

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NORTHWEST AUSTIN :

4 MUNICIPAL UTILITY DISTRICT :

5 NUMBER ONE, :

6 Appellant :

7 v. : No. 08-322

8 ERIC H. HOLDER, JR., ATTORNEY :

9 GENERAL, ET AL. :

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11 Washington, D.C.

12 Wednesday, April 29, 2009

13

14 The above-entitled matter came on for oral  
15 argument before the Supreme Court of the United States  
16 at 10:14 a.m.

17 APPEARANCES:

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

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

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

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P R O C E E D I N G S

(10:14 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,

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 subdivision,  
9 and then there's "governmental unit"? The district  
10 qualifies as a governmental unit. Why would Congress  
11 add that third category if the district came within  
12 "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 bail out 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 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 bailout.

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 not in a covered State, right? There is this  
22 argument, for instance, that -- that that State could be  
23 covered in whole or in part. And certainly, for  
24 instance, in California, the State is -- is covered in  
25 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  
13 opportunities. Congress believed that many, if perhaps  
14 not most, political subdivisions in 1982 would be  
15 eligible for 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 you can 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  
17 to, 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 SOUTER: 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 -- 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 -- it's not  
14 affecting anything you're doing on a day-to-day basis,  
15 as I 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 someday we want to preclear again, and maybe we  
19 wouldn't be as successful as we have been in each of the  
20 instances before. But I don't see how that gets you  
21 into 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 -- a MUD board meeting of

1 potentially some changes, and discussion on that was  
2 tabled 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  
12 lawsuit -

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: Right? Is it any different  
18 from a -- from a Federal law prohibiting certain speech?  
19 Do 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 that was in a suit  
24 that's brought -- correct me if I'm wrong, and I may be  
25 wrong on this. I thought this suit eventuated from the

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

7 MR. COLEMAN: I do think you're wrong about  
8 that, Justice Souter. We had not been denied bailout.  
9 The suit sought bailout.

10 JUSTICE SOUTER: Yes.

11 JUSTICE COLEMAN: The only way to seek a  
12 bailout is through the lawsuit --

13 JUSTICE SOUTER: Right.

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

17 JUSTICE SOUTER: You separately asked for  
18 declaratory judgment?

19 MR. COLEMAN: Yes.

20 JUSTICE SOUTER: Okay.

21 JUSTICE COLEMAN: There are different claims  
22 in the lawsuit, Your Honor. And indeed, the standing  
23 point is--

24 JUSTICE GINSBURG: You -- you don't  
25 challenge -- if you have bailout, say we accept your

1 reading of the statute, you are not contesting the  
2 constitutionality of the Act if it matched your  
3 obligation to preclear with the right to bail out.

4 MR. COLEMAN: Well, that's not exactly right  
5 either, Justice Ginsburg. We certainly contest and  
6 contend that preclearance is unconstitutional. We  
7 acknowledge that if the Court were to give us bailout  
8 that the Court might choose on its own not to reach the  
9 constitutional issues because we would receive relief.

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

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

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

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

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

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

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

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

25                   But what we've got in the record in front of

1 us -- I don't have a laundry list to read, but I mean,  
2 we've got, I think at the present time a 6-point -- a  
3 16-point registration difference on Hispanic and  
4 non-Hispanic white voters in Texas. We've got a record  
5 of some 600 interpositions by the -- by the Justice  
6 Department on section 5 proceedings, section 5  
7 objections, over a period of about 20 years.

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

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

21 MR. COLEMAN: Our answer, Your Honor, is --  
22 is a very clear one, and that is there is a difference  
23 between a nondiscrimination statute and a  
24 noncircumvention statute. Section 2, section 203, the  
25 prohibition on the uses of tests and devices, these are

1 clear nondiscrimination provisions that are textually  
2 linked back to the -- to the constitutional  
3 prohibitions. Section 5 was never intended to be a  
4 nondiscrimination statute. Section 5 is a  
5 noncircumvention statute, notwithstanding the volume --

6 JUSTICE SOUTER: Well, the evidence that  
7 I've been getting into is a pretty good indication -- I  
8 would have thought, Congress thought so and I would have  
9 thought so, too -- that there is something to be  
10 concerned about on the issue of circumvention; that in  
11 fact the -- the attitudes have not so radically changed  
12 as to render circumvention irrelevant.

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

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

24 MR. COLEMAN: Justice Ginsburg, the Court in  
25 Katzenbach recognized that Congress had been trying for

1 several years to try to fix this problem and it walked  
2 through, as this Court has walked through innumerable  
3 times, that section 5 was simply not about  
4 nondiscrimination, but it was about the unremitting and  
5 ingenious defiance of statutes in a way that made  
6 ordinary enforcement mechanisms, including litigation,  
7 simply ineffective, that no matter what the courts did,  
8 in the South the enforcement mechanisms were unable to  
9 allow minority individuals to register and get out and  
10 vote, that -- no matter what happened. Preclearance put  
11 a stop to that.

