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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 greatly 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 the old disease, limiting people's right to register and  
22 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 described 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 is  
9 what is being done, that seemed to me equally improper.  
10 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 a 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 measure.

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  
2 with 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  
12 equality of the States invoked by South Carolina does  
13 not bar this approach, for that doctrine applies only to  
14 the terms upon which States are admitted to the Union  
15 and 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 Congress in  
4 proportionality asked 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 Fifteenth  
19 it violates the Fourteenth. And the Court's precedent  
20 under the Fourteenth Amendment is very clear that the  
21 City of Boerne congruence and proportionality test  
22 applies. The Court has applied it, but I don't think we  
23 -- we wouldn't really need to get that far because we  
24 believe that if you examine it under McCullough, just as  
25 they did in Katzenbach, it would fail as well.

1 If there are no further questions.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

6 General Verrilli?

7 ORAL ARGUMENTS OF DONALD B. VERRILLI, JR.,  
8 ON BEHALF OF THE FEDERAL RESPONDENT

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

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

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

25 Now, when Congress faced the question

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

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

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

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

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

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

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

1 the Voting Rights Act. And it has always been true that  
2 only a tiny fraction of submissions result in  
3 objections.

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

12 GENERAL VERRILLI: No.

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

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

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

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

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

25 GENERAL VERRILLI: But they are related.

1 They're related.

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

5 GENERAL VERRILLI: I do not.

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

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

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

17 GENERAL VERRILLI: I do not know that.

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

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



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

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

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

14 JUSTICE ALITO: There's no question --

15 CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

1 country should be covered based on a formula that is  
2 grounded in up-to-date statistics.

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

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

1 mechanism and it does have a bailout mechanism which  
2 allows for tailoring over time.

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

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

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

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

24 JUSTICE GINSBURG: General Verrilli --

25 JUSTICE BREYER: What the question --

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

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

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

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

25 JUSTICE KENNEDY: Well, I -- I do think the

1 evidence is very clear that Section -- that individual  
2 suits under Section 2 type litigation were just  
3 insufficient and that Section 5 was utterly necessary in  
4 1965. No doubt about that.

5 GENERAL VERRILLI: And I think it remains --

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

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

25 Even with respect to the big ticket items,

1 the big redistrictings, I think the logic Katzenbach  
2 holds in that those suits are extremely expensive and  
3 they typically result in after-the-fact litigation.

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

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

23 JUSTICE KENNEDY: Can you tell us how many  
24 attorneys and how many staff in the Justice Department  
25 are involved in the preclearance process? Is it 5 or

1 15?

2 GENERAL VERRILLI: It's a -- it's a very  
3 substantial number and --

4 JUSTICE KENNEDY: Well, what does that mean?

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

7 JUSTICE SCALIA: Hundreds? Hundreds?  
8 Dozens? What?

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

13 JUSTICE SCALIA: Right.

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

21 And I'll point out there's a certain irony  
22 in the argument that what -- that what Petitioner wants  
23 is to substitute Section 2 litigation of that kind for  
24 the Section 5 process, which is much more efficient and  
25 much more -- and much speedier, much more efficient and

1 much more cost effective.

2 JUSTICE ALITO: Then why shouldn't it apply  
3 everywhere in the country?

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

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

17 GENERAL VERRILLI: I think the combination  
18 of the history, which I concede is not dispositive, but  
19 is relevant, because it suggests caution is in order and  
20 that's a reasonable judgment on the part of Congress,  
21 the combination of that history and the fact that there  
22 is a very significant disproportion in successful  
23 Section 2 results in the covered jurisdictions as  
24 compared to the rest of the country, that Congress was  
25 justified in concluding that there -- that it -- there



1 was reason to think that there continued to be a serious  
2 enough differential problem to justify --

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

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

21 CHIEF JUSTICE ROBERTS: General, is it -- is  
22 it the government's submission that the citizens in the  
23 South are more racist than citizens in the North?

