 action under section 5 has to be congruent and
18 proportional to what it's trying to remedy. Here, as I
19 understand it, one-twentieth of 1 percent of the
20 submissions are not precleared. That, to me, suggests
21 that they are sweeping far more broadly than they need
22 to, to address the intentional discrimination under the
23 Fifteenth Amendment.

24 MR. KATYAL: I -- I disagree with that,
25 Mr. Chief Justice. I think what that represents is that

1 section 5 is actually working very well; that it
2 provides a deterrent. This was a debate in Congress.
3 Indeed, Mr. Coleman himself testified before Congress
4 and said the low objection rate is evidence that it
5 isn't congruent to proportional.

6 The Congress disagreed with that. What it
7 found instead was that section 5 was deterring the
8 problem.

9 CHIEF JUSTICE ROBERTS: Well, that's like
10 the old -- you know, it's the elephant whistle. You
11 know, I have this whistle to keep away the elephants.
12 You know, well, that's silly. Well, there are no
13 elephants, so it must work.

14 I mean, if you have 99.98 percent of these
15 being precleared, why isn't that reaching far too
16 broadly.

17 MR. KATYAL: Well, let me suggest another
18 example. Yesterday the Administrative Office for the
19 United States Courts said there were approximately
20 17,500 requests for Title 3 wiretaps in the past 10
21 years. Four of them had been rejected. That's a .023
22 percent rejection rate.

23 But I don't think one could use those
24 numbers and say, oh, that means that Title 3 doesn't
25 deter or prevent abusive wiretaps. What it suggests

1 instead, if Congress would have found -- I agree that if
2 we were just standing up with no record whatsoever,
3 that's one thing, but if Congress heard testimony, they
4 found example after example of --

5 JUSTICE SCALIA: No, the parallel -- the
6 parallel isn't there. I mean, there are laws against
7 intentional discrimination. So there should be laws
8 against wiretapping. There should also be laws against
9 intentional discrimination. But where the -- the
10 argument here is not that those laws be eliminated.
11 It's just that the preclearance requirements be
12 eliminated.

13 MR. KATYAL: Absolutely. And Congress found
14 with respect to those intentional -- laws that prevent
15 intentional vote discrimination, which is section 2,
16 which you hear Mr. Coleman relying on today, that that
17 is ineffective for the same reasons that this Court has
18 found them repeatedly in *South Carolina v. Katzenbach*,
19 in *City of Rome*.

20 JUSTICE SCALIA: A long time ago. How much
21 of the evidence that Congress amassed was specifically
22 circumvention evidence?

23 MR. KATYAL: Quite a bit of evidence about
24 the ineffectiveness of section 2 as a remedy. So -- and
25 the statement for the intervenors -- there's a 500-page

1 statement filed before the district court which excerpts
2 the congressional record. In the pages 270 to 279 you
3 see a long series of -- a long analysis by Congress
4 about how section 2 is ineffective, that it costs too
5 much to bring the litigation, that there are few
6 attorneys that will handle it, that -- that there isn't
7 enough money and that --

8 JUSTICE ALITO: Well, if section 2 is
9 ineffective, then why didn't Congress extend section 5
10 to the entire country? Could Congress have reauthorized
11 section 5 without identifying significant differences
12 between the few jurisdictions that are covered and the
13 rest of the country?

14 MR. KATYAL: I don't believe so. I think
15 Congress had to make some showing. And here there are
16 explicit legislative findings that say that section 5 is
17 needed in these areas --

18 JUSTICE SCALIA: Not comparative, however.
19 Not comparative with the rest of the country except
20 in -- in --

21 MR. KATYAL: Well, I disagree with that for
22 several reasons. First of all, and most I think what
23 this utility district can argue about is Texas, and
24 Congress found very specific evidence about
25 discrimination in the State of Texas. They found that

1 they led the country in the number of objections. They
2 found that the -- that the registration rates, as
3 Justice Souter said, between Hispanics and whites was
4 great.

5 JUSTICE ALITO: Well, it's 18 percent. If
6 these statistics are correct, the difference between
7 Latino registration and white registration in Texas was
8 18.6 percent, which is not good, but it's substantially
9 lower than the rate in California, which is not covered,
10 37 percent; Colorado, 28 percent; New Mexico, 24
11 percent; the nationwide average, 30 percent.

12 MR. KATYAL: Well, again, I think that what
13 Congress found is that the rate in Texas coupled with
14 its historical amount of discrimination together
15 justified -- justified the reauthorization of section 5.

16 CHIEF JUSTICE ROBERTS: Well, let me focus
17 on that historical aspect. Obviously no one doubts the
18 history here and that the history was different. But at
19 what point does that history seek -- stop justifying
20 action with respect to some jurisdictions but not with
21 respect to others that show greater disparities?

22 MR. KATYAL: Again, I think what this Court
23 has -- has answered that question in Katzenbach by
24 saying it may be the case that there are other
25 jurisdictions discriminate more, Congress can deal with

1 the problem one step at a time. And the -- and Congress
2 has said that the Court should be particularly worried
3 about trying to predict the future and say that
4 discrimination is now over. We have fairly good --

5 CHIEF JUSTICE ROBERTS: Well, so your answer
6 is that Congress can impose this disparate treatment
7 forever because of the history in the south?

