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IN THE SUPREME COURT OF THE UNITED STATES

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SHELBY COUNTY, ALABAMA, :

Petitioner : No. 12-96

v. :

ERIC H. HOLDER, JR., :

ATTORNEY GENERAL, ET AL. :

- - - - - x

Washington, D.C.

Wednesday, February 27, 2013

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

APPEARANCES:

BERT W. REIN, ESQ., Washington, D.C.; on behalf of Petitioner.

DONALD B. VERRILLI, JR., ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of Federal Respondent.

DEBO P. ADEGBILE, ESQ., New York, New York; on behalf of Respondents Bobby Pierson, et al.

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P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 12-96, Shelby County v. Holder.

Mr. Rein?

ORAL ARGUMENT OF BERT W. REIN

ON BEHALF OF THE PETITIONER

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

Almost 4 years ago, eight Justices of the Court agreed the 2005 25-year extension of Voting Rights Act Section 5's preclearance obligation, uniquely applicable to jurisdictions reached by Section 4(b)'s antiquated coverage formula, raised a serious constitutional question.

Those Justices recognized that the record before the Congress in 2005 made it unmistakable that the South had changed. They questioned whether current remedial needs justified the extraordinary federalism and cost burdens of preclearance.

JUSTICE SOTOMAYOR: May I ask you a question? Assuming I accept your premise, and there's some question about that, that some portions of the South have changed, your county pretty much hasn't.

1 MR. REIN: Well, I --

2 JUSTICE SOTOMAYOR: In -- in the period
3 we're talking about, it has many more discriminating --
4 240 discriminatory voting laws that were blocked by
5 Section 5 objections.

6 There were numerous remedied by Section 2
7 litigation. You may be the wrong party bringing this.

8 MR. REIN: Well, this is an on-face
9 challenge, and might I say, Justice Sotomayor --

10 JUSTICE SOTOMAYOR: But that's the standard.
11 And why would we vote in favor of a county whose record
12 is the epitome of what caused the passage of this law to
13 start with?

14 MR. REIN: Well, I don't agree with your
15 premises, but let me just say, number one, when I said
16 the South has changed, that is the statement that is
17 made by the eight Justices in the Northwest Austin case.
18 And I certainly --

19 JUSTICE GINSBURG: And Congress -- Congress
20 said that, too. Nobody -- there isn't anybody in -- on
21 any side of this issue who doesn't admit that huge
22 progress has been made. Congress itself said that. But
23 in line with Justice Sotomayor's question, in the D.C.
24 Court of Appeals, the dissenting judge there, Judge
25 Williams, said, "If this case were about three States,

1 Mississippi, Louisiana, and Alabama, those States have
2 the worst records, and application of Section 5 to them
3 might be okay."

4 MR. REIN: Justice Ginsburg, Judge Williams
5 said that, as he assessed various measures in the
6 record, he thought those States might be distinguished.
7 He did not say, and he didn't reach the question,
8 whether those States should be subject to preclearance.
9 In other words, whether on an absolute basis, there was
10 sufficient record to subject them --

11 JUSTICE KAGAN: But think about this State
12 that you're representing, it's about a quarter black,
13 but Alabama has no black statewide elected officials.
14 If Congress were to write a formula that looked to the
15 number of successful Section 2 suits per million
16 residents, Alabama would be the number one State on the
17 list.

18 If you factor in unpublished Section 2
19 suits, Alabama would be the number two State on the
20 list. If you use the number of Section 5 enforcement
21 actions, Alabama would again be the number two State on
22 the list.

23 I mean, you're objecting to a formula, but
24 under any formula that Congress could devise, it would
25 capture Alabama.

1 MR. REIN: Well, if -- if I might respond
2 because I think Justice Sotomayor had a similar
3 question, and that is why should this be approached on
4 face. Going back to Katzenbach, and all of the cases
5 that have addressed the Voting Rights Act preclearance
6 and the formula, they've all been addressed to determine
7 the validity of imposing preclearance under the
8 circumstances then prevailing, and the formula because
9 Shelby County is covered, not by an independent
10 determination of Congress with respect to Shelby County,
11 but because it falls within the formula as part of the
12 State of Alabama. So I -- I don't think that there's
13 any reluctance upon on this --

14 JUSTICE SOTOMAYOR: But facial challenges
15 are generally disfavored in our law. And so the
16 question becomes, why do we strike down a formula, as
17 Justice Kagan said, which under any circumstance the
18 record shows the remedy would be congruent,
19 proportional, rational, whatever standard of review we
20 apply, its application to Alabama would happen.

21 MR. REIN: There -- there are two separate
22 questions. One is whether the formula needs to be
23 addressed. In Northwest Austin, this Court addressed
24 the formula, and the circumstances there were a very
25 small jurisdiction, as the Court said, approaching a

1 very big question.

2 It did the same in Rome, the City of Rome.
3 It did the same in Katzenbach. The -- so the formula
4 itself is the reason why Shelby County encounters the
5 burdens, and it is the reason why the Court needs to
6 address it.

7 JUSTICE SOTOMAYOR: Interestingly enough, in
8 Katzenbach the Court didn't do what you're asking us to
9 do, which is to look at the record of all the other
10 States or all of the other counties. It basically
11 concentrated on the record of the two litigants in the
12 case, and from that extrapolate -- extrapolated more
13 broadly.

14 MR. REIN: I don't think that --

15 JUSTICE SOTOMAYOR: You're asking us to do
16 something, which is to ignore your record and look at
17 everybody else's.

18 MR. REIN: I don't think that's a fair
19 reading of Katzenbach. In Katzenbach, what the Court
20 did was examined whether the -- the formula was rational
21 in practice and theory. And what the Court said is,
22 while we don't have evidence on every jurisdiction
23 that's reached by the formula, that by devising two
24 criteria, which were predictive of where discrimination
25 might lie, the Congress could then sweep in

1 jurisdictions as to which it had no specific findings.

2 So we're not here to parse the
3 jurisdictions. We are here to challenge this formula
4 because in and of itself it speaks to old data, it isn't
5 probative with respect to the kinds of discrimination
6 that Congress was focusing on and it is an inappropriate
7 vehicle to sort out the sovereignty of individual
8 States.

9 I could tell you that in Alabama the number of
10 legislators in the Alabama legislature are proportionate
11 to the number of black voters. There's a very high
12 registration and turnout of black voters in Alabama.
13 But I don't think that that really addresses the issue
14 of the rationality in theory and practice in the
15 formula.

16 If Congress wants to write another statute,
17 another hypothetical statute, that would present a
18 different case. But we're here facing a county, a State
19 that are swept in by a formula that is neither rational
20 in theory nor in practice. That's the -- that's the hub
21 of the case.

22 JUSTICE KENNEDY: I suppose the thrust of
23 the questions so far has been if you would be covered
24 under any formula that most likely would be drawn, why
25 are you injured under this one?

1 MR. REIN: Well, we don't agree that we
2 would be covered under any formula.

3 JUSTICE KENNEDY: But that's -- that's the
4 hypothesis. If you could be covered under most
5 suggested formulas for this kind of statute, why are you
6 injured by this one? I think that's the thrust of the
7 question.

8 MR. REIN: Well, I think that if -- if
9 Congress has the power to look at jurisdictions like
10 Shelby County, individually and without regard to how
11 they stand against other States -- other counties, other
12 States, in other words, what is the discrimination here
13 among the jurisdictions, and after thoroughly
14 considering each and every one comes up with a list and
15 says this list gravely troubles us, that might present a
16 vehicle for saying this is a way to sort out the covered
17 jurisdictions --

18 JUSTICE ALITO: Suppose Congress passed a
19 law that said, everyone whose last name begins with A
20 shall pay a special tax of \$1,000 a year. And let's say
21 that tax is challenged by somebody whose last name
22 begins with A. Would it be a defense to that challenge
23 that for some reason this particular person really
24 should pay a \$1,000 penalty that people with a different
25 last name do not pay?

1 MR. REIN: No, because that would just
2 invent another statute, and this is all a debate as to
3 whether somebody might invent a statute which has a
4 formula that is rational.

5 JUSTICE SCALIA: I was about to ask a
6 similar question. If someone is acquitted of a Federal
7 crime, would it -- would the prosecution be able to say,
8 well, okay, he didn't commit this crime, but Congress
9 could have enacted a different statute which he would
10 have violated in this case. Of course, you wouldn't
11 listen to that, would you?

12 MR. REIN: No, I agree with you.

13 JUSTICE SOTOMAYOR: The problem with those
14 hypotheticals is obvious that it starts from a predicate
15 that the application has no basis in any record, but
16 there's no question that Alabama was rightly included in
17 the original Voting Rights Act. There's no challenge to
18 the reauthorization acts. The only question is whether
19 a formula should be applied today. And the point is
20 that the record is replete with evidence to show that
21 you should.

22 MR. REIN: Well, I mean --

23 JUSTICE SOTOMAYOR: It's not like there's
24 some made-up reason for why the \$1,000 is being applied
25 to you or why a different crime is going to be charged

1 against you. It's a real record as to what Alabama has
2 done to earn its place on the list.

3 MR. REIN: Justice Sotomayor, with all
4 respect, the question whether Alabama was properly
5 placed under the act in 1964 was -- it was answered in
6 Katzenbach because it came under a formula then deemed
7 to be rational in theory and in practice.

