IN THE SUPREME COURT OF THE UNITED STATES

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NORTHWEST AUSTIN :

MUNICIPAL UTILITY DISTRICT :

NUMBER ONE, :

Appellant :

v. : No. 08-322

ERIC H. HOLDER, JR., ATTORNEY :

GENERAL, ET AL. :

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Washington, D.C.

Wednesday, April 29, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:13 a.m.

APPEARANCES:

GREGORY S. COLEMAN, ESQ., Austin, Tex.; on behalf of the Appellant.

NEAL K. KATYAL, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Appellee Holder.

DEBO P. ADEGBILE, ESQ., New York, N.Y.; on behalf of the Intervenor-Appellees.

C O N T E N T S

P R O C E E D I N G S

(10:13 a.m.)

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

Mr. Coleman.

ORAL ARGUMENT OF GREGORY S. COLEMAN

ON BEHALF OF THE APPELLANT

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

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

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

MR. COLEMAN: Well, we disagree with that,

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

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

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

JUSTICE GINSBURG: Yes, but the -- but the

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

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

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

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

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

possibility of Federal examiners because we are a political subdivision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Attorney General or the district court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. COLEMAN: That's correct.

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

MR. COLEMAN: No, Justice Scalia.

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

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

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

JUSTICE SOUTER: Right.

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

JUSTICE SOUTER: You separately asked for declaratory judgment?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: Whatever you want.

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

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

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

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

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

JUSTICE KENNEDY: Well, Justice Breyer --

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

MR. COLEMAN: That's --

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

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

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

covered jurisdictions?

And the other thing it didn't do is say: Among covered jurisdictions and noncovered jurisdictions, let's look among -- let's separate out among these jurisdictions and see where the problem locations are and what areas we think might, if -- if preclearance is going to be constitutional, might be subject. There is absolutely no evidence in the record of that. Preclearance once again is based on the results -- well, whether there was a test or device in the 1960s and the results of the 1964, 1968, and 1972 presidential elections.

JUSTICE GINSBURG: What kind of coverage formula would be adequate? You are attacking Congress' preservation of the same coverage formula. But what other coverage formula could it come up with?

MR. COLEMAN: Well, just to give one example -- and I'm not -- not recommending this -- but if, for instance, the same coverage formula had been applied to the 2000 and 2004 elections, equalizing for citizen voting age population, the only covered State would have been Hawaii. Under that formula, using modern data, modern information, none of these States would have been covered if you account for noncitizen voting age population.

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

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

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

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

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

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

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

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

MR. COLEMAN: That evidence --

JUSTICE SOUTER: It has never stopped.

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

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

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

thousands upon thousands of jurisdictions --

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

MR. COLEMAN: From -- from 1982 forward.

JUSTICE SOUTER: Yes, that's correct.

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Coleman.

Mr. Katyal.

ORAL ARGUMENT OF NEAL K. KATYAL

ON BEHALF OF THE APPELLEE HOLDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. KATYAL: Absolutely not.

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

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

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

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

happened before.

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

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

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

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

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

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

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

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

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

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

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

MR. KATYAL: But -- but --

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

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

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

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

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

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

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

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

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

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

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

which is the bailout provision --

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

MR. KATYAL: That's correct.

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

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

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

MR. KATYAL: I am saying --

JUSTICE SCALIA: It's obviously quite impracticable --

MR. KATYAL: Again --

JUSTICE SCALIA: -- for anybody to bail out.

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

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

(Laughter.)

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

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

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

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

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

MR. KATYAL: Excuse me?

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

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

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

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

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

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

MR. KAYTAL: But --

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

MR. KAYTAL: Yes, and --

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

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

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

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

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

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

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

of special protection was over.

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

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

JUSTICE ALITO: If it's the case that there

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

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

JUSTICE SCALIA: That was 1980?

MR. KATYAL: That's correct.

JUSTICE GINSBURG: Why --

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

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

JUSTICE SCALIA: Less than one a year?

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

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

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

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

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

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

under its Fifteenth and Fourteenth Amendment powers.

JUSTICE KENNEDY: Just one thing on bailout. It's like Eurystheus keeps telling Hercules, "Oh, you did a good job, but now you've got another -- got another thing to do." That's the bailout provision. Anybody who has tried to fill out a government form realizes they make a mistake, so that the DOJ rejects it, that counts as a rejection. You have to have a -- what, a clean record for how many -- how many years -- before you can preclear? I mean, this is simply impracticable. And it seems to me a cornerstone of the Act and of your argument for upholding the Act, and if we find that it doesn't work, that it's just -- it's just an illusion, that gives me serious pause.

MR. KATYAL: Justice Kennedy, the only evidence in the record is that the bailout provision works nothing like the way that it might be hypothesized. That is, every single county, every single political subdivision that has asked for a bailout has received one, and in 2006 there was an even amendment offered to minimize the bailout provision. That amendment was rejected overwhelmingly, and the reason it was rejected was that jurisdictions that are covered have now come to appreciate the power of Section 5 to deter voting discrimination, and that's why

Congress made a judgment --

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

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

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

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

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

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

JUSTICE GINSBURG: And the number is 18 now?

MR. KATYAL: The number is 18.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Adegbile.

ORAL ARGUMENT OF DEBO P. ADEGBILE

ON BEHALF OF THE INTERVENOR-APPELLEES

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

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

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

this problem of the case-by-case method.

I want to --

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

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

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

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

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

CHIEF JUSTICE ROBERTS: So your answer is yes?

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

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

CHIEF JUSTICE ROBERTS: So -- but I guess

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

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

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

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

CHIEF JUSTICE ROBERTS: Well, incumbent --

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

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

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

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

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

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

MR. ADEGBILE: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

jurisdictions, covering formula had --

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

MR. ADEGBILE: Yes, indeed it was.

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: Thank you.

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

MR. ADEGBILE: Approximately 10 months, Justice Breyer.

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. ADEGBILE: Thank you.

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

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

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

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

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

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

them.

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

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

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

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

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

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

1960s.

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

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

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

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

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

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

JUSTICE STEVENS: Are you arguing the

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

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

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

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

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

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

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

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

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

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

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

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

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

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