8 MR. KATYAL: Absolutely not.

9 CHIEF JUSTICE ROBERTS: When can they --
10 when can they -- when do they have to stop?

11 MR. KATYAL: Well, Congress here said 25
12 years was -- 25 years was the appropriate
13 reauthorization period.

14 CHIEF JUSTICE ROBERTS: Well, they said five
15 years originally and then another 20 years. I mean, at
16 some point it begins to look like the idea is that this
17 is going to go on forever.

18 MR. KATYAL: Well, again, if Congress can't
19 make the findings, then I think this Court would be well
20 within its powers to -- to strike it down. But here the
21 Court is being asked to do something that has never been
22 done before, which is to use its Fifteenth -- to say
23 that Congress exceeded the balance of its Fifteenth
24 Amendment powers and its Fourteenth Amendment powers in
25 an area involving race and voting. That has never

1 happened before.

2 JUSTICE KENNEDY: Well, is the burden that
3 the Act puts on the State irrelevant consideration?

4 MR. KATYAL: It certainly is. We don't --

5 JUSTICE KENNEDY: How many people in the
6 Department of Justice -- what's the Department of
7 Justice budget for preclearance processes each year, do
8 you know?

9 MR. KATYAL: I don't know what the budget
10 is. I can tell you there are -- there are approximately
11 30 attorneys who work in the voting --

12 JUSTICE KENNEDY: Thirty attorneys. Do you
13 quarrel with the assessment -- the testimony before the
14 Senate Judiciary Committee that it costs the States and
15 the municipalities a billion dollars over 10 years to
16 comply?

17 MR. KATYAL: Again, I don't quarrel with
18 that, but Congress certainly --

19 JUSTICE KENNEDY: But you think that is --
20 that is relevant?

21 MR. KATYAL: I -- I certainly think the
22 burden on the States is relevant. Also relevant is the
23 fact that the States are now not coming before the Court
24 and objecting the way they were in South Carolina v.
25 Katzenbach.

1 JUSTICE KENNEDY: But yet -- yet the
2 Congress has made a finding that the sovereignty of
3 Georgia is less than the sovereign dignity of Ohio. The
4 sovereignty of Alabama, is less than the sovereign
5 dignity of Michigan. And the governments in one are to
6 be trusted less than the governments than the other.
7 And does the United States take that position today?

8 MR. KATYAL: I wouldn't put it at all in
9 those terms. I would say what Congress found is that
10 there is a historical amount of discrimination coupled
11 with recent evidence and comparative data between
12 covered and noncovered jurisdictions that justifies
13 continuation of a remedy that States now overwhelmingly
14 appreciate.

15 JUSTICE KENNEDY: Well, then my point
16 stands. You say that there is a basis for treating
17 States quite differently as to the -- this fundamental
18 right that we all agree on with respect to voting. And
19 what's happened in part is that because of section 5
20 preclearance, say, a minority opportunity district is
21 protected in covered jurisdictions and not in noncovered
22 jurisdictions.

23 MR. KATYAL: But -- but --

24 JUSTICE KENNEDY: This is -- this is a great
25 disparity in treatment, and the government of the United

1 States is saying that our States must be treated
2 differently. And you have a very substantial burden if
3 you're going to make that case.

4 MR. KATYAL: Justice Kennedy, their burden
5 is the same as it has always been in South Carolina
6 versus Katzenbach and City of Rome. The burden is on
7 Congress to say is continuation of this landmark
8 achievement, one of the most transformative acts in
9 American history, still justified, because with this act
10 what Congress -- what Congress did was essentially
11 redeem itself in the eyes of the world.

12 JUSTICE KENNEDY: No one -- no one questions
13 the validity, the urgency, the essentiality of the
14 Voting Rights Act. The question is whether or not it
15 should be continued with this differentiation between
16 the States. And that is for Congress to show.

17 MR. KATYAL: And Congress did show precisely
18 that. They showed, for example, Justice Kennedy,
19 that -- that the differential between covered and
20 noncovered States with respect to section 2 lawsuits was
21 57 percent of successful section 2 lawsuits were filed
22 in covered jurisdictions, even though they are 25
23 percent of the population --

24 CHIEF JUSTICE ROBERTS: Well, why didn't
25 Congress then extend the Act to Massachusetts, whereas

1 your brother told us the disparity between Hispanic and
2 non-Hispanic voting is far greater than jurisdictions
3 that are covered?

4 MR. KATYAL: Because that -- because, again,
5 that is only one aspect of the overall problem, the
6 amount of registration rates or something like that.
7 What Congress has historically done ever since the
8 inception of the Voting Rights Act is target those
9 States where discrimination is so rooted that it is hard
10 to get rid of without preclearance.

11 Preclearance will transform the landscape
12 and enfranchise millions of Americans. And Congress
13 heard evidence and said, after 16,000 pages of
14 testimony, that the extension in these specific areas
15 was necessary in order to root out and prevent
16 discriminatory changes.

17 JUSTICE ALITO: Wouldn't you agree that
18 there is some oddities in this coverage formula?
19 Isn't -- is it not the case that in New York City the
20 Bronx is covered and Brooklyn and Queens are not?