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

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

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

25           JUSTICE GINSBURG: But if you take the

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

7 MR. COLEMAN: Two points on that, Justice  
8 Ginsburg. First, with respect to the Waller County  
9 issue, that was an issue that was very swiftly addressed  
10 by Texas officials themselves in cooperation with the  
11 NAACP. The Texas secretary of state and the Texas  
12 attorney general came down very swiftly on that issue.  
13 The second point is --

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

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

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

1 States, Virginia and Texas, with significant  
2 disparities.

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

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

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

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

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

25 MR. COLEMAN: Well, I'm obviously not going

1 to have time to respond to all of that, Justice Breyer.

2 JUSTICE BREYER: Whatever you want.

3 MR. COLEMAN: But, for instance, with  
4 respect to the first point that you raised, which is  
5 voter registration and turnout issues, those numbers  
6 don't tell the whole story. In fact -- in fact, with  
7 respect to both black and Hispanic voters, the record in  
8 covered jurisdictions is above the national average.  
9 Massachusetts, for instance, you might be learned to  
10 know, has a white-black voter registration and turnout  
11 differential that is in the high 20s, far in excess of  
12 any covered jurisdiction. And that's part of what  
13 Congress didn't do.

14 So in addition to the argument we have that  
15 the record Congress produced is really a  
16 nondiscrimination record and not a circumvention record,  
17 we also have the argument that we've made that it is  
18 simply irrational for Congress to go back and say the  
19 Voting Rights Act of 1965 was intended to make sure that  
20 minority voters can register and vote and that's going  
21 to be our number one priority -- as Justice Ginsburg  
22 recognized, Congress believes that that has been  
23 satisfied -- but now we are going to go back and in  
24 determining who's going to be covered under the 2006  
25 amendment, we are going to use the same data from the

1 1964 election.

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

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

15           MR. COLEMAN: That's --

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

23           MR. COLEMAN: The only comparative data that  
24 existed was of two kinds. There was a -- there was a --  
25 some data that grouped all covered jurisdictions into

1 one lump and all noncovered jurisdictions into another  
2 lump and counted up section 2 lawsuits. And the  
3 difference was about 17 successful -- more -- 17 more  
4 successful section 2 suits in covered jurisdictions than  
5 in noncovered jurisdictions. That's -- that's not a big  
6 difference.

7           What Congress didn't do, though, is look at  
8 specific noncovered jurisdictions, for instance, the one  
9 -- the ones I've cited, and say, how do these compare to  
10 covered jurisdictions?

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

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

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

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

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

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

20           MR. COLEMAN: I -- I actually dispute that.  
21 There is a lot of discussion of that information, Your  
22 Honor, but it's not that much information. And, again  
23 it doesn't -- it doesn't take into account any attempt  
24 to say how does the panhandle of Texas do against  
25 Florida, against parts of northeast Georgia or northwest

1 Alabama? How are these -- it makes no attempt  
2 whatsoever. It is simply all covered jurisdictions as a  
3 lump and all noncovered jurisdictions as a lump, and  
4 Congress had no basis to make that -- that declaration.

5 JUSTICE GINSBURG: In your -- in your answer  
6 you said if they used the 2004 the only State would be  
7 Hawaii. But I asked you what formula would pass if  
8 Congress wants to get at -- wants to protect the gains  
9 that have been made but are still fragile against  
10 backsliding? If that's its objective, what can it  
11 cover?

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

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

22 MR. COLEMAN: That evidence --

23 JUSTICE SOUTER: It has never stopped.

24 MR. COLEMAN: That evidence justifies strict  
25 enforcement of nondiscrimination statutes, but it does

1 not justify a presumption that State and local officials  
2 in these areas are so racist that they cannot be relied  
3 on to pass and enforce fair voting laws.

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

8 MR. COLEMAN: Again, this -- this  
9 information that goes out over 30 years and across  
10 thousands upon thousands of jurisdictions --

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

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

17 JUSTICE SOUTER: Yes, that's correct.

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

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Coleman.

