

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SHELBY COUNTY, ALABAMA,	.	
	.	
Plaintiff,	.	
	.	CA No. 10-0651 (JDB)
v.	.	
	.	
ERIC H. HOLDER, JR.,	.	Washington, D.C.
	.	Tuesday, February 2, 2011
Defendant.	.	9:30 a.m.
	.	
. . . . .	.	

TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE JOHN D. BATES  
UNITED STATES DISTRICT JUDGE

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

THE DEPUTY CLERK: Your Honor, we have civil action 10-651, Shelby County, Alabama versus Eric Holder, et al. I would ask that counsel please approach the lectern, identify yourself and those at your respective tables, starting with the plaintiffs.

MR. REIN: Good morning, Your Honor. I am Bert Rein. I'm one of the counsel for Shelby County, and with me at counsel table are Will Consovoy, Tom McCarthy, and Frank Ellis, who's the county attorney of Shelby County.

THE COURT: And will you be presenting the entirety of the argument?

MR. REIN: No, Your Honor. As we advised chambers before, I'm going to deal with two issues and Mr. Consovoy is going to deal with a separate issue. But we've divided that time and we'll stay within those boundaries.

THE COURT: Thank you.

MR. BAGENSTOS: Your Honor, I'm Samuel Bagenstos. I represent the United States. Along with me at counsel table, also representing the United States, is Richard Dellheim. I'll let the intervenors' counsel introduce themselves.

MR. GREENBAUM: Good morning, Your Honor. Jon Greenbaum for defendant-intervenor Bobby Lee Harris, and with me just behind counsel table are Robert Kengle and Mark Posner.

MS. CLARKE: Good morning, Your Honor. Kristen

1 Clarke, NAACP legal defense fund, on behalf of the Cunningham  
2 intervenors. And with me at counsel table is Debo Adegbile.

3 MR. MCDONALD: I'm Laughlin McDonald, Your Honor, and  
4 I represent the Pierson defendant-intervenors.

5 THE COURT: All right. Well, good morning to  
6 everyone. The introductions are almost as long as the briefs,  
7 which are almost as long as the legislative record. We've got a  
8 fair amount to do today. I don't have any particular opening  
9 instructions other than to ask that while I know that you're  
10 going to have lots of references to the legislative record,  
11 because it is essential here, please be sure that we do cover  
12 the -- they're not all legal issues, but some of the issues in  
13 the case, including the proper analytical standard or framework,  
14 be it the rationality test or the congruence and proportionality  
15 test. Also what evidence is appropriate for the Congress and  
16 hence the Court to consider, the types of evidence. I'd like  
17 you to touch on the 4(b) coverage formula and also on the length  
18 of the extension. With that, Mr. Rein.

19 MR. REIN: Thank you, Your Honor. And good morning.

20 THE COURT: Good morning.

21 MR. REIN: I'll explain that I'll be addressing two of  
22 the issues that you just mentioned quite specifically, and that  
23 is the standard to be used by this court in making a  
24 determination of constitutionality of the extended VRA, and also  
25 talk a little bit about preclearance and whether the record

1 compiled by the Congress was sufficient to justify the extension  
2 of preclearance for another 25 years.

3 Mr. Consovoy is going to focus specifically on the coverage  
4 formula and whether that coverage formula remains viable under  
5 the record compiled by the Congress in this go-round. If that's  
6 acceptable, we'll just proceed.

7 THE COURT: Please do so.

8 MR. REIN: I'd just like to make a couple of threshold  
9 points. The Court will remember the prior hearing in which we  
10 stated that this challenge is on its face, and you instructed us  
11 to adhere to that guidance, and we have. I think it's fair to  
12 say that we presented this challenge squarely as to whether the  
13 legislative record, when properly judged under the appropriate  
14 standard, requires a finding that the Congress has exceeded the  
15 powers delegated under Section 2 of the Fifteenth Amendment.

16 So we're not asking for anything else, and we'll reiterate  
17 that the information that we submitted specific to Shelby County  
18 was for the purpose of establishing its standing and explaining  
19 why it was not seeking bailout, and it continues to be in that  
20 posture.

21 Now, I think that we have to focus first on the Supreme  
22 Court's decision in the case that's popularly known as NAMUDNO,  
23 called Northwest Austin by Mr. Consovoy so he'll avoid saying  
24 "MUNDO," and look at how the Court, which did not decide the  
25 issues which you've raised, framed them, because I think the

1 Court has given us guideposts that would help to assess those  
2 issues.

3 First of all, in NAMUDNO, the Court highlighted -- and this  
4 is eight members of the Court, and I'll leave Justice Thomas to  
5 the side because his opinion is separate. But the Court  
6 highlighted the unique and intrusive remedy, the nature of the  
7 preclearance remedy, and pointed out that it was justified  
8 historically because exceptional conditions could justify  
9 legislative measures not otherwise appropriate.

10 So it's pointed us to the unique nature of the remedial  
11 scheme in the Voting Rights Act. The Voting Rights Act differs  
12 from conventional enforcement of constitutional guarantees which  
13 are normally done by adding remedies to be applied in a judicial  
14 process in which a court makes findings of violation and then  
15 remedy is applied. And that of course was the historic  
16 framework until the Voting Rights Act was passed. Civil rights  
17 legislation relied upon judicial findings and judicial remedies.  
18 And it was the alleged ineffectiveness of those remedies that  
19 led Congress to go further.

20 But the Court here has recognized that that is an exception  
21 to our normal constitutional process and that it requires a  
22 finding of an exceptional circumstance. And I think that's  
23 something that we need to bear in mind.

24 The Court also --

25 THE COURT: The Supreme Court has found those

1 exceptional circumstances every time it's looked at the Voting  
2 Rights Act.

3 MR. REIN: And we can discuss those cases, and we  
4 intend to. I think what we would say is that the Superior Court  
5 found those exceptional circumstances in South Carolina, the  
6 Katzenbach case, and it found that Congress had appropriately  
7 identified them and had moved to a remedy which was appropriate  
8 in those circumstances. That's the word of the Fifteenth  
9 Amendment.

10 I think that if you look at the remaining cases, three of  
11 them -- or two of them, so we have three together, fall within  
12 that initial period. That is to say, a first determination, the  
13 Georgia case followed on it and really didn't take much of a  
14 hard look. Just said Katzenbach is still operative. And City  
15 of Rome, at least in our view, largely found that with 95 years  
16 of ingenious defiance, it was unlikely to be cured within the  
17 period of time that Congress had originally specified, which is  
18 five years, five more and then seven, and that there was warrant  
19 under Katzenbach for continuing the remedy in effect until the  
20 job had been done.

21 And then of course we've had further extensions. I think  
22 Lopez is a different case because I'm not sure Lopez really went  
23 into any detail on the constitutional validity. It simply  
24 assumed it and was largely a case of breadth of application and  
25 whether California could be accountable when it was not covered

1 but had a covered jurisdiction within it whose practices it was  
2 affecting. So I think we do agree, and we're not challenging  
3 Katzenbach --

4 THE COURT: So what you want to do is guide me with  
5 the language from the recent Supreme Court decision that didn't  
6 reach the constitutional issue, but set aside the Supreme Court  
7 cases that did reach the constitutional issue.

8 MR. REIN: Well, it's not fair to say set aside the  
9 cases, because what it did was recognize that current needs are  
10 what governs, so that those cases may be very good law, and  
11 we're not challenging the propriety of those determinations, but  
12 they were based on a different record.

13 THE COURT: Absolutely.

14 MR. REIN: So I don't think the Supreme Court was  
15 telling us they're no good. The Supreme Court's saying, well,  
16 they teach you something, look again and see if the  
17 circumstances present today warrant the same kind of intrusive  
18 relief.

19 And I'm not going further than that. I'm not claiming that  
20 the Court decided anything. It was careful not to decide  
21 anything. And that's why I said this is guidance as to how to  
22 address it, not necessarily resolution.

23 THE COURT: But the Northwest Austin majority doesn't  
24 help us in choosing the rationality versus the congruence and  
25 proportionality test, does it?

1 MR. REIN: It specifically says that -- well, it does  
2 say -- flatly says we're not deciding today.

3 THE COURT: That's right.

4 MR. REIN: But it recognizes that there is at least a  
5 bona fide question. I mean, as the government would have it,  
6 there's no question, it's all rationality, and there's no  
7 argument for the other side.

8 THE COURT: Questions are presented by briefing, and  
9 the briefing obviously presented that question in Northwest  
10 Austin and it presents it here today.

11 MR. REIN: And the Court went on to say there were  
12 serious issues whichever standard you adopted. And the Court  
13 didn't really indicate whether those standards -- which the  
14 briefing has treated as a dichotomy, it's either/or -- really  
15 represented the best view of the evolution of the case law. And  
16 we would say to you that those alleged differences are smaller  
17 than one would think when you use the labels, to wit, in our  
18 view, what Boerne did was really to refine an analytical  
19 framework that had developed through Katzenbach and Rome and  
20 more precisely pose the questions that were actually addressed  
21 in those cases.

22 So Boerne is a more rigorous framework, it's a more  
23 structured framework, but it doesn't really ask questions  
24 different from the ones the Court answered in Katzenbach and its  
25 successors and certainly go into that.

1 THE COURT: There may not be a great deal of  
2 difference between the two tests, but the parties have spent a  
3 great deal of effort and paper on choosing one test or another.  
4 And which test are you advocating and why?

5 MR. REIN: I think we believe that Boerne being the  
6 more recent standard is the best explication. And what it does  
7 is it says let's focus on three things that matter. One,  
8 Congress is presumably using an enforcement power. That's the  
9 word of Section 2. It's to enforce.

10 THE COURT: Whether it's under the Fifteenth  
11 Amendment, Section 2, or the Fourteenth Amendment, Section 5,  
12 it's an enforcement power.

13 MR. REIN: Correct. And enforcement has a  
14 significance --

15 THE COURT: Indeed the language is almost identical.

16 MR. REIN: Yes. And in fact it was pointed out in  
17 many cases, and I think it's fair to say it's hard to find a  
18 difference based on language. And to enforce really suggests  
19 that you've targeted some kind of constitutional violation,  
20 because what you're enforcing by the language, by appropriate  
21 legislation, you are enforcing that the rights, the guarantees  
22 of that amendment, against violations thereof.

23 And I think that Katzenbach goes through that. Katzenbach  
24 finds that there's a horrendous violation, a continuing  
25 violation of people's -- of the ability to vote, to register to

1 vote. That's what they called primary factors. But Katzenbach  
2 looks at the world and says something is grossly wrong. The  
3 right to vote exists in name but not in fact. And the  
4 statistics are frightening.

5 And clearly Katzenbach is the tip of the iceberg. And why  
6 I say that is if you think about the time of Katzenbach, the  
7 Court identifies devices that could be used to block minority  
8 registration, but devices are one part of the problem. There's  
9 much more to it. There was physical intimidation, there was  
10 violence. Those low numbers were not just the product of  
11 devices. They were assisted by devices when somebody actually  
12 managed to get to the registration or to the polling booth.

13 But the climate in the country was totally different; it  
14 was a crisis, and the right to vote was suppressed. There's no  
15 doubt about it. The core -- what the government would call the  
16 core right under the Fifteenth Amendment, the right to register  
17 and go into the ballot and use the ballot box, was not  
18 effective, and in the jurisdictions that Congress singled out  
19 for remedial treatment.

20 THE COURT: Well, let's get down to this issue, the  
21 Fifteenth versus Fourteenth Amendment issue. Is there any case  
22 that you're aware of that you can cite to me where the  
23 congruence and proportionality test that City of Boerne -- is  
24 how I usually say it -- test was applied where the Fifteenth  
25 Amendment enforcement power was at issue? Any case?

1 MR. REIN: I don't think we have an express case on  
2 that, Your Honor. We didn't claim that, but there's been really  
3 no test of it until the argument started in NAMUDNO, and I think  
4 the reason this court said it's an open issue is because it  
5 hasn't been --

6 THE COURT: Well, Lopez arguably was a test of it  
7 because Lopez actually came down about two years after City of  
8 Boerne.

9 MR. REIN: Right. But I think if we look at the --

10 THE COURT: And they favorably cited Katzenbach,  
11 favorably cited City of Rome.

12 MR. REIN: Right. I understand that. I think if you  
13 look at Lopez and you look at the briefs, this issue was not  
14 squarely raised by the parties, and Lopez had a somewhat  
15 different dimension because the State of California wasn't  
16 covered, and so you have --

17 THE COURT: I understand it was a different context.

18 MR. REIN: So you have a very different analytical  
19 framework in Lopez, and the Court's basically answering the  
20 question what do you do with an uncovered state affecting the  
21 way voting takes place --

22 THE COURT: But you still have a situation where, in  
23 every case involving the enforcement power under Section 2 of  
24 the Fifteenth Amendment, the rationality test has been used.  
25 The City of Boerne line of cases, the congruence and

1 proportionality test has arisen in cases dealing with the  
2 Fourteenth Amendment. Indeed, in large part in cases not  
3 dealing with race issues under the Fourteenth Amendment. And in  
4 none of those cases, although there's favorable citation to the  
5 Voting Rights Act line of cases, in none of those cases do any  
6 of the justices give a hint of an indication that, whoops, maybe  
7 the test used in those cases is the wrong test. Maybe  
8 rationality is not the right test.

9 Of course, you have Justice Scalia totally abandoning the  
10 congruence and proportionality test and saying he's not going to  
11 apply that in any setting.

12 MR. REIN: But of course Justice Scalia is one  
13 justice, and it would be the same as saying Justice Thomas  
14 thinks the Voting Rights Act is unconstitutional in NAMUDNO.

15 THE COURT: Fair point, but we've got a lot of  
16 justices who haven't indicated any adherence to applying the  
17 congruence and proportionality test when the Fifteenth Amendment  
18 is involved.

19 MR. REIN: I understand that, and I don't think we  
20 have argued to the contrary, and that's why we believe that the  
21 Court was willing to say this is an open issue in NAMUDNO, but I  
22 think I can give you reasons why it ought to apply.

23 One preliminary matter is that of course the government  
24 says that the Voting Rights Act, especially under so-called  
25 secondary considerations, incorporates concepts from the

1 Fourteenth Amendment. That is to say -- and this is important,  
2 and the reason it's important is this. There are two aspects to  
3 the remedy in the Voting Rights Act. One is taking Section 2,  
4 for example, pretty square enforcement of the guarantee of the  
5 right to vote itself. The idea being we can identify the  
6 constitutional violation and we can enforce and create new  
7 remedies for that violation.

8 One of the cases that Justice Scalia wrote, in the Georgia  
9 case, Georgia v. U.S., really makes that principle very  
10 apparent, because what he says is where someone alleges a direct  
11 violation of the Eighth Amendment, I don't have the trouble that  
12 I have in cases like Boerne with the congruence and  
13 proportionality. I don't have to get there. Because you're  
14 directly enforcing against a violation by standard judicial  
15 means.

16 So to the extent that the VRA was looking at direct  
17 violations -- I'm suppressing the right to vote, that has one  
18 dimension, it's the Fifteenth Amendment. Now, when you get into  
19 other restrictions, like dilution restrictions, or restrictions  
20 on tests that are not on their face unconstitutional, which has  
21 been a lot of the litigation and concern starting right after  
22 Katzenbach, you're in a different dimension, and the reason  
23 you're in a different dimension is because if those provisions  
24 are strictly remedial --

25 THE COURT: But in those cases you're referring to

1 after Katzenbach, the rationality test was still what was  
2 applied. And indeed, you have cases as clear as the other  
3 Katzenbach case, Katzenbach v. Morgan, which was a Fourteenth  
4 Amendment Section 5 case in which rationality was applied.

5 MR. REIN: Well, and I think -- and all I'm  
6 indicating, Your Honor, is that to the extent that the VRA is  
7 supported by the Fourteenth as well as the Fifteenth  
8 Amendment --

9 THE COURT: Let's assume it is. Therefore what?

10 MR. REIN: Which is the government's argument, then of  
11 course you can't say that we don't have direct precedent because  
12 Boerne is an interpretation of how the Fourteenth Amendment is  
13 to be evaluated, Section 5 thereof. And it's pretty clear, at  
14 least on its language, that you really can't distinguish from a  
15 language or contemporaneity -- if I can say that right -- point  
16 of view between Section 5 and Section 2.

17 THE COURT: So if we have a hybrid situation where you  
18 have an enforcement power with the Voting Rights Act that  
19 involved both the Fifteenth Amendment Section 2 and the  
20 Fourteenth Amendment Section 5, it's your view that that should  
21 push us towards the congruence and proportionality test.

22 MR. REIN: Well, because largely, if you look at the  
23 way Congress attempted to justify the continuation, it really  
24 doesn't go to the primary factor, which is suppression of the  
25 right to vote, lack of registration, lack of voting access,

1 turnout.

2 THE COURT: Why does that primary factor matter so  
3 much to you? The language of the Fifteenth Amendment does not  
4 distinguish, does it? It uses two terms, the second of which is  
5 abridge, which means to diminish or dilute. So why -- what is  
6 this primary issue that --

7 MR. REIN: Certainly this is language that has been  
8 used by all parties to the case, because I think there's some  
9 lack of clarity in the word "abridged." "Deny" means you can't  
10 vote. "Abridge" can be looked at in various ways. One way to  
11 abridge, for example, is you can vote in certain elections, but  
12 you can't vote in others. You can't be in a white primary.  
13 That would abridge the right to vote.

14 I think there's an argument that it has a sweeping meaning  
15 and it says anything that might affect the effectiveness of the  
16 vote is somehow an abridgment. But then --

17 THE COURT: All right. So?

18 MR. REIN: Well, I think that that's probably not a  
19 fair reading. I don't think we have any history of the  
20 amendment that would suggest that abridgment goes that far. And  
21 that is why the government has said what you're incorporating  
22 concepts under the Fourteenth Amendment which deals with the  
23 weight of the vote, and has been the framework for litigation  
24 over the weighting of the vote.

25 So I think that -- and this is probably more technical

1 argument than I think we've made in our briefs, but to the  
2 extent that the VRA provisions are justified under the  
3 Fourteenth Amendment -- and I think that makes a difference,  
4 there is direct precedent, Boerne is the governing analytical  
5 framework. But if I looked at Katzenbach independently, the  
6 so-called rational basis, I think one could say the Court did  
7 exactly what Boerne was talking about, and that's why the Court  
8 in Boerne was able to rely on Katzenbach.