21 MR. KATYAL: There -- there -- there are
22 certainly some oddities, as there always have been, from
23 Katzenbach and from City of Rome. And what this Court
24 has said is that Congress can act on the state-by-state
25 level and -- and that there is a remedy for the problem,

1 which is the bailout provision --

2 JUSTICE SCALIA: Oh, let's talk about the
3 bailout provision. That -- that was inserted in 1982.

4 MR. KATYAL: That's correct.

5 JUSTICE SCALIA: How many years is that?
6 Over a quarter of a century, there have been 15 bailouts
7 that have gone through? All of them in the State of
8 Virginia?

9 MR. KATYAL: There -- there have been 18
10 under the new provision, which is --

11 JUSTICE SCALIA: You bring this before us as
12 a justification for the legislation.

13 MR. KATYAL: I am saying --

14 JUSTICE SCALIA: It's obviously quite
15 impracticable --

16 MR. KATYAL: Again --

17 JUSTICE SCALIA: -- for anybody to bail out.

18 MR. KATYAL: Justice Scalia, that precise
19 argument was made to Congress in 2006 and it was
20 rejected. And it --

21 JUSTICE SCALIA: The question is whether
22 it's right, not whether Congress rejected it.

23 (Laughter.)

24 MR. KATYAL: And I think it's not right
25 because what the testimony found was that States are

1 able to bail out, but they don't, and this goes back to
2 my point to Justice Kennedy, because today States are
3 finding that preclearance actually serves their
4 interests; it increases --

5 JUSTICE SCALIA: It fends off Section 2
6 suits, I assume. I mean, that's great. You get a
7 declaratory judgment, here -- you know, a benediction,
8 and you skip off without having to face suits. That may
9 be one reason. Another reason may be that they like the
10 packing of minorities and the other -- the other
11 districting tricks that can be -- that can be pulled
12 because - because of the requirements of the Voting
13 Rights Act.

14 MR. KATYAL: Well, I don't think that's a
15 quite fair characterization. After all, here, Congress
16 in 2006 -- all Senators voted for this bill, and indeed
17 90 of the 110 Representatives from covered jurisdictions
18 voted for it, so if the Court is concerned about --

19 JUSTICE SCALIA: Well, they get elected
20 under this system. Why should that they take it away?

21 MR. KATYAL: Excuse me?

22 JUSTICE SCALIA: I say, everybody who voted
23 for this -- this system was elected under this system.
24 Should it be surprising that they think it it's a good
25 thing?

1 MR. KATYAL: Well, I think that we shouldn't
2 -- this Court should be loathe to second-guess the
3 motivations of Congress under --

4 JUSTICE GINSBURG: We have -- we have before
5 us the representations of the county in which the
6 district is located, and of several of the covered
7 jurisdictions, that they don't seek bailout because they
8 think that the benefits, many of which have nothing to
9 do with districting, outweigh whatever burden
10 preclearance puts on them. It's first, bringing
11 minority groups into the discussion of what the change
12 will be in the first place, and then warding off the
13 kind of examples that appear in the -- in the Louis -- I
14 think we -- we can't impugn their integrity by saying
15 that that host of reasons, having nothing to do with
16 redistricting, is why they are not asking for bailout.

17 MR. KATYAL: That's precisely right, Justice
18 Ginsburg, and what the covered jurisdictions also say is
19 something about how this -- the test before this Court
20 shouldn't be the narrowest time slice of today, but
21 rather the test should be to think about historically
22 what has happened.

23 JUSTICE SCALIA: We are not insisting that
24 they -- the other side is not insisting that they be
25 kicked out. If they want to voluntarily stay in, fine.

1 In fact, you should let other States and other
2 jurisdiction opt in if they want to.

3 MR. KAYTAL: But --

4 JUSTICE SCALIA: If you want to make this a
5 voluntary system that's something entirely different,
6 but the question is assuming a State or -- or a covered
7 jurisdiction does not want to be in, do you have the
8 right to coerce them to be in? That's all we are
9 talking about.

10 MR. KAYTAL: Yes, and --

11 JUSTICE SCALIA: If they want to stay in,
12 that's fine.

13 MR. KATYAL: And this Court has recognized
14 and the brief of the covered jurisdictions recognizes
15 the fact that it's a separate sovereign requiring in
16 this provides an additional deterrent element and
17 increases the integrity of the elections.

18 If I could return to the point I was saying
19 a moment ago, what these covered jurisdictions are
20 saying is that this moment in time isn't the right test.
21 Rather you should look at the overall historical
22 record --

23 JUSTICE KENNEDY: Well, the overall
24 historical record, Katzenbach said there had been
25 unremitting and ingenious defiance, and that was

1 certainly true as of the time of the Voting Rights Act.
2 Democracy was a shambles in those -- that's not true
3 anymore, and to say that the States are willing to yield
4 their sovereign authority and their sovereign
5 responsibilities to govern themselves doesn't work.

6 We've said in Clinton s New York that
7 Congress can't surrender its powers to the President,
8 and the same is true with reference to the States.
9 Wouldn't you agree?

10 MR. KATYAL: That is correct. And here this
11 Court has repeatedly said this isn't any sort of
12 surrendering of power. It was justified because of the
13 record of discrimination. South Carolina v Katzenbach,
14 Justice Kennedy, I don't quite think said that defiance
15 was the precondition; rather it found that the onerous
16 amount of case-by-case litigation itself wasn't enough.
17 And I would caution this Court because this Court has
18 had examples before in which the historical record
19 looked good at a narrow moment in time. If we think
20 back 100 years to Reconstruction, 95 percent of
21 African-Americans in franchise, 600 black members in the
22 State legislatures, 8 black members of Congress, 8 black
23 justice in the South Carolina Supreme Court. Things
24 looked good, and that led this Court in the civil rights
25 cases over Justice Harlan's lone dissent to say the era

1 of special protection was over.