24 GENERAL VERRILLI: It is not, and I do not  
25 know the answer to that, Your Honor, but I do think it

1 was reasonable for Congress --

2 CHIEF JUSTICE ROBERTS: Well, once you said  
3 it is not, and you don't know the answer to it.

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

14 CHIEF JUSTICE ROBERTS: A need to do what?

15 GENERAL VERRILLI: To maintain the deterrent  
16 and constraining effect of the Section 5 preclearance  
17 process in the covered jurisdictions, and that --

18 CHIEF JUSTICE ROBERTS: And not -- and not  
19 impose it on everyone else?

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

23 JUSTICE BREYER: So what's the answer? I  
24 just want to be sure that I hear your answer to an  
25 allegation, argument, an excellent argument, that's been

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

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

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

21 All right. Now, I don't know how  
22 satisfactory that answer is. I want to know what your  
23 response is as to whether we should -- if he's right --  
24 if he's right that there is an irrationality involved if  
25 you were writing it today in treating State A, which is

1 not too discriminatorily worse than apparently  
2 Massachusetts or something. All right? So -- so if  
3 that's true, do we respond State by State? Or is this a  
4 matter we should consider not as applied, but on its  
5 face?

6 I just want to hear what you think about  
7 that.

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

22 CHIEF JUSTICE ROBERTS: I don't -- I don't  
23 understand the distinction between facial and as-applied  
24 when you are talking about a formula. As applied to  
25 Shelby County, they are covered because of the formula,

1 so they're challenging the formula as applied to them.  
2 And we've heard some discussion. I'm not even sure what  
3 your position is on the formula. Is the formula  
4 congruent and proportional today, or do you have this  
5 reverse engineering argument?

6 GENERAL VERRILLI: Congress's decision in  
7 2006 to reenact the geographic coverage was congruent  
8 and proportional because Congress had evidence --

9 CHIEF JUSTICE ROBERTS: To -- to the problem  
10 or -- or was the formula congruent and proportional to  
11 the remedy?

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

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

18 GENERAL VERRILLI: -- were true even back in  
19 City of Rome, because of course the tests and devices  
20 were eliminated by the statute, so no -- no jurisdiction  
21 could have tests and devices. And City of Rome itself  
22 said that the registration problems had been very  
23 substantially ameliorated by then, but there were  
24 additional kinds of problems. The ascent of these  
25 second-generation problems was true in City of Rome as a

1 justification that made it congruent and proportional.

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

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

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

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

24           And this last enactment, not a single vote  
25 in the Senate against it. And the House is pretty much

1 the same. Now, I don't think that's attributable to the  
2 fact that it is so much clearer now that we need this.  
3 I think it is attributable, very likely attributable, to  
4 a phenomenon that is called perpetuation of racial  
5 entitlement. It's been written about. Whenever a  
6 society adopts racial entitlements, it is very difficult  
7 to get out of them through the normal political  
8 processes.

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

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

1                   Even the name of it is wonderful: The  
2 Voting Rights Act. Who is going to vote against that in  
3 the future?

4                   CHIEF JUSTICE ROBERTS: You have an extra 5  
5 minutes.

6                   GENERAL VERRILLI: Thank you. I may need it  
7 for that question.

8                   (Laughter.)

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

22                   So with respect to the constitutional grant  
23 of power, we do think it is a grant of power to Congress  
24 to make these judgments, now of course subject to review  
25 by this Court under the standard of Northwest Austin,



1 which we agree is an appropriate standard. That's the  
2 first point.

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

9           JUSTICE SCALIA: We looked behind it in  
10 Boerne. I'm not talking about dismissing it. I'm --  
11 I'm talking about looking at it to see whether it makes  
12 any sense.

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

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

9                   JUSTICE KENNEDY: Do you think the  
10 preclearance device could be enacted for the entire  
11 United States.

12                   GENERAL VERRILLI: I don't think there is a  
13 record that would substantiate that. But I do think  
14 Congress was --

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

20                   GENERAL VERRILLI: And we agree with that,  
21 we respect that, we acknowledge that Northwest  
22 Austin requires an inquiry into that.

23                   JUSTICE KENNEDY: But if -- if Alabama wants  
24 to have monuments to the heros of the Civil Rights  
25 Movement, if it wants to acknowledge the wrongs of its

1 past, is it better off doing that if it's an own  
2 independent sovereign or if it's under the trusteeship  
3 of the United States Government?

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

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

22 JUSTICE ALITO: Before your time expires, I  
23 would like to make sure I understand your position on  
24 this as-applied versus facial issue. Is it your  
25 position that this would be a different case if it were

1 brought by, let's say, a county in Alaska as opposed to  
2 Shelby County, Alabama?