9 The Court identified what it considered to be a huge gap in  
10 the constitutional regime, a square violation of the right to  
11 vote, and didn't have to get to abridgment. It looked for a  
12 pattern and it said in the jurisdictions we're covering it's not  
13 just random; it's a historic pattern, there's ingenious  
14 defiance, there's a serious and continuing problem that needs to  
15 be cured, and it calls for a form of action more effective than  
16 what has gone before.

17 So in that sense the Court has determined in Katzenbach  
18 this remedy, which is clearly controversial, unusual, not in  
19 harmony with the usual precepts of the federal system, and  
20 actually causes Justice Black to dissent, saying it's too far,  
21 it goes beyond what the Constitution ever contemplated in the  
22 compact between the states -- but that remedy is in fact a  
23 necessary remedy for what we've experienced and what is likely  
24 to go on in the absence of some direct federal control. That's  
25 the holding of Katzenbach.

1 THE COURT: The problem I have with this reliance on  
2 Katzenbach and the hybrid argument to steer us towards the City  
3 of Boerne test is that this is a Fifteenth Amendment case at its  
4 core, is it not?

5 MR. REIN: Well, I think that it's a Voting Rights  
6 Act. One would assume that this is a Fifteenth Amendment case  
7 at its core.

8 THE COURT: And for Fifteenth Amendment cases, the  
9 Supreme Court has consistently applied the rationality test, has  
10 it not?

11 MR. REIN: Well, I don't want to characterize Lopez  
12 that way because Lopez is not a detailed explanation in any  
13 sense.

14 THE COURT: It certainly didn't apply any other test,  
15 did it? It relied, cited Katzenbach, City of Rome. It didn't  
16 say a lot, but --

17 MR. REIN: I think the premise of the case was there's  
18 a valid VRA in effect. The question is whether it should be  
19 interpreted to cover the actions of a noncovered state that  
20 affect a covered jurisdiction. It's a central issue in Lopez,  
21 and I think that it could have been pushed harder on the  
22 question, well, if you do reach a noncovered state remedially  
23 and affect its actions, albeit as focused on the single  
24 jurisdiction, does that form of remedy so depart from the  
25 constitutional framework that one can say, well, let's test that

1 and see whether that is congruent and proportional to the  
2 problem. I think it would have survived on that as well,  
3 Your Honor.

4 THE COURT: But the focus on Lopez is really getting  
5 me off of my question. The other Voting Rights Act cases  
6 certainly --

7 MR. REIN: Yes. And the earlier Voting Rights Act  
8 cases --

9 THE COURT: -- use Fifteenth Amendment.

10 MR. REIN: -- are of a piece. And I think they're of  
11 a piece in that --

12 THE COURT: Let me go on with my question.

13 MR. REIN: Okay.

14 THE COURT: That's an observation. And looking back  
15 at Katzenbach, Katzenbach puts some emphasis on its observation  
16 that Section 2 of the Fifteenth Amendment was indicative of the  
17 intent of Congress, that Congress, not the courts, would be  
18 chiefly responsible for implementing the rights that were  
19 created in Section 1 of the Fifteenth Amendment.

20 Doesn't that also steer us towards a rationality test? If  
21 Congress is to be chiefly responsible, doesn't that almost by  
22 definition carry a deference that would lead us to the  
23 rationality test?

24 MR. REIN: I think the reason for Boerne needs to be  
25 explained, and I think that will help respond to your question.

1 What Boerne did was say look, Congress is responsible, has the  
2 power, it has constitutional authority to deal with the  
3 enforcement of the rights under the amendment. The risk that  
4 was perceived in Boerne --

5 THE COURT: The amendment being the Fourteenth  
6 Amendment.

7 MR. REIN: And I think the Fifteenth as well.

8 THE COURT: They weren't speaking of the Fifteenth.

9 MR. REIN: They weren't speaking to it, but I think  
10 what the risk that was perceived was, look, because we've  
11 accorded to the Congress more than the direct enforcement, we've  
12 accorded to the Congress the right to use prophylactic measures.  
13 That is, deal with things that are not unconstitutional and bar  
14 them. In order to make more effective the remedy against the  
15 unconstitutional, we've got to carefully guard against Congress  
16 using that power to go further than enforcement and to create  
17 new rights, to essentially usurp the Article III role of the  
18 Court. I think that's one key to Boerne, in determining when  
19 there is a violation of the right of free expression.

20 So the Court is looking and saying, okay, we can accord  
21 them discretion as to the means they choose, but when those  
22 means are so detached from the underlying problem, they're not  
23 congruent or proportional to it, then what we get when we have  
24 these remedies is the creation of rights that are not to be  
25 adjudicated in the Congress.

1           THE COURT: The context giving rise to that analysis  
2 by the Supreme Court was a Fourteenth Amendment context in that  
3 case and in later cases, and the Fourteenth Amendment is a much  
4 broader amendment. It has a broader sweep. It deals with lots  
5 and lots of different kinds of issues and issues far beyond  
6 race-related issues.

7           MR. REIN: Correct.

8           THE COURT: And the Supreme Court has focused on that  
9 in the evolution of that standard in those cases. That's not  
10 true, obviously, with the Fifteenth Amendment. The Fifteenth  
11 Amendment is a much more specific, focused amendment dealing  
12 with what some feel is the primary right, to vote, and that most  
13 important in the development of these amendments and the law, of  
14 all the concerns, and that is the concern about race  
15 discrimination in voting.

16          MR. REIN: And certainly that's the government's  
17 point, that you've got --

18          THE COURT: It's not only the government's point.  
19 It's evolved somewhat in the Supreme Court teaching.

20          MR. REIN: But I think it is true that a wider variety  
21 of violations may occur under the Fourteenth Amendment --

22          THE COURT: And that's why the Court in those cases is  
23 saying, wait a minute, we've got to make sure that Congress  
24 isn't enacting substantive law and is only enacting remedial  
25 law. And there's a particular danger of that with the

1 Fourteenth Amendment, a danger that doesn't exist, at least not  
2 to the same degree, with the Fifteenth Amendment.

3 MR. REIN: It's depending, Your Honor, on how one  
4 defines the word "abridgment." Because if you use abridgment to  
5 bring into the Fifteenth Amendment all of the concepts that have  
6 been litigated under the Fourteenth Amendment, then the  
7 situation has become much more parallel under the Fourteenth and  
8 the Fifteenth. That is, the broader the scope of things that  
9 are deemed to violate the substance of the Fifteenth Amendment,  
10 the closer one gets to questions that arise under the Fourteenth  
11 Amendment. Just to be clear --

12 THE COURT: That's a fair point.

13 MR. REIN: If, for example, we deal with, not with  
14 registration and voting, but we deal with the ability to elect a  
15 candidate of one's choice, it would be hard to say that the  
16 right to vote is abridged because I don't get to elect the  
17 candidate of my choice. It happens to me all the time. I'd be  
18 the first complainant, just by geography.

19 But that being said, I think that you have to put some  
20 bound on abridgment or else you've actually just said, well,  
21 we'll drag in the Fourteenth Amendment litigation through the  
22 back door into the Fifteenth, and now we'll declare it's narrow.  
23 So that risk, that Congress goes beyond and says, well, you have  
24 a right to, you know, max-black, which was one of the criteria  
25 that Justice used for a while, that raises the question, is

1 that -- in the Fifteenth Amendment, is that a remedial  
2 provision? Is that an abridgment? And those lines have to be  
3 drawn.

4 And what Boerne does is just disciplines, in a more  
5 tempered way, what the Court was doing in Katzenbach. Because  
6 in Katzenbach, whether you call it rational basis, whatever name  
7 you put on it, there still was an exploration of whether this  
8 particular remedy, because of the sensitivity of the remedy in  
9 the federal system, costs of federalism which have been  
10 identified throughout all of this, whether that particular  
11 remedy was appropriate to the circumstances. And in urgent  
12 circumstances and widespread violation, I think the Court was  
13 going to give Congress latitude, saying you've identified a  
14 major issue squarely under the Fifteenth Amendment. You know,  
15 people can't register, they can't vote. Nothing else has  
16 helped. Maybe this will do it.

17 I think when we get to -- all the way through Rome, where  
18 the Court says, look, there was a huge problem. It went on for  
19 95 years. There's a lesson in history, when Reconstruction was  
20 ended too early, it fell apart -- that Congress has the ability  
21 to say well, it's not yet done; we need to keep it into effect.

22 THE COURT: I need to let you get on to other points,  
23 but let me see if I can understand exactly where you are on this  
24 issue. You agree that this case, as well as the other Voting  
25 Rights Act challenges that the Supreme Court has seen, are at

1 their core Fifteenth Amendment cases?

2 MR. REIN: I think that's a fair statement,  
3 Your Honor.

4 THE COURT: Is it your position that the evolving  
5 Supreme Court test first articulated in City of Boerne applies  
6 to pure Fifteenth Amendment cases as well as to pure Fourteenth  
7 Amendment cases?

8 MR. REIN: I think the answer to that is yes.

9 THE COURT: So it is the test in your view now that  
10 should be applied in any Voting Rights Act case, whether it be a  
11 Fifteenth Amendment case, hybrid case or just a Fourteenth  
12 Amendment case?

13 MR. REIN: Yeah, and when I say -- I think the word  
14 "test" is a little unfair, because it's not a test.

15 THE COURT: I agree with you. I think that is a  
16 little unfair, but we use shorthands.

17 MR. REIN: It's an analytical methodology. It is a  
18 three-step analysis. It asks three questions: What is the  
19 specific constitutional right that this legislation is intended  
20 to target, one. Two, has the Congress identified a pattern of  
21 constitutional violation which needs to be remedied, and three,  
22 is the remedy congruent and proportional.

23 THE COURT: But obviously it's a little different, is  
24 it not, than the rationality test? It's a little more  
25 demanding. Certainly Justice Scalia believes that.

1 MR. REIN: It's more rigorous, but I think for Justice  
2 Scalia, if I take his view, is, putting aside an area he didn't  
3 want to get into, voting rights and other direct enforcement, he  
4 doesn't like balancing tests. He realizes that any effort to  
5 supervise and determine whether something is truly remedial or  
6 perhaps --

7 THE COURT: He's giving people like me too much of an  
8 ability to be an activist.

9 MR. REIN: I think that's a view he's held across the  
10 board. So I think he is finding a way to exercise that view  
11 without challenging -- by things that he thinks are *stare*  
12 *decisis*. Because if you just took his view, you might not have  
13 Katzenbach. And he realizes that that's well settled law. When  
14 I say his view, his view of the absence of balancing might say,  
15 you know, you can do what you do in Georgia v. U.S., you can  
16 enforce direct rights, have a court find a violation, and then  
17 Congress has latitude on the remedies.

18 But I think the discretion of Congress --

19 THE COURT: I don't want to get off on Justice Scalia  
20 too much. I just want to finish this. You're basically saying  
21 apply City of Boerne. It may not be much different -- it's a  
22 series of questions as an analytical methodology. It may not be  
23 much different than a rationality test, but that newly evolved  
24 test from the Supreme Court is the one that should be applied  
25 here.

1 MR. REIN: Yes, Your Honor, and I think the word  
2 "evolved" is important.

3 THE COURT: But does this mean that I would be saying,  
4 inconsistent with Supreme Court cases that have actually  
5 grappled with the constitutionality of the Voting Rights Act,  
6 inconsistent with my fellow district court decision from the  
7 lower court in Northwest Austin, I would be saying that the City  
8 of Boerne congruence and proportionality test is the one that  
9 should be applied, even though the Supreme Court sort of says,  
10 well, changing a test should be the job of the Supreme Court.

11 If you have cases that are directly in a line of authority,  
12 you as a lower court need to follow that line of authority and  
13 leave it to the Supreme Court to take this new line of authority  
14 and apply it there. Don't I have to follow that guidance from  
15 the Supreme Court?

16 MR. REIN: You do, but that also means you have to  
17 take into account what it said in NAMUDNO. And what the Court  
18 said in NAMUDNO --

19 THE COURT: It didn't really say anything other than  
20 this is an issue.

21 MR. REIN: I understand that, but by saying it's an  
22 issue, if this were well settled, if there was a line -- the  
23 Court could have said we have resolved the issue of standing on  
24 Voting Rights Act in the past, and it is up to us to change it  
25 if we deem it appropriate. Could have said exactly what you're

1 saying now. I think by opening it and saying this is an issue  
2 to be litigated, the Court has asked essentially for the views  
3 of the -- and I don't like the word "lower," but other courts on  
4 how that issue --

5 THE COURT: I'm just thinking of the way I would write  
6 that. That would be an interesting thing for me to write.

7 MR. REIN: Well, we can help Your Honor.

8 (Laughter)

9 THE COURT: You've tried already.

10 MR. REIN: I think the way one would write that is by  
11 saying that Boerne and rationality are not opposite poles. They  
12 are really ways to restate a process of examination. You have  
13 the question of latitude, but there are certain things to which  
14 latitude is appropriate. The selection of the remedy is  
15 something -- what is the best way to enforce? There are a whole  
16 variety of techniques that could be used. I think it's pretty  
17 clear that the precedent says Congress has some discretion in  
18 figuring out what would be effective. And if that remedy falls  
19 within this boundary of -- and we call it congruence and  
20 proportionality, they call it rationality -- but if it seems  
21 like it's actually directed at the violation, courts need to  
22 understand that Congress has primary power to enforce.

23 So, I don't want to get hung up as to we can only win in  
24 this case if it's congruence and proportionality. I think we  
25 believe that's the right standard. It's an evolving standard.

1           If you look at the first time the Court dealt with the  
2     linguistic history of the Fourteenth and Fifteenth Amendment  
3     enforcement clauses was Justice Brennan, who said, well,  
4     "necessary and proper" used to be in it, so it must mean it. In  
5     Boerne the Court came back and said, wait, it was taken out, and  
6     it was taken out for a reason.

7           So there is an evolution, a change in thinking there from  
8     that original opinion, which is Allen, I believe, written by  
9     Justice Brennan, where he said, well, it used to be in there, it  
10    must mean the same thing, to the current position, which is it  
11    doesn't mean the same thing because it was intentionally -- and  
12    it was certainly controversial, that language was taken out and  
13    replaced with appropriate legislation. So I think I've  
14    exhausted that vein.

15           THE COURT: I think so, too. Let's move on to your  
16    next issue.

17           MR. REIN: So the next issue then is however we frame  
18    the test, we still have to ask the same three questions. Those  
19    questions are, what is the constitutional violation that's being  
20    remedied in the Voting Rights Act? How widespread is this  
21    violation? Is there something going on that says you've got  
22    more than incidental violations which are not systemic? And if  
23    one identifies the extent of that, then is the remedy at least  
24    something that appears to address the problem?

25           And I think that's how we'd have to look at preclearance

1 and that's what we wanted to talk about. And that largely turns  
2 on the objectives in the record.

3 So, preclearance. When we think about preclearance, and  
4 going back even to --

5 THE COURT: Now, the record is extensive, right?

6 MR. REIN: There's certainly no question about volume  
7 of the record. I've picked it up. I will testify that it's  
8 extensive. The question is what's it about. I think that one  
9 thing really isn't --

10 THE COURT: Does the volume of record matter at all?  
11 Should it weigh on me at all that Congress went through a  
12 process with dozens of hearings, if you combine both the House,  
13 two committees of the House and the Senate, 50 or more witnesses  
14 if you combine both, I think there were -- I think it turned out  
15 to be 46 in each, but I'm not sure if they're identical  
16 witnesses in the two chambers -- and a legislative record of  
17 15,000 or more pages, and then you have, I think it's fair to  
18 say, a pretty overwhelming congressional vote. Unanimity from  
19 the Senate, 390 to 33 from the House.

20 With that kind of volume of a record, indicating a pretty  
21 exhaustive review by Congress, and that overwhelming vote -- and  
22 indeed it's a vote that is more overwhelming than the original  
23 vote for the Voting Rights Act, which in Katzenbach was noted as  
24 being important and overwhelming -- should all of that weigh on  
25 me? Is that part of the analysis here as I look at this and

1 determine whether to sustain the extension of the Voting Rights  
2 Act?

3 MR. REIN: Well, Your Honor, you've asked the  
4 question, which would suggest it's weighing on you a little bit,  
5 but the question is --

6 THE COURT: But should it?

7 MR. REIN: Let me put it this way. If the Voting  
8 Rights Act extension had been passed by a narrower margin, would  
9 it be less constitutional? I mean, I don't think these  
10 gentlemen on this side of the table and this lady would be  
11 arguing that it's not constitutional because there were more  
12 dissenting votes. I think that it's politically popular.  
13 There's no question about it.

14 The breadth of the record has some significance in  
15 indicating that Congress is not being arbitrary, that it is at  
16 least endeavoring to find out what is the -- what are the  
17 current needs, what's the condition of the country. But the  
18 scope of the record can't answer the question, what did you find  
19 when you did all that looking? Because that's really what we're  
20 testing. It's not how hard did you look, but what did you find.

21 THE COURT: So ultimately the scope or size of the  
22 record, and indeed the size of the majority really are just  
23 interesting items but not of any significance?

24 MR. REIN: Well, yeah. I think that -- I would  
25 certainly say -- I don't want to cast Congress aside.

1 THE COURT: I think it would be difficult to do that,  
2 given some of the observations from the Supreme Court, including  
3 from the Northwest Austin majority, that this is the gravest and  
4 most delicate duty that a judge can engage in.

5 MR. REIN: And therefore you have to honor what  
6 Congress engaged in. And the more seriously they do it, the  
7 more you have to think very hard about anything that would  
8 impede --

9 THE COURT: Certainly the more seriously they do it,  
10 the more overwhelmingly they do it?

11 MR. REIN: I don't think the vote count really -- in  
12 none of the cases I see, other than just recounting history and  
13 consensus, is there an indication that you can determine  
14 constitutionality by vote. Otherwise, Congress could vote all  
15 kinds of things unanimously and say, well, the RFRA, for  
16 example, which was addressed in Boerne, had an overwhelming  
17 vote. And I think that in a sense is a risk dimension. Things  
18 that become politically popular, whether or not they're  
19 constitutional, is a risk dimension, because it's not just do we  
20 like it, it's whether it's compatible.