2 JUSTICE ALITO: Could I ask you this
3 question about -- about bailout? I mean we have --
4 there's a very odd aspect to this case. We have an
5 immense constitutional question and then on the other
6 hand you have this little utility district, which -- and
7 you'll correct me if I'm wrong, but as far as I got from
8 the briefs, they have never done anything wrong, and
9 they would like to bail out and the Voting Rights Act
10 was intended to permit jurisdictions that were not
11 committing transgressions to bail out. Now if the
12 statute doesn't allow them to do it, the statute doesn't
13 allow them to do it, but is there any good reason why a
14 district like that should not be permitted to bail out?

15 MR. COLEMAN: Again, this Court has
16 repeatedly said that this Congress, of the United
17 States, can legislate on the State-by-State level.
18 After all, the text of the Fifteenth Amendment speaks of
19 "any State." So I think the relevant test is the amount
20 of discrimination in Texas, and there the evidence is
21 not just registration rates; it's the fact that they
22 lead the country in objections under section 5, that the
23 greatest deterrent effect of the more information
24 process is in the State of Texas.

25 JUSTICE ALITO: If it's the case that there

1 is no discrimination going on, no evasion going on in
2 this little utility district, is there any good reason
3 why they shouldn't be able to bail out?

4 MR. KATYAL: Yes, absolutely, because that's
5 what City of Rome argued in 1980, and what this Court
6 said in rejecting precisely that argument over Justice
7 Powell's dissent, was that it's not that discrimination
8 can't be to be at the individual unit-by-unit level. It
9 rather, if Congress so chooses, can do it on a more
10 broad level.

11 JUSTICE SCALIA: That was 1980?

12 MR. KATYAL: That's correct.

13 JUSTICE GINSBURG: Why --

14 JUSTICE SCALIA: The bailout provision was
15 adopted in 1982, 27 years ago. There have been 15
16 bailouts since then. Is that what you think Congress
17 contemplated when it enacted the bailout provision in
18 1982?

19 MR. KATYAL: First of all there was a
20 bailout provision at issue in 1980. It was amended in
21 1982. And yes, I think Congress contemplated a process
22 -- the legislative record on this is very clear.

23 JUSTICE SCALIA: Less than one a year?

24 MR. KAYTAL: -- that -- no, what they
25 contemplated was to make it easier for political

1 divisions to bail out, and what Congress --- what
2 Congress anticipated, certainly more than one a year,
3 that didn't materialize. And again, I think, Justice
4 Scalia, the reason why it didn't materialize is because
5 States generally -- general appreciate Section 5's
6 preclearance process as well as its -- covered
7 jurisdictions.

8 CHIEF JUSTICE ROBERTS: Counsel, I thought
9 -- I thought our opinion in City of Boerne said that the
10 problem that Section 5 legislation addresses has to be
11 widespread and persisting. Do you think the record that
12 is before us today shows widespread and persisting
13 discrimination in voting?

14 MR. KATYAL: I do. I think that Congress,
15 Congress' reports, it's 16,000-page track record --

16 JUSTICE KENNEDY: In covered States as
17 opposed to noncovered States, if I can add that to the
18 Chief Justice's question, please.

19 MR. KATYAL: I do agree that they went State
20 by State and showed -- showed tremendous amounts of
21 discrimination in those places. Of course I disagree
22 with the notion that this utility district can point to
23 any one place in the country, be it Massachusetts or
24 some corner in Georgia, and say well, the evidence
25 wasn't there. I think Congress has far more latitude

1 under its Fifteenth and Fourteenth Amendment powers.

2 JUSTICE KENNEDY: Just one thing on bailout.

3 It's like Eurystheus keeps telling Hercules, "Oh, you

4 did a good job, but now you've got another -- got

5 another thing to do." That's the bailout provision.

6 Anybody who has tried to fill out a government form

7 realizes they make a mistake, so that the DOJ rejects

8 it, that counts as a rejection. You have to have a --

9 what, a clean record for how many -- how many years --

10 before you can preclear? I mean, this is simply

11 impracticable. And it seems to me a cornerstone of the

12 Act and of your argument for upholding the Act, and if

13 we find that it doesn't work, that it's just -- it's

14 just an illusion, that gives me serious pause.

15 MR. KATYAL: Justice Kennedy, the only

16 evidence in the record is that the bailout provision

17 works nothing like the way that it might be

18 hypothesized. That is, every single county, every

19 single political subdivision that has asked for a

20 bailout has received one, and in 2006 there was an even

21 amendment offered to minimize the bailout provision.

22 That amendment was rejected overwhelmingly, and the

23 reason it was rejected was that jurisdictions that are

24 covered have now come to appreciate the power of Section

25 5 to deter voting discrimination, and that's why

1 Congress made a judgment --

2 JUSTICE SCALIA: What I understand it, is
3 this incorrect? As I understand it for Travis County to
4 get a bailout, it would -- it has within Travis County
5 something like 106 political subdivisions that are
6 covered, and Travis County would have to go to all of
7 those 106 and demonstrate that there has been no
8 violation by any of those 106 for the preceding whatever
9 it is, five years, whatever the bailout provision is.