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

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

16 CHIEF JUSTICE ROBERTS: Thank you, General.

17 GENERAL VERRILLI: Thank you,  
18 Mr. Chief Justice.

19 CHIEF JUSTICE ROBERTS: Mr. Adegbile.

20 ORAL ARGUMENT BY DEBO P. ADEGBILE

21 ON BEHALF OF RESPONDENTS BOBBY PIERSON, ET AL.

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

24 The extensive record supporting the renewal of  
25 the preclearance provisions of the Voting Rights Act

1 illustrates two essential points about the nature and  
2 continuing aspects of voting discrimination in the  
3 affected areas. The first speaks to this question of  
4 whether Section 2 was adequate standing alone.

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

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

13 MR. ADEGBILE: Justice Scalia --

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

18 MR. ADEGBILE: Fair enough. It's beyond a  
19 question of being true in any place. Our brief shows  
20 that specifically in the covered jurisdictions, there is  
21 a pattern, a demonstrated pattern of Section 2 and 5  
22 being used in tandem whereas in other jurisdictions,  
23 most of the Section 2 cases are one-off examples.

24 We point to a whole number of examples.  
25 Take for example Selma, Alabama. Selma, Alabama in the

1 1990s, not in the 1960s but in the 1990s, had a series  
2 of objections and Section 2 activity and observers all  
3 that were necessary to continue to give effect to the  
4 minority inclusion principle that Section 5 was passed  
5 to vindicate in 1965.

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

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

20 After this Court ruled that the  
21 redistricting plan after the 2000 round of redistricting  
22 bore the mark of intentional discrimination, in the  
23 remedial election, the State of Texas tried to shorten  
24 and constrain the early voting period for purposes of  
25 denying the Latino community of the opportunity to have

1 the benefits of the ruling.

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

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

18 CHIEF JUSTICE ROBERTS: Do you agree with  
19 the reverse engineering argument that the United States  
20 has made today?

21 MR. ADEGBILE: I would frame it slightly  
22 differently, Chief Justice Roberts. My understanding is  
23 that the history bears some importance in the context of  
24 the reauthorizations, but that Congress in -- in none of  
25 the reauthorizations stopped with the historical

1 backward look. It takes cognizance of the experience,  
2 but it also looks to see what the experience has been on  
3 the ground. And what Congress saw in 2006 is that there  
4 was a surprisingly high number of continuing objections  
5 after the 1982 reauthorization period and that --

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

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

17 CHIEF JUSTICE ROBERTS: Well, we also said  
18 congruent and proportional.

19 MR. ADEGBILE: Indeed. Indeed. I don't  
20 understand those things to be unrelated. I think that  
21 they're part of the same, same test, same evaluative  
22 mechanism. The idea is, is Congress -- the first  
23 question is, is Congress remedying something or is it  
24 creating a new right. That's essentially what Boerne is  
25 getting to, is Congress trying to go -- do an



1 end-around, a back doorway to expand the Constitution.  
2 We know in this area Congress is trying to implement the  
3 Fifteenth Amendment and the history tells us something  
4 about that. But specifically to the question --

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

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

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

22 JUSTICE ALITO: Well, Section 5 -- the  
23 Section 5 activity may show that there's a problem in  
24 the jurisdictions covered by Section 5, but it says  
25 nothing about the presence or absence of similar

1 problems in noncovered jurisdictions, isn't that right?

2 MR. ADEGBILE: Absolutely, Justice Alito.

3 JUSTICE ALITO: All right.

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

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

19 JUSTICE SCALIA: All of the noncovered  
20 states are worse in that regard than the nine covered  
21 states; is that correct?

22 MR. ADEGBILE: Justice Scalia --

23 JUSTICE SCALIA: Every -- every one of them  
24 is worse.

25 MR. ADEGBILE: Justice Scalia, it's -- it's

1 a fair question, and -- and I was speaking to the  
2 aggregate --

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

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

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

24 So therefore Congress in 2005 looks back and  
25 says don't change horses in the middle of the stream,

1 because we still have a ways to go.

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

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

17 Now, I would like you to address that.

18 MR. ADEGBILE: Fair enough, Justice Breyer.  
19 I think that the -- what the evidence shows before  
20 Congress is that it hasn't run out yet. The whole  
21 purpose of this act is that we made progress and  
22 Congress recognized the progress that we made. And, for  
23 example, they took away the examiner provision which was  
24 designed to address the registration problem.