8 There's no independent determination by the
9 Congress that Alabama singly should be covered.
10 Congress has up -- you know, has readopted the formula
11 and it is the formula that covers Alabama and thus
12 Shelby County --

13 JUSTICE BREYER: Now, the reason for the
14 formula -- of course, part of the formula looks back to
15 what happened in 1965. And it says are you a
16 jurisdiction that did engage in testing and had low
17 turnout or -- or low registration? Now, that isn't true
18 of Alabama today.

19 MR. REIN: That's correct. That's correct.

20 JUSTICE BREYER: So when Congress in fact
21 reenacted this in 2005, it knew what it was doing was
22 picking out Alabama. It understood it was picking out
23 Alabama, even though the indicia are not -- I mean, even
24 though they're not engaging in that particular thing.
25 But the underlying evil is the discrimination. So the

1 closest analogy I could think of is imagine a State has
2 a plant disease and in 1965 you can recognize the
3 presence of that disease, which is hard to find, by a
4 certain kind of surface movement or plant growing up.

5 Now, it's evolved. So by now, when we use
6 that same formula, all we're doing is picking out that
7 State. But we know one thing: The disease is still
8 there in the State. Because this is a question of
9 renewing a statute that in fact has worked. And so the
10 question I guess is, is it rational to pick out at least
11 some of those States? And to go back to Justice
12 Sotomayor's question, as long as it's rational in at
13 least some instances directly to pick out those States,
14 at least one or two of them, then doesn't the statute
15 survive a facial challenge? That's the question.

16 MR. REIN: Thank you. Justice Breyer, a
17 couple of things are important. The Court said in
18 Northwest Austin, an opinion you joined, "Current needs
19 have to generate the current burden." So what happened
20 in 1965 in Alabama, that Alabama itself has said was a
21 disgrace, doesn't justify a current burden.

22 JUSTICE BREYER: But this is then the
23 question, does it justify? I mean, this isn't a
24 question of rewriting the statute. This is a question
25 of renewing a statute that by and large has worked.

1 MR. REIN: Justice Breyer --

2 JUSTICE BREYER: And if you have a statute
3 that sunsets, you might say, I don't want it to sunset
4 if it's worked, as long as the problem is still there to
5 some degree. That's the question of rationality. Isn't
6 that what happened?

7 MR. REIN: If you base it on the findings of
8 1965. I could take the decision in City of Rome, which
9 follows along that line. We had a huge problem at the
10 first passage of the Voting Rights Act and the Court was
11 tolerant of Congress's decision that it had not yet been
12 cured. There were vestiges of discrimination.

13 So when I look at those statistics today and
14 look at what Alabama has in terms of black registration
15 and turnout, there's no resemblance. We're dealing with
16 a completely changed situation --

17 JUSTICE GINSBURG: You keep -- you keep --

18 MR. REIN: -- to which if you apply those
19 metrics -- excuse me.

20 JUSTICE GINSBURG: Mr. Rein, you keep
21 emphasizing over and over again in your brief,
22 registration and you said it a couple of times this
23 morning. Congress was well aware that registration was
24 no longer the problem. This legislative record is
25 replete with what they call second generation devices.

1 Congress said up front: We know that the registration
2 is fine. That is no longer the problem. But the
3 discrimination continues in other forms.

4 MR. REIN: Let me speak to that because I
5 think that that highlights one of the weaknesses here.
6 On the one hand, Justice Breyer's questioning, well,
7 could Congress just continue based on what it found in
8 '65 and renew? And I think your question shows it's a
9 very different situation. Congress is not continuing
10 its efforts initiated in 1975 to allow people --

11 JUSTICE SOTOMAYOR: Counsel, the reason
12 Section 5 was created was because States were moving
13 faster than litigation permitted to catch the new forms
14 of discriminatory practices that were being developed.
15 As the courts struck down one form, the States would
16 find another. And basically, Justice Ginsburg calls it
17 secondary. I don't know that I'd call anything
18 secondary or primary. Discrimination is discrimination.

19 And what Congress said is it continues, not
20 in terms of voter numbers, but in terms of examples of
21 other ways to disenfranchise voters, like moving a
22 voting booth from a convenient location for all voters
23 to a place that historically has been known for
24 discrimination. I think that's an example taken from
25 one of the Section 2 and 5 cases from Alabama.

1 MR. REIN: Justice Sotomayor --

2 JUSTICE SOTOMAYOR: I mean, I don't know
3 what the difference is except that this Court or some
4 may think that secondary is not important. But the form
5 of discrimination is still discrimination if Congress
6 has found it to be so.

7 MR. REIN: When Congress is addressing a new
8 evil, it needs then -- and assuming it can find this
9 evil to a level justifying --

10 JUSTICE SOTOMAYOR: But that's not --

11 MR. REIN: -- the extraordinary remedy --

12 JUSTICE SOTOMAYOR: -- what it did with
13 Section 5. It said we can't keep up with the way States
14 are doing it.

15 MR. REIN: I think we're dealing with two
16 different questions. One is was that kind of remedy, an
17 unusual remedy, never before and never after invoked by
18 the Congress, putting States into a prior restraint in
19 the exercise of their core sovereign functions, was that
20 justified? And in Katzenbach, the Court said we're
21 confronting an emergency in the country, we're
22 confronting people who will not, who will not honor the
23 Fifteenth Amendment and who will use --

24 JUSTICE KAGAN: And in 1986 -- or excuse me,
25 2006 -- Congress went back to the problem, developed a

1 very substantial record, a 15,000-page legislative
2 record, talked about what problems had been solved,
3 talked about what problems had yet to be solved, and
4 decided that, although the problem had changed, the
5 problem was still evident enough that the act should
6 continue.

7 It's hard to see how Congress could have
8 developed a better and more thorough legislative record
9 than it did, Mr. Rein.

10 MR. REIN: Well, I'm not questioning whether
11 Congress did its best. The question is whether what
12 Congress found was adequate to invoke this unusual
13 remedy.

14 JUSTICE SCALIA: Indeed, Congress must have
15 found that the situation was even clearer and the
16 violations even more evident than originally because,
17 originally, the vote in the Senate, for example, was
18 something like 79 to 18, and in the 2006 extension, it
19 was 98 to nothing. It must have been even clearer in
20 2006 that these States were violating the Constitution.
21 Do you think that's true?

22 MR. REIN: No. I think the Court has
23 to --

24 JUSTICE KAGAN: Well, that sounds like a
25 good argument to me, Justice Scalia. It was clear to 98

1 Senators, including every Senator from a covered State,
2 who decided that there was a continuing need for this
3 piece of legislation.

4 JUSTICE SCALIA: Or decided that perhaps
5 they'd better not vote against it, that there's nothing,
6 that there's no -- none of their interests in voting
7 against it.

8 JUSTICE BREYER: I don't know what they're
9 thinking exactly, but it seems to me one might
10 reasonably think this: It's an old disease, it's gotten
11 a lot better, a lot better, but it's still there. So if
12 you had a remedy that really helped it work, but it
13 wasn't totally over, wouldn't you keep that remedy?

14 MR. REIN: Well --

15 JUSTICE BREYER: Or would you not at least
16 say that a person who wants to keep that remedy, which
17 has worked for that old disease which is not yet dead,
18 let's keep it going. Is that an irrational decision?

19 MR. REIN: That is a hypothetical that
20 doesn't address what happened because what happened is
21 that the old disease, limiting people's right to register
22 and vote, to have --

23 JUSTICE BREYER: No, I'm sorry. The old
24 disease is discrimination under the Fifteenth Amendment,
25 which is abridging a person's right to vote because of

1 color or race.

2 MR. REIN: But the focus of the Congress in
3 1965 and in Katzenbach in 1964 and in Katzenbach was on
4 registration and voting, precluding --

5 JUSTICE SOTOMAYOR: It was on voter dilution
6 as well. It had already evolved away from that, or
7 started to.

8 MR. REIN: I beg your pardon, but I think,
9 Justice Sotomayor, that this Court has never decided
10 that the Fifteenth Amendment governs vote dilution. It
11 has said the Fourteenth Amendment does, but the original
12 enactment was under the Fifteenth Amendment.

13 JUSTICE KAGAN: Well, the Fifteenth
14 Amendment says "denial or abridgement." What would
15 "abridgement" mean except for dilution?

16 MR. REIN: Well, "abridgement" might mean,
17 for example, I let you vote in one election, but not in
18 another; for example, separate primary rules from
19 election rules. Abridgement can be done in many ways.

20 I think dilution is a different concept.
21 We're not saying that dilution isn't covered by the
22 Fourteenth Amendment, but I was responding to
23 Justice Breyer in saying there was an old disease and
24 that disease is cured. If you want to label it
25 "disease" and generalize it, you can say, well, the new

1 disease is still a disease.

2 JUSTICE KENNEDY: Well, some of --

3 MR. REIN: But I think that's not what
4 happened.

5 JUSTICE KENNEDY: Some of the questions
6 asked to this point I think mirror what the government
7 says toward the end of its brief, page 48 and page 49.
8 It's rather proud of this reverse engineering: We
9 really knew it was some specific States we were
10 interested in, and so we used these old categories to
11 cover that State.