21 And I think to be fair -- and I've always thought this when  
22 we've looked at it -- the cost here, the heavy cost of  
23 federalism is not a bleeding cost. So when Congress, which is a  
24 political body, acts, that dimension becomes much harder to  
25 bring to the table. But in the courts, all the way back to

1 Katzenbach, it's been recognized that one bastion of the  
2 Constitution is the courts. They support the constitutional  
3 system.

4 So that interest in preserving division of powers,  
5 preserving the sovereignty of the states, is a court interest,  
6 not likely to be weighed in the Congress. Congress doesn't sit  
7 as a constitutional adjudicatory body. It decides what it wants  
8 to do.

9 THE COURT: I'm not sure that that's giving Congress  
10 enough credit. I think many members of our current Congress are  
11 quite concerned with intrusions on states' rights, on the  
12 equality of states, on all the principles that make up the  
13 federalism concern in this setting. So I'm not sure that I  
14 could agree with you.

15 MR. REIN: But I don't think the record indicates a  
16 detailed examination of those issues. It's looking toward what  
17 we would call current need, which is what the Supreme Court did.  
18 So I think the question --

19 THE COURT: But the current burdens, which is the  
20 other side of the equation the Supreme Court identified, is in  
21 fact in part the federalism concern.

22 MR. REIN: I agree. And certainly that's the burden  
23 on which we have focused. There's been some discussion in the  
24 briefs about how administratively the Justice Department has  
25 eased the process of preclearance. That doesn't ease the

1 federalism burden. The question is not how quickly you can fill  
2 out the form, it's why you're filling it out in the first place.

3 And if you look at the progress of the cases, with more  
4 dissents arising after Katzenbach, they're all addressing that  
5 issue.

6 THE COURT: So let's get to the quality rather than  
7 the quantity of the record.

8 MR. REIN: Right. And I think that's right. It's the  
9 quality of the record. And one of the questions is are the  
10 things that are being explored -- and I think most fundamental  
11 to us is the question, are the issues that Congress is  
12 exploring -- racially polarized voting to take an example --  
13 really germane -- they may be politically germane, but are they  
14 germane to a finding of constitutional violation.

15 And that issue is certainly an important one, because  
16 racially polarized voting is one of the criteria that was used  
17 by the district court in the NAMUDNO decision that was reversed.  
18 It's certainly highlighted in some of the briefs, and initially  
19 it looked like a factor of its own, and it was indeed part of  
20 the congressional findings.

21 But if you think about that, it's now been kind of agreed  
22 between the parties that it's not a violation in itself because  
23 it's private conduct. It isn't state action. The state doesn't  
24 polarize voting. What it said is --

25 THE COURT: And indeed, the various groups among the

1 voters engage in polarizing voting.

2 MR. REIN: Correct. But they do that on their own,  
3 and therefore you can't bring that activity within the framework  
4 of either the Fourteenth or the Fifteenth Amendment.

5 THE COURT: It's only because of its linkage to vote  
6 dilution that it becomes arguably relevant.

7 MR. REIN: Yes. It is said that, well, if you know  
8 there's polarized voting, then you have the ability to set  
9 districts or processes of election with a more predictable  
10 outcome, because you say, well, I know there's polarized voting.  
11 If I change the ratio of African Americans or Latinos in any  
12 particular community, in different ways, and either add more  
13 whites or concentrate -- there's a whole bunch of techniques  
14 that are discussed, I can predictably get to a result that may  
15 deny the ability to elect a candidate of choice.

16 But certainly none of it goes to, does that have anything  
17 to do with the ability of those voters to register and cast  
18 their ballot. It doesn't go to the right to vote. And so you  
19 have to take that position that abridgment includes electing a  
20 candidate of choice. And certainly the Supreme Court, even in  
21 the Fourteenth Amendment cases on redistricting, has kind of  
22 said, well, it kind of matters but it doesn't, and race should  
23 not be the primary criteria in redistricting.

24 And one thing the Supreme Court pointed out is that  
25 tension, that in Fourteenth Amendment reapportionment cases,

1 race cannot be the predominant factor. But under the VRA, race  
2 becomes a critical factor, and that makes these two competing  
3 interests hard to sort out. That was specifically called out in  
4 NAMUDNO.

5 THE COURT: What types of evidence do you think are of  
6 import?

7 MR. REIN: I think that the evidence that matters  
8 targets the question, do you have the right to vote? Now, what  
9 you can say is, where devices or other contrivances, albeit  
10 constitutional on their face, are used to support a denial of  
11 the ability to register and go to the polls and vote, which was  
12 the case in Katzenbach, then they become important and  
13 cognizable as evidence that more remedy is needed, because  
14 you're analyzing what's cutting off the right to vote.

15 THE COURT: But you seem, in the way you're  
16 articulating this and in your desire not to give "abridge" too  
17 broad a scope, you seem to be giving it no meaning whatsoever.  
18 Because you're saying it's only the denial of the right to vote  
19 that matters. That's just the first of the two words used.

20 MR. REIN: I think we're saying if one moves, uses  
21 devices, you can either cut up through it absolutely, or if you  
22 go to the point of intentionally structuring voting, voting  
23 practices, in a way that makes the vote meaningless, that has no  
24 significance. Gomillion v. Lightfoot. At that point you've got  
25 a violation because it affects the underlying right to vote.

1           And yes, it's a line-drawing exercise, Your Honor, as to  
2           how broadly one wants to take abridgment, because if abridgment  
3           goes to all of the weight of the vote considerations, then of  
4           course we walk right back into whether you've identified a  
5           problem that's that broad.

6           Because I think that what really happens, you look at this  
7           record, and you can scour it and it has all kinds of things in  
8           it, some of it's anecdotal, some of it's more systemic. The  
9           Supreme Court has already said if you're looking for evidence  
10          that people cannot register and cast their votes, you're going  
11          to have to look a long way to get it. You're nowhere near  
12          Katzenbach. Nor have you got evidence that people are being cut  
13          off indirectly from exercising that right, intimidated or  
14          subject to devices that say yes, you showed up but we're not  
15          going to count it.

16          So what you now have is you've moved on to what they call  
17          the second generation, and that second generation really deals  
18          with the weight of the vote. And let me just explain why we  
19          think there's a risk in that, because it really comes back to  
20          why we have this analytical framework --

21                THE COURT: Well, you're going to tell me why there's  
22          a risk and are you going to tell me that that shouldn't be  
23          considered?

24                MR. REIN: I think that what we're saying is these  
25          factors, if they don't come back to the ability to vote in a

1 meaningful way, just because you lose elections, are not  
2 sufficient to warrant the highly intrusive --

3 THE COURT: How about objections by the Attorney  
4 General? Where do those fit?

5 MR. REIN: Objections, as you know with objections,  
6 they can be on several grounds. They can either be because the  
7 Attorney General believes there's an unconstitutional action  
8 taking place, or because the Attorney General believes that  
9 there are violations of other provisions, or simply that the  
10 change has not been justified.

11 THE COURT: All right. So they have to be analyzed  
12 with some care, but are they irrelevant evidence?

13 MR. REIN: Well, I think if they are indications that  
14 there are still efforts afoot to deny the right to vote, then  
15 they have significance because they're part of history. But the  
16 Attorney General is not an adjudicatory power. He does not  
17 determine, yes, this is a constitutional violation.

18 And what makes this difficult is you've got to avoid  
19 bootstrapping. And what I mean by bootstrapping is if the  
20 Congress has the remedial power to set prophylactically  
21 standards that are not constitutional violations themselves but  
22 might contribute, you can't turn around and say, oh, those  
23 violations now become the basis of finding a basis for  
24 constitutional error.

25 And let me be a little more clear about that. There's this

1 kind of phenomenon in which you say, if I can identify what is  
2 an agreed violation of somebody's constitutional rights and  
3 there's a pattern of it, and remedy's required, the Court has  
4 said remedy can be broader than a direct. Now, if I set up a  
5 remedial test, you have to preclear. That's a remedial  
6 function. The absence of preclearance is not a constitutional  
7 violation.

8 But now I count up the number of times people had to be  
9 brought to court because they failed to preclear. And I've  
10 identified -- slated this. I can do two things with that. One  
11 of them would be to say, well, that's just evidence that further  
12 violation sets a basis for further remedy. That's one thing.  
13 And I think that just is bootstrapping, because now you've taken  
14 a provision that's not a constitutional violation and  
15 transformed it. It becomes a remedy if it becomes a violation,  
16 and there's some of that in this record.

17 And the second thing you can say is, well, okay, if that's  
18 happening, perhaps it's caused by an effort to avoid scrutiny  
19 and go forward with other unconstitutional actions. That would  
20 be far more significant because --

21 THE COURT: You seem to be saying -- correct me if I'm  
22 wrong in what I'm understanding, but you seem to be saying that  
23 the number and the types of -- well, I guess both of the  
24 submissions by covered jurisdictions and the objections by the  
25 Attorney General are not relevant evidence.

1 MR. REIN: I think what we would say is you have to  
2 analyze them further to determine --

3 THE COURT: That may be. That may be. It may be that  
4 they require some care in terms of analysis, but is that a  
5 relevant body of evidence?

6 MR. REIN: Well, it's certainly a body of evidence  
7 that can be analyzed, and one can extract from it relevant  
8 information.

9 THE COURT: Now, in City of Rome, when the Supreme  
10 Court used exactly that language and cited favorably in  
11 upholding the extension at that point of the Voting Rights Act,  
12 and cited Congress's consideration of the number and types of  
13 submissions from covered jurisdiction and the number and types  
14 of -- number and nature of objections by the Attorney General,  
15 what further analysis did the Supreme Court do of Congress's  
16 reliance on that?

17 MR. REIN: Well, I think City of Rome poses a somewhat  
18 different issue, because what Congress --

19 THE COURT: It may pose a different issue, but answer  
20 my question. What further analysis did the Supreme Court do?

21 MR. REIN: They applied that count to their  
22 determination that Congress, having put in place a remedy  
23 against the 95-year established practice, had the right to see  
24 that remedy become effective over time. And they said, look,  
25 we're looking for indicia that the underlying problem, the will

1 to deny the right to vote, is still there.

2 So, yes, when we count up, we're going to look and we're  
3 going to say, gee, people are still trying to get away with it.  
4 We don't have to look too hard because all that's happening here  
5 is the extension of a remedy that perhaps couldn't operate as  
6 quickly as the five-year optimistic forecast. And I think they  
7 start with, you know, the picture is mixed. It's mixed on  
8 registration, it's mixed on casting votes.

9 And the question in Rome is do we want to cut it off now?  
10 Do we want to say, gee, let's ignore 95 years of history? We're  
11 a lot further down the line. And when the Supreme Court tells  
12 us that current needs must justify current burdens, it's saying,  
13 look at this differently. You can't justify this by looking at  
14 that history.

15 THE COURT: Alone.

16 MR. REIN: So I think that when we look at the  
17 criteria which have been put before the Court and were certainly  
18 before the Court in the NAMUDNO three-judge panel decision,  
19 certainly we would say registration and voting are the direct  
20 indication of suppression. I think there's no question. But  
21 the question then becomes the quantum of the evidence, is there  
22 a problem in registration and voting. And I think, Your Honor,  
23 you've seen enough of that in the briefs to know that it  
24 doesn't.

25 The number of elected minorities has -- something that

1 people have focused on. It tends to say has the vote been  
2 effective? Have people been able to actually participate in the  
3 process in a meaningful way. That number is growing very  
4 rapidly, but it's kind of an indirect measure, if you will.  
5 It's an indirect measure saying, okay, if people can vote, you  
6 would expect to see that they would elect candidates of their  
7 choice. Has it happened? Or is there some other set of devices  
8 being used to restrict it. And I think the enormous, thousand  
9 percent growth in the number of elected minorities is saying the  
10 vote has become quite effective.

11 THE COURT: But that issue was further analyzed by the  
12 three-judge panel to point out that it wasn't quite so  
13 convincing as you would put it, and that's exactly the kind of  
14 further analysis of the evidence that you're advocating,  
15 correct?

16 MR. REIN: Yes. And I think what the panel did was to  
17 try to determine, okay, to what extent is dilution in one form  
18 or another impacting that, that is, the way that districts are  
19 apportioned, is that impacting the significance of the vote?  
20 When people are actually coming out to register and vote, are  
21 they being defeated in their ability to have a meaningful vote?

22 And one could argue about that. I don't think that, again,  
23 it was properly analyzed because it was attached to the  
24 question, is this vote meaningful.

25 The Attorney General's objections certainly was a factor in

1 Rome in saying is there still a need? Is this supervisory  
2 mechanism significant? Is something happening that tells us  
3 that the remedy is having a bite? And certainly in Rome, the  
4 Court said, yeah, it's having a bite. The AG is a bulwark, the  
5 AG is preventing people who have adverse motives from doing it.

6 THE COURT: Why is the record here so much different  
7 than the record there on that issue?

8 MR. REIN: Because I think if you look at the trends  
9 in the record that we've described, the number of objections  
10 continuously declined. It's virtually down to nothing. And one  
11 can argue about how this is happening and why, but it is not a  
12 picture of ingenious defiance. It's not a picture of massive  
13 resistance of the right to vote.

14 THE COURT: There still are a lot of objections that  
15 took place over the 25-year period between 1982 and 2006.

16 MR. REIN: Well, that's a long time.

17 THE COURT: I know it's a long time. Long time is a  
18 theme that I'm sure I'll hear a little bit more about this  
19 morning.

20 MR. REIN: There are a number of objections. Again,  
21 they haven't been analyzed and parsed to see how many were  
22 objections to actions that would be deemed unconstitutional in  
23 their own right, how many were objections based on the broader  
24 criteria which are used by the AG to review. And at the end  
25 they are AG objections. If we went five years and the AG hadn't

1 objected to anything, I think we would be before you saying this  
2 remedy is ineffective, it doesn't do anything, and we'd hear the  
3 other side saying, well, no, it's effective because people  
4 aren't doing bad things anymore.

5 I think the bottom line of that is we don't believe that  
6 the number of objections, especially the percentage of changes  
7 objected to --

8 THE COURT: But Congress in one committee report  
9 concluded that -- or observed that more Section 5 objections  
10 were lodged between '82 and 2004 than were lodged between '65  
11 and '82, and that those objections didn't just encompass minor  
12 or inadvertent voting changes, but included calculated decisions  
13 to keep minority voters from being able to participate fully in  
14 the process.

15 I'm supposed to undercut that conclusion by Congress? Why  
16 isn't that a valid conclusion by Congress based on the evidence  
17 that was before it?

18 MR. REIN: There are a couple of things.

19 THE COURT: And I recognize that's not stated by  
20 Congress as a body; that's in one of the committee reports.

21 MR. REIN: Right. But it was certainly the subject of  
22 argument in this case, and it is a fact. First of all, you're  
23 comparing 17 years to 25. So there's a baseline question.

24 THE COURT: All right.

25 MR. REIN: It's just numerical. Secondarily, we've

1 identified at least two sources of objection that were deemed  
2 ultimately to be not valid sources. Those are objections based  
3 on purpose -- on effect without discriminatory purpose, which  
4 has now been added back, but was not a proper basis of objection  
5 at the time. And there's the Miller question of the so-called  
6 max-black strategy, which Justice pursued, which was really  
7 deemed to be outside of constitutional boundaries under the  
8 Fourteenth Amendment.

9 THE COURT: I've heard a little bit about that, and  
10 maybe the Justice Department will have more of an answer to  
11 this, so what percentage of the objections fall into that  
12 category that was struck down in Miller v. Johnson?

13 MR. REIN: We really haven't made a count, nor is  
14 there anything in the briefs that tells you how to count them.  
15 I think what we're saying is once those sources have been  
16 removed, and certainly in the last few years before the  
17 enactment, the rate of objections and the number of objections  
18 is way, way down.

19 Now, there's still a lot of submissions. And that's the  
20 other side of this coin, Your Honor. The burden on federalism  
21 is signaled by the number of submissions, the number of  
22 preclearances submitted, where a state now becomes subordinate  
23 to an administrative officer, an executive officer of the  
24 United States government, and they're not violating the act.

25 And those numbers are very, very big, and they have to be

1 weighed as well because they measure federalism cost. All of  
2 these things being submitted, some of them are quite trivial --

3 THE COURT: Although there's some evidence in the  
4 record before Congress that many jurisdictions don't consider  
5 that really to be much of a burden at all.

6 MR. REIN: Well, are you talking about --

7 THE COURT: And some jurisdictions welcome it.

8 MR. REIN: Well, two different issues. One is the  
9 administrative burden. How hard is it to fill out the form? I  
10 think you could make your 1040 very easy to fill out. The  
11 burden is when you pay your taxes. I think the federalism  
12 burden is being placed under that kind of direct supervision,  
13 and really doesn't have to deal with how much form you have to  
14 fill out.

15 And I understand, from the point of view of a single  
16 individual who may feel that the more comfort I have, meaning  
17 the more big bad wolves are looking over my shoulder, the easier  
18 it is for me to do my job and satisfy other people that I'm  
19 doing it right, that's an idiosyncratic view, and I don't think  
20 that alone establishes it.

21 But I think what we have said is that if you look at the AG  
22 objections, no one has established a pattern of constitutional  
23 violation, and that's important. We've had discussion of more  
24 information request letters, and I think the question on those,  
25 that you can count those up, but do they signal that there was

1 something wrong that would have been objected to, or simply you  
2 haven't justified it fully enough, and the fact that somebody in  
3 the face of that says, you know, the game's not worth the  
4 candle, it needs to be analyzed, and it hasn't been analyzed.  
5 It's just been counted.

6 THE COURT: Now, evidence that goes to vote dilution  
7 is relevant evidence for Congress. Do you agree with that?

8 MR. REIN: I think to the extent that Congress wants  
9 to use its Fourteenth Amendment power --

10 THE COURT: Whether you call it Fourteenth or  
11 Fifteenth Amendment, evidence that goes -- you're returning to  
12 an issue -- evidence that goes --

13 MR. REIN: I just want to make sure you don't forget  
14 it, Your Honor.

15 THE COURT: You're doing a good job. Is that relevant  
16 evidence for Congress to consider?

17 MR. REIN: Well, I think to the extent that Congress  
18 is concerned about the effectiveness of the vote and evidence of  
19 vote dilution, it can certainly explore it. It's important.  
20 The question is does it form the kind of pattern which suffices  
21 to support preclearance as a remedy. Because you can't detach.  
22 I mean, clearly there is remedy against vote dilution; you can  
23 move directly under the Fourteenth Amendment, there is Voting  
24 Rights Act consideration, there are numerous ways to challenge  
25 it.