10 You think that's -- you think that's
11 feasible?

12 MR. KATYAL: For the way the statute works,
13 they have to go to the 107 subunits, which is absolutely
14 feasible because they are under contract with all 107
15 subunits to administer their elections. They have all
16 of the voting data to put together that bailout, and in
17 previous --

18 JUSTICE SCALIA: Travis County is not the
19 superior of many of those subunits, as it is not of this
20 district here. This district is a subdivision of the
21 State, but not of Travis County.

22 MR. KATYAL: Again, I think that's a
23 distinction without a difference. They have all of the
24 registration data and everything else necessary to make
25 the bailout provision. And the only record Congress and

1 the only record before this Court is that every single
2 entity that has sought a bailout has received one.

3 JUSTICE GINSBURG: And the number is 18 now?

4 MR. KATYAL: The number is 18.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Adegbile.

7 ORAL ARGUMENT OF DEBO P. ADEGBILE

8 ON BEHALF OF THE INTERVENOR-APPELLEES

9 MR. ADEGBILE: Mr. Chief Justice, and may it
10 please the Court:

11 Our long experience demonstrates that racial
12 discrimination in voting has been persistent and
13 adaptive. Only after careful assessment of the record
14 did Congress find that the case-by-case method was
15 inadequate and that section 5 continued to do important
16 work within the covered jurisdictions.

17 There are a couple of things that I want to
18 call the Court's attention to in light of the discussion
19 that we've been having. First, the pernicious nature of
20 voting discrimination is such that small changes in the
21 rules of the game can affect many people. In addition,
22 the Court has observed, as Congress has on multiple
23 occasions when reauthorizing the Act, that the
24 case-by-case method is slow and inadequate to the task.
25 Indeed, Justice Kennedy's opinion in Boerne spoke to

1 this problem of the case-by-case method.

2 I want to --

3 JUSTICE KENNEDY: I think that's absolutely
4 right. Section 2 cases are very expensive. They are
5 very long. They are very inefficient. I think this
6 section 5 preclearance device has -- has shown -- has
7 been shown to be very very successful. The question is
8 whether or not it can be justified when other States are
9 not covered today.

10 MR. ADEGBILE: As -- as the Court said in
11 Katzenbach when it first was presented with this
12 question of the coverage formula, Congress is permitted
13 to use so much of its power as is necessary to target
14 the problem as it finds it. The discrimination that was
15 manifest in the covered jurisdictions was different in
16 character at that time and -- but Congress did not stop
17 and get frozen in time in 1965. The periodic
18 reauthorizations have given Congress an opportunity to
19 revisit the progress.

20 CHIEF JUSTICE ROBERTS: So is it your -- is
21 it your position that today southerners are more likely
22 to discriminate than northerners?

23 MR. ADEGBILE: I wouldn't frame it in that
24 way, Justice -- Chief Justice Roberts. I think the
25 record does reveal that discrimination in the covered

1 jurisdictions has a repetitive form. There are very --
2 there are brief talks about over six dozen examples.
3 Those are illustrative and not exhaustive, but
4 repetitious violations, that is, violations in covered
5 jurisdictions after a section 2 case --

6 CHIEF JUSTICE ROBERTS: So your answer is
7 yes?

8 MR. ADEGBILE: I think that it's fair to say
9 that the pattern has been more repetitious violations in
10 the covered jurisdictions and -- and more one off
11 discrimination in other places.

12 That is not to say that there isn't voting
13 discrimination in other States. The record shows that
14 there is discrimination in other States. But the -- but
15 Congress found that the nature of the way the
16 discrimination is practiced, viewed through the lens of
17 history, is that repetitive violations happen. For
18 example, after this Court decided the LULAC case, a case
19 that was litigated over a number of months and very
20 expensive and complicated, the State then tried to
21 shorten the period for early voting. And the plaintiffs
22 in that case needed to file a section 5 enforcement
23 action, post-2000 redistricting, to give effect to this
24 Court's judgment.

25 CHIEF JUSTICE ROBERTS: So -- but I guess

1 that point depends upon the assumption that shortening
2 the time period for early voting is discriminatory as
3 opposed to good policy.

4 MR. ADEGBILE: I think in the context of
5 that circumstance, Justice -- Chief Justice Roberts, the
6 issue was that you had a long-standing incumbent and
7 that the early voting -- the timing of the early voting
8 period was such that it was going to conflict with a --
9 a holiday of -- of a --

10 CHIEF JUSTICE ROBERTS: So that was largely
11 to protect the incumbent.

12 MR. ADEGBILE: To protect the incumbent, but
13 to disadvantage the community that was prepared to
14 exercise its voice, as this Court found in the LULAC
15 opinion. That is to say --

16 CHIEF JUSTICE ROBERTS: Well, incumbent --

17 MR. ADEGBILE: -- the incumbent was not the
18 candidate of choice.

19 CHIEF JUSTICE ROBERTS: Incumbent protection
20 takes place in the North as well as the South.

21 MR. ADEGBILE: By all means, but the -- but
22 the incumbent protection in this instance was designed
23 to cut off the minority community, the Latino voters who
24 had been disadvantaged by virtue of that plan. But
25 certainly that is not the only example.