12 Is that a methodology that in your view is
13 appropriate under the test of congruence and -- and
14 proportionality?

15 MR. REIN: No, I think it is not. First of
16 all, I don't accept that it was, quote, "reverse
17 engineered." I think it was just, as Justice Breyer
18 indicated, continued because it was there. If you look
19 at what was done and was approved in 1964, what Congress
20 said, well, here are the problem areas that we detect.
21 We've examined them in detail. We've identified the
22 characteristics that would let somebody say, yes, that's
23 where the discrimination is ripe. They're using a
24 tester device. The turnout is below the national
25 average by a substantial margin. That spells it out and

1 we have a relief valve in the then-existing bailout. So
2 it was all very rational.

3 Here you'd have to say is the finding with
4 respect to every State -- Alaska, Arizona, the covered
5 jurisdictions in New York City -- is the designation of
6 them congruent to the problem that you detect in each
7 one? Even assuming -- and we don't accept -- that any
8 of these problems require the kind of extraordinary
9 relief, what's the congruence and what's the
10 proportionality of this remedy to the violation you
11 detect State by State.

12 So merely saying it's reverse engineered,
13 first of all it says, well, Congress really thought
14 about it and said, we made up a list in our heads and,
15 gee whiz, this old formula miraculously covered the
16 list. There's no record that that happened.

17 JUSTICE SOTOMAYOR: Counsel, are you --

18 JUSTICE KENNEDY: Suppose -- suppose there
19 were and suppose that's the rationale because that's
20 what I got from the government's brief and what I'm
21 getting -- getting from some of the questions from the
22 bench. What is wrong with that?

23 MR. REIN: If -- if there was a record
24 sufficient for each of those States to sacrifice
25 their -- their inherent core power to preclearance, to

1 prior restraint, I think that you certainly could argue
2 that, well, how Congress describes them, as long as it's
3 rational, might work. But I don't think that we have
4 that record here, so --

5 JUSTICE KENNEDY: Well, and -- and I don't
6 know why -- why you even go that far. I don't know why
7 under the equal footing doctrine it would be proper to
8 just single out States by name, and if that, in effect,
9 is what is being done, that seemed to me equally
10 improper. But you don't seem to make that argument.

11 MR. REIN: Well, I think that --

12 JUSTICE SCALIA: I thought -- I thought the
13 same thing. I thought it's sort of extraordinary to say
14 Congress can just pick out, we want to hit these eight
15 States, it doesn't matter what formula we use; so long
16 as we want to hit these eight States, that's good enough
17 and that makes it constitutional. I doubt that that's
18 true.

19 MR. REIN: Justice Scalia, I agree with
20 that. What I was saying here is that Congress did --

21 JUSTICE SOTOMAYOR: Why? Why does Congress
22 have to fix any problem immediately?

23 JUSTICE KENNEDY: I would like to hear the
24 answer to the question.

25 MR. REIN: Okay. The answer,

1 Justice Kennedy, is Congress cannot arbitrarily pick out
2 States. Congress has to treat each State with equal
3 dignity. It has to examine all the States. The
4 teaching of Katzenbach is that when Congress has done
5 that kind of examination, it can devise a formula even
6 if it understands that that formula will not apply
7 across all 50 States.

8 JUSTICE KAGAN: Well, the formula that
9 has --

10 MR. REIN: So we accept Katzenbach. But in
11 terms of just picking out States and saying, I'm going
12 to look at you and I'm going to look at you, no, that --
13 that does not protect the equal dignity of the States.

14 JUSTICE KAGAN: Well, Mr. Rein, the formula
15 that -- that is applied right now, under that formula
16 covered jurisdictions, which have less than 25 percent
17 of the nation's total population, they account for
18 56 percent of all successful published Section 2
19 lawsuits.

20 If you do that on a per capita basis, the
21 successful Section 2 lawsuits, four times higher in
22 covered jurisdictions than in noncovered jurisdictions.
23 So the formula -- you can -- you know, say maybe this
24 district shouldn't be covered, maybe this one should be
25 covered.

1 The formula seems to be working pretty well
2 in terms of going after the actual violations on the
3 ground and who's committing them.

4 MR. REIN: There are -- there are two
5 fallacies, Justice Kagan, in -- in that statement.
6 Number one is treating the covered jurisdictions as some
7 kind of entity, a lump: Let us treat them. And as
8 Judge Williams did in his dissent, if you look at them
9 one by one, giving them their equal dignity, you won't
10 reach the same result.

11 JUSTICE KAGAN: Well, all formulas are
12 underinclusive and all formulas are overinclusive.
13 Congress has developed this formula and has continued it
14 in use that actually seems to work pretty well in
15 targeting the places where there are the most successful
16 Section 2 lawsuits, where there are the most violations
17 on the ground that have been adjudicated.

18 MR. REIN: Well, if -- if you look at the
19 analysis State by State done by Judge Williams, that
20 isn't true. Congress has picked out some States that
21 fall at the top and some that do not, and there are
22 other States like Illinois or Tennessee, and I don't
23 think they deserve preclearance, that clearly have
24 comparable records.

25 And second, dividing by population may make

1 it look it look better, but it is irrational. It is not
2 only irrational when we object to it, but note that in
3 the brief of the Harris Respondent they say it's
4 irrational because, after all, that makes Delaware, a
5 small State, look worse on the list of who are the primary
6 violators. It's not a useful metric. It may make a
7 nice number. But there is no justification for that
8 metric.

9 JUSTICE SCALIA: And it happens not to be
10 the method that Congress selected.

11 MR. REIN: Correct.

12 JUSTICE SCALIA: If they selected that, you
13 could say they used a rationale that works. But just
14 because they picked some other rationale, which happens
15 to produce this result, doesn't seem to me very
16 persuasive.

17 JUSTICE KENNEDY: Your time is --

18 MR. REIN: Thank you.

19 JUSTICE KENNEDY: -- about ready to
20 expire for the rebuttal period. But I do have this
21 question: Can you tell me -- it seems to me that the
22 government can very easily bring a Section 2 suit and as
23 part of that ask for bail-in under Section 3. Are those
24 expensive, time-consuming suits? Do we have anything in
25 the record that tells us or anything in the bar's

1 experience that you could advise us?

2 MR. REIN: Well --

3 JUSTICE KENNEDY: Is this an effective
4 remedy?

5 MR. REIN: It is -- number one, it is
6 effective. There are preliminary injunctions. It
7 depends on the kind of dispute you have. Some of them
8 are very complex, and it would be complex if somebody
9 brought -- a State brought a Section 5 challenge in a
10 three-judge court saying the attorney general's denied
11 me preclearance. So it's the complexity of the
12 question, not the nature of Section 2.

13 And might I say, if you look at the Voting
14 Rights Act, one thing that really stands out is you are
15 up against States with entrenched discriminatory
16 practices in their law. The remedy Congress put in
17 place for those States was Section 2. And all across
18 the country, when you talk about equal sovereignty, if
19 there is a problem in Ohio the remedy is Section 2. So
20 if Congress thought that Section 2 was an inadequate
21 remedy, it could look to the specifics of Section 2 and
22 say, maybe we ought to put timetables in there or modify
23 it.

24 But that's not what happened. They
25 reenacted Section 2 just as it stood. So I think that

1 Section 2 covers even more broadly because it deals with
2 results, which the Court has said is broader than
3 effects. It's an effective remedy, and I think at this
4 point, given the record, given the history, the right
5 thing to do is go forward under Section 2 and remove the
6 stigma of prior restraint and preclearance from the
7 States and the unequal application based on data that
8 has no better history than 1972.

9 JUSTICE GINSBURG: Mr. Rein, I just remind
10 because it's something we said about equal footing, in
11 Katzenbach the Court said, "The doctrine of the equality
12 of the States invoked by South Carolina does not bar
13 this approach, for that doctrine applies only to the
14 terms upon which States are admitted to the Union and
15 not to the remedies for local evils which have
16 subsequently appeared." That's what -- has the Court
17 changed that interpretation?

18 MR. REIN: I think that that referred in
19 Katzenbach -- I'm familiar with that statement. It
20 referred to the fact that once you use a formula you are
21 not -- you are selecting out. The Court felt the
22 formula was rational in theory and practice and
23 therefore it didn't, on its face, remove the equality of
24 the States. They were all assessed under the same two
25 criteria. Some passed, some did not. But I think that

1 that really doesn't mask the need for equal treatment of
2 the sovereign States.

3 JUSTICE SOTOMAYOR: I'm going to have a hard
4 time with that because you can't be suggesting that the
5 government sees a problem in one or more States and
6 decides it's going to do something for them and not for
7 others, like emergency relief, and that that somehow
8 violates the equal footing doctrine. You can't treat
9 States the same because their problems are different,
10 their populations are different, their needs are
11 different. Everything is different about the States.

12 MR. REIN: Well, I think when Congress uses
13 the powers delegated under Article I, Section 8, it has
14 substantial latitude in how it exercises the power. We
15 are talking about remedial power here. We are talking
16 about overriding powers that are reserved to the States
17 to correct abuse. When Congress does that, it has to
18 treat them equally. It can't say --

19 JUSTICE SOTOMAYOR: Would you tell me what
20 you think is left of the rational means test in
21 Katzenbach and City of Rome? Do you think the City of
22 Boerne now controls both Fourteen -- the Fourteenth and
23 the Fifteenth Amendment and how we look at any case that
24 arises under them?