1           THE COURT: That would seem like it might be returning  
2     to the inefficient ways that gave rise to the Voting Rights Act  
3     in the first instance.

4           MR. REIN: I understand that, Your Honor. But I would  
5     only say that the question of efficiency depends on the nature  
6     of the violation. People clearly do find injunctive actions,  
7     actions directly on this, to be efficient. I think the courts  
8     are able to police that kind of activity, because it's  
9     structural, much more than they could police the kinds of things  
10    that were happening before Katzenbach, which were pervasive,  
11    which were varying. And I don't think that it's quite the same  
12    thing.

13          Clearly, the number of submissions and the amount of  
14    activity does vary, as we've all agreed. With the census and  
15    redistricting, it becomes more controversial. And I think one  
16    other thing I'd just say about the question of objection, one of  
17    the things that's a cost of this system of preclearance is it  
18    has risks of its own. Because polarized voting is in part  
19    defined by race, but it's also defined by, as the Court said,  
20    different attitudes, different politics. And when you start  
21    looking at effectiveness in terms of political divisions, I  
22    think you're running the risk of getting into partisanship.

23          And that's inherent here when you starting going into  
24    apportionment and questions of dilution, and when you measure it  
25    by who did you elect. Because the differences that polarize the

1 races are not necessarily only race. They may be quite  
2 political, different social views, different attitudes. And to  
3 try to deal with those, they're not the subject of these  
4 amendments.

5 So there are a couple of other things --

6 THE COURT: Are annexations relevant only because of  
7 the polarized voting?

8 MR. REIN: To the extent that one says the annexation  
9 is an intentional effort to suppress the effectiveness of the  
10 vote of a minority, yes, then they're important, because one  
11 would say that when you did it, and you brought in voters of a  
12 different race, you knew what you were doing, it shows intent.  
13 But annexation after all is a normal process. Annexation poses  
14 difficulties of its own, because one reason cities annex is to  
15 improve their tax base. And if people have moved around in ways  
16 that --

17 THE COURT: So what do we do with annexations as a  
18 part of this legislative record?

19 MR. REIN: I think you've got to say, do we see  
20 annexation forming a pattern that suggests that its use is to  
21 effect a constitutional violation. That's what you need to do.  
22 And unfortunately, it's the Court that has to do it. Congress  
23 is not really constrained to do it. Congress enumerates  
24 factors, but you have to look at them and adjudicate them.

25 THE COURT: So if a given jurisdiction over the course

1 of 25 years does eight annexations, four of which can be  
2 targeted to tax reasons, and four of which can be targeted to  
3 race-based voting reasons, that's irrelevant or relevant  
4 evidence?

5 MR. REIN: I think it's certainly relevant. Certainly  
6 in a bail-in case, for example, where you raise directly has  
7 there been a constitutional violation, that would be relevant to  
8 say, well, you've taken these actions, they may individually  
9 create a constitutional violation. And in bail-in, one of the  
10 available remedies is a very narrow and targeted preclearance.

11 That's a very different concept from a sweeping  
12 preclearance based on a general record. Because that's what's  
13 at issue here; a general record, a designation -- and  
14 Mr. Consovoy will deal with it -- of certain jurisdictions as  
15 covered without regard to their individual histories, and then a  
16 very stringent remedy of oversight. And I don't want to use up  
17 Mr. Consovoy's time on an issue --

18 THE COURT: We're going to get to him in one second.

19 MR. REIN: I'm not trying to escape, Your Honor. I  
20 just want to make sure we cover --

21 THE COURT: I know. You don't have anything to escape  
22 from.

23 MR. REIN: -- the coverage formula.

24 THE COURT: The issue of anecdotal or isolated  
25 instances that you referred to earlier and that Justice Thomas

1 refers to in his dissenting opinion in Northwest Austin, do you  
2 agree that that's what the record shows, just occasional  
3 isolated interferences with the right to vote?

4 MR. REIN: Well, we would say there's certainly  
5 anecdotal evidence in the record, and Congress didn't preclude  
6 people from coming forward with anecdotal evidence. Similarly,  
7 there are the reported Section 2 cases which, when they go to  
8 verdict, show you that there's not much in finding intentional  
9 discrimination over this period in Section 2 cases. That's six  
10 cases out of, you know, 25 years.

11 So I think we would say there's anecdotal evidence, but the  
12 test is not was there anecdotal evidence, it's whether Congress  
13 could find a pattern of violation, something endemic, something  
14 that needed to be cured by a wholesale remedy of the type that  
15 preclearance --

16 THE COURT: Just focus for a second on objection  
17 letters. What would be a pattern? How many objection letters  
18 that were based on discriminatory intent would there have to be  
19 for there to be the kind of pattern that you're looking for?

20 MR. REIN: Certainly, without dancing on the head of a  
21 pin and counting the angels, I would say --

22 THE COURT: But that's what you're asking me to do,  
23 though.

24 MR. REIN: No.

25 THE COURT: You're saying I have to assess it and come

1 to some conclusion as to whether there's a pattern. How should  
2 I do that?

3 MR. REIN: Certainly more than we have in the record  
4 today.

5 THE COURT: That's a nonanswer, isn't it? What does  
6 the record have?

7 MR. REIN: The record has several hundred objections,  
8 752 I think, over a period of 25 years, not all of which have  
9 been analyzed to determine are they objections on a  
10 constitutional ground. I think if we compare that again --  
11 because Katzenbach is kind of a marker. Compare that to the  
12 number of violations ongoing in the covered jurisdictions in  
13 Katzenbach, it's *de minimis*. It doesn't signal a wholesale  
14 rebellion because, as Justice Roberts said in the opinion for  
15 eight justices, the South has changed. That's what's not being  
16 accepted.

17 And if I have one final word, I think that when you read  
18 the briefs, Your Honor, it's fair to say that a concern of the  
19 other parties and a concern in the Congress is deterrence, not  
20 so much what has gone on, but what might have gone on if we  
21 didn't have the remedy, and what might go on tomorrow if the  
22 remedy is withdrawn. And I understand that concern, but I think  
23 that --

24 THE COURT: Is it a valid concern for Congress? You  
25 understand it. Is it valid?

1           MR. REIN: For Congress I believe it is. I think that  
2 Congress is looking at a situation where people's expectations  
3 influence what the Congress ought to do. I don't believe that  
4 deterrence is lacking, for two reasons. Number one, there's  
5 bail-in. So if these jurisdictions start resorting, going back  
6 to their old tricks, so to speak, they can be bailed in and  
7 placed back under preclearance.

8           And second, the Congress isn't going away. So if, absent  
9 this legislation, the same pattern of serious constitutional  
10 violation existed, Congress would then have a record, say we  
11 gave you a chance, we tested you, we're bringing it back, and  
12 there would be a foundation.

13           THE COURT: That's an approach that does create some  
14 concern. Basically, it's okay if we take away these remedies,  
15 Section 5 in particular, because if we fall back as a country or  
16 in parts of the country into this pattern of suppressing the  
17 vote, the voting rights of some members of the country, we can  
18 just reenact the Voting Rights Act. I don't find that to be a  
19 very comforting approach. What happens in the meantime?

20           MR. REIN: Well, I think what we're saying, we do not  
21 expect, and I don't think there's anything in the record that  
22 suggests there is going to be a restoral of ingenious defiance  
23 and massive resistance. It isn't going to happen. We're just  
24 saying that the absence of a fact record that supports the  
25 remedy doesn't mean that you're foreclosing the issue forever.

1           And I think that -- it's important because Congress can  
2 politically act out of fear. We don't have the record, but  
3 we're not sure we wouldn't have it because, as the Court pointed  
4 out, what we have in front of us is very much influenced by the  
5 existence of the remedy.

6           So how do you determine why the number of objections is  
7 going down? Is it going down because the remedy has made people  
8 say this is fruitless, let's stop trying, or is it going down  
9 because attitudes have changed, political power has changed and  
10 we have a very different situation. I think you can't presume  
11 that it's the former.

12           And the only point we're making is if it's all wrong, if  
13 we're grossly wrong, if things have not changed, we're not  
14 abolishing the amendment. We're not doing away with Section 2,  
15 we're not doing away with bail-in, we're not doing away with the  
16 ability of the Congress to say we now have a record upon which  
17 we can act.

18           And I'll turn over to Mr. Consovoy because I don't want to  
19 miss talking about the formula.

20           THE COURT: Thank you, Mr. Rein. Mr. Consovoy.

21           MR. CONSOVOY: Good morning, Your Honor.

22           THE COURT: Good morning.

23           MR. CONSOVOY: The reason why we have emphasized  
24 Section 4(b) both in briefing and in argument is because Shelby  
25 County believes it is both the narrowest and most obvious basis

1 for granting a complete relief in this case. In 2006 Congress  
2 reauthorized a coverage formula that predicates coverage for the  
3 jurisdiction on election data from 1964, 1968, and 1972. As the  
4 Supreme Court explained in Northwest Austin, that choice raises  
5 constitutional problems in several respects.

6 First of all, using a formula based on data that old is  
7 itself problematic, from two perspectives. One, the data is  
8 archaic, it's fossilized, it doesn't bear at all on the current  
9 political conditions in the country. And the Court was clearly  
10 concerned with that.

11 But beyond that, I think it shows, and I think the record  
12 reflects this, a lack of frankly diligence on Congress's part in  
13 reexamining the formula and taking a hard look at it to  
14 determine whether it really represents the best mechanism for  
15 determining which jurisdictions in this country are going to be  
16 subject to the most far-reaching prophylactic remedy Congress  
17 has ever enacted.

18 THE COURT: Would your concerns have been cured if  
19 Congress had simply added another sentence -- and I use that  
20 word intentionally, because that's what 4(b) talks of -- another  
21 sentence that incorporated a more recent year than 1964, 1968,  
22 or 1972?

23 MR. CONSOVOY: No. I think replacement would  
24 potentially have solved the problem. As 4(b) works now, it's  
25 additive, as you suggest. So once you were captured in '64 --

1           THE COURT: That's how 4(b) has evolved. It simply  
2 adds additional jurisdictions through these additional  
3 assessments, but it doesn't eliminate the early --

4           MR. CONSOVOY: That's right. So if you were added in  
5 based on '72 data, they didn't go back and look at the '64  
6 jurisdiction to determine whether they should be out. Had they  
7 done so, there would have been a lot of changes along the way.

8           Had Congress actually replaced it with 2004, I believe the  
9 record shows and the briefing shows, from the intervenors,  
10 agreeing with our position, the only fully covered state would  
11 have been Hawaii. That alone stands as a stark example of a  
12 massive disconnect between the current record, at least with  
13 respect to voter registration and turnout, which again remain  
14 the inputs for the formula.

15           The Attorney General and intervenors attempt to move away  
16 from that and simply suggest that the inputs don't matter. I  
17 think one brief actually says that voter participation is no  
18 longer the chief evil that Congress is trying to aim at. We  
19 dispute that proposition. But even if you accept that  
20 proposition, the formula still does, and the formula cannot be  
21 ignored from a theoretical level. In fact, in Katzenbach the  
22 Court made clear that the reason it upheld the formula was  
23 because it was rational in both theory and in practice.

24           THE COURT: So which is, or are they both the problem?  
25 Is the problem the things that the formula looks at, or is the

1 problem that it looks at outdated information?

2 MR. CONSOVOY: It's both. Either are sufficient to  
3 strike it down, but it's both.

4 THE COURT: With respect to the things that it looks  
5 at, the Supreme Court has upheld the formula, has it not?

6 MR. CONSOVOY: It was only examined in one case, in  
7 Katzenbach, and the Court took a very close look at it, devoted  
8 several pages to it, and did uphold it. But it upheld it,  
9 again, to repeat the language of the Court, because it was  
10 rational in theory and in practice. It was rational in theory  
11 because the problem Congress was identifying was interference  
12 with the ability to cast a vote. And the Court found that  
13 looking to the use of voting tests and voter registration  
14 turnout was a rational means of identifying and trying to solve  
15 that problem.

16 And it was rational in practice because even if it was  
17 reverse-engineered, which it really was, it got the right  
18 jurisdictions, because Congress was -- and I think this was the  
19 final sentence in their discussion of the coverage formula --  
20 what confirms its rationality is the fact that they captured  
21 every jurisdiction that that problem was identified.

22 THE COURT: Now, would you agree that that is the test  
23 that I should apply in examining 4(b) now, rationality?

24 MR. CONSOVOY: No. Certainly not.

25 THE COURT: Even though Katzenbach did that, I should

1 do something else.

2 MR. CONSOVOY: In all honesty, I don't think it drives  
3 the analysis on this issue at all.

4 THE COURT: You may be right.

5 MR. CONSOVOY: I don't think there is a rational  
6 basis. So again, this is why we believe it is both the  
7 narrowest and most obvious basis for striking down the statute.  
8 I don't think the Court needs to -- we believe that Boerne is  
9 certainly nothing more than elaboration on what Katzenbach had  
10 done, that Boerne merely put some discipline on an analysis that  
11 had some broader language in it.

12 And not to go over issues that have already been discussed,  
13 but you mentioned Katzenbach v. Morgan. The Supreme Court had a  
14 concern with Katzenbach v. Morgan in the Boerne decision. They  
15 spent a little time discussing it. And they said we recognize  
16 that decision had broad language. It cites McCulloch, it cites  
17 In Re: Virginia. They said, but we're not giving those  
18 decisions in that discussion the broad reading that others would  
19 suggest. And I think that really does form a conceptual tie  
20 between the older cases and the newer ones.

21 So the theoretical problems here are on two levels really.  
22 We've identified one, which is the data is old. But the second  
23 one, which is a massive mismatch between what Congress is aiming  
24 at now and what the formula looks at.

25 THE COURT: If the legislative record established --

1 and I know you don't think it does, but if it established that  
2 the bulk of voting discrimination, however you define that term,  
3 took place in the covered jurisdictions, would that be enough to  
4 support the 4(b) coverage formula?

5 MR. CONSOVOY: It would perhaps solve the  
6 reverse-engineering problem. But again, that is accepting your  
7 premise. We do not accept the premise. In fact, one of the  
8 main problems with the formula is that it doesn't -- the  
9 problems Congress identified, are not concentrated in the  
10 covered jurisdictions. That really goes to both the mismatch  
11 problem and to the equal sovereignty point the Court stressed in  
12 Northwest Austin.

13 If Congress had decided that vote dilution is the principal  
14 concern that exists at the current time -- and I don't think,  
15 based on your questions to Mr. Rein and the briefing in this  
16 case, that anyone can dispute that most of the record evidence  
17 goes to dilution; it deals with racially polarized voting, which  
18 has now been argued as merely a predicate to dilution, deals  
19 with Section 2 cases which are almost all dilution cases, and  
20 most of the objections deal with redistricting, which in turn  
21 almost all deal with dilution questions.

22 I don't think there's any question that whether Congress  
23 could or could not -- and we don't think they really can use  
24 this remedy to get a dilution -- even if they could, that has  
25 nothing to do with voter registration and turnout. It's not

1 probative. It's not the kind of probative evidence that forms a  
2 rational relationship between this formula and that problem.

3 If Congress is concerned with vote dilution, Congress was  
4 required to craft a formula that identified the jurisdictions  
5 that have a vote dilution problem. They didn't.

6 THE COURT: So, Senator Consovoy, what is the right  
7 formula for the Voting Rights Act? What should the formula be?  
8 If not what's set forth in 4(b), what is a rational formula?

9 MR. CONSOVOY: I'm not sure there is. And I'm not  
10 sure that there needs to be a formula to get at the problems  
11 Congress is looking at. Section 3(c), bail-in, would impose,  
12 could impose preclearance on any jurisdiction that has been  
13 adjudicated in a court to have violated either the Fourteenth or  
14 Fifteenth Amendment.

15 I believe there are perhaps six cases since 1982 where  
16 there's been an adjudicated Section 2 dilution claim for  
17 intentional discrimination. You don't need a formula --

18 THE COURT: So your answer is we don't need a Section  
19 4(b) and therefore don't need a Section 5.

20 MR. CONSOVOY: I think that's one answer. And there's  
21 a strong basis in --

22 THE COURT: Let's assume that Section 5 is going to  
23 stay alive. What kind of coverage formula in a 4(b) provision  
24 would be appropriate?

25 MR. CONSOVOY: I wouldn't get into specific

1 language --

2 THE COURT: Don't get into specifics. Just give me a  
3 concept.

4 MR. CONSOVOY: I think you would have to focus on  
5 dilution. So you would have to move away from voter  
6 registration and turnout, look at the record and determine what  
7 kind of formula can we craft that will identify. Congress would  
8 have to take some time and care to figure that out. It's not an  
9 easy task. But the task shouldn't be easy, because you're using  
10 these formulas to impose preclearance on every voting change in  
11 the jurisdiction based on a dilution problem. That in itself is  
12 highly problematic.

13 THE COURT: If you're right that most of the record  
14 relates to voter dilution, then looking, for example, at  
15 something like the Senate Judiciary Committee appendix, that  
16 large, 300, 280-page appendix, a good portion of that, I would  
17 say a disproportionate portion of that relates to summary  
18 descriptions of evidence of discrimination in the nine covered  
19 jurisdictions. That would seem, just on a superficial look, to  
20 indicate that there's more of a problem in covered jurisdictions  
21 than in noncovered jurisdictions.

22 MR. CONSOVOY: I would respectfully disagree. If you  
23 look --

24 THE COURT: I know it's very superficial, but why --

25 MR. CONSOVOY: When the Court takes a long look at

1 that appendix, you'll see that most of those instances are from  
2 the earlier -- from the '80s. Almost none of it is recent.  
3 There's no suggestion that something that happened in '82 is  
4 equally relevant to the decision in 2006 as something that  
5 happened in 2000. That wouldn't seem to make sense.