1 JUSTICE SCALIA: Mr. Adegbile, what was -- I
2 read it in the briefs, and I forget what it was. What
3 was the vote on this 2006 extension -- 98 to nothing in
4 the Senate, and what was it in the House? Was --

5 MR. ADEGBILE: It was -- it was 33 to 390, I
6 believe.

7 JUSTICE SCALIA: 33 to 390. You know, the
8 -- the Israeli Supreme Court, the Sanhedrin, used to
9 have a rule that if the death penalty was pronounced
10 unanimously, it was invalid, because there must be
11 something wrong there. Do you ever expect -- do you
12 ever seriously expect Congress to vote against a
13 reextension of the Voting Rights Act? Do you really
14 think that any incumbent would -- would vote to do that?

15 MR. ADEGBILE: Well --

16 JUSTICE SCALIA: Twenty-five years from now?
17 Fifty years from now? When?

18 MR. ADEGBILE: Justice Scalia, I think some
19 members of Congress did of course vote against the Act.

20 JUSTICE SCALIA: Thirty-three members of the
21 House and nobody in the Senate.

22 MR. ADEGBILE: Thirty-three members of the
23 House, indeed. But I think the -- the reason that they
24 voted for it is what's more important. Congress did not
25 assume that section 5 was necessary. It took a very

1 careful examination to see how it was operating, and the
2 determination was that in the absence of section 5,
3 because of the repetitive violations, because of 620
4 objections -- there was evidence that approximately 60
5 percent of those show some evidence of intentional
6 discrimination.

7 If you take away the prophylaxis, the
8 discrimination will return in a way that we don't need
9 to revisit. The history has been that voting
10 discrimination manifests itself through repetitive
11 efforts and --

12 JUSTICE GINSBURG: But the question is, do
13 you agree that this is unlike access to buildings by
14 people who are in wheelchairs? There has to come a
15 point where it will end, and perhaps Congress was just
16 picking up on what this court said a few years before in
17 the University of Michigan law school case, this court
18 came up with a 25-year figure so maybe Congress thought
19 this court thinks 25 years is about right, must be about
20 right.

21 MR. ADEGBILE: Congress had a more specific
22 reason as I understand the record. There was a specific
23 amendment proposed to shorten the time to 10 years.
24 Then Chairman of the judiciary committee James
25 Sensenbrenner rose to it explain part of the experience

1 most of the infractions not all but most when many
2 voting changes are necessary through reapportionment.
3 Not all of them involved reapportionment but many of
4 them are necessitated and the judgment was that it was
5 going to capture two censuses and they also looked back
6 to see how much discrimination they found from 1962 to
7 reauthorization.

8 And indeed Congress has been a little bit
9 surprised they have not been able to dislodge more of
10 the discrimination. They acknowledged the progress.
11 Progress didn't happen by itself and the experience had
12 been that it was helping us to move forward and that is
13 reflected I think in the State's brief to come to
14 Justice Kennedy's point. I think there is an intrusion.
15 This Court's decisions have recognized that Section 5
16 does intrude but even in *Bernie* as the court
17 distinguished Section 5 of the Voting Rights Act from
18 the, many of the statutes that were there at issue in
19 this case, RFRA, certainly other cases followed, the
20 court kept returning to section 5 because the problem
21 had been demonstrated by Congress. The gravity of the
22 harm was so severe that Congress needed a special
23 mechanism to dislodge it because if we don't have the
24 vote as this court's decisions have recognized, our
25 whole system is undermined.

1 JUSTICE BREYER: So what is the reason in
2 your opinion if you had to summarize it in ray sentence
3 or two, you would say that the reason that Congress
4 didn't go into other States and decide which ones to add
5 to this or go into these States district by district and
6 decide which ones to subtract from this, the reason that
7 Congress didn't modify voting rights statute but simply
8 renewed it?

9 MR. ADEGBILE: Is that it wanted to stay the
10 course of ridding the covered jurisdictions from
11 discrimination. Katzenbach spoke in items of the case.
12 Subsequent have spoke about ridding the country of this
13 scourge as it manifested itself in the covered
14 jurisdictions and I think this was some State-by-State
15 analysis and the reports of the covered jurisdictions
16 that do it --

17 JUSTICE ALITO: Would you say from your
18 experience and I'm sure you're very knowledgeable about
19 this that there is no great are discrimination in voting
20 in Virginia than in North Carolina or in Tennessee or in
21 Arkansas or in Ohio?

22 MR. ADEGBILE: I can't precisely quantify
23 the quantum of discrimination in each of those stays but
24 I think that Congress' judgment was there had been a
25 demonstrated pattern of discrimination in the covered

1 jurisdictions, covering formula had --

2 JUSTICE SCALIA: Wasn't Virginia the first
3 State in the Union to elect a black governor.

4 MR. ADEGBILE: Yes, indeed it was.

5 JUSTICE SCALIA: And it has a black chief
6 justice of the supreme court currently.

7 MR. ADEGBILE: Yes, Justice Scalia, I take
8 the point. But I think it's not quite fair to say. As
9 my predecessor at the podium made the point, that there
10 have been African-Americans to rise to high office
11 throughout our history, but that occasion of a single
12 person sitting in a seat doesn't change the experience
13 on the ground for everyday citizens.