2 Mr. Katyal.

3 ORAL ARGUMENT OF NEAL K. KATYAL

4 ON BEHALF OF THE APPELLEE HOLDER

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

7 And let me begin where Mr. Coleman left off,  
8 because I don't think that his argument adequately  
9 grapples either with this Court's consistent upholding  
10 of the provision at issue four times over 4 decades or  
11 with Congress's action in 2006. Congress's  
12 reauthorization in 2006 was the paradigmatic attempt of  
13 what to do in Congress. It didn't redefine a right, nor  
14 did it cast aspersions at Supreme Court doctrine.  
15 Rather, it took that doctrine seriously, both this  
16 Court's teachings with respect to the Voting Rights Act  
17 specifically, as well as the -- as the scope of the  
18 Congress's Reconstruction enforcement powers, and  
19 arrived at a considered judgment.

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

24 CHIEF JUSTICE ROBERTS: Counsel, the -- the  
25 -- our -- our decision in City of Boerne said that

1 action under section 5 has to be congruent and  
2 proportional to what it's trying to remedy. Here, as I  
3 understand it, one-twentieth of 1 percent of the  
4 submissions are not precleared. That, to me, suggests  
5 that they are sweeping far more broadly than they need  
6 to, to address the intentional discrimination under the  
7 Fifteenth Amendment.

8 MR. KATYAL: I -- I disagree with that,  
9 Mr. Chief Justice. I think what that represents is that  
10 section 5 is actually working very well, that it  
11 provides a deterrent. This was a debate in Congress.  
12 Indeed, Mr. Coleman himself testified before Congress  
13 and said the low objection rate is evidence that it  
14 isn't congruent to proportion.

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

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

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

1           MR. KATYAL: Well -- well let me suggest  
2 another example. Yesterday the administrative office  
3 for the United States Courts said there that were  
4 approximately 17,500 requests for Title 3 wiretaps in  
5 the past 10 years. Four of them have been rejected.  
6 That's a .023 percent rejection rate.

7           But I don't think one could use those  
8 numbers and say, oh, that means that Title 3 doesn't  
9 deter or prevent abusive wiretaps. What it suggests  
10 instead, if Congress so found -- I agree that if we were  
11 just standing up with no record whatsoever, that's one  
12 thing, but Congress heard testimony, they found example  
13 after example of --

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

22           MR. KATYAL: Right. Absolutely. And  
23 Congress found with respect to those intentional -- laws  
24 that prevent intentional vote discrimination, which is  
25 section 2, which you hear Mr. Coleman relying on today,

1 that that is ineffective for the same reasons that this  
2 Court has found them ineffective repeatedly in South  
3 Carolina v. Katzenbach, in City of Rome.

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

7 MR. KATYAL: Quite a bit of evidence about  
8 the ineffectiveness of section 2 as a remedy. So -- and  
9 the statement for the intervenors -- there's a 500-page  
10 statement filed before the district court which excerpts  
11 the Congressional Record. In the pages 270 to 279 you  
12 see a long series of -- a long analysis by Congress  
13 about how section 2 is ineffective, that it costs too  
14 much to bring the litigation, that there are few  
15 attorneys that will handle it, that -- that there isn't  
16 enough money and that --

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

23 MR. KATYAL: I don't believe so. I think  
24 Congress had to make some showing. And here there are  
25 explicit legislative findings that say that section 5 is

1 needed in these areas.

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

5 MR. KATYAL: Well, I disagree with that for  
6 several reasons. First of all -- and most I think what  
7 this utility district can argue about is Texas, and  
8 Congress found very specific evidence about  
9 discrimination in the State of Texas. They found that  
10 they led the country in the number of objections. They  
11 found that the -- that the registration rates, as  
12 Justice Souter said, between Hispanics and whites was  
13 great.

14 JUSTICE ALITO: Well, it's 18 percent. If  
15 these statistics are correct, the difference between  
16 Latino registration and white registration in Texas was  
17 18.6 percent, which is not good, but it's substantially  
18 lower than the rate in California, which is not covered,  
19 37 percent; Colorado, 28 percent; New Mexico, 24  
20 percent; the nationwide average, 30 percent.

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

25 CHIEF JUSTICE ROBERTS: Well, let me focus

1 on that historical aspect. Obviously no one doubts the  
2 history here and that the history was different. But at  
3 what point does that history seek -- stop justifying  
4 action with respect to some jurisdictions but not with  
5 respect to others that show greater disparities?

6 MR. KATYAL: Again, I think what this Court  
7 has -- has answered that question in Katzenbach by  
8 saying it may be the case that other jurisdictions  
9 discriminate more; Congress can deal with the problem  
10 one step at a time. And the -- and Congress has said  
11 that the Court should be particularly worried about  
12 trying to predict the future and say that discrimination  
13 is now over. We have fairly good --

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

17 MR. KATYAL: Absolutely not.

18 CHIEF JUSTICE ROBERTS: Well, when can  
19 they -- when can they -- when do they have to stop?

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

23 CHIEF JUSTICE ROBERTS: Well, they said 5  
24 years originally, then another 20 years. I mean, at  
25 some point it begins to look like the idea is that this

1 is going to go on forever.