6 Beyond that, there's nothing in that record -- and this  
7 goes I think back more towards Section 5, but it also bears on  
8 Section 4(b) -- suggesting a pattern of discrimination. And  
9 that's what matters. That's what mattered in Katzenbach.  
10 Katzenbach said that absent ingenious defiance and the  
11 manipulation by the covered jurisdictions, preclearance and  
12 coverage would be unconstitutional. It is a measure of last  
13 resort.

14 There is nothing in that appendix that suggests that those  
15 instances couldn't be resolved on a case-by-case basis. And  
16 moreover, that when those practices were eradicated, that those  
17 same jurisdictions kept repeating and repeating and repeating  
18 and looking for new problems. They are the stringing together  
19 of disparate examples to attempt to form a pattern. And our  
20 position is they fell short.

21 THE COURT: Now, it's your view that there's no  
22 evidence, or Congress made no finding that there's evidence of  
23 greater discrimination in the covered jurisdictions than in  
24 noncovered ones. Correct?

25 MR. CONSOVOY: Correct. It's more than the findings.

1 It's what the record itself shows.

2 THE COURT: Just give me your reaction to these two  
3 pieces -- and they're only two pieces -- of the legislative  
4 record. You've got six states originally covered by Section 5,  
5 and five of those six states, which are still all covered  
6 jurisdictions, account for 66 percent of the federal observer  
7 coverage since 1982. Why isn't that an indication of some  
8 greater problem in the covered jurisdictions than in the  
9 noncovered jurisdictions?

10 MR. CONSOVOY: Two reasons. One, we don't believe, as  
11 we say in our briefs, that federal election coverage is a strong  
12 basis for determining infringement with the right to vote.  
13 Federal election coverage is triggered by a concern that there  
14 might be in those jurisdictions a violation that might occur.

15 THE COURT: But it nonetheless is a relevant basis  
16 because the Supreme Court has already considered that to be a  
17 relevant --

18 MR. CONSOVOY: It is relevant, but not all relevant  
19 bases are created equal. I think it falls on the far end of the  
20 scale in terms of what the Court would look at in terms of  
21 holding. In other words, if, when you cut through everything  
22 else, if all you're left with is federal election coverage, it  
23 might be enough to allow for some prophylactic remedy, but it  
24 wouldn't be enough to allow for this prophylactic remedy.

25 THE COURT: What's your second reason?

1 MR. CONSOVOY: It's unfair also, or I think a mistake  
2 to look at simply covered jurisdictions versus noncovered. And  
3 I think this may have been lost a little bit in the back and  
4 forth in the briefing. It's conceivable that if Congress went  
5 back and took a careful look and came up with a more accurate  
6 formula, or simply chose jurisdictions for coverage based on  
7 evidence as to them -- which is another way Congress could act  
8 here, is simply identify the jurisdictions where it believes  
9 there's a problem -- that's not to say that none of the covered  
10 jurisdictions would fall within coverage. It just suggests that  
11 not all of them would, and in fact some outside would.

12 So, for example, I believe with respect to three of the  
13 jurisdictions -- and it's in our brief, I don't remember which  
14 three it was -- New Jersey has three times more election  
15 observers than those three states combined. So maybe some of  
16 the covered jurisdictions have election observer problems, but  
17 not all of them, and some of them not nearly as much as New  
18 Jersey. So the formula may capture some of them, but it won't  
19 capture all of them.

20 And that point goes down the line with all their evidence.  
21 Section 2 litigation, the Attorney General says the principal  
22 study identified 114 instances of Section 2 cases in which there  
23 was a favorable outcome for the plaintiffs. First of all,  
24 favorable outcome isn't the right standard, because there are a  
25 whole host of quote-unquote favorable outcomes that do not

1 require a finding of intentional discrimination.

2 THE COURT: And the record would also show that a  
3 higher proportion of those were in covered jurisdictions.

4 MR. CONSOVOY: Marginally. 64 to 50. Again, that  
5 kind of gap may allow Congress some measure of prophylactic  
6 remedy, but not this one. The same thing with racially  
7 polarized voting. The principal study relied on identified 105  
8 instances of racially polarized voting over a 25-year period.  
9 53 of those were in noncovered jurisdictions; 52 were in covered  
10 jurisdictions. Congress identified racially polarized voting as  
11 the leading example of the need to reauthorize the statute.

12 So as the Supreme Court explained in Northwest Austin, this  
13 is a serious problem. Congress didn't take a careful  
14 examination of where the problems it has identified still exist.  
15 And by any measure, whether some of those problems still exist  
16 in some of the covered jurisdictions, they're not concentrated  
17 there, and they exist to a large extent outside them.

18 THE COURT: For a court, what's the right analysis  
19 under a rationality test that was applied in Katzenbach? Just  
20 assume for a second that's where we are. What's the right  
21 assessment? How do I assess whether there's enough of a showing  
22 of a greater problem in covered jurisdictions than in noncovered  
23 jurisdictions for purposes of analyzing whether 4(b) in its  
24 coverage formula is rational?

25 MR. CONSOVOY: I think there is some line drawing.

1 There's no question about that. And I think the line, you have  
2 to look at the language and the decision in Katzenbach as a  
3 guide, particularly if the Court is going to rely on rational  
4 basis. There the Court said the coverage formula  
5 constitutionality was confirmed because every state for which  
6 the problem identified existed was captured by the formula.  
7 Every single one of them.

8 Here, even if the Court said I'm not going to hold to an  
9 every state example, even if it was some sort of substantial  
10 difference between the two, this record falls far short. It's  
11 not even in the same ballpark.

12 THE COURT: Why isn't part of the problem cured by the  
13 bailout provision? The bailout provision allows jurisdictions  
14 that believe that they shouldn't still be covered to come in and  
15 bail out --

16 MR. CONSOVOY: For several reasons.

17 THE COURT: -- unless they have a problem.

18 MR. CONSOVOY: I think bailout doesn't solve the  
19 problem for several reasons. It doesn't solve  
20 underinclusiveness at all, and at most deals with  
21 overinclusiveness. And underinclusiveness is a serious problem.  
22 That in fact is the principal problem the Court was concerned  
23 about when it said that the coverage formula doesn't appear to  
24 account for political conditions throughout the country. It was  
25 underinclusiveness.

1 But even with respect to overinclusiveness, first of all,  
2 bailout isn't complete relief because jurisdictions that are  
3 granted bailout are still under continuing jurisdiction of a  
4 court for at least a number of years. Bailout is granted or  
5 denied based on considerations that go far beyond evidence of a  
6 constitutional violation. It is simply -- it is, for lack of a  
7 better term, it is parole, I suppose, from preclearance. But  
8 the question here is whether Congress had enough evidence to  
9 convict in the first place, and they did not.

10 And with respect to --

11 THE COURT: I don't think that's actually your  
12 position. I think that in 1965 Congress did have enough  
13 evidence to convict.

14 MR. CONSOVOY: That's right. But again, the record is  
15 looked at anew. And that really is the principal point of the  
16 Northwest Austin opinion, which is the reviewing courts should  
17 look at the evidence in this legislative record, determine  
18 whether it requires this remedy. And it is not a historical  
19 examination. If the opinion stands for anything, it stands for  
20 that.

21 THE COURT: So your view is I should strike down 4(b)  
22 as unconstitutional, whether under a rationality or a congruence  
23 and proportionality test. And what would that mean?

24 MR. CONSOVOY: That would mean that the jurisdictions  
25 currently subject to coverage are no longer covered, which is

1        why we would afford complete relief to Shelby County. It would  
2        mean that Section 3(c) remains intact. It includes its own  
3        preclearance provision. So even if there was a question about  
4        Section 5's validity in light of Section 4 being struck down,  
5        Section 3(c) includes its own preclearance requirements. It  
6        would still remain a viable remedy to eradicate discrimination  
7        where it's found by a court. And Congress, if it so chooses,  
8        can go back to the drawing board and come up with a formula. It  
9        is not an opinion that suggests -- if the opinion was limited to  
10       that --

11                THE COURT: But you seem to feel that Congress might  
12       have an impossible task in front of it, in coming up with such a  
13       formula. You certainly haven't given me any hint of what an  
14       acceptable formula might be.

15                MR. CONSOVOY: I think it being acceptable moves along  
16       two axes, is the problem. I think if Congress went back, for  
17       instance, and said we're going to impose preclearance on any  
18       jurisdiction that has this amount of dilution claims against it,  
19       I think that -- and I'm not prejudging that issue -- that may  
20       move closer to solving the formula problem. But then the  
21       question would still arise whether that kind of formula is  
22       responsive to the massive preclearance obligation itself.

23                But there's nothing that says that Congress has to use a  
24       formula at all. 3(c) doesn't use a formula. 3(c) requires  
25       proving a violation, much like Section 2 does. And beyond that,

1 Congress could in fact identify jurisdictions where it believes  
2 the problems exist, and build a record as to those  
3 jurisdictions.

4 In 1964 that necessarily wasn't required. It was obvious  
5 where the jurisdictions were. Again, Congress captured every  
6 jurisdiction that had used a prohibited voting test or device,  
7 and where voter registration lagged behind the national average  
8 by 12 percent.

9 If you use those metrics today, you would not come up with  
10 these same jurisdictions. You simply would not. For that  
11 principal reason, we believe the coverage formula is  
12 unconstitutional.

13 Unless you have any further questions, Your Honor.

14 THE COURT: Are you going to address the 25-year  
15 issue? Or is that not on your --

16 MR. CONSOVOY: Absolutely. The 25-year issue I think  
17 is wrapped up into how the Court analyzes the evidence itself.  
18 In 1982 it was reauthorized for 25 years. Congress did so again  
19 here. It depends on the record. Here, if this is the record --  
20 and I think this was the final point we made in our final brief  
21 to the Court -- if this is the kind of evidence that can sustain  
22 the act, then it isn't a 25-year authorization anyway. It's  
23 forever.

24 THE COURT: That's a different issue, because you'd be  
25 making that same argument if it were a five-year extension. But

1 is there a problem with it being 25 years instead of five years?

2 MR. CONSOVOY: We haven't briefed it in that way. We  
3 certainly think that it being 25 years --

4 THE COURT: Is it irrational for Congress to have  
5 chosen 25 years as opposed to five or seven or 10 years?

6 MR. CONSOVOY: We haven't briefed the issue in that  
7 way. Our position is that if it's this evidence, then certainly  
8 25 years is too long. But frankly, as you just noted, on this  
9 evidence, another year is too long as well.

10 THE COURT: All right. Thank you. I don't really  
11 have the lineup in mind as to who's going to be arguing and what  
12 they're going to be arguing. So Mr. Bagenstos, why don't you  
13 first inform me of that.

14 MR. BAGENSTOS: Okay. So to the extent I understand  
15 it, I will be arguing for 45 minutes.

16 THE COURT: I hope you understand.

17 MR. BAGENSTOS: And I will address all the issues on  
18 behalf of the United States, at which point the intervenors will  
19 proceed, I believe in the order they're sitting. So  
20 Mr. Greenbaum will speak first, and he will address I think  
21 really what is the first or first and second issues that you've  
22 identified, Your Honor. Ms. Clarke will speak next, and she  
23 will address, I think, some combination of the second issue that  
24 you identified and some of the others, and then Mr. McDonald  
25 will speak and talk again about the record and the application

1 of Section 5.

2 THE COURT: Please.

3 MR. BAGENSTOS: If I might, Your Honor, I would like  
4 to begin by talking about Northwest Austin, and then address in  
5 order each of the issues that Your Honor has raised. Because  
6 Northwest Austin I think does say four things that are relevant  
7 to this court. Obviously did not decide the constitutional  
8 issue, which is why we're here, but the Court did first note  
9 absolutely that Section 5 and its coverage formula raised  
10 serious constitutional questions. I think that's been actually  
11 rather settled since South Carolina. That's why there's been so  
12 much litigation about it.

13 But the Court also did say a number of things that are  
14 relevant to framing the issues before this court. The Court  
15 said that the coverage formula must be justified by current  
16 needs, without a doubt. The Court noted that some of the  
17 conditions have unquestionably improved that justified the  
18 statute originally, but also noted that it might be that these  
19 improvements are insufficient and that conditions continue to  
20 warrant preclearance under the act. And that's really the  
21 question that this court has to decide.

22 THE COURT: If they hadn't said that, they would have  
23 decided the question.

24 MR. BAGENSTOS: I think that's right, but I think it's  
25 also important to note, this is an opinion of the Supreme Court,

1 of eight justices, that says a number of different things.  
2 Certainly frames the issues, but does not actually put a thumb  
3 on the scale one way or the other. The Court also said that the  
4 coverage has to be sufficiently related to the purpose it  
5 serves. But again, as Your Honor has noted, it didn't decide  
6 what "sufficiently related" means, and that's what we're talking  
7 about.

8 And the Court did reaffirm, by citing Justice Holmes in  
9 Blodgett v. Holden about the gravest and most delicate duty, and  
10 by just talking about the Fifteenth Amendment itself, that it's  
11 up to Congress, not the courts, to determine in the first  
12 instance what legislation is needed to enforce it, and that  
13 Congress did amass a sizable record here in support of its  
14 decision to extend the preclearance requirements. And I think  
15 that frames the issues before this court.

16 As to the question of congruence and proportionality versus  
17 rational basis, I think Your Honor has identified a number of  
18 the relevant issues here. The most basic point is that when the  
19 Supreme Court has addressed Congress's efforts to enforce racial  
20 discrimination -- the prohibition against racial discrimination  
21 in voting, it has applied a rationality test. It said in South  
22 Carolina that as against the reserved powers of the states,  
23 Congress may use any rational means to effectuate the  
24 constitutional prohibition of race discrimination in voting.

25 And it continued to apply the same standard in Rome.

1 Certainly in Lopez, when addressing the constitutionality of  
2 Section 5 after City of Boerne --

3 THE COURT: Is the reason that that's a different  
4 standard than under the City of Boerne line of cases because  
5 it's Fifteenth Amendment versus Fourteenth Amendment?

6 MR. BAGENSTOS: I think that certainly is a part of  
7 it, Your Honor. I think the other part of it is --

8 THE COURT: Because every once in a while the Supreme  
9 Court gets a little confused, doesn't it, on that issue?

10 MR. BAGENSTOS: Well, I would never suggest that the  
11 Supreme Court is confused.

12 THE COURT: In Hibbs it seemed like they were  
13 indicating that the Voting Rights Act prophylactic provisions  
14 were really valid exercises of the Fourteenth Amendment.

15 MR. BAGENSTOS: Right. And there's definitely that  
16 language in the discussions, in the various discussions in the  
17 Boerne line of cases. I think the fact that it is Fifteenth  
18 Amendment versus Fourteenth Amendment is one significant factor  
19 here. Certainly the Court has never applied congruence and  
20 proportionality to Fifteenth Amendment cases.

21 THE COURT: Have they had a case before them since --

22 MR. BAGENSTOS: Except for Lopez.

23 THE COURT: -- City of Boerne? And in Lopez the issue  
24 really was not presented.

25 MR. BAGENSTOS: I think it's fair to say it was a

1 glancing blow at the issue. The Court certainly did decide the  
2 question that was before it, but it was not an extensive focus  
3 of the parties' briefing in the case.

4 But the Fifteenth Amendment is a piece of it, and I think  
5 it's a very significant piece, because the Fifteenth Amendment  
6 cases that remain on the books are South Carolina and City of  
7 Rome.

8 But it's more than just the Fifteenth Amendment, because in  
9 the City of Boerne cases the Court expressed a concern, and in  
10 Boerne itself, that the Fourteenth Amendment is so broad, it  
11 protects a wide array of different rights that cover a wide  
12 array of different state conduct, and impose a wide array of  
13 different levels of scrutiny, and it's easy to get concerned  
14 that Congress is acting to change the substance of the  
15 constitutional right rather than enforce the substance of the  
16 constitutional right.

17 It articulated the congruence and proportionality test  
18 precisely for the reason -- and the Court explains this, Justice  
19 Kennedy in the majority opinion in Boerne explains this --  
20 articulated the congruence and proportionality test there  
21 precisely for the reason that we have to in these cases figure  
22 out has Congress enforced or has Congress tried to change the  
23 substance.

24 And so -- and here of course, when Congress is responding  
25 to race discrimination, core concern of the Fourteenth and

1 Fifteenth Amendments, and voting, again, core concern of the  
2 Fourteenth and Fifteenth Amendments, there is no need to engage  
3 in this more difficult analysis as to whether Congress has  
4 enforced or merely -- or instead has tried to change the  
5 substance of the constitutional right.

6 THE COURT: Why does the Supreme Court keep referring  
7 to those Voting Rights Act cases in the City of Boerne line of  
8 cases seemingly in a way that would indicate that the same  
9 analytical framework is being applied?

10 MR. BAGENSTOS: Well, I think what the Court is  
11 saying, the analytical framework that is being applied certainly  
12 is the analytical framework of is Congress enforcing or is it  
13 instead changing the substance. And in City of Boerne when the  
14 Court cites South Carolina as an example of a case that showed  
15 Congress acting to enforce constitutional rights, the Court  
16 didn't suggest that congruence and proportionality had applied  
17 there, but just suggested that this is a case where Congress was  
18 responding to a record of discrimination and acting in a manner  
19 appropriate as a response to it.

20 In a case like City of Boerne or in the other Boerne line  
21 of cases that struck down federal enactments, what the Court  
22 held was that it was not a case where Congress was responding to  
23 a record of constitutional violations, and trying to enforce  
24 constitutional rights. Boerne is a great example where Congress  
25 was trying to reverse a constitutional decision of the Supreme

1 Court, which is obviously not what we have in the extension of  
2 the Voting Rights Act.

3 THE COURT: The United States has been accused,  
4 through Northwest Austin and this case, of changing its position  
5 a little bit with respect to whether rationality or City of  
6 Boerne congruence and proportionality is the proper test. What  
7 is the United States's position today?

8 MR. BAGENSTOS: Our position today is the same as the  
9 position we took before the Supreme Court in Northwest Austin,  
10 which is that rational basis is the test. The test is the test  
11 articulated in South Carolina and in Rome.