14 It is -- it has an important salutary effect
15 and it tells us about the possibilities of our
16 Constitution, but it doesn't mean that voters that are
17 trying to vote in a school board election in Louisiana
18 are going to have an easy time of it where racially
19 polarized voting is as extreme as it is and when
20 election officials manipulate the rules of the game to
21 try and disadvantage the minority community.

22 JUSTICE KENNEDY: Well, the brief filed by
23 the NAACP Legal Defense Fund, the first 15 pages I think
24 makes a good demonstration of discrete discriminatory
25 acts; and the brief filed by Nathaniel, Professor

1 Percelly, makes an important point about crossovers in
2 different -- my concern is it's just not clear to me
3 that Congress addressed this for the rest of the
4 country. That's my concern.

5 MR. ADEGBILE: I think the close -- the best
6 evidence of the comparison question to which you're
7 returning is the section 2 cases that were examined in a
8 report that was submitted to Congress. And as
9 Appellants recognize in their brief, 600 --
10 notwithstanding the powerful section 5 remedy, there
11 were 653 successful section 2 cases in covered
12 jurisdictions, and the success rate in covered
13 jurisdictions was much higher than in noncovered
14 jurisdictions.

15 So when you put together the objections, the
16 requests for more information followed by withdrawals,
17 the section 5 enforcement actions, the section 2 cases,
18 it is a picture that far exceeds the record that was
19 before this august body when considering enactments of
20 Congress in other contexts in Hibbs and in Lane, and the
21 record was of intentional discrimination, not simply
22 disparities but purposeful efforts to disadvantaged
23 minority groups. And I think that's the fundamental
24 difference between the covered jurisdictions and the
25 noncovered.

1 CHIEF JUSTICE ROBERTS: Well, the cases
2 you're talking about include both intentional and impact
3 cases. And the Constitution that section 5 is designed
4 to implement covers only intentional discrimination. So
5 even the examples you have given sweep broadly as a
6 prophylactic measure and then the section 5 preclearance
7 of course sweeps even more broadly. So we do have a
8 situation, despite the evidence that was -- that you
9 have cited, where less than one-twentieth of 1 percent
10 of the submissions that the States make are denied
11 preclearance.

12 Again, it seems to me that that means that
13 section 5 sweeps very, very broadly.

14 MR. ADEGBILE: I think there are two
15 responses. First, the relevant assessment is not simply
16 the rate. As the lower court found, the rate of
17 objections even at the time of the 1975 re-authorization
18 in Rome was very small. Judge Tatel spoke to this point
19 in his opinion and in the oral argument. The rate has
20 always been small. But what section 5 is designed to do
21 is to vindicate the principles of our Constitution, and
22 the gravity of the harm is such that if we have 620
23 examples of discrimination and 60 percent of those are
24 intentional discrimination together with some of the
25 other indicia and under this Court's cases Congress is

1 entitled to look broadly, not simply at the decided
2 case, but to look broadly and to be the factfinder of
3 this important information.

4 This is a pattern. It's a widespread
5 pattern of intentional discrimination, and I think that
6 that is something that this Court needs to focus on as
7 it works through this important and serious issue.

8 JUSTICE BREYER: Thank you.

9 I have another question. How long did it
10 take Congress to compile this 13,000-page record?

11 MR. ADEGBILE: Approximately 10 months,
12 Justice Breyer.

13 JUSTICE BREYER: And how long would it have
14 taken Congress in your opinion to have compiled the
15 record to figure out what's happening in this respect in
16 every State or in these States district by district?

17 MR. ADEGBILE: I think that I can't put a
18 precise time on it, but it would have been certainly a
19 couple more years. The time that is necessary to
20 compile these investigations and the expertise that's
21 necessary to assemble them and cull the data takes some
22 time in my personal experience.

23 CHIEF JUSTICE ROBERTS: So your position is
24 that it makes no difference if discrimination in the
25 noncovered jurisdiction is more widespread and more

1 persistent; it doesn't matter, because Congress can
2 focus solely on the jurisdictions that have been covered
3 since 1965?

4 MR. ADEGBILE: I make a slightly different
5 point. I don't think that it doesn't matter at all. I
6 think Congress has to act reasonably, but in light of
7 the record before it its judgment to stay the course in
8 the covered jurisdictions because of the way voting
9 discrimination has manifested itself in those
10 jurisdictions, that judgment is reasonable on the record
11 it had before it. It made a judgment in effect that
12 section 2 has proven more adequate to the task in other
13 jurisdictions that don't have the same history of
14 repetitive violations.

15 CHIEF JUSTICE ROBERTS: So I guess your
16 answer is that they can address the covered
17 jurisdictions that have been covered since 1965 without
18 looking at all to the rest of the country?

19 MR. ADEGBILE: I think that if things were
20 flipped and discrimination was much worse outside, that
21 would reflect on the reasonableness of Congress'
22 judgment. But that's a fact situation that was not
23 present before Congress.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 MR. ADEGBILE: Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Coleman, have
2 you 5 minutes.

3 REBUTTAL ARGUMENT OF GREGORY S. COLEMAN
4 ON BEHALF OF THE APPELLANT

5 MR. COLEMAN: But, as Justice Alito pointed
6 out, Congress didn't know, because it didn't ask,
7 whether discrimination is worse in Tennessee or Arkansas
8 than in Virginia and other States. Nobody knows sitting
9 here today.