25 MR. REIN: Justice Sotomayor, I think that

1 the two tests have a lot in common because in City of
2 Boerne, the Katzenbach decision was pointed out as a
3 model of asking the questions that congruence in
4 proportionality ask us to address. Number one, how
5 does this remedy meet findings of constitutional
6 violation? You've got to ask that question. They asked
7 that question in Katzenbach. What is the relation
8 between the two?

9 And then I think you have to ask the
10 question: All right -- you know, is this killing a fly
11 with a sledgehammer, a fair question because when you
12 start to invade core functions of the States, I think
13 that a great deal of caution and care is required. So I
14 think that the rational basis test, the McCulloch test,
15 still applies to delegated powers.

16 But here on the one hand the Solicitor
17 defends under the Fourteenth and Fifteenth Amendment
18 saying, well, if something doesn't violate the
19 Fifteenth, it violates the Fourteenth. And the Court's
20 precedent under the Fourteenth Amendment is very clear
21 that the City of Boerne congruence and proportionality
22 test applies. The Court has applied it, but I don't
23 think we -- we wouldn't really need to get that far
24 because we believe that if you examine it under
25 McCullough, just as they did in Katzenbach, it would

1 fail as well.

2 If there are no further questions.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Our questions have intruded on your rebuttal
5 time, so we'll give you the 5 minutes and a commensurate
6 increase in the General's time.

7 General Verrilli?

8 ORAL ARGUMENTS OF DONALD B. VERRILLI, JR.,

9 ON BEHALF OF THE FEDERAL RESPONDENT

10 GENERAL VERRILLI: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 There's a fundamental point that needs to be
13 made at the outset. Everyone acknowledges, Petitioner,
14 its amici, this Court in Northwest Austin, that the
15 Voting Rights Act made a huge difference in transforming
16 the culture of blatantly racist vote suppression that
17 characterized parts of this country for a century.

18 Section 5 preclearance was the principal
19 engine of that progress. And it has always been true
20 that only a tiny fraction of submissions under Section 5
21 result in objections. So that progress under Section 5
22 that follows from that has been as a result of the
23 deterrence and the constraint Section 5 imposes on
24 States and jurisdictions and not on the actual
25 enforcement by means of objection.

1 Now, when Congress faced the question
2 whether to reauthorize Section 5 in 2006, it had to
3 decide whether the -- whether it could be confident that
4 the attitudes and behaviors in covered jurisdictions had
5 changed enough that that very effective constraint and
6 deterrence could be confidently removed. And Congress
7 had, as Judge Kagan identified earlier, a very
8 substantial record of continuing need before it when
9 it --

10 CHIEF JUSTICE ROBERTS: Can I ask you just a
11 little bit about that record? Do you know how many
12 submissions there were for preclearance to the Attorney
13 General in 2005?

14 GENERAL VERRILLI: I don't know the precise
15 number, but many thousands. That's true.

16 CHIEF JUSTICE ROBERTS: 3700. Do you know
17 how many objections the Attorney General lodged?

18 GENERAL VERRILLI: There was one in that
19 year.

20 CHIEF JUSTICE ROBERTS: One, so one out of
21 3700.

22 GENERAL VERRILLI: But I think -- but,
23 Mr. Chief Justice, that is why I made the point a minute
24 ago that the key way in which Section 5 -- it has to be
25 the case, everyone agrees, that the significant progress

1 that we've made is principally because of Section 5 of
2 the Voting Rights Act. And it has always been true that
3 only a tiny fraction of submissions result in
4 objections.

5 JUSTICE SCALIA: And that will always be true
6 forever into the future. You could always say, oh,
7 there has been improvement, but the only reason there
8 has been improvement are these extraordinary procedures
9 that deny the States sovereign powers, which the
10 Constitution preserves to them. So, since the only
11 reason it's improved is because of these procedures, we
12 must continue those procedures in perpetuity.

13 GENERAL VERRILLI: No.

14 JUSTICE SCALIA: Is that the argument you
15 are making?

16 GENERAL VERRILLI: That is not the argument.
17 We do not think that --

18 JUSTICE SCALIA: I thought that was the
19 argument you were just making.

20 GENERAL VERRILLI: It is not. Congress
21 relied on far more on just the deterrent effect. There
22 was a substantial record based on the number of
23 objections, the types of objections, the findings of --

24 JUSTICE SCALIA: That's a different
25 argument.

1 GENERAL VERRILLI: But they are related.
2 They're related.

3 CHIEF JUSTICE ROBERTS: Just to get the --
4 do you know which State has the worst ratio of white
5 voter turnout to African American voter turnout?

6 GENERAL VERRILLI: I do not.

7 CHIEF JUSTICE ROBERTS: Massachusetts. Do
8 you know what has the best, where African American
9 turnout actually exceeds white turnout? Mississippi.

10 GENERAL VERRILLI: Yes, Mr. Chief Justice.
11 But Congress recognized that expressly in the findings
12 when it reauthorized the act in 2006. It said that the
13 first generation problems had been largely dealt with,
14 but there persisted significant --

15 CHIEF JUSTICE ROBERTS: Which State has the
16 greatest disparity in registration between white and
17 African American?

18 GENERAL VERRILLI: I do not know that.

19 CHIEF JUSTICE ROBERTS: Massachusetts.
20 Third is Mississippi, where again the African American
21 registration rate is higher than the white registration
22 rate.

23 GENERAL VERRILLI: But when Congress -- the
24 choice Congress faced when it -- Congress wasn't writing
25 on a blank slate in 2006, Mr. Chief Justice. It faced a

1 choice. And the choice was whether the conditions were
2 such that it could confidently conclude that this
3 deterrence and this constraint was no longer needed, and
4 in view of the record of continuing need and in view of
5 that history, which we acknowledge is not sufficient on
6 its own to justify reenactment, but it's certainly
7 relevant to the judgment Congress made because it
8 justifies Congress having made a cautious choice in 2006
9 to keep the constraint and to keep the deterrence in
10 place.

11 JUSTICE ALITO: Well, there's no question
12 that --

13 JUSTICE SOTOMAYOR: Counsel, in the
14 reauthorization --

15 JUSTICE ALITO: There's no question --

16 CHIEF JUSTICE ROBERTS: Justice Alito.

17 JUSTICE ALITO: There is no question that
18 the Voting Rights Act has done enormous good. It's one
19 of the most successful statutes that Congress passed
20 during the twentieth century and one could probably go
21 farther than that.

22 But when Congress decided to reauthorize it
23 in 2006, why wasn't it incumbent on Congress under the
24 congruence and proportionality standard to make a new
25 determination of coverage? Maybe the whole country

1 should be covered. Or maybe certain parts of the
2 country should be covered based on a formula that is
3 grounded in up-to-date statistics.

4 But why -- why wasn't that required by the
5 congruence and proportionality standards? Suppose that
6 Congress in 1965 had based the coverage formula on
7 voting statistics from 1919, 46 years earlier. Do you
8 think Katzenbach would have come out the same way?

9 GENERAL VERRILLI: No, but what Congress did
10 in 2006 was different than what Congress did in 1965.
11 What Congress did -- Congress in 2006 was not writing on
12 a clean slate. The judgment had been made what the
13 coverage formula ought to be in 1965, this Court upheld
14 it four separate times over the years, and that it seems
15 to me the question before Congress under congruence and
16 proportionality or the reasonably adapted test in
17 McCullough -- or whatever the test is, and under the
18 formula in Northwest Austin is whether the judgment to
19 retain that geographic coverage for a sufficient
20 relation to the problem Congress was trying to target,
21 and Congress did have before it very significant
22 evidence about disproportionate results in Section 2
23 litigation in covered jurisdictions, and that, we
24 submit, is a substantial basis for Congress to have made
25 the judgment that the coverage formula should be kept in

1 place, particularly given that it does have a bail-in
2 mechanism and it does have a bailout mechanism, which
3 allows for tailoring over time.

4 JUSTICE KENNEDY: This reverse engineering
5 that you seem so proud of, it seems to me that that
6 obscures the -- the real purpose of -- of the statute.
7 And if Congress is going to single out separate States
8 by name, it should do it by name. If not, it should use
9 criteria that are relevant to the existing -- and
10 Congress just didn't have the time or the energy to do
11 this; it just reenacted it.

12 GENERAL VERRILLI: I think the -- the
13 formula was -- was rational and effective in 1965. The
14 Court upheld it then, it upheld it three more times
15 after that.

16 JUSTICE KENNEDY: Well, the Marshall Plan
17 was very good, too, the Morrill Act, the Northwest
18 Ordinance, but times change.

19 GENERAL VERRILLI: And -- but the question
20 is whether times had changed enough and whether the
21 differential between the covered jurisdictions and the
22 rest of the country had changed enough that Congress
23 could confidently make the judgment that this was no
24 longer needed.

25 JUSTICE GINSBURG: General Verrilli --

1 JUSTICE BREYER: What the question --

2 JUSTICE GINSBURG: General Verrilli, could
3 you respond to the question that Justice Kennedy asked
4 earlier, which was for why isn't Section 2 enough now?
5 The government could bring Section 2 claims if it seeks
6 privately to do. Why isn't -- he asked if it was
7 expensive. You heard the question, so.