12 THE COURT: Now, in the -- I think in your statement  
13 of material facts is where it really appears, there seems to be  
14 a suggestion that the standard of review for assessing the  
15 constitutionality of an extension of Section 5 might be somewhat  
16 different than the standard of review for assessing the  
17 constitutionality of Section 5 when it was originally passed.  
18 Is that your position?

19 MR. BAGENSTOS: The standard of constitutional review  
20 being different? I don't know where we suggested that. We  
21 certainly didn't mean to suggest that the standard of  
22 constitutional review would be different. It's the same  
23 standard.

24 THE COURT: All right.

25 MR. BAGENSTOS: And the point is that Congress may act

1 in a way that rationally responds to the problem of race  
2 discrimination in voting.

3 Now, Your Honor asked in addition the question of --

4 THE COURT: What if the Voting Rights Act were under  
5 the Fourteenth Amendment, under Fourteenth Amendment Section 5  
6 rather than Fifteenth Amendment Section 2? Would that make a  
7 difference in terms of what standard applies?

8 MR. BAGENSTOS: I don't think it would in the end.  
9 Certainly it would remove the one point that I discussed with  
10 Your Honor earlier, that this is certainly a Fifteenth Amendment  
11 statute. On the other hand, because Congress would still be  
12 enforcing a right that is at the core really this intersection  
13 of rights at the core of the Fourteenth Amendment as well,  
14 prohibiting race discrimination, prohibiting discrimination in  
15 voting -- and certainly there's a long line of voting rights  
16 cases under the Fourteenth Amendment as well as the Fifteenth  
17 Amendment -- still the same lack of concerns that the Court had  
18 in Katzenbach and in Rome would exist.

19 So we would think the same standard applies. Our case is  
20 easier than that, I think, because this is in very significant  
21 measure the Fifteenth Amendment statute. It's certainly, even  
22 entirely as applied to Shelby County, Alabama, Fifteenth  
23 Amendment statute for reasons we articulate in our briefs.

24 THE COURT: I'm not sure we can parse it like that.  
25 It's certainly these days, it has elements of Fourteenth

1 Amendment. I suppose the easiest place to look would be the  
2 language minorities. Many people feel that is a Fourteenth  
3 Amendment exercise.

4 MR. BAGENSTOS: Right. And of course the coverage of  
5 Shelby County, Alabama was not because of language minority  
6 status.

7 THE COURT: I understand.

8 MR. BAGENSTOS: So I'm saying that here, in the  
9 context of Shelby County, I'm not sure Shelby County would have  
10 standing to challenge coverage under the subsequent  
11 reauthorizations after '65.

12 But in any event, here certainly we have Fifteenth  
13 Amendment problems. We have race discrimination in voting.  
14 Even the kind of vote dilution that we've talked about that has  
15 been discussed in the argument of this case is a Fifteenth  
16 Amendment problem as well as a Fourteenth Amendment problem.

17 And I think the problem is not, as Mr. Rein suggested, that  
18 a group of people just continues to lose elections or has lost  
19 an election, but as the Supreme Court has made clear in cases  
20 like Rogers v. Lodge, as five justices made clear in Mobile v.  
21 Bolden, when there's intentional action by the state or a state  
22 actor to adopt or maintain a voting plan or other state action  
23 in order to dilute minority voting strength, that is a  
24 Fourteenth Amendment violation as well as a Fifteenth Amendment  
25 violation. And that's the kind of thing we're talking about

1 Congress responding to here.

2 THE COURT: Now, I think in your brief you argue --  
3 I'm not finding it right away, but I think your argument is that  
4 the constitutionality of Section 5 can be upheld either by  
5 looking facially or by looking just at Shelby County.

6 MR. BAGENSTOS: It's certainly the case that when a  
7 plaintiff brings a facial challenge to a federal statute, the  
8 plaintiff has to establish that, depending on which case you  
9 read, whether it's Washington Grange or whether it's Salerno,  
10 that in all the applications or in all but a very legitimate  
11 sweep of applications, the statute is unconstitutional.

12 One way of responding to a facial challenge always is that  
13 this -- except in the First Amendment area -- is that this  
14 statute is constitutional as to the plaintiff. So the plaintiff  
15 can't challenge the statute as applied to anyone else because  
16 it's constitutional as applied to this party, this plaintiff.

17 That's the analysis that the Court applied in U.S. v.  
18 Raines -- it was the defendant, but the defendant was raising  
19 the challenge -- and has been a continuous part of the facial  
20 challenge analysis articulated by the Supreme Court.

21 Certainly when we talk about Alabama and Shelby County, a  
22 lot of the concerns that I heard in the first half of the  
23 argument about the overbreadth of the coverage or the  
24 underbreadth of the coverage sort of fall out. Alabama of  
25 course is a state with not only a long history leading up to

1 1965 of violations of the Constitution that would later be  
2 addressed by the Voting Rights Act, but also a continuing record  
3 of violations under the Voting Rights Act. And Shelby County as  
4 well. We talked about the record some in our briefs.

5 So certainly this court could resolve Shelby County's  
6 challenge by saying maybe if we had some other jurisdiction that  
7 did not have the history, they might be able to proceed on a  
8 facial challenge in the sense that in Northwest Austin the  
9 municipal utility district there didn't even exist at the time  
10 the Voting Rights Act had been enacted, and had a very clean  
11 bill of health, and that's why we bailed them out on remand,  
12 after the remand from the Supreme Court. In the context of  
13 Shelby County and Alabama, they can't make the same argument.

14 Of course, it's in our interest for you to uphold the  
15 statute as a whole.

16 THE COURT: I understand, but it does concern me  
17 somewhat. Should I first look at the narrower way with respect  
18 to Shelby County before I look at the facial challenge?

19 MR. BAGENSTOS: Well, Your Honor, I think that would  
20 be appropriate. Your Honor could certainly do that. I think  
21 that is sort of the steps of analysis --

22 THE COURT: How does that differ from an as-applied  
23 challenge?

24 MR. BAGENSTOS: I think the way it would differ from  
25 an as-applied challenge is really what the plaintiff is saying

1 as opposed to what the defendants are saying. That is, it's  
2 always a proper response to a facial challenge that the statute  
3 can't be unconstitutional on its face, it can only be  
4 unconstitutional as applied to you.

5 THE COURT: Analytically for the Court, how does it  
6 differ --

7 MR. BAGENSTOS: Analytically, I think it's the same  
8 point. I think a party that undertakes to make a facial  
9 challenge to a statute really is carrying a very heavy burden,  
10 because they have to establish two things; they have to  
11 establish it's unconstitutional as to them, and they have to  
12 establish that it's unconstitutional as to everybody in order to  
13 get the kind of injunction that they want. Neither prong of  
14 that has been satisfied here.

15 We cite in our brief a number of examples about Alabama and  
16 about Shelby County in particular, both predating the  
17 reenactment in 2006 and even in the last couple of years with  
18 the City of Calera in its response, its gamesmanship after  
19 getting out of the Dillard consent decree.

20 So there's all that evidence there that this court can rely  
21 on. I think the first half of the argument certainly focused on  
22 the broad constitutionality of the Voting Rights Act extension,  
23 and that's certainly what I'm happy to talk about as well.

24 One more point on congruence and proportionality versus  
25 rational basis, unless the Court has further questions about

1 that. Another sort of theme or set of questions in the first  
2 half of the argument was, what's the significance? Who cares  
3 what the standard is? Is it rationality or is it congruence and  
4 proportionality? And what I heard the plaintiff say was, well,  
5 it's actually not that different. It's not that different  
6 because South Carolina really always applied a Boerne standard.

7 Not surprisingly, I think you might imagine the  
8 United States takes kind of the opposite view, that to the  
9 extent there is a difference in the context of race  
10 discrimination, where Congress is enforcing rights not only to  
11 trigger heightened scrutiny, but to trigger the highest scrutiny  
12 in our Constitution, that Congress has a much easier time of  
13 satisfying even the congruence and proportionality test. And  
14 that's just an *a fortiori* from Hibbs and from Lane, which said  
15 there where heightened scrutiny existed Congress had an easier  
16 time --

17 THE COURT: What's the difference between congruence  
18 and proportionality and the following language: Let the end be  
19 legitimate. Let it be within the scope of the Constitution, and  
20 all means which are appropriate which are plainly adapted to  
21 that end, which are not prohibited but consistent with the  
22 letter and spirit of the Constitution, our Constitution?

23 MR. BAGENSTOS: I think the best sort of mature  
24 understanding and discussion of that question really is in  
25 Justice Scalia's dissenting opinion in the Lane case, where he

1 says I can't apply congruence and proportionality anymore. It's  
2 too gauzy. I'm going to look simply to whether this is a  
3 statute that enforces an actual violation either by prohibiting  
4 a violation, providing damages for it, or reporting requirements  
5 facilitating enforcement outside of the race context. In the  
6 race context I won't apply congruence and proportionality  
7 either. I'll apply the lesser standard of McCulloch, and he  
8 cites that language from McCulloch.

9 And I think that is the proper way to understand it. When  
10 the Court has, in a case like South Carolina or a case like  
11 Morgan, relied on the McCulloch-like language to support the  
12 rationality analysis, I think that's right. And I think that's  
13 the standard that ought to apply here.

14 THE COURT: That's what you want me to do here?

15 MR. BAGENSTOS: Absolutely. If the Court has no  
16 further questions about the standard of review, I'd like to move  
17 to the record.

18 THE COURT: Go ahead.

19 MR. BAGENSTOS: So as to the record, a couple of  
20 initial points before kind of moving to some of the more  
21 specific arguments. First, the breadth of the record, we heard  
22 counsel for the plaintiff say shows that Congress has not acted  
23 in an arbitrary way. We think that would be sufficient to  
24 establish a rational basis; if it's not arbitrary, it's not  
25 irrational under the standards of South Carolina.

1           Secondly -- and I think this is especially important  
2           because it frames the analysis of all the evidence in the  
3           legislative record -- Congress is not a lower court. Congress  
4           is not subject to the standards of gathering evidence of a lower  
5           court. Congress can look to evidence from any probative source.

6           THE COURT: That's what Katzenbach says.

7           MR. BAGENSTOS: That's what Katzenbach says. So when  
8           we look at the evidence that is probative of constitutional  
9           violations, and I think it has to be probative of continuing  
10          constitutional violations in the covered jurisdictions, it  
11          doesn't have to be findings of courts that there were continuing  
12          constitutional violations. It can be any probative evidence  
13          that is relevant to that fact.

14          And I think that's what the Court looked to in Katzenbach  
15          as well. In Katzenbach there was some evidence of adjudicated  
16          violations, some evidence of just a lot of facts that seemed  
17          very consistent and hard to explain other than race, but they  
18          didn't require, and the Court did not require Congress to comply  
19          with the standards that a court would.

20          Also, I think it's important to note that Congress does  
21          have very significant constitutional responsibilities. They  
22          take an oath to defend the Constitution, just like Your Honor  
23          does and I do. And they are entitled to deference as to their  
24          assessment of the constitutional issues. And I think it's not  
25          appropriate to say it's very popular therefore we have

1 heightened concern about its constitutionality.

2 The overwhelming vote in favor of passage of the amendments  
3 is certainly probative. I wouldn't say it's a ticket to the  
4 best seat in the house, but it's certainly a piece of  
5 evidence suggesting that it fits within the scheme --

6 THE COURT: So it's a different analysis for a court  
7 with the overwhelming vote here than it would be if it was a  
8 bare majority in each house?

9 MR. BAGENSTOS: I think it's something that at the  
10 extreme margins the Court would look to. I don't think it's  
11 much more than that, honestly, in the analysis. But I do think  
12 it is something, because when you have members of Congress and  
13 the Senate and the President who take the oath to comply with  
14 the Constitution and they all think it's constitutional because  
15 they voted for it, that certainly suggests something. Now,  
16 obviously this court has to make an independent --

17 THE COURT: Some voted for it and then gave some  
18 observations in the congressional record questioning their  
19 votes.

20 MR. BAGENSTOS: A couple of them did. It's definitely  
21 true. But nonetheless, it's not something that we should look  
22 more skeptically on, see as more risky. It is an act of  
23 Congress signed by the President.

24 THE COURT: Now, do you agree with the  
25 characterization given by plaintiff's counsel that this is much

1 more a voting dilution record than anything else these days? Is  
2 that an evolution that has taken place, fairly?

3 MR. BAGENSTOS: I think there is an evolution that has  
4 taken place. I don't think the evolution is to the point where  
5 you can say it's more a voting dilution record than something  
6 else, because I think if you look in the record for Congress of  
7 2006, there's a lot of evidence of voting dilution -- I'm happy  
8 to talk about why that matters -- but there's also evidence of  
9 voter intimidation, voter suppression on the basis of race  
10 continuing even in the 2000s in front of Congress. So there's  
11 really all of that going on in front of Congress.

12 Now, whether it's a vote dilution record or it's a record  
13 of voter suppression, it's not the crucial question that the  
14 Court sets up in its constitutional analysis. The crucial  
15 question is, is Congress enforcing constitutional rights.  
16 There's certainly a constitutional right against race-based  
17 voter suppression, race-based voter intimidation, without  
18 question. There's also a constitutional right against  
19 intentionally discriminatory vote dilution, where a jurisdiction  
20 maintains a voting practice knowing and because they want to, in  
21 part, that it will suppress minority voting strength, dilute  
22 minority voting strength.

23 THE COURT: How strong is the record on tying the  
24 voter dilution evidence to intentional discrimination?

25 MR. BAGENSTOS: I think the evidence is quite strong.

1 Let me go through a little bit of it. I think the most -- there  
2 are two categories of evidence that are very significant here in  
3 finding voting discrimination, a lot of which is vote dilution.  
4 One is the Attorney General objections. The Attorney General's  
5 objections, either the number of over 700 in the last  
6 argument -- if you look throughout the legislative history, the  
7 numbers differ a little bit, but they're all north of 600  
8 between 1982 and 2006, a very substantial number of which were  
9 based on discriminatory purpose that is unconstitutionality  
10 grounds.

11 That is evidence also in the legislative record. Up to 70  
12 percent in one decade were based in whole or in part on a  
13 determination by the Attorney General that the discriminatory  
14 purpose prong of Section 5 had not been satisfied by the  
15 jurisdiction.

16 So that's very probative evidence, directly probative  
17 evidence of whether there was voting discrimination that  
18 violated the Constitution, because intentional discrimination  
19 does violate the Constitution. And it's not a case where this  
20 court has to examine each of the objections and say would I  
21 agree or disagree with them. Of course, covered jurisdictions  
22 have the option always of going to court to get judicial  
23 preclearance, and that would be probative evidence, what  
24 happened in those judicial preclearance suits. And there is  
25 evidence of 25 of those in the record which show overwhelmingly

1 that the jurisdictions are not -- are violating Section 5 in  
2 their submission.

3 But in any event, this court does not have to sort of parse  
4 each Attorney General objection, which of course doesn't result  
5 in a judicial opinion, it results in a letter, isn't based on  
6 the practices of a court. But the sheer number is very  
7 significant, because we're talking about, even if you assume  
8 half of the 600, 700 or so of objections were based on  
9 discriminatory intent, even a third, which would be counting out  
10 some of the ones that plaintiffs say we shouldn't count, that's  
11 still talking about over 200 --

12 THE COURT: Why should I put any stock in the estimate  
13 of a half or a third or 1/10?

14 MR. BAGENSTOS: Well, the evidence in the record -- so  
15 there's evidence in the legislative record that 74 percent of  
16 the objections between 1990 and the Bossier decision in 2000  
17 were based in whole or in part on discriminatory intent. I'm  
18 extrapolating there's 75 percent, and I'm lowering that number  
19 quite a lot. There's other evidence in the record that it's 40  
20 or 50 percent over the period is based on discriminatory intent.

21 I'm saying this court could take a low bound estimate of  
22 that and could cut that down even further, and we'd still have  
23 hundreds of cases in which the Attorney General objects on  
24 discriminatory purpose grounds. And that is something that  
25 Congress can be aware of and take into account and say do we

1 want hundreds of plaintiffs to have to file hundreds of Section  
2 lawsuits -- with all the attendant burdens of time and  
3 expense, which Congress discussed quite extensively, and which  
4 the Northwest Austin district court panel discussed quite  
5 extensively -- do we want to put plaintiffs to that?

6 Well, this is a very large number of cases in which we  
7 don't want to do that, in which we've seen the preclearance  
8 process work.

9 Now, I think you know you could take an even higher number  
10 than that. I think the evidence in the record is consistent  
11 with it. What I'm saying is even if you take the most  
12 conservative estimate in the record, and even if you lower it a  
13 little bit, you still have many, many cases in which there's a  
14 purpose objection, and that is evidence of unconstitutional  
15 discrimination.

16 The other category of evidence -- and there's much more in  
17 the legislative record about preclearance, about withdrawals of  
18 preclearance submissions, about 200 of them, about jurisdictions  
19 that are affected by more information requests, about 800 of  
20 them. But aside from that, the other significant category of  
21 evidence on continuing intentional discrimination in a covered  
22 jurisdiction is the evidence of Section 2 cases. And of course  
23 those cases don't require a finding of unconstitutionality in  
24 order for a plaintiff to prevail, and so courts typically apply  
25 constitutional avoidance and don't reach the constitutional

1 question, but instead when they find for a plaintiff they find  
2 for the plaintiff on Section 2 statutory grounds.

3       Nonetheless, when you look at those cases, when you look at  
4 both the adjudicated cases and the settlements, there are about  
5 I think 651 in the covered jurisdictions after 1982, whereas in  
6 the noncovered jurisdictions you have substantially less. Even  
7 looking just at the evidence in the legislative record, 85  
8 percent of the successful, either in litigated judgments or in  
9 settlements, Section 2 cases, were in the covered jurisdictions,  
10 even though the covered jurisdictions have about 24 percent of  
11 America's population and 33 percent of America's minority  
12 population.

13       THE COURT: There aren't many of those Section 2 cases  
14 that wind up with published decisions of unconstitutional  
15 discrimination.

16       MR. BAGENSTOS: No. Absolutely not. Because courts  
17 do apply constitutional avoidance. But what's important is that  
18 the factors that the Supreme Court has looked to in finding  
19 intentional discrimination and vote dilution -- in Rogers v.  
20 Lodge, a case upholding a finding of intentional discrimination,  
21 intentional dilution -- are the same factors that courts have to  
22 look at in the totality of the circumstances analysis in a  
23 Section 2 case. So it's certainly probative evidence.