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

11 JUSTICE KENNEDY: Well, is the burden that  
12 the Act puts on the State a relevant consideration?

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

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

18 MR. KATYAL: I don't know what the budget  
19 is. I can tell you there are -- there are approximately  
20 30 attorneys who work in the voting --

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

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

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

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

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

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

24          JUSTICE KENNEDY:  Well, then my point  
25 stands.  You say that there is a basis for treating

1 States quite differently as to the -- this fundamental  
2 right that we all agree on with respect to voting. And  
3 what's happened in part is that because of section 5  
4 preclearance, say, a minority opportunity district is  
5 protected in covered jurisdictions and not in noncovered  
6 jurisdictions.

7 MR. KATYAL: But -- but --

8 JUSTICE KENNEDY: This is -- this is a great  
9 disparity in treatment, and the Government of the United  
10 States is saying that our States must be treated  
11 differently. And you have a very substantial burden if  
12 you're going to make that case.

13 MR. KATYAL: Justice Kennedy, their burden  
14 is the same as it has always been in *South Carolina v*  
15 *Katzenbach* and *City of Rome*. The burden is on Congress  
16 to say is continuation of this landmark achievement, one  
17 of the most transformative acts in American history,  
18 still justified? Because with this act what Congress --  
19 what Congress did was essentially redeem itself in the  
20 eyes of the world.

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

1           MR. KATYAL: And Congress did show precisely  
2 that. They showed, for example, Justice Kennedy,  
3 that -- that the differential between covered and  
4 noncovered States with respect to section 2 lawsuits was  
5 57 percent of successful section 2 lawsuits were filed  
6 in covered jurisdictions, even though they are 25  
7 percent of the population.

8           CHIEF JUSTICE ROBERTS: Well, why didn't  
9 Congress then extend the Act to Massachusetts, where as  
10 your brother told us, the disparity between Hispanic and  
11 non-Hispanic voting is far greater than jurisdictions  
12 that are covered?

13           MR. KATYAL: Because that -- because, again,  
14 that is only one aspect of the overall problem, the  
15 amount of registration rates or something like that.  
16 What Congress has historically done ever since the  
17 inception of the Voting Rights Act is target those  
18 States where discrimination is so rooted that it is hard  
19 to get rid of without preclearance. Preclearance will  
20 transform the landscape and enfranchise millions of  
21 Americans. And Congress heard evidence and said, after  
22 16,000 pages of testimony, that the extension in these  
23 specific areas was necessary in order to root out and  
24 prevent discriminatory changes.

25           JUSTICE ALITO: Wouldn't you agree that

1 there are some oddities in this coverage formula?  
2 Isn't -- is it not the case that in New York City the  
3 Bronx is covered and Brooklyn and Queens are not?

4 MR. KATYAL: There -- there -- there are  
5 certainly some oddities, as there always have been, from  
6 Katzenbach and from City of Rome. And what this Court  
7 has said is that Congress can act on the State-by-State  
8 level and -- and that there is a remedy for the problem,  
9 which is the bailout provision --

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

12 MR. KATYAL: That's correct.

13 JUSTICE SCALIA: So how many years is that?  
14 Ninety -- over a quarter of a century, there have been  
15 15 bailouts that have gone through? All of them in the  
16 State of Virginia?

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

19 JUSTICE SCALIA: You -- you bring this  
20 before us as a justification for the legislation?

21 MR. KATYAL: I am saying --

22 JUSTICE SCALIA: It's obviously quite  
23 impracticable --

24 MR. KATYAL: Again --

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

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

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

6           MR. KATYAL: And I think it's not right  
7 because -- because what the testimony found was that  
8 States are able to bail out, but they don't; and this  
9 goes back to my point to Justice Kennedy, because today  
10 States are finding that preclearance actually serves  
11 their interests; it increases --

12           JUSTICE SCALIA: It -- it fends off Section  
13 2 suits, I assume. I mean, that's great. You get a  
14 declaratory judgment, here -- you know, a benediction,  
15 and you -- you skip off without having to face suits.  
16 That may be one reason. Another reason may be that they  
17 -- that they like the packing of minorities and the  
18 other -- the other districting tricks that can be --  
19 that can be pulled because of -- because of the  
20 requirements of the Voting Rights Act.