8 GENERAL VERRILLI: Yes. With respect to --
9 start with Katzenbach. Katzenbach made the point that
10 Section 2 litigation wasn't an effective substitute for
11 Section 5 because what Section 5 does is shift the
12 burden of inertia. And there's a -- I think it is
13 self-evident that Section 2 cannot do the work of
14 Section 5.

15 Take one example: Polling place changes.
16 That in fact is the most frequent type of Section 5
17 submission, polling place changes. Now, changes in the
18 polling places at the last minute before an election can
19 be a source of great mischief. Closing polling places,
20 moving them to inconvenient locations, et cetera.

21 What Section 5 does is require those kinds
22 of changes to be pre-cleared and on a 60-day calendar,
23 which effectively prevents that kind of mischief. And
24 there is no way in the world you could use Section 2 to
25 effectively police those kinds of activities.

1 JUSTICE KENNEDY: Well, I -- I do think the
2 evidence is very clear that Section -- that individual
3 suits under Section 2 type litigation were just
4 insufficient and that Section 5 was utterly necessary in
5 1965. No doubt about that.

6 GENERAL VERRILLI: And I think it
7 remains true --

8 JUSTICE KENNEDY: But with -- with a modern
9 understanding of -- of the dangers of polling place
10 changes, with prospective injunctions, with preliminary
11 injunctions, it's not clear -- and -- and with the fact
12 that the government itself can commence these suits,
13 it's not clear to me that there's that much difference
14 in a Section 2 suit now and preclearance. I may be
15 wrong about that. I don't have statistics for it.
16 That's why we're asking.

17 GENERAL VERRILLI: I -- I don't -- I don't
18 really think that that conclusion follows. I think
19 these under the -- there are thousands and thousands of
20 these under-the-radar screen changes, the polling places
21 and registration techniques, et cetera. And in most of
22 those I submit, Your Honor, the -- the cost-benefit
23 ratio is going to be, given the cost of this litigation,
24 which one of the -- one of the reasons Katzenbach said
25 Section 5 was necessary, is going to tilt strongly

1 against bringing these suits.

2 Even with respect to the big ticket items,
3 the big redistrictings, I think the logic Katzenbach
4 holds in that those suits are extremely expensive and
5 they typically result in after-the-fact litigation.

6 Now, it is true, and the Petitioners raised
7 the notion that there could be a preliminary injunction,
8 but I really think the Petitioner's argument that
9 Section 2 is a satisfactory and complete substitute for
10 Section 5 rests entirely on their ability to demonstrate
11 that preliminary injunctions can do comparable work to
12 what Section 5 does. They haven't made any effort to do
13 that. And while I don't have statistics for you, I can
14 tell you that the Civil Rights Division tells me that
15 it's their understanding that in fewer than one-quarter
16 of ultimately successful Section 2 suits was there a
17 preliminary injunction issued.

18 So I don't think that there's a basis,
19 certainly given the weighty question before this Court
20 of the constitutionality of this law, to the extent the
21 argument is that Section 2 is a valid substitute for
22 Section 5, I just don't think that the -- that the
23 Petitioners have given the Court anything that allows
24 the Court to reach that conclusion and of course --

25 JUSTICE KENNEDY: Can you tell us how many

1 attorneys and how many staff in the Justice Department
2 are involved in the preclearance process? Is it 5 or
3 15?

4 GENERAL VERRILLI: It's a -- it's a very
5 substantial number and --

6 JUSTICE KENNEDY: Well, what does that mean?

7 GENERAL VERRILLI: It means I don't know the
8 exact number, Justice Kennedy.

9 (Laughter.)

10 JUSTICE SCALIA: Hundreds? Hundreds?
11 Dozens? What?

12 GENERAL VERRILLI: I think it's dozens. And
13 so the -- and so it -- so it's a substantial number. It
14 is true in theory that those people could be used to
15 bring Section 2 litigation.

16 JUSTICE SCALIA: Right.

17 GENERAL VERRILLI: But that doesn't answer
18 the mail, I submit, because it's still -- you're never
19 going to get at all these thousands of under-the-radar
20 changes and you're still going to be in the position
21 where the question will be whether preliminary
22 injunctions are available to do the job. There is no
23 evidence that that's true.

24 And I'll point out there's a certain irony
25 in the argument that what -- that what Petitioner wants

1 is to substitute Section 2 litigation of that kind for
2 the Section 5 process, which is much more efficient and
3 much more -- and much speedier, much more efficient and
4 much more cost effective.

5 JUSTICE ALITO: Then why shouldn't it apply
6 everywhere in the country?

7 GENERAL VERRILLI: Well, because I think
8 Congress made a reasonable judgment that the problem --
9 that in 2006, that its prior judgments, that there --
10 that there was more of a risk in the covered
11 jurisdictions continued to be validated by the Section 2
12 evidence.

13 JUSTICE ALITO: Well, you do really think
14 there was -- that the record in 2006 supports the
15 proposition that -- let's just take the question of
16 changing the location of polling places. That's a
17 bigger problem in Virginia than in Tennessee, or it's a
18 bigger problem in Arizona than Nevada, or in the Bronx
19 as opposed to Brooklyn.

20 GENERAL VERRILLI: I think the combination
21 of the history, which I concede is not dispositive, but
22 is relevant because it suggests caution is in order and
23 that's a reasonable judgment on the part of Congress,
24 the combination of that history and the fact that there
25 is a very significant disproportion in successful

1 Section 2 results in the covered jurisdictions as
2 compared to the rest of the country, that Congress was
3 justified in concluding that there -- that it -- there
4 was reason to think that there continued to be a serious
5 enough differential problem to justify --

6 JUSTICE ALITO: Well, the statistics that I
7 have before me show that in, let's say the 5 years prior
8 to reauthorization, the gap between success in Section 2
9 suits in the covered and the non-covered jurisdiction
10 narrowed and eventually was eliminated. Do you disagree
11 with that?

12 GENERAL VERRILLI: Well, I think the --
13 the -- you have to look at it, and Congress
14 appropriately looked at it through a broader -- in a --
15 in a broader timeframe, and it made judgments. And I
16 think that actually, the -- the right way to look at it
17 is not just the population judgment that Mr. Rein was
18 critical of, the fact is, and I think this is in the
19 Katz amicus brief, that the covered jurisdictions
20 contain only 14 percent of the subjurisdictions in the
21 nation. And so 14 percent of the subjurisdictions in
22 the nation are generating up to 81 percent of the
23 successful Section 2 litigation. And I think --

24 CHIEF JUSTICE ROBERTS: General, is it -- is
25 it the government's submission that the citizens in the

1 South are more racist than citizens in the North?

2 GENERAL VERRILLI: It is not, and I do not
3 know the answer to that, Your Honor, but I do think it
4 was reasonable for Congress --

5 CHIEF JUSTICE ROBERTS: Well, which you said
6 it is not, and you don't know the answer to it.

7 GENERAL VERRILLI: I -- it's not our
8 submission. As an objective matter, I don't know the
9 answer to that question. But what I do know is that
10 Congress had before it evidence that there was a
11 continuing need based on Section 5 objections, based on
12 the purpose-based character of those objections, based
13 on the disparate Section 2 rate, based on the
14 persistence of polarized voting, and based on a gigantic
15 wealth of jurisdiction-specific and anecdotal evidence,
16 that there was a continuing need.

17 CHIEF JUSTICE ROBERTS: A need to do what?

18 GENERAL VERRILLI: To maintain the deterrent
19 and constraining effect of the Section 5 preclearance
20 process in the covered jurisdictions, and that --

21 CHIEF JUSTICE ROBERTS: And not -- and not
22 impose it on everyone else?

23 GENERAL VERRILLI: And -- that's right,
24 given the differential in Section 2 litigation, there
25 was a basis for Congress to do that.

1 JUSTICE BREYER: So what's your answer? I
2 just want to be sure that I hear your answer to an
3 allegation, argument, an excellent argument, that's been
4 made, or at least as I've picked up, and that is that:
5 Yes, the problem was terrible; it has gotten a lot
6 better; it is not to some degree cured. All right? I
7 think there is a kind of common ground. Now then the
8 question is: Well, what about this statute that has a
9 certain formula? One response is: Yes, it has a
10 formula that no longer has tremendous relevance in terms
11 of its characteristic -- that is literacy tests. But it
12 still picked out nine States. So, so far, you're with
13 me.

14 So it was rational when you continue. You
15 know, you don't sunset it. You just keep it going.
16 You're not held to quite the same criteria as if you
17 were writing it in the first place. But it does treat
18 States all the same that are somewhat different.

19 One response to that is: Well, this is the
20 Fifteenth Amendment, a special amendment -- you know?
21 Added by. Maybe you're right. Then let's proceed State
22 by State. Let's look at it State by State. That's what
23 we normally do, not as applied.

24 All right. Now, I don't know how
25 satisfactory that answer is. I want to know what your

1 response is as to whether we should -- if he's right --
2 if he's right that there is an irrationality involved if
3 you were writing it today in treating State A, which is
4 not too discriminatorily worse than apparently
5 Massachusetts or something. All right? So -- so if
6 that's true, do we respond State by State? Or is this a
7 matter we should consider not as applied, but on its
8 face?