24       Now, again, if Congress were a lower court and this were a  
25 reviewing court to a lower court, you might look at that

1 evidence and say, well, but is this actually based on a finding  
2 of discrimination? But Congress can look at any probative  
3 evidence, and certainly that evidence is probative, because  
4 where there's a Section 2 case, a successful Section 2 case,  
5 that's suggestive of, although not conclusive of intentional  
6 discrimination. Where there are a lot of successful Section 2  
7 cases, that's suggestive of quite a lot of intentional  
8 discrimination.

9 THE COURT: Now, things have gotten better. Is that a  
10 fair characterization?

11 MR. BAGENSTOS: I think things have gotten better in  
12 many significant ways, yes.

13 THE COURT: Indeed, the majority in Northwest Austin  
14 pointed out some of the ways that seemed to it to be  
15 improvements in conditions. Under a rationality review, is  
16 there some point at which things have gotten better enough so  
17 that Section 5 isn't --

18 MR. BAGENSTOS: I think there definitely could be such  
19 a point. One can imagine, one hopes for such a point honestly.  
20 That's the purpose of the statute, of the preclearance  
21 provision, is to accelerate its own obsolescence. So there's no  
22 question that that's the goal and there ought to be such a  
23 point.

24 Now, the question is whether that point's been reached.  
25 Unfortunately, there's no mathematical standard for rationality

1 review. There's no mathematical standard, honestly, for a  
2 congruence and proportionality review. This is something that a  
3 court has to assess. Looking at the record of the problems that  
4 Congress is responding to which are constitutional violations or  
5 suggestive of constitutional violations, is now the time when  
6 it's no longer rational? I think it would be very difficult to  
7 make that argument, that now is the time when it's no longer  
8 rational, when you have these literally hundreds of instances of  
9 either purpose-based objections or successful Section 2  
10 litigation in the covered jurisdictions, which suggests that  
11 Congress's decision to shift the burden of time and inertia  
12 continues to make sense. And it doesn't -- a constitutional  
13 violation is a constitutional violation for these purposes.

14 So another thing, I just want to talk a little bit about  
15 some of the other evidence. A lot of it's in our briefs. I  
16 don't want to dwell too much on it. Racially polarized voting  
17 is relevant for what reason? It's relevant for one and only one  
18 reason. It's relevant because it shows -- which is the entire  
19 reason of the case -- it shows that this is a context where the  
20 adoption of voting practices like cracking districts in the  
21 LULAC case, like at-large elections in Rogers and other cases,  
22 this is a context where, if a jurisdiction wants to dilute  
23 minority votes, it can do it because there is racially polarized  
24 voting. It enables the intentional vote dilution. And I think  
25 that is very significant.

1 I think it's also significant that -- and I don't want to  
2 lose the thread of the Fifteenth Amendment discussion in the  
3 first part of the argument. I think the Fifteenth Amendment  
4 says "deny or abridge." I think everything that the plaintiffs  
5 have suggested comes within the word "abridge" would also come  
6 within the word "deny." "Abridge" means to minimize, to lessen,  
7 to dilute. That's what we have here. And that's what five  
8 justices explained in Mobile v. Bolden, although in separate  
9 opinions.

10 I don't know if there are further questions about the state  
11 of the legislative record. The legislative record is a very  
12 substantial record --

13 THE COURT: I suppose we could have questions all day  
14 about the state of the legislative record. It's big enough.

15 MR. BAGENSTOS: It is a very big record, and I think  
16 what's important about it is it's not appropriate to go through  
17 that record in every case and say would I as a federal judge  
18 have found discrimination in this case, in the hundreds of  
19 examples cited. This is statistical evidence. There's also  
20 findings of courts. There's also testimony from individuals who  
21 have been involved in election processes.

22 That's the way that either Congress or even plaintiffs in  
23 cases establishing systemic discrimination prove it, with a  
24 combination of statistics, with a combination of individual  
25 findings, and with individual testimony that brings the numbers

1 to life. And I think that's all there, and it's all discussed  
2 in our briefs.

3 I think it's also -- I'd like to spend some time talking  
4 about the coverage formula as well. I think the coverage  
5 formula is -- obviously that was a question that Your Honor had  
6 posed, and I think it's a very important and relevant question.  
7 I think some common ground here. Plaintiffs agree that the  
8 coverage formula in 1965 was reverse-engineered, that is, the  
9 problem that Congress went to solve wasn't just a problem of  
10 registration or turnout being below 50 percent and the existence  
11 of a test or device.

12 The problem Congress was trying to resolve was systemic  
13 race discrimination, which took many different forms. It  
14 sometimes took the form, particularly in the years leading up to  
15 the Voting Rights Act, took the form of intimidation and denial  
16 of the opportunity to register to vote.

17 But it also often took the form of other kinds of  
18 discrimination, whether the Gomillion example of redrawing  
19 district boundaries so that people couldn't effectively vote for  
20 a black, or whether the examples that we discuss in our brief of  
21 Alabama in the state shifting between at-large and  
22 district-based elections for local officials, as blacks were  
23 more or less enfranchised. During periods of time when blacks  
24 were able to register and cast ballots, Alabama had at-large  
25 elections and moved toward at-large elections. Then, after a

1 disenfranchisement in 1901, Alabama moved toward district-based  
2 elections. Then, after the white primary cases in 1944, it  
3 moved back to at-large elections with other dilutive practices.

4 All of this was going on at the time Congress acted, and  
5 Congress was responding to all of it. What Chief Justice Warren  
6 says in the South Carolina case is the coverage formula itself  
7 applies to a number of jurisdictions that Congress itself knew  
8 by name. It wasn't that they were simply mathematically trying  
9 to figure out where registration gaps were.

10 And they always recognized, Congress always recognized and  
11 the Court always recognized that the kinds of discrimination  
12 might change, that one symptom might be eliminated, but the  
13 underlying disease would express itself with another kind of  
14 symptom.

15 THE COURT: Indeed, that's the genius of Section 5.

16 MR. BAGENSTOS: That is the genius and the purpose of  
17 Section 5, absolutely. Congress in 1965 defined voting as all  
18 action necessary to make a vote effective, which the Court  
19 relied on in 1969 in the Allen case, before even the first  
20 reauthorization, and said therefore we know Congress wasn't just  
21 talking about casting ballots and registering; Congress was also  
22 talking about all of the action that might minimize or cancel  
23 out or dilute the ability to vote.

24 THE COURT: But while the type of coverage formula  
25 might make some sense -- indeed, the Supreme Court has held it

1 made sense, was rational, in terms of a means back in 1965,  
2 given the primary problems, to steal some of the language from  
3 the plaintiffs, does that type of coverage formula still make  
4 sense today?

5 MR. BAGENSTOS: I think the proof, as it was in 1965  
6 and in 1966 when South Carolina was cited, the proof is really  
7 in who does it cover. Is the coverage formula identifying a  
8 series of jurisdictions that have a history and a continuing  
9 pattern of voting discrimination that's unconstitutional? I  
10 mean, that's the question.

11 THE COURT: History may not be enough there. It seems  
12 to me that if you go to the current language of the Supreme  
13 Court in Northwest Austin, it has to be more than just history.

14 MR. BAGENSTOS: I meant the conjunctive intentionally.  
15 It has to be the history and the continuing pattern, because I  
16 think when we talk about what's unusual about Section 5, other  
17 jurisdictions may lose a Section 2 lawsuit, may be found to have  
18 violated some federal statute, but without the history and the  
19 continuing line that you can draw, it might be more difficult  
20 for Congress to say we can constitutionally apply a preclearance  
21 requirement there.

22 Here we're talking about jurisdictions that have this  
23 history. And certainly the plaintiff before this court is a  
24 county and in a state that has this history. But also, I think  
25 it's very important, after Northwest Austin especially, also the

1 continuing pattern. And that's the question. Of course it  
2 captures states with a history. We know that because in 1965 we  
3 know what states it captured, and the Supreme Court said that  
4 was the states that had the history, and those are all still  
5 covered. But do they have the continuing pattern? I think the  
6 answer is yes. And the evidence --

7 THE COURT: Continuing pattern of what? Not  
8 continuing pattern of low percentages of voter registration, not  
9 continuing pattern of tests, which are the two parts of the  
10 coverage formula, but a continuing pattern of something else.

11 MR. BAGENSTOS: Right. No, I agree. And of course, a  
12 continuing pattern of tests, Congress eliminated the tests in  
13 the covered jurisdictions in 1965, and eliminated them  
14 nationwide in 1975. No one has a continuing pattern of tests  
15 anymore, except in sort of outrageous cases.

16 THE COURT: Can anyone say that this coverage formula,  
17 applied today, captures those jurisdictions and only those  
18 jurisdictions that have that continuing problem that you're  
19 alluding to?

20 MR. BAGENSTOS: The coverage formula that's written in  
21 the statute as applied today. So in 1964 there was a test or  
22 device and less than 50 percent. Yes. I think that's the very  
23 question that's the right question before the Court.

24 THE COURT: And does it?

25 MR. BAGENSTOS: Yes, it does, absolutely.

1 THE COURT: Why?

2 MR. BAGENSTOS: For all of the reasons that are  
3 discussed. Number one, the very extensive record of voting  
4 discrimination in the covered jurisdictions, identified through  
5 the preclearance process. Obviously that's not comparative, but  
6 that does show a very large absolute number of instances of  
7 discrimination or instances that raise serious suggestions of  
8 unconstitutional discrimination.

9 But also there's the comparative evidence in the record,  
10 particularly with regard to Section 2 cases, which I think it's  
11 very significant, in the legislative record of the successful  
12 Section 2 cases, 85 percent -- and we think the number is  
13 actually lower, and that's the McCrary declaration we submitted,  
14 which says it's 81 percent. 81 percent of successful Section 2  
15 cases, whether in litigated judgments or in consent decrees and  
16 settlements, were in the covered jurisdictions, even though the  
17 covered jurisdictions are a very small part of America.

18 THE COURT: Is it just an astounding coincidence or is  
19 there a logic to the fact, as you put it, that this test, based  
20 on 1964, 1968, 1972 circumstances, and not one replacing the  
21 other but just adding to, that that test captures today the  
22 jurisdictions that are most involved in a different kind of  
23 voting discrimination than was the focus in 1965? Is that just  
24 a coincidence, or is there some logic that I can look to that  
25 would explain why that is true, if it is factually true?

1           MR. BAGENSTOS: I think there is logic. I think it's  
2           the very logic of Section 5 from the beginning. The logic of  
3           Section 5 from the beginning was that in 1965 Congress was  
4           identifying jurisdictions that had such a significant history,  
5           going back, but also extending very recently, of voting  
6           discrimination, that the problems of voting discrimination would  
7           not so easily be eliminated, would not be eliminated right away,  
8           and would not be eliminated by eliminating the particular  
9           practices that instantiated voting discrimination in those  
10          states.

11          Congress recognized at that point that these are the states  
12          that are the problem. These are the states that have very  
13          significant histories and very significant threats of future  
14          changing of the kinds of discrimination, just as they had in the  
15          past. That's the genius of Section 5, as Your Honor says.

16          So it's not surprising that the jurisdictions that had that  
17          history in 1965 are the jurisdictions -- and Alabama was one of  
18          them -- are the jurisdictions that today are the jurisdictions  
19          where we have different kinds of voting discrimination problems,  
20          but we still have very significant voting discrimination  
21          problems. And that's what Congress expected.

22          THE COURT: It's not surprising that that would be  
23          true for some jurisdictions. It is surprising, if it is a fact  
24          as you say it is, that we would be capturing through this arcane  
25          test exactly those jurisdictions that continue to be a problem,

1 and no jurisdictions that don't continue to be a problem. That  
2 seems a little bit --

3 MR. BAGENSTOS: I understand. And that places a lot  
4 of weight on the word "exactly," of course. And the question is  
5 whether that's the test before Congress. Congress has to  
6 legislate in a manner that draws lines.

7 THE COURT: How did Congress legislate here? What  
8 should I look to in the record to exhibit Congress's analysis of  
9 this 4(b) coverage formula issue? What did Congress say about  
10 it? What was Congress's analysis of why it made sense to  
11 continue it exactly as it was back as early as 1975? Because it  
12 hasn't changed since then.

13 MR. BAGENSTOS: I think the most extensive discussion  
14 of this really is in the House report, which explains very much  
15 what I've been saying, that the coverage formula itself  
16 identified a set of jurisdictions. The question in 2006 was do  
17 we think these jurisdictions should continue to be covered? Not  
18 do we think anything about registration or turnout or test or  
19 devices, but do we think that these jurisdictions, which we know  
20 what they are because it's been clear since we adopted the  
21 statute and we adopted the coverage formula, can these  
22 jurisdictions continue to be covered? And the answer is yes  
23 because we continue to see very significant problems in the  
24 covered jurisdictions.

25 Now, I will agree, there are probably patterns that have

1 shifted in various ways among different jurisdictions. There  
2 may well be jurisdictions that are not covered by Section 5 -- I  
3 mean, there certainly are jurisdictions not covered by Section 5  
4 where there is voting discrimination that has happened or been  
5 adjudicated. But that's really not the question. The question  
6 is can Congress say this set of jurisdictions, which we've known  
7 for a long time, which we've extensively studied, we see an  
8 overall pattern in this set of jurisdictions that is very  
9 different from the pattern outside of these jurisdictions;  
10 should we continue to cover these jurisdictions? And the answer  
11 to that is yes.

12 Requiring the kind of precision of should Congress have  
13 made clear that some jurisdictions might have moved a little  
14 bit, I don't think that's what's required of Congress and I  
15 don't think that's an appropriate judicial role in measuring  
16 Congress. Congress gets a great deal of latitude under either  
17 City of Boerne or rational basis on precisely the point of  
18 designing the remedial scheme, when we know they're responding  
19 to very significant threats of constitutional violations. And  
20 here the question of whether it should have been tailored a  
21 little more or a little less or a little differently is really  
22 something within the --

23 THE COURT: But even for Section 4(b), to return to  
24 Northwest Austin, there's still the question of current needs  
25 and current burdens. And "current" is a term that's used. And

1 we have, in 4(b), we have a coverage formula first devised in  
2 1965 and then added to. It's not that these additional points  
3 that focus on '68 statistics and '72 statistics eliminated any  
4 jurisdictions. All they did was add jurisdictions.

5 And we're now looking at a situation where that information  
6 is at least, what, 45 years out of date? At least 45 years out  
7 of date. And by the time the 2006 extension of the Voting  
8 Rights Act runs its course, they'll be 70 years out of date.  
9 That wouldn't seem to be a current coverage formula, would it?

10 MR. BAGENSTOS: I think there are two aspects to  
11 what's current here. Certainly it relies -- it doesn't even  
12 really rely on any old statistics anymore. What it relies on is  
13 a determination made a long time ago by the director of the  
14 census and by the Attorney General that these jurisdictions  
15 should be covered. And if what the statute had said is we're  
16 going to recodify this, it's too confusing, '64, '68, '72, let's  
17 just list the jurisdictions that have been covered, and we're  
18 going to extend the statute as to those jurisdictions, and list  
19 them. Alabama, Mississippi, Louisiana, Georgia, South Carolina,  
20 et cetera. And Congress had passed a law which would have  
21 exactly the same effect indeed, in legal effect, exactly the  
22 same thing that Congress did, the question would not be were the  
23 states initially chosen in 1965 based on a formula that doesn't  
24 work anymore, but the question would be is there continuing  
25 discrimination in those identified states.

1           And the answer is yes. That's what Congress was  
2       considering during the period of time, during the 16,000 pages  
3       of the legislative record, Congress was considering what is it  
4       that could continue to justify, can we continue to justify  
5       applying this remedy to the states, which we know. We know what  
6       the states are. The formula that we used to identify  
7       discrimination in 1965 is a formula that was relevant to showing  
8       the states with a very significant history and a very  
9       significant threat that they would continue to violate the  
10      statute. Of course jurisdictions do have clean hands. They can  
11      bail out. That's a very important point. And in the Northwest  
12      Austin case --

13           THE COURT: It's very hard for a state to bail out  
14      given the fact that any jurisdiction within that state, over  
15      which the states really have very little control, if any, does  
16      something, then the state can't bail out.

17           MR. BAGENSTOS: It might be difficult for a state to  
18      bail out, although I would reject the empirical premise that the  
19      state has very little control over the local officials. That  
20      may or may not be true.

21           THE COURT: It may or may not, but often it is not.

22           MR. BAGENSTOS: States may not be able to bail out,  
23      but certainly localities can bail out. And we have since the  
24      time of Northwest Austin taken seriously what the Supreme Court  
25      said there. At the Department of Justice we've taken that very

1 seriously. The Court said that the bailout standard has to be  
2 interpreted more broadly to provide a meaningful opportunity for  
3 bailout. And that's something -- we've substantially expanded  
4 what we've done to try to encourage jurisdictions to bail out.  
5 And that option is very much available. We've bailed out a  
6 number of --

7 THE COURT: No state has ever bailed out. I'm not  
8 sure any state has ever sought to bail out.

9 MR. BAGENSTOS: Not under the 1982 test. I think  
10 under the earlier tests a couple states bailed out and bailed  
11 in.

12 THE COURT: Since 1982, under the 1982 test, no state.

13 MR. BAGENSTOS: That's right.

14 THE COURT: Any county?

15 MR. BAGENSTOS: Have any counties? Yes. We have a  
16 number of counties that have bailed out. Indeed before --

17 THE COURT: The Virginia group or others?

18 MR. BAGENSTOS: Well, it was the Virginia group before  
19 Northwest Austin. Northwest Austin sort of changed the way the  
20 Department of Justice understood bailouts. We had interpreted  
21 the bailout standard to mean essentially you had to have a  
22 county level or higher jurisdiction to bail out, unless it  
23 registered its own voters, because that's what the text of the  
24 statute said.

25 And what the Court said is, no, any jurisdiction that's

1 covered can bail out no matter what kind of subjurisdictions.  
2 Since then we have bailed out subjurisdictions. We bailed out a  
3 city in Georgia, we bailed out the Northwest Austin Municipal  
4 Utility District, a city in North Carolina, and we are looking  
5 at and working informally with a very large number of  
6 jurisdictions and trying to get the message out that this is  
7 something that's a viable option for folks.