21           MR. KATYAL: Well, I don't think that's a  
22 quite fair characterization. After all, here, Congress  
23 in 2006 -- all Senators voted for this bill, and indeed  
24 90 of the 110 Representatives from covered jurisdictions  
25 voted for it, so if the Court is concerned about --

1 JUSTICE SCALIA: Well, they get elected  
2 under this system. Why should they kick it away?

3 MR. KATYAL: Excuse me?

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

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

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

24 MR. KATYAL: That's -- that's precisely  
25 right, Justice Ginsburg, and what the covered

1 jurisdictions also say is something about how this --  
2 the test before this Court shouldn't be the narrow time  
3 slice of today, but rather the test should be to think  
4 about historically what has happened.

5 JUSTICE SCALIA: We're -- we're not  
6 insisting that they -- the other side is not insisting  
7 that they be kicked out. If they want to voluntarily  
8 stay in, fine. In fact, you should let other States and  
9 other jurisdictions opt in if they want to.

10 MR. KATYAL: But --

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

17 MR. KATYAL: Yes, and --

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

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

25 If I could return to the point I was saying

1 a moment ago, what these covered jurisdictions are  
2 saying is that this moment in time isn't the right test.  
3 Rather you should look at the overall historical  
4 record --

5 JUSTICE KENNEDY: Well, the overall  
6 historical record, Katzenbach said there had been  
7 "unremitting and ingenious defiance," and that was  
8 certainly true as of the time of the Voting Rights Act.  
9 Democracy was a shambles in those -- that's not true  
10 anymore. And to say that the States are willing to  
11 yield their sovereign authority and their sovereign  
12 responsibilities to govern themselves doesn't work.

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

17 MR. KATYAL: That -- that is correct. And  
18 here this Court has repeatedly said this isn't any sort  
19 of surrendering of power. It was justified because of  
20 the record of discrimination. *South Carolina v*  
21 *Katzenbach*, Justice Kennedy, I don't quite think said  
22 that defiance was the precondition; rather it found that  
23 the onerous amount of case-by-case litigation itself  
24 wasn't enough. And I would caution this Court because  
25 this Court has had examples before in which the

1 historical record looked good at a narrow moment in  
2 time. If we think back 100 years to Reconstruction, 95  
3 percent of African-Americans in franchise, 600 black  
4 members in the State legislatures, 8 black members of  
5 Congress, a black South -- a black justice in the South  
6 Carolina Supreme Court. Things looked good, and that  
7 led this Court in the civil rights cases over Justice  
8 Harlan's lone dissent to say the era of special  
9 protection was over.

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

23 MR. COLEMAN: Again, this Court has  
24 repeatedly said that this Congress, of the United  
25 States, can legislate on the State-by-State level.

1 After all, the text of the Fifteenth Amendment speaks of  
2 "any State." So I think the relevant test is the amount  
3 of discrimination in Texas, and there the evidence is  
4 not just registration rates; it's the fact that they  
5 lead the country in objections under section 5, that the  
6 greatest deterrent effect of the more information  
7 process is in the State of Texas.

8 JUSTICE ALITO: But if it's the case that  
9 there is no discrimination going on, no evasion going on  
10 in this little utility district, is there any good  
11 reason why they shouldn't be able to bail out?

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

19 JUSTICE SCALIA: That was 1980?

20 MR. KATYAL: That's correct.

21 JUSTICE GINSBURG: Why --

22 JUSTICE SCALIA: The bailout provision was  
23 adopted in 1982 --

24 MR. KATYAL: The --

25 JUSTICE SCALIA: -- 27 years ago. There

1 have been 15 bailouts since then. Is that what you  
2 think Congress contemplated when it enacted the bailout  
3 provision in '82?

4 MR. KATYAL: First of all there was a  
5 bailout provision at issue in 1980. It was amended in  
6 1982. And yes, I think Congress contemplated a process;  
7 the legislative record on this is very clear, that --

8 JUSTICE SCALIA: Less than one a year?

9 MR. KATYAL: No, what they contemplated was  
10 to make it easier for political subdivisions to bail  
11 out, and what Congress --- what Congress anticipated,  
12 certainly more than one a year, that didn't materialize.  
13 And again, I think, Justice Scalia, the reason why it  
14 didn't materialize is because States generally --  
15 generally appreciate Section 5's preclearance process as  
16 well as its -- covered jurisdictions.

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

23 MR. KATYAL: I do. I think that Congress,  
24 Congress' reports, its 16,000-page track record --

25 JUSTICE KENNEDY: In covered States as

1 opposed to noncovered States, if I can add that to the  
2 Chief Justice's question, please.