9 I just want to hear what you think about
10 that.

11 GENERAL VERRILLI: Let me give two
12 responses, Justice Breyer. The first is one that
13 focuses on the practical operation of the law and the
14 consequences that flow from it. I do not think that
15 Shelby County or Alabama ought to be able to bring a
16 successful facial challenge against this law on the
17 basis that it ought not to have covered Arizona or
18 Alaska. The statute has bailout mechanism. Those
19 jurisdictions can try to avail themselves of it. And if
20 they do and it doesn't work, then they -- they may very
21 well have an as-applied challenge that they can bring to
22 the law. But that doesn't justify -- given the
23 structure of the law and that there is a tailoring
24 mechanism in it, it doesn't justify Alabama --

25 CHIEF JUSTICE ROBERTS: I don't -- I don't

1 understand the distinction between facial and as-applied
2 when you are talking about a formula. As applied to
3 Shelby County, they are covered because of the formula,
4 so they're challenging the formula as applied to them.
5 And we've heard some discussion. I'm not even sure what
6 your position is on the formula. Is the formula
7 congruent and proportional today, or do you have this
8 reverse engineering argument?

9 GENERAL VERRILLI: Congress's decision in
10 2006 to reenact the geographic coverage was congruent
11 and proportional because Congress had evidence --

12 CHIEF JUSTICE ROBERTS: To -- to the problem
13 or -- or was the formula congruent and proportional to
14 the remedy?

15 GENERAL VERRILLI: The Court has upheld the
16 formula in four different applications. So the Court
17 has found four different times that the formula was
18 congruent and proportional. And the same kinds of
19 problems that Mr. Rein is identifying now were --

20 CHIEF JUSTICE ROBERTS: Well -- I'm sorry.

21 GENERAL VERRILLI: -- were true even back in
22 City of Rome because of course the tests and devices
23 were eliminated by the statute, so no -- no jurisdiction
24 could have tests and devices. And City of Rome itself
25 said that the registration problems had been very

1 substantially ameliorated by then, but there were
2 additional kinds of problems. The ascent of these
3 second-generation problems was true in City of Rome as a
4 justification that made it congruent and proportional.

5 And we submit that it's still true now, that
6 Congress wasn't writing on a blank slate in 2006.
7 Congress was making a judgment about whether this
8 formula, which everyone agrees, and in fact Mr. Rein's
9 case depends on the proposition that Section 5 was a big
10 success.

11 JUSTICE SCALIA: Well, maybe it was making
12 that judgment, Mr. Verrilli. But that's -- that's a
13 problem that I have. This Court doesn't like to get
14 involved in -- in racial questions such as this one.
15 It's something that can be left -- left to Congress.

16 The problem here, however, is suggested by
17 the comment I made earlier, that the initial enactment
18 of this legislation in a -- in a time when the need for
19 it was so much more abundantly clear was -- in the
20 Senate, there -- it was double-digits against it. And
21 that was only a 5-year term.

22 Then, it is reenacted 5 years later, again
23 for a 5-year term. Double-digits against it in the
24 Senate. Then it was reenacted for 7 years. Single
25 digits against it. Then enacted for 25 years, 8 Senate

1 votes against it.

2 And this last enactment, not a single vote
3 in the Senate against it. And the House is pretty much
4 the same. Now, I don't think that's attributable to the
5 fact that it is so much clearer now that we need this.
6 I think it is attributable, very likely attributable, to
7 a phenomenon that is called perpetuation of racial
8 entitlement. It's been written about. Whenever a
9 society adopts racial entitlements, it is very difficult
10 to get out of them through the normal political
11 processes.

12 I don't think there is anything to be gained
13 by any Senator to vote against continuation of this act.
14 And I am fairly confident it will be reenacted in
15 perpetuity unless -- unless a court can say it does not
16 comport with the Constitution. You have to show, when
17 you are treating different States differently, that
18 there's a good reason for it.

19 That's the -- that's the concern that those
20 of us who -- who have some questions about this statute
21 have. It's -- it's a concern that this is not the kind
22 of a question you can leave to Congress. There are
23 certain districts in the House that are black districts
24 by law just about now. And even the Virginia Senators,
25 they have no interest in voting against this. The State

1 government is not their government, and they are going
2 to lose -- they are going to lose votes if they do not
3 reenact the Voting Rights Act.

4 Even the name of it is wonderful: The
5 Voting Rights Act. Who is going to vote against that in
6 the future?

7 CHIEF JUSTICE ROBERTS: You have an extra 5
8 minutes.

9 GENERAL VERRILLI: Thank you. I may need it
10 for that question.

11 (Laughter.)

12 GENERAL VERRILLI: Justice Scalia, there's a
13 number of things to say. First, we are talking about
14 the enforcement power that the Constitution gives to the
15 Congress to make these judgments to ensure protection of
16 fundamental rights. So this is -- this is a situation
17 in which Congress is given a power which is expressly
18 given to it to act upon the States in their sovereign
19 capacity. And it cannot have been lost on the framers
20 of the Fourteenth and Fifteenth Amendments that the
21 power Congress was conferring on them was likely to be
22 exercised in a differential manner because it was, the
23 power was conferred to deal with the problems in the
24 former States of the Confederacy.

25 So with respect to the constitutional grant

1 of power, we do think it is a grant of power to Congress
2 to make these judgments, now of course subject to review
3 by this Court under the standard of *Northwest Austin*,
4 which we agree is an appropriate standard. That's the
5 first point.

6 The second point is I do -- I do say with
7 all due respect, I think it would be extraordinary to --
8 to look behind the judgment of Congress as expressed in
9 the statutory findings, and -- and evaluate the judgment
10 of Congress on the basis of that sort of motive
11 analysis, as opposed to --

12 JUSTICE SCALIA: We looked behind it in
13 *Boerne*. I'm not talking about dismissing it. I'm --
14 I'm talking about looking at it to see whether it makes
15 any sense.

16 GENERAL VERRILLI: And -- but -- but I do
17 think that the deference that Congress is owed, as *City*
18 of *Boerne* said, "much deference" -- *Katzenbach* said
19 "much deference." That deference is appropriate because
20 of the nature of the power that has been conferred here
21 and because, frankly, of the superior institutional
22 competence of Congress to make these kinds of judgments.
23 These are judgments that assess social conditions.
24 These are predictive judgments about human behavior and
25 they're predictive judgments about social conditions and

1 human behavior about something that the people in
2 Congress know the most about, which is voting and the
3 political process.

4 And I would also say I understand your point
5 about entrenchment, Justice Scalia, but certainly with
6 respect to the Senate, you just can't say that it's in
7 everybody's interests -- that -- that the enforcement of
8 Section 5 is going to make it easier for some of those
9 Senators to win and it's going to make it harder for
10 some of those Senators to win. And yet they voted
11 unanimously in favor of the statute.

12 JUSTICE KENNEDY: Do you think the
13 preclearance device could be enacted for the entire
14 United States?

15 GENERAL VERRILLI: I don't think there is a
16 record that would substantiate that. But I do think
17 Congress was --

18 JUSTICE KENNEDY: And that is because that
19 there is a federalism interest in each State being
20 responsible to ensure that it has a political system
21 that acts in a democratic and a civil and a decent and a
22 proper and a constitutional way.

23 GENERAL VERRILLI: And we agree with that,
24 we respect that, we acknowledge that Northwest
25 Austin requires an inquiry into that.

1 JUSTICE KENNEDY: But if -- if Alabama wants
2 to have monuments to the heros of the Civil Rights
3 Movement, if it wants to acknowledge the wrongs of its
4 past, is it better off doing that if it's an own
5 independent sovereign or if it's under the trusteeship
6 of the United States government?

7 GENERAL VERRILLI: Of course it would be
8 better in the former situation. But with all due
9 respect, Your Honor, everyone agrees that it was
10 appropriate for -- for Congress to have exercised this
11 express constitutional authority when it did in 1965,
12 and everybody agrees that it was the -- was the exercise
13 of that authority that brought about the situation where
14 we can now argue about whether it's still necessary.

15 And the point, I think, is of fundamental
16 importance here is that that history remains relevant.
17 What Congress did was make a cautious choice in 2006
18 that given the record before it and given the history,
19 the more prudent course was to maintain the deterrent
20 and constraining effect of Section 5, even given the
21 federalism costs because, after all, what it protects is
22 a right of fundamental importance that the Constitution
23 gives Congress the express authority to protect through
24 appropriate legislation.

25 JUSTICE ALITO: Before your time expires, I

1 would like to make sure I understand your position on
2 this as-applied versus facial issue. Is it your
3 position that this would be a different case if it were
4 brought by, let's say, a county in Alaska as opposed to
5 Shelby County, Alabama?

6 GENERAL VERRILLI: No. Not -- not -- no.
7 Let me just try to articulate clearly what our -- what
8 our position is. They've brought a facial challenge.
9 We -- we recognize that it's a facial challenge.

10 We're defending it as a facial challenge,
11 but our point is that the facial challenge can't succeed
12 because they are able to point out that there may be
13 some other jurisdictions that ought not to be
14 appropriately covered, and that's especially true
15 because there is a tailoring mechanism in the statute.
16 And if the tailoring mechanism doesn't work, then
17 jurisdictions that could make such a claim may well have
18 an as-applied challenge. That's how we feel.