10 I respectfully disagree that Congress
11 couldn't have put together that effort. What we really
12 do hear is that this, this badge that is preclearance,
13 this Congressional judgment that State and local
14 officials in covered jurisdictions who in my experience
15 are strongly --

16 JUSTICE BREYER: You should have a chance to
17 answer the same question. You heard my question, the
18 time question. What's your estimate?

19 MR. COLEMAN: Oh, I strongly disagree with
20 that. AEI put in a number of reports that evaluated
21 things on the ground in a variety of noncovered
22 jurisdictions such as Milwaukee. I certainly think
23 within the time that Congress took to look at this if
24 they had been interested they could have easily
25 evaluated this. It would have been easily available to

1 them.

2 JUSTICE ALITO: Well, they now have 25 years
3 to look at, or 24 years, to look at the rest of the
4 country. Are they doing that? Are they holding
5 hearings?

6 MR. COLEMAN: No, nobody is doing that. In
7 answer to Justice Ginsburg's question, that's what
8 Congress did in 1982. It said 25 years. That 25 years
9 has gone by. Times have changed.

10 JUSTICE GINSBURG: Well, this Court said --
11 -- it was not 1982, it was two thousand something. This
12 Court thought from two thousand something 25 years was a
13 reasonable period.

14 MR. COLEMAN: Congress' justification simply
15 does -- I think as we've heard from counsel, in light of
16 our mobile society and the fact that people don't live
17 in the same place people lived 40 years ago. This is a
18 bad --

19 JUSTICE STEVENS: Let me ask this question
20 just as sort of background. Does your case challenge at
21 all the standards that Congress has used throughout the
22 statute for causing States to become covered
23 jurisdictions?

24 MR. COLEMAN: Well the only standards that
25 exist are whether they use a test or devise in the

1 1960s.

2 JUSTICE STEVENS: Correct. Have you ever
3 challenged those as a basis for making a State or county
4 or election district covered?

5 MR. COLEMAN: I don't think we've challenged
6 the action that took place --

7 JUSTICE STEVENS: Well, you have a history
8 that some States are covered and some are not because of
9 certain requirements that the statute imposed. And I
10 didn't understand the case to involve a challenge to the
11 method by which States became -- become covered.

12 MR. COLEMAN: No, Justice Stevens, we do
13 challenge that. In fact --

14 JUSTICE STEVENS: Then why is it relevant
15 there are a lot of States out there that are not
16 covered?

17 MR. COLEMAN: Because this Court's
18 discussions of these issues in Morris and in Garrett and
19 even in Hibbs indicate that it does matter what the
20 evidence shows with respect to a coverage determination,
21 and Congress' decision to not update it, which we
22 believe was for political reasons, simply bears no
23 resemblance to reality. And looking back to see who was
24 registered and who was voting in the '60s doesn't --

25 JUSTICE STEVENS: Are you arguing the

1 statute is unconstitutional because Congress failed to
2 extend it to other -- other parts of the country?

3 MR. COLEMAN: No, I don't think that's our
4 argument. I think our argument is it's partially
5 unconstitutional because it even failed to look at the
6 coverage criteria and that it used the criteria
7 literally off the books from the '60s and '70s without
8 even looking at the information.

9 Again, if Congress had done that in 1965 and
10 said, we want to look at this Franklin-Hoover -- excuse
11 me -- this Franklin Roosevelt-Hoover election in 1932, I
12 think the Court would have been pretty surprised that
13 that was the best and most relevant information that
14 Congress could come up with.

15 This idea of -- of a badge that really runs
16 with the land is -- is something that we -- we think is
17 inherently unjustifiable.

18 I'd also like to address the point about
19 racial bloc voting. Racial bloc voting is not
20 discrimination, and it's not unconstitutional. And,
21 indeed, the way the Court has interpreted section 2 --
22 and I realize there are divisions in the Court about
23 this --

24 JUSTICE GINSBURG: The district will -- the
25 district will never be involved in racial bloc voting

1 for districting purposes because it doesn't -- it's
2 boundaries don't change.

3 MR. COLEMAN: That's true, Justice Ginsburg.
4 But in terms of this facial challenge, it is important
5 for the Court to understand and to consider the fact
6 that Congress really thumbed its nose at the Court in
7 terms of rejecting the constitutional concerns that the
8 Court raised in -- in Miller and in Bossier Parish and
9 in Georgia versus Ashcroft.

10 The new enactment has been changed in a way
11 that -- that really requires covered jurisdictions to
12 engage more and more in race-based redistricting and
13 race-based -- and it's not only redistricting, Justice
14 Ginsburg -- in race-based decisionmaking. And so here
15 we are 40 years --

16 JUSTICE GINSBURG: Why wouldn't one
17 construing the Act as it was passed in 2006, say, well,
18 Congress obviously had in mind that this would be
19 enforced consistent with this Court's decision in Shaw,
20 this Court's decision in Miller?

21 MR. COLEMAN: We believe that the
22 interpretation of the Act or -- excuse me -- the passage
23 of the amendments in 2006 go far beyond what
24 preclearance was in 1965. We have a more restrictive
25 form of preclearance that requires State and local

1 governments to engage in more, not less, race-based
2 decisionmaking with respect to elections. And that, as
3 the Court has noted, creates additional constitutional
4 issues with the Court -- with the statute.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 The case is submitted.

7 (Whereupon, at 11:26 a.m., the case in the
8 above-entitled matter was submitted.)

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