3 MR. KATYAL: I do agree that they went State  
4 by State and showed -- showed tremendous amounts of  
5 discrimination in those places. Of course I disagree  
6 with the notion that this utility district can point to  
7 any one place in the country, be it Massachusetts or  
8 some corner in Georgia, and say well, the evidence  
9 wasn't there. I think Congress has far more latitude  
10 under its Fifteenth Amendment and Fourteenth Amendment  
11 powers.

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

26 MR. KATYAL: Justice Kennedy, the only

1 evidence in the record is that the bailout provision  
2 works nothing like the way that it might be  
3 hypothesized. That is, every single county, every  
4 single political subdivision that has asked for a  
5 bailout has received one, and in 2006 there was an even  
6 amendment offered to liberalize the bailout provision.  
7 That amendment was rejected overwhelmingly, and the  
8 reason it was rejected was that jurisdictions that are  
9 covered have now come to appreciate the power of Section  
10 5 to deter voting discrimination, and that's why  
11 Congress made a judgment --

12 JUSTICE SCALIA: What I understand it, is  
13 this incorrect? As I understand it for Travis County to  
14 get a bailout, it would -- it has within Travis County  
15 something like 106 political subdivisions that are  
16 covered, and Travis County would have to go to all of  
17 those 106 and demonstrate that there has been no  
18 violation by any of those 106 for the preceding whatever  
19 it is, 5 years, whatever the bailout provision is.

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

22 MR. KATYAL: For the way the statute works,  
23 they have to go to the 107 subunits, which is absolutely  
24 feasible because they are under contract with all 107  
25 subunits to administer their elections. They have all

1 of the voting data to -- to put together that bailout,  
2 and in previous --

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

7 MR. KATYAL: Again, I think that's a  
8 distinction without a difference. They have all of the  
9 registration data and everything else necessary to make  
10 the bailout provision. And the only record Congress  
11 had, and the only record before this Court, is that  
12 every single entity that has sought a bailout has  
13 received one.

14 JUSTICE GINSBURG: And the number is 18 now?

15 MR. KATYAL: The number is 18.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Adegbile.

18 ORAL ARGUMENT OF DEBO P. ADEGBILE

19 ON BEHALF OF THE INTERVENOR-APPELLEES

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

22 Our long experience demonstrates that racial  
23 discrimination in voting has been persistent and  
24 adaptive. Only after careful assessment of the record  
25 did Congress find that the case-by-case method was

1 inadequate and that section 5 continued to do important  
2 work within the covered jurisdictions.

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

14           I -- I want to --

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

22           MR. ADEGBILE: As -- as the Court said in  
23 Katzenbach when it first was presented with this  
24 question of the coverage formula, Congress is permitted  
25 to use so much of its power as is necessary to target

1 the problem as it finds it. The discrimination that was  
2 manifest in the covered jurisdictions was different in  
3 character at that time and -- but Congress did not stop  
4 and get frozen in time in 1965. The periodic  
5 reauthorizations have given Congress an opportunity to  
6 revisit the -- progress.

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

10 MR. ADEGBILE: I wouldn't frame it in that  
11 way, Justice -- Chief Justice Roberts. I think the  
12 record does reveal that discrimination in the covered  
13 jurisdictions has a repetitive form. There are very --  
14 there are brief talks about over six dozen examples.  
15 Those are illustrative and not exhaustive, but  
16 repetitious violations, that is, violations in covered  
17 jurisdictions after a section 2 case --

18 CHIEF JUSTICE ROBERTS: So your answer is  
19 yes?

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

24 That is not to say that there isn't voting  
25 discrimination in other States. The record shows that

1 there is discrimination in other States. But the -- but  
2 Congress found that the nature of the way the  
3 discrimination is practiced, viewed through the lens of  
4 history, is that repetitive violations happen. For  
5 example, after this Court decided the LULAC case, a case  
6 that was litigated over a number of months and very  
7 expensive and complicated, the State then tried to  
8 shorten the period for early voting. And the plaintiffs  
9 in that case needed to file a section 5 enforcement  
10 action, post-2000 -- post-2000 redistricting, to give  
11 effect to this Court's judgment.

12 CHIEF JUSTICE ROBERTS: So -- but I guess  
13 that point depends upon the assumption that shortening  
14 the time period for early voting is discriminatory as  
15 opposed to good policy.

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

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

24 MR. ADEGBILE: To protect the incumbent, but  
25 to disadvantage the community that was prepared to

1 exercise its voice, as this Court found in the LULAC  
2 opinion. That is to say --

3 CHIEF JUSTICE ROBERTS: Well, incumbent --

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

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

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

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

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

20 JUSTICE SCALIA: 33 to 390. You know, the  
21 -- the Israeli Supreme Court, the Sanhedrin, used to  
22 have a rule that if the death penalty was pronounced  
23 unanimously, it was invalid, because there must -- must  
24 be something wrong there. Do you ever expect -- do you  
25 ever seriously expect Congress to vote against a

1 reextension of the Voting Rights Act? Do you really  
2 think that any incumbent would -- would vote to do that?