19 CHIEF JUSTICE ROBERTS: Thank you, General.

20 GENERAL VERRILLI: Thank you,
21 Mr. Chief Justice.

22 CHIEF JUSTICE ROBERTS: Mr. Adegbile?

23 ORAL ARGUMENT BY DEBO P. ADEGBILE

24 ON BEHALF OF RESPONDENTS BOBBY PIERSON, ET AL.

25 MR. ADEGBILE: Mr. Chief Justice, and may it

1 please the Court:

2 The extensive record supporting the renewal of
3 the preclearance provisions of the Voting Rights Act
4 illustrates two essential points about the nature and
5 continuing aspects of voting discrimination in the
6 affected areas. The first speaks to this question of
7 whether Section 2 was adequate standing alone.

8 As our brief demonstrates, in Alabama and in many
9 of the covered jurisdictions, Section 2 victories often
10 need Section 5 to realize the benefits of the -- of the
11 ruling in the Section 2 case. That is to say, that
12 these measures act in tandem to protect minority
13 communities, and we've seen it in a number of cases.

14 JUSTICE SCALIA: But that's true in every
15 State, isn't it?

16 MR. ADEGBILE: Justice Scalia --

17 JUSTICE SCALIA: I mean -- you know, I don't
18 think anybody is contesting that it's more effective if
19 you use Section 5. The issue is why just in these
20 States. That's it.

21 MR. ADEGBILE: Fair enough. It's beyond a
22 question of being true in any place. Our brief shows
23 that specifically in the covered jurisdictions, there is
24 a pattern, a demonstrated pattern of Section 2 and 5
25 being used in tandem whereas in other jurisdictions,

1 most of the Section 2 cases are one-off examples.

2 We point to a whole number of examples.

3 Take for example Selma, Alabama. Selma, Alabama in the
4 1990s, not in the 1960s but in the 1990s, had a series
5 of objections and Section 2 activity and observers all
6 that were necessary to continue to give effect to the
7 minority inclusion principle that Section 5 was passed
8 to vindicate in 1965.

9 JUSTICE KENNEDY: But a Section 2 case can,
10 in effect, have an order for bail-in, correct me if I'm
11 wrong, under Section 3 and then you basically have a
12 mini -- something that replicates Section 5.

13 MR. ADEGBILE: The bail-in is available --
14 bail-in is available if there's an actual finding of a
15 constitutional violation. It has been used in -- in a
16 number of circumstances. The United States brief has an
17 appendix that points to those. One of the recent ones
18 was in Port Chester, New York, if memory serves. But
19 it's quite clear that the pattern in the covered
20 jurisdictions is such that the repetitive nature of
21 discrimination in those places -- take, for example, the
22 case in LULAC.

23 After this Court ruled that the
24 redistricting plan, after the 2000 round of
25 redistricting, bore the mark of intentional

1 discrimination, in the remedial election, the State of
2 Texas tried to shorten and constrain the early voting
3 period for purposes of denying the Latino community of
4 the opportunity to have the benefits of the ruling.

5 What we've seen in Section 2 cases is that
6 the benefits of discrimination vest in incumbents who
7 would not be there, but for the discriminatory plan.
8 And Congress, and specifically in the House Report, I
9 believe it's page 57, found that Section 2 continues to
10 be an inadequate remedy to address the problem of these
11 successive violations.

12 Another example that makes this point very
13 clearly is in the 1990s in Mississippi. There was an
14 important Section 2 case brought, finally after
15 100 years, to break down the dual registration system
16 that had a discriminatory purpose. When Mississippi
17 went to implement the National Voter Registration Act,
18 it tried to bring back dual registration, and it was
19 Section 5 -- Section 5 enforcement action that was able
20 to knock it down.

21 CHIEF JUSTICE ROBERTS: Do you agree with
22 the reverse engineering argument that the United States
23 has made today?

24 MR. ADEGBILE: I would frame it slightly
25 differently, Chief Justice Roberts. My understanding is

1 that the history bears some importance in the context of
2 the reauthorizations, but that Congress in -- in none of
3 the reauthorizations stopped with the historical
4 backward look. It takes cognizance of the experience,
5 but it also looks to see what the experience has been on
6 the ground. And what Congress saw in 2006 is that there
7 was a surprisingly high number of continuing objections
8 after the 1982 reauthorization period and that --

9 CHIEF JUSTICE ROBERTS: I guess -- I guess
10 the question is whether or not that disparity is
11 sufficient to justify the differential treatment under
12 Section 5. Once you take away the formula, if you think
13 it has to be reverse engineered and -- and not simply
14 justified on its own, then it seems to me you have a
15 much harder test to justify the differential treatment
16 under Section 5.

17 MR. ADEGBILE: This Court in Northwest
18 Austin said that it needs to be sufficiently related,
19 and I think there are two principal sources of evidence.

20 CHIEF JUSTICE ROBERTS: Well, we also said
21 congruent and proportional.

22 MR. ADEGBILE: Indeed. Indeed. I don't
23 understand those things to be unrelated. I think that
24 they're part of the same, same test, same evaluative
25 mechanism. The idea is, is Congress -- the first

1 question is, is Congress remedying something or is it
2 creating a new right. That's essentially what Boerne is
3 getting to, is Congress trying to go -- do an
4 end-around, a back doorway to expand the Constitution.
5 We know in this area Congress is trying to implement the
6 Fifteenth Amendment and the history tells us something
7 about that. But specifically to the question --

8 CHIEF JUSTICE ROBERTS: Well, the Fifteenth
9 Amendment is limited to intentional discrimination, and,
10 of course, the preclearance requirement is not so
11 limited, right?

12 MR. ADEGBILE: That's correct. But this
13 Court's cases have held that Congress, in proper
14 exercise of its remedial powers, can reach beyond the --
15 the core of the intentional discrimination with
16 prophylactic effect when they have demonstrated that a
17 substantial problem exists.

18 The -- the two things that speak to this
19 issue about the disparity in coverage and continuing to
20 cover these jurisdictions, there are two major inputs.
21 The first is the Section 5 activity. The Section 5
22 activity shows that the problem persists. It's a range
23 of different obstacles, and Section 5 was passed to
24 reach the next discriminatory thing. The case in --

25 JUSTICE ALITO: Well, Section 5 -- the

1 Section 5 activity may show that there's a problem in
2 the jurisdictions covered by Section 5, but it says
3 nothing about the presence or absence of similar
4 problems in noncovered jurisdictions, isn't that right?

5 MR. ADEGBILE: Absolutely, Justice Alito.

6 JUSTICE ALITO: All right.

7 MR. ADEGBILE: And so I come to my second
8 category. The second category, of course, is the piece
9 of the Voting Rights Act that has national application,
10 Section 2. And what the evidence in this case shows,
11 and it was before Congress, is that the concentration of
12 Section 2 successes in the covered jurisdictions is
13 substantially more. Justice Kagan said that it was four
14 times more adjusting for population data.

15 The fact of the matter is that there is
16 another piece of evidence in the record in this case
17 where Peyton McCrary looks at all of the Section
18 2 cases, and what he shows is that the directional
19 sense, that the Ellen Katz study pointed to dramatically
20 understates the disparity under Section 2. And so
21 he found that 81 percent --

22 JUSTICE SCALIA: Do you think all of the
23 noncovered States are worse in that regard than the nine
24 covered States, is that correct?

25 MR. ADEGBILE: Justice Scalia --

1 JUSTICE SCALIA: Every -- every one of them
2 is worse.

3 MR. ADEGBILE: Justice Scalia, it's -- it's
4 a fair question, and -- and I was speaking to the
5 aggregate --

6 JUSTICE SCALIA: It's not just a fair one,
7 it's the crucial question. Congress has selected these
8 nine States. Now, is there some good reason for
9 selecting these nine?

10 MR. ADEGBILE: What we see in the evidence
11 is that of the top eight States with section --
12 favorable Section 2 outcomes, seven of them, seven of
13 them are the covered jurisdictions. The eighth was
14 bailed in under the other part of the mechanism that, as
15 Justice Kennedy points out, can bring in some
16 jurisdictions that have special problems in voting. And
17 so we think that that points to the fact that this is
18 not a static statute, it's a statute that is --

19 JUSTICE BREYER: Yes, but his point, I think
20 the point is this: If you draw a red line around the
21 States that are in, at least some of those States have a
22 better record than some of the States that are out. So
23 in 1965, well, we have history. We have 200 years or
24 perhaps of slavery. We have 80 years or so of legal
25 segregation. We have had 41 years of this statute. And

1 this statute has helped, a lot.

2 So therefore Congress in 2005 looks back and
3 says don't change horses in the middle of the stream
4 because we still have a ways to go.

5 Now the question is, is it rational to do
6 that? And people could differ on that. And one thing
7 to say is, of course this is aimed at States. What do
8 you think the Civil War was about? Of course it was
9 aimed at treating some States differently than others.
10 And at some point that historical and practical
11 sunset/no sunset, renew what worked type of
12 justification runs out. And the question, I think, is
13 has it run out now?

14 And now you tell me when does it run out?
15 What is the standard for when it runs out? Never?
16 That's something you have heard people worried about.
17 Does it never run out? Or does it run out, but not yet?
18 Or do we have a clear case where at least it doesn't run
19 out now?