25 In terms of when we are there, I think it

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

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

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

20           CHIEF JUSTICE ROBERTS: Have there been  
21 episodes, egregious episodes of the kind you are talking  
22 about in States that are not covered?

23           MR. ADEGBILE: Absolutely, Chief Justice  
24 Roberts.

25           CHIEF JUSTICE ROBERTS: Well, then it

1 doesn't seem to help you make the point that the  
2 differential between covered and noncovered continues to  
3 be justified.

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

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

17 To be fair, this statute cannot go on  
18 forever, but our experience teaches that six amendments  
19 to the Constitution have had to be passed to ensure  
20 safeguards for the right to vote, and there are many  
21 Federal laws. They protect uniform voters, some protect  
22 eligible voters who have not had the opportunity yet to  
23 register. But together these protections are important  
24 because our right to vote is what the United States  
25 Constitution is about.

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

3 REBUTTAL ARGUMENT OF BERT W. REIN

4 ON BEHALF OF THE PETITIONER

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

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

8 MR. REIN: No. The Fifteenth Amendment  
9 protects the right of all to vote and --

10 JUSTICE SOTOMAYOR: I asked a different  
11 question. Do you think Section 5 was voted for because  
12 it was a racial entitlement?

13 MR. REIN: Well, Congress --

14 JUSTICE SOTOMAYOR: Do you think there was  
15 no basis to find that --

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

22 If I might say, I think that  
23 Justice Breyer --

24 JUSTICE SOTOMAYOR: Do you think that racial  
25 discrimination in voting has ended, that there is none

1 anywhere?

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

8 JUSTICE SOTOMAYOR: But shouldn't --

9 MR. REIN: We are not trying --

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

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

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



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

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

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

15 JUSTICE BREYER: Don't change horses. You  
16 renew what is in the past --

17 MR. REIN: Right.

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

20 MR. REIN: Well, and I think the problem to  
21 which the Voting Rights Act was addressed is solved.  
22 You look at the registration, you look at the voting.  
23 That problem is solved on an absolute as well as a  
24 relative basis. So that's like saying if I detect that  
25 there is a disease afoot in the population in 1965 and I

1 have a treatment, a radical treatment that may help cure  
2 that disease, when it comes to 2005 and I see a new  
3 disease or I think the old disease is gone, there is a  
4 new one, why not apply the old treatment?

5 JUSTICE KAGAN: Well, Mr. Rein --

6 MR. REIN: I wouldn't --

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

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

12 (Laughter.)

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

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

20 JUSTICE KAGAN: Well, that's a big, new  
21 power that you are giving us, that we have the power now  
22 to decide whether racial discrimination has been solved?  
23 I did not think that that fell within our bailiwick.

24 MR. REIN: I did not claim that power,  
25 Justice Kagan. What I said is, based on the record made

1 by the Congress, you have the power, and certainly it  
2 was recognized in Northwest Austin, to determine whether  
3 that record justifies the discrimination among --

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

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

18 MR. REIN: I think you look at Katzenbach  
19 and you look at the evidence within the four corners of  
20 the Voting Rights Act. It responds to limited  
21 registration and voting as measured and the use of  
22 devices.

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

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

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

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

19           They were responding to an acute situation  
20 where people could not register and vote. There was  
21 intentional denial of the rights under the Fifteenth  
22 Amendment.

23           CHIEF JUSTICE ROBERTS: Thank you, counsel.

24           MR. REIN: Thank you.

25           CHIEF JUSTICE ROBERTS: Counsel.

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The case is submitted.

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

<b>A</b>				
<b>ability</b> 38:8	54:11	68:3	<b>analysis</b> 23:19	<b>argue</b> 21:1 51:11
<b>able</b> 10:7 44:12	<b>acute</b> 68:19	<b>aimed</b> 60:4,6	49:8	<b>arguing</b> 64:3
52:9 55:16	<b>adapted</b> 34:15	<b>al</b> 1:7,22 2:11	<b>anecdotal</b> 42:12	<b>argument</b> 1:13
<b>aborigines</b> 61:13	<b>additional</b> 45:24	52:21	<b>answer</b> 21:24,25	2:2,5,8,12 3:3,7
<b>above-entitled</b>	<b>address</b> 7:6	<b>Alabama</b> 1:3 5:1	39:14 41:25	16:25 21:10
1:12 69:3	17:20 28:4 55:7	5:13,16,19,21	42:3,6,23,24	31:13,15,18,24
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