3 MR. ADEGBILE: Well --

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

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

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

10 MR. ADEGBILE: Thirty-three members of the  
11 House, indeed. But I think the -- the reason that they  
12 voted for it is what's more important. Congress did not  
13 assume that section 5 was necessary. It took a very  
14 careful examination to see how it was operating, and the  
15 determination was that in the absence of section 5,  
16 because of the repetitive violations, because of 620  
17 objections -- there was evidence that approximately 60  
18 percent of those show some evidence of intentional  
19 discrimination.

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

25 JUSTICE GINSBURG: But the question is, do

1 you agree that this is unlike access to buildings by  
2 people who are in wheelchairs? There has to come a  
3 point where it will end, and perhaps Congress was just  
4 picking up on what this Court said 2 years before in the  
5 University of Michigan Law School case, this Court came  
6 up with a 25-year figure. So maybe Congress thought  
7 this Court thinks 25 years is about right, must be about  
8 right.

9 MR. ADEGBILE: Congress had a more specific  
10 reason as I understand the record. There was a specific  
11 amendment proposed to shorten the time to 10 years.  
12 Then-Chairman of the judiciary committee James  
13 Sensenbrenner rose to explain that part of the  
14 experience has been that most of the infractions, not  
15 all but most, happen after the decennial census, when  
16 many voting changes are necessitated by -- through  
17 reapportionment. Not all of them involved  
18 reapportionment, but many are necessitated, and the  
19 judgment was that it was going to capture two decennial  
20 censuses, and they also looked back to see how much  
21 discrimination they found from 1982 until the 2006  
22 reauthorization.

23 And indeed I think Congress was a little bit  
24 surprised that they had not yet been able to dislodge  
25 more of the discrimination. They acknowledged the

1 progress but saw that section 5 was part of the agent of  
2 change, that progress didn't happen by itself, and the  
3 experience had been that it was helping us to move  
4 forward.

5           And that is reflected I think in the States'  
6 brief, to come to Justice Kennedy's point. I think  
7 there is an intrusion. This Court's decisions have  
8 recognized that section 5 does intrude. But even in  
9 Boerne, as the Court distinguished section 5 of the  
10 Voting Rights Act from the -- many of the statutes that  
11 were there at issue in that case, RFRA, certainly other  
12 cases followed -- the Court kept returning to section 5  
13 because the problem had been demonstrated by Congress.

14           The gravity of the harm was so severe that  
15 Congress needed a special mechanism to dislodge it,  
16 because if we don't have the vote, as this Court's  
17 decisions have recognized, our whole system is  
18 undermined.

19           JUSTICE BREYER: So what is the reason in  
20 your opinion, if you had to summarize it in a sentence  
21 or two, you would say that the reason that Congress  
22 didn't go into other States and decide which ones to add  
23 to this, or go into these States, district by district,  
24 and decide which ones to subtract from this -- the  
25 reason that Congress didn't modify the voting rights

1 statute but simply renewed it, is --

2 MR. ADEGBILE: Is that it wanted to stay the  
3 course of ridding the covered jurisdictions from  
4 discrimination. Katzenbach spoke in terms of  
5 eradication. Subsequent decisions have spoke about  
6 ridding the country of this scourge, as it manifested  
7 itself in the covered jurisdictions; and I think there  
8 was some State-by-State analysis and the reports of the  
9 covered jurisdictions that do it -- and --

10 JUSTICE ALITO: Would you say from your  
11 experience, and I'm sure you're very knowledgeable about  
12 this, that there is now greater discrimination in  
13 voting in Virginia than in North Carolina or in  
14 Tennessee or in Arkansas or in Ohio?

15 MR. ADEGBILE: I can't precisely quantify  
16 the quantum of discrimination in each of those States,  
17 but I think that Congress's judgment was there had been  
18 a demonstrated pattern of discrimination in the covered  
19 jurisdictions, that the coverage formula had --

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

22 MR. ADEGBILE: Yes, indeed it was. And yet  
23 that certainly did not --

24 JUSTICE SCALIA: And it has a black chief  
25 justice of the supreme court currently?

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

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

16           JUSTICE KENNEDY: Well, the brief filed by  
17 the NAACP Legal Defense Fund, the first 15 pages, I  
18 think makes a good demonstration of discrete  
19 discriminatory acts; and the brief filed by Nathaniel  
20 Percelly, Professor Percelly, makes an -- an important  
21 point about crossovers in different -- my concern is I  
22 -- it's just not clear to me that Congress addressed  
23 this for the rest of the country. That's -- that's my  
24 concern.