20 Now, I would like you to address that.

21 MR. ADEGBILE: Fair enough, Justice Breyer.
22 I think that the -- what the evidence shows before
23 Congress is that it hasn't run out yet. The whole
24 purpose of this act is that we made progress and
25 Congress recognized the progress that we made. And, for

1 example, they took away the examiner provision which was
2 designed to address the registration problem.

3 In terms of when we are there, I think it
4 will be some point in the future. Our great hope is
5 that by the end of this next reauthorization we won't be
6 there. Indeed, there is an overlooked provision that
7 says in 15 years, which is now 9 years from where I
8 stand here today before you, Congress should go back and
9 look and see is it still necessary.

10 So we don't think that this needs to be
11 there in perpetuity. But based on the record and a 2011
12 case in which a Federal judge in Alabama cited this
13 Court's opinion in Northwest Austin -- there were
14 legislators that sit today that were caught on tape
15 referring to African American voters as illiterates.
16 Their peers were referring to them as aborigines.

17 And the judge, citing the Northwest Austin
18 case -- it's the McGregor case cited in our brief --
19 said that, yes, the South has changed and made progress,
20 but some things remain stubbornly the same and the
21 trained effort to deny African American voters the
22 franchise is part of Alabama's history to this very day.

23 CHIEF JUSTICE ROBERTS: Have there been
24 episodes, egregious episodes of the kind you are talking
25 about in States that are not covered?

1 MR. ADEGBILE: Absolutely, Chief Justice
2 Roberts.

3 CHIEF JUSTICE ROBERTS: Well, then it
4 doesn't seem to help you make the point that the
5 differential between covered and noncovered continues to
6 be justified.

7 MR. ADEGBILE: But the great weight of
8 evidence -- I think that it's fair to look at -- on some
9 level you have to look piece by piece, State by State.
10 But you also have to step back and look at the great
11 mosaic.

12 This statute is in part about our march
13 through history to keep promises that our Constitution
14 says for too long were unmet. And this Court and
15 Congress have both taken these promises seriously. In
16 light of the substantial evidence that was adduced by
17 Congress, it is reasonable for Congress to make the
18 decision that we need to stay the course so that we can
19 turn the corner.

20 To be fair, this statute cannot go on
21 forever, but our experience teaches that six amendments
22 to the Constitution have had to be passed to ensure
23 safeguards for the right to vote, and there are many
24 Federal laws. They protect uniform voters, some protect
25 eligible voters who have not had the opportunity yet to

1 register. But together these protections are important
2 because our right to vote is what the United States
3 Constitution is about.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Rein, 5 minutes.

6 REBUTTAL ARGUMENT OF BERT W. REIN
7 ON BEHALF OF THE PETITIONER

8 MR. REIN: Thank you, Mr. Chief Justice.

9 JUSTICE SOTOMAYOR: Do you think that the
10 right to vote is a racial entitlement in Section 5?

11 MR. REIN: No. Section -- the Fifteenth
12 Amendment protects the right of all to vote and --

13 JUSTICE SOTOMAYOR: I asked a different
14 question. Do you think Section 5 was voted for because
15 it was a racial entitlement?

16 MR. REIN: Well, Congress --

17 JUSTICE SOTOMAYOR: Do you think there was
18 no basis to find that --

19 MR. REIN: -- was reacting -- may I say
20 Congress was reacting in 1964 to a problem of race
21 discrimination, which it thought was prevalent in
22 certain jurisdictions. So to that extent, as the
23 intervenor said, yes, it was intended to protect those
24 who had been discriminated against.

25 If I might say, I think that

1 Justice Breyer --

2 JUSTICE SOTOMAYOR: Do you think that racial
3 discrimination in voting has ended, that there is none
4 anywhere?

5 MR. REIN: I think that the world is not
6 perfect. No one -- we are not arguing perfectibility.
7 We are saying that there is no evidence that the
8 jurisdictions that are called out by the formula are the
9 places which are uniquely subject to that kind of
10 problem --

11 JUSTICE SOTOMAYOR: But shouldn't --

12 MR. REIN: We are not trying --

13 JUSTICE SOTOMAYOR: You've given me some
14 statistics that Alabama hasn't, but there are others
15 that are very compelling that it has. Why should we
16 make the judgment, and not Congress, about the types and
17 forms of discrimination and the need to remedy them?

18 MR. REIN: May I answer that? Number one,
19 we are not looking at Alabama in isolation. We are
20 looking at Alabama relative to other sovereign States.
21 And coming to Justice Kennedy's point, the question is
22 has Alabama, even in isolation, and those other States
23 reached the point where they ought to be given a chance,
24 subject to Section 2, subject to cases brought directly
25 under the Fifteenth Amendment, to exercise their

1 sovereignty --

2 JUSTICE SOTOMAYOR: How many other States
3 have 240 successful Section 2 and Section 5 --

4 MR. REIN: Again -- Justice Sotomayor, I
5 could parse statistics, but we are not here to try
6 Alabama or Massachusetts or any other State. The
7 question is the validity of the formula. That's what
8 brings Alabama in.

9 If you look at Alabama, it has a number of
10 black legislators proportionate to the black population
11 of Alabama. It hasn't had a Section 5 rejection in a
12 long period.

13 I want to come to Justice Breyer's point
14 because I think that -- I think he's on a somewhat
15 different wavelength, which is isn't this a mere
16 continuation? Shouldn't the fact that we had it before
17 mean, well, let's just try a little bit more until
18 somebody is satisfied that the problem is cured?

19 JUSTICE BREYER: I had said don't change
20 horses. You renew what is in the past --

21 MR. REIN: Right.

22 JUSTICE BREYER: -- where it works, as long
23 as the problem isn't solved. Okay?

24 MR. REIN: Well, and I think the problem to
25 which the Voting Rights Act was addressed is solved.

1 You look at the registration, you look at the voting.
2 That problem is solved on an absolute, as well as, a
3 relative basis. So that's like saying if I detect that
4 there is a disease afoot in the population in 1965 and I
5 have a treatment, a radical treatment that may help cure
6 that disease, when it comes to 2005 and I see a new
7 disease or I think the old disease is gone, there is a
8 new one, why not apply the old treatment?

9 JUSTICE KAGAN: Well, Mr. Rein --

10 MR. REIN: I wouldn't --

11 JUSTICE KAGAN: -- that is the question,
12 isn't it? You said the problem has been solved. But
13 who gets to make that judgment really? Is it you, is it
14 the Court, or is it Congress?

15 MR. REIN: Well, it is certainly not me.

16 (Laughter.)

17 JUSTICE SCALIA: That's a good answer. I
18 was hoping you would say that.

19 MR. REIN: But I think the question is
20 Congress can examine it, Congress makes a record; it is
21 up to the Court to determine whether the problem indeed
22 has been solved and whether the new problem, if there is
23 one --

24 JUSTICE KAGAN: Well, that's a big, new
25 power that you are giving us, that we have the power now

1 to decide whether racial discrimination has been solved?
2 I did not think that that fell within our bailiwick.

3 MR. REIN: I did not claim that power,
4 Justice Kagan. What I said is, based on the record made
5 by the Congress, you have the power, and certainly it
6 was recognized in Northwest Austin, to determine whether
7 that record justifies the discrimination among --

8 JUSTICE BREYER: But there is this
9 difference, which I think is a key difference. You
10 refer to the problem as the problem identified by the
11 tool for picking out the States, which was literacy
12 tests, et cetera. But I suspect the problem was the
13 denial or abridgement by a State of the right to vote on
14 the basis of race and color. And that test was a way of
15 picking out places where that problem existed.

16 Now, if my version of the problem is the
17 problem, it certainly is not solved. If your version of
18 the problem, literacy tests, is the problem, well, you
19 have a much stronger case. So how, in your opinion, do
20 we decide what was the problem that Congress was
21 addressing in the Voting Rights Act?

22 MR. REIN: I think you look at Katzenbach
23 and you look at the evidence within the four corners of
24 the Voting Rights Act. It responds to limited
25 registration and voting as measured and the use of

1 devices.

2 The devices are gone. That problem has been
3 resolved by the Congress definitively. So it can't be
4 the basis for further -- further legislation.

5 I think what we are talking about here is
6 that Congress looks and says, well, we did solve that
7 problem. As everyone agrees, it's been very effective,
8 Section 5 has done its work. People are registering and
9 voting and, coming to Justice Scalia's point, Senators
10 who see that a very large group in the population has
11 politically wedded themselves to Section 5 are not going
12 to vote against it; it will do them no good.

13 And so I think, Justice Scalia, that
14 evidence that everybody votes for it would suggest some
15 of the efficacy of Section 5. You have a different
16 constituency from the constituency you had in 1964.

17 But coming to the point, then if you think
18 there is discrimination, you have to examine that
19 nationwide. They didn't look at some of the problems of
20 dilution and the like because they would have found them
21 all over the place in 1965. But they weren't responding
22 to that.

23 They were responding to an acute situation
24 where people could not register and vote. There was
25 intentional denial of the rights under the Fifteenth

1 Amendment.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 MR. REIN: Thank you.

4 CHIEF JUSTICE ROBERTS: Counsel.

5 The case is submitted.

6 (Whereupon, at 11:30 a.m., the case in the
7 above-entitled matter was submitted.)

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