25           MR. ADEGBILE: I think the -- the close --

1 the best evidence of the -- of the comparison question  
2 to which you're returning is the section 2 cases that  
3 were examined in a report that was submitted to  
4 Congress. And as Appellants recognized in their brief,  
5 600 -- notwithstanding the powerful section 5 remedy,  
6 there were 653 successful section 2 cases in covered  
7 jurisdictions, and the success rate in covered  
8 jurisdictions was much higher than in noncovered  
9 jurisdictions.

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

21 CHIEF JUSTICE ROBERTS: Well, the cases  
22 you're talking about include both intentional and impact  
23 cases. And the Constitution that section 5 is designed  
24 to implement covers only intentional discrimination. So  
25 even the examples you have given sweep are -- broadly as

1 a prophylactic measure, and then the section 5  
2 preclearance of course sweeps even more broadly.

3 So we do have a situation, despite the  
4 evidence that was -- that you have cited, where less  
5 than one-twentieth of 1 percent of the submissions that  
6 the States make are denied preclearance. Again, it  
7 seems to me that that means that section 5 sweeps very,  
8 very broadly.

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

24 It's a widespread pattern of intentional --  
25 intentional discrimination, and I think that that is

1 something that this Court needs to focus on as it works  
2 through this important and serious issue.

3 CHIEF JUSTICE ROBERTS: Thank you --

4 JUSTICE BREYER: I have another question.  
5 How long did it take Congress to compile this  
6 13,000-page record?

7 MR. ADEGBILE: Approximately 10 months,  
8 Justice Breyer.

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

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

20 CHIEF JUSTICE ROBERTS: So your position is  
21 that it makes no difference; if discrimination in the  
22 noncovered jurisdiction is more widespread and more  
23 persistent; it doesn't matter, because Congress can  
24 focus solely on the jurisdictions that have been covered  
25 since 1965?

1 MR. ADEGBILE: I -- I make a slightly  
2 different point. I don't think that it doesn't matter  
3 at all. I think Congress has to act reasonably, but the  
4 -- in light of the record before it, its judgment to  
5 stay the course in the covered jurisdictions because of  
6 the way voting discrimination has manifested itself in  
7 those jurisdictions, that judgment was reasonable on the  
8 record it had before it.

9 It made a judgment in effect that section 2  
10 has proven more adequate to the task in other  
11 jurisdictions that don't have the same history of  
12 repetitive violations.

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

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

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 MR. ADEGBILE: Thank you.

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

1 REBUTTAL ARGUMENT OF GREGORY S. COLEMAN

2 ON BEHALF OF THE APPELLANT

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

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

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

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

25 JUSTICE ALITO: Well, they now have 25 years

1 to look at, or 24 years, to look at the rest of the  
2 country. Are they doing that? Are they holding  
3 hearings?

4 MR. COLEMAN: No, nobody is doing that. In  
5 answer to Justice Ginsburg's question about the -- Gratz  
6 and Grutter point, that's what Congress did in 1982. It  
7 said 25 years. That 25 years has gone by. Times have  
8 changed.

9 JUSTICE GINSBURG: Well, this Court said, in  
10 -- what was the year of Grutter? It was not 1982, it  
11 was two thousand something.

12 MR. COLEMAN: That's correct, Your Honor.

13 JUSTICE GINSBURG: And this Court thought  
14 from two thousand something, 25 years was a reasonable  
15 period.

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

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

1           MR. COLEMAN: Well, the only standards that  
2 exist are whether they used a test or device in the  
3 1960s where --

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

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

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

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

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

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

1 registered and who was voting in the '60s doesn't --

2 JUSTICE STEVENS: Are you arguing the  
3 statute is unconstitutional because Congress failed to  
4 extend it to other -- other parts of the country?

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

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

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

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

1                   JUSTICE GINSBURG: The district will -- the  
2 district will never be involved in racial bloc voting  
3 for districting purposes because it doesn't -- its  
4 boundaries don't change.

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

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

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

23                   MR. COLEMAN: We believe that the  
24 interpretation of the Act or -- excuse me -- the passage  
25 of the amendments in 2006 go far beyond what

1 preclearance was in 1965. We have a more restrictive  
2 form of preclearance that requires State and local  
3 governments to engage in more, not less, race-based  
4 decisionmaking with respect to elections. And that, as  
5 the Court has noted, creates additional constitutional  
6 issues with the Court -- with the statute.

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

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

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| <b>A</b>                                                                                                                                                                         |                                                                                                                                                                                  |
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