8 And it is something that is a viable option. All the  
9 jurisdiction effectively has to show is that for the last 10  
10 years it hasn't discriminated. And now that it can be that  
11 jurisdiction itself and not other jurisdictions it's tied to,  
12 that is broadened. So that is a way of trimming the  
13 overbreadth.

14 Now, the underbreadth that the Court talked about, I don't  
15 think there is significant underbreadth. However, it is also  
16 true, as the intervenors point out, under Section 3, and as  
17 actually the plaintiffs point out, under Section 3 even now, new  
18 jurisdictions can come in. Most recently one was brought in in  
19 2009 under Section 3.

20 So there are means -- there is a broad standard that  
21 Congress adopted that paints not with a very broad brush, but  
22 paints with a brush that has certain limitations but is very  
23 well tied to a history and pattern of discrimination. And there  
24 is a means that Congress adopted to provide a remedy for  
25 possible over- and underbreadth. That is, under either City of

1 Boerne or under a rationality test, that is something the Court  
2 should take account of.

3 And I did not hear the plaintiffs to challenge the 25-year  
4 extension per se as being too long, but I heard that challenge  
5 as being mixed in with all their challenges to the extensions  
6 per se. So therefore I don't think we need to say more than we  
7 said in our brief on that subject.

8 THE COURT: Say a little more on 25 years.

9 MR. BAGENSTOS: Okay. That's why I asked, Your Honor.

10 So a couple points on that. First of all, 25-year  
11 extension was the length of the extension in 1982, so they had  
12 something to look to. 25-year extension makes sense because,  
13 Congress thought, because it will provide enough information  
14 when we're reconsidering the statute later. If we just have one  
15 redistricting cycle or a few years, that's not going to provide  
16 sufficient information --

17 THE COURT: Is Congress right that a lot of the  
18 Section 5 activity takes place because of the redistricting that  
19 takes place on the decennial basis?

20 MR. BAGENSTOS: I think yes, that's definitely right  
21 because -- Section 5 applies to all voting changes, but because  
22 of the census and all of the dominos that start falling after  
23 the census -- reapportionment, redistricting, changing precinct  
24 boundaries, et cetera, et cetera -- there are lots of voting  
25 changes in the few years after a census.

1           And if you look at the statistics in the House report --  
2       they're very good -- there are humps every 10 years just after  
3       the census. The biggest hump of course was after the first  
4       redistricting period when Section 5 covered. Not surprising.  
5       But yes, that is definitely true. And it made sense for  
6       Congress to say we need to evaluate this through a couple of  
7       these humps, so we can see whether there continues to be the  
8       problem.

9           Previous rounds of redistricting, previous years had shown  
10      that after the census there are objections, which are indicative  
11      of unconstitutional discrimination. There are examples that we  
12      talk about. Kilmichael, Mississippi in 2001, blacks become a  
13      majority in the town and they cancel elections. We found that  
14      as purposeful discrimination. That is relevant evidence that  
15      Congress wants to look at later.

16      Of course, Congress gets a great deal of deference in  
17      setting time limits, so long as there is an end date that  
18      Congress would have to pass the statute. Eldred v. Ashcroft is  
19      a great example of that, where the Supreme Court said setting  
20      those kinds of dates is something that's within Congress's  
21      general power. If they could extend the statute, they could  
22      extend it for 25 years.

23           THE COURT: All right. Thank you.

24           MR. BAGENSTOS: Thank you, Your Honor.

25           THE COURT: Mr. Greenbaum.

1 MR. GREENBAUM: Thank you, Your Honor. As  
2 Mr. Bagenstos mentioned, I'm primarily going to focus on the  
3 proper legal standard, though that does bleed into the other  
4 three questions, because you look at the other three questions  
5 in the context of what's the proper legal standard.

6 We agree that the proper legal standard here is the  
7 rational means standard. And there's several reasons for that,  
8 some of which have been articulated already. First of all, it's  
9 the standard in the two cases that dealt with this question  
10 directly, as to the constitutionality of Section 5, Katzenbach  
11 and Rome, where the Court clearly, in both of those cases,  
12 articulated the rational basis standard.

13 Secondly, Katzenbach and Rome are cited to a number of  
14 times in the Boerne cases, and not once is there the suggestion  
15 that -- and they're cited to positively. Not once is there a  
16 suggestion that they got the standard wrong in Katzenbach or  
17 Rome.

18 THE COURT: That positive citation would also arguably  
19 indicate a belief that the same standard was being or should be  
20 applied in the two situations.

21 MR. GREENBAUM: Well, primarily positively cited to as  
22 examples as to what Congress -- how Congress should act  
23 appropriately in terms of using its Fourteenth and Fifteenth  
24 Amendment enforcement powers, as opposed to going beyond its  
25 enforcement powers and trying to substantially redefine the act.

1 But nothing in there at all suggesting that rationality wasn't  
2 the way to look at these particular types of cases.

3 THE COURT: There's certainly nothing explicit  
4 suggested in that.

5 MR. GREENBAUM: Okay. Rome's the only case of all of  
6 these cases involving a reauthorization. So if there's one case  
7 to really look to as to -- if there's one case the Court should  
8 follow here, it's Rome, which applied rational basis, which  
9 looked at the evidence after the point in time in Katzenbach  
10 where you didn't have the tests anymore, where you had a large  
11 decrease in the disparity of registration rates, and where the  
12 Court specifically looked at the dilution evidence as being an  
13 essential part of justifying this as a proper use of Congress's  
14 Fifteenth Amendment powers.

15 THE COURT: But you've got this similarity in the  
16 enforcement provisions of the Fourteenth and Fifteenth  
17 Amendments. Indeed, it's more than a similarity; it's almost an  
18 identity. Slightly different order of the words. And you do  
19 have several justices -- well, Katzenbach itself, the majority  
20 decision -- Katzenbach v. Morgan I guess it was, and some other  
21 cases, really talking about the identity of this enforcement  
22 provision, and then several dissenting justices more recently,  
23 Justice Scalia in Hibbs and Justice Thomas in Lopez, Justice  
24 Rehnquist in City of Rome, all talking about the identity of the  
25 enforcement provisions.

1           Why shouldn't the same standard apply when you're looking  
2       at them? How can they be identical and yet totally different  
3       standards be applied in analyzing enforcement actions under the  
4       two provisions?

5           MR. GREENBAUM: The big difference is the right at  
6       issue. This is something you actually hit on earlier. That  
7       here we're talking about race and voting. Core Fifteenth  
8       Amendment right. There's less of an issue in terms of has  
9       Congress redefined the right. Whereas when you're talking about  
10      some of the Fourteenth Amendment protections that were at issue  
11      in the Boerne cases, they did not involve fundamental rights.

12           That anybody can always bring some type of a Fourteenth  
13      Amendment challenge, or say that something violates the  
14      Fourteenth Amendment, because almost with any law you can  
15      discriminate between different classes of people. But the  
16      question is when you're treating -- does the class of people  
17      that's being treated differently, are they entitled to some form  
18      of heightened protection? And that's when you look at the  
19      Boerne cases, particularly the five --

20           THE COURT: So what you would say is that whether it's  
21      under the Fourteenth Amendment or the Fifteenth Amendment that  
22      the enforcement proceeds, if it is a race issue, it's a  
23      rationality test.

24           MR. GREENBAUM: Race issue, race discrimination,  
25      voting, rationality test.

1           THE COURT: So it's only if it's race and voting that  
2       it's a rationality test. Everything else, under the Fourteenth  
3       Amendment at least, is a City of Boerne analysis.

4           MR. GREENBAUM: It gets a lot closer if you're talking  
5       about race specifically or voting specifically, but where you  
6       have race and voting, it's a rationality test. I would agree  
7       with the plaintiff to the extent that they say that in this  
8       context there isn't a lot of difference between the two.

9           Boerne asks the questions a little bit differently, but if  
10      you look at how the courts actually applied the Boerne test,  
11      when you've dealt with protecting a right that merits heightened  
12      scrutiny, hasn't dealt with it all that differently.

13           And that goes back to what's really at issue in these  
14      cases. And that is, is Congress enforcing a constitutional  
15      right, or is it attempting to substantively redefine that right?  
16      And you look at Boerne as being the prototypical example of  
17      that, where what Congress tried to do and said in its preamble  
18      regarding the statute that they were doing this, they  
19      essentially said, Supreme Court interpreted the First Amendment,  
20      the free exercise clause, incorrectly in the Smith case. And so  
21      what we are going to do is legislatively bring what we think the  
22      proper test should be into play.

23           So you can look at that and very clearly say Congress is  
24      redefining -- attempting to redefine a constitutional right as  
25      opposed to using its enforcement powers.

1           The other Boerne cases, the issue is actually quite a  
2 narrow one. And that is, you had all these statutes that were  
3 passed under Congress's Article I powers. Included in these  
4 statutes was -- gave people the right to sue governmental  
5 entities that had violated the law, including states. You had  
6 the Supreme Court in 1996 say, in Seminole Tribe case, say the  
7 Eleventh Amendment does not enable Congress to use its Article I  
8 powers to allow people to sue states, that you have to look  
9 someplace else for the congressional authority. And of course  
10 one of those places where you could look was the Fourteenth  
11 Amendment.

12           So you had all these statutes that had been passed prior to  
13 1996, primarily passed under the commerce clause justification,  
14 and then it's a matter of going back and saying, okay, was there  
15 enough of a Fourteenth Amendment justification to justify why  
16 you should be able to bring lawsuits against the states? And in  
17 the cases dealing with, where you didn't have a heightened  
18 protection, the Court said no. And the Court was pretty  
19 demanding on what the Congress had to have as a record in those  
20 cases.

21           Where you had the heightened scrutiny, the answer was  
22 different. And in fact, if you look at Hibbs and Lane, you will  
23 see very little to no evidence of proof of unconstitutional  
24 conduct by the states.

25           THE COURT: But you think the proper test in those

1 cases, obviously what the Supreme Court applied, is still the  
2 City of Boerne test because those were not voting cases. Even  
3 though there was heightened scrutiny because race was involved,  
4 they were not voting cases and therefore rationality test  
5 doesn't apply.

6 MR. GREENBAUM: Race wasn't involved in either of  
7 those cases, but yes, there were -- one was gender  
8 discrimination --

9 THE COURT: Right. But they were heightened scrutiny.

10 MR. GREENBAUM: -- and one was access to the courts.  
11 Yes. Race discrimination and voting is different, and the  
12 Supreme Court has, not just in Katzenbach and Rome, but we've  
13 seen in some of the other cases too, like Katzenbach v. Morgan,  
14 where rationality was applied.

15 I think where there is a big difference between where the  
16 plaintiffs are and where we are on the standard of review is,  
17 well, what does rational basis mean? And what I hear in the  
18 plaintiff's argument is a relatively high level of scrutiny that  
19 seems to be inconsistent with what the Court has defined as  
20 rational basis. And I'll read something from Garrett.

21 "The burden is upon the challenging party to negative 'any  
22 reasonably conceivable state of facts that could provide a  
23 rational basis'."

24 I think it's hard to look at what we have here and say that  
25 they negatively -- that they've negated any reasonably

1 conceivable state of facts that could provide a rational basis  
2 here. And maybe now I'm starting to bleed into the second  
3 question a little bit, and that is, well, how do you actually  
4 apply this to the record?

5 What Congress did -- and the record is voluminous here --  
6 is it attempted to receive all the evidence of voting  
7 discrimination or a lack of voting discrimination that was out  
8 there. The number of witnesses, the amount of reports that were  
9 admitted. I don't think anybody can say that I wanted to submit  
10 something into this congressional record and Congress wouldn't  
11 let me.

12 So Congress has this enormous record, and they look at it,  
13 and Congress made some judgments as to what it should do. And  
14 it's hard to look at the level activity, the voting rights  
15 activity that had occurred in the jurisdictions that are  
16 covered, and the briefs go through all the different measures --

17 THE COURT: With a focus on a different kind of  
18 discrimination than might have been the case in '65.

19 MR. GREENBAUM: Yes. But as the Court in City of Rome  
20 made clear, evidence of dilution and evidence of objections  
21 based on a racially discriminatory effect are things that are  
22 relevant in the record. So it sifted through this enormous pile  
23 of evidence and basically said, look, we've done a reasonably  
24 good job of identifying where the statute should apply in the  
25 past, and it's working. And it's working by looking at all --

1 it's working by looking at all these different measures.

2 And that's really all Congress needs to do in terms of  
3 rational basis. We may all have different views as to who  
4 should be covered or who shouldn't be covered, but the question  
5 is did Congress have a rational basis to stay the course on  
6 this? And I think the answer to that is unquestionably yes.

7 Specifically on that --

8 THE COURT: Can you foresee a day when there would not  
9 be a rational basis to continue Section 5?

10 MR. GREENBAUM: Certainly.

11 THE COURT: When there wouldn't be jurisdictions that  
12 would be every 10 years engaged in redistricting, where there  
13 wouldn't be an isolated perhaps jurisdiction in this state or  
14 another state that wouldn't be doing some annexations? Can you  
15 really foresee that day?

16 MR. GREENBAUM: Well, of course there are going to  
17 continue to be voting changes, but the question is, does there  
18 remain a risk that voting changes are being made with a  
19 discriminatory purpose out there. So you'd look at the same  
20 types of evidence that Congress looked at in this record to say  
21 have we reached that day? We'd look at the objections, we would  
22 look at Section 2 cases, we would look at the observer coverage.  
23 We would look at all of the different elements of voting rights  
24 activity.

25 And just going back to the question, the whole issue about

1 racially polarized voting, if you're going to have vote  
2 dilution, you have to have racially polarized voting. Congress  
3 would have been remiss if it hadn't analyzed the issue of  
4 racially polarized voting. But certainly if you look at this  
5 record and you look at Congress's findings, it wasn't as though  
6 racially polarized voting was the only thing that Congress had  
7 found.

8 So you would look at these same pieces of evidence that  
9 Congress looked at in 2005 and 2006, and you'd make your  
10 judgment based on that.

11 I don't know if you have any further questions for me.

12 THE COURT: Let's hear from Ms. Clarke.

13 MR. GREENBAUM: Thank you.

14 MS. CLARKE: Your Honor, I'd like to turn your  
15 attention back to an observation that you made earlier, that  
16 it's not the quantity of evidence in the record but rather the  
17 quality of the record. And it's here I'd like to turn the  
18 Court's attention.

19 The questions before the Court in this case turn in large  
20 part on the record that was developed before Congress. And it's  
21 a record that the plaintiff hasn't truly engaged in any  
22 meaningful way.

23 We believe that even a cursory review of that record,  
24 Your Honor, makes clear the following: That notwithstanding  
25 tremendous progress, ongoing discrimination remains in the

1 covered jurisdictions; that the case-by-case method of dealing  
2 with and confronting that discrimination remains plainly  
3 inadequate; and that the discrimination is especially  
4 concentrated in the covered jurisdictions. And that's how  
5 Congress concluded that the strong remedy afforded by Section 5  
6 remains necessary.

7 THE COURT: Can I be confident, and the second  
8 question is do I need to be confident, but can I be confident  
9 that the nine states that are subject to Section 5 are the nine  
10 of our 50 states that have the worst problems? Have we captured  
11 the nine worst, if you will, covered jurisdictions? Can I be  
12 confident of that?

13 MS. CLARKE: Indeed, Your Honor. The standard I  
14 believe that should be employed by the Court in this case is one  
15 that has been set forth by the Court in Katzenbach, that we've  
16 got to look to see whether the coverage provision is relevant to  
17 the problem and an appropriately tailored remedy. No surgical  
18 precision is required, as counsel for the government noted.  
19 There's no requirement that Congress go hamlet by hamlet to  
20 identify a record of discrimination in each and every one of the  
21 political subunits throughout the 16 jurisdictions covered in  
22 whole or in part.

23 Rather, the Court should look to see whether the coverage  
24 provision bears a plainly legitimate sweep. And we believe in  
25 looking through the extensive record of discrimination revealed

1 throughout the covered jurisdictions, that remains current to  
2 the present day, justified Congress's decision to maintain the  
3 coverage provision.

4 And there are a few points that I'd like to make about the  
5 coverage provision. The Supreme Court has always pointed to and  
6 regarded the coverage provision as what weighs in favor of the  
7 statute's constitutionality. This is an observation made by the  
8 Court in Boerne, in Garrett, in Morrison and Florida Prepaid.

9 THE COURT: I think they pointed to two things, the  
10 geographic limitation as weighing in favor of the  
11 constitutionality, also the temporal limitation weighing in  
12 favor of constitutionality. 25 years may raise a question  
13 there. But keeping focus on the geographic, is there a better  
14 formula, do you think? Do you think that there's a coverage  
15 formula that would be, perhaps not surgically precise, but more  
16 precise, that would capture, in this day and age, where vote  
17 dilution is more of a focus than it was back in 1965? Is there  
18 a formula that would better capture the jurisdictions that are  
19 most problematic?

20 MS. CLARKE: I think it's difficult to answer that  
21 hypothetical question, Your Honor, but certainly it was rational  
22 for Congress to choose to stay the course and continue to see  
23 Section 5 do the work necessary to root out discrimination in  
24 the covered jurisdictions where it applies, based on the record  
25 showing ongoing --

1           THE COURT: I mark that down as it's difficult and  
2     you're not going to do it.

3           (Laughter)

4           MS. CLARKE: Well, I will note, Your Honor, that this  
5     is a question that Congress took up very carefully. There was  
6     an amendment introduced by Representative Norwood that proposed  
7     changing the coverage provision, and that was soundly rejected  
8     by a vote of 318 to 96. And Representative Sensenbrenner made  
9     very clear that the coverage provision does not -- and he  
10    emphasized "does not" -- turn on participation statistics alone;  
11    that the coverage position is based on the record showing  
12    ongoing discrimination in the covered jurisdictions.

13          So I think there's been an improper focus on the coverage  
14    provision as initially adopted in 1965. What Congress sought to  
15    do in 2006 was look to see whether Section 5 remained necessary  
16    today in the covered jurisdictions, and found a contemporary  
17    record and meaningful differences between the covered and  
18    noncovered.

19          THE COURT: If I analyze the record -- and I know this  
20    is a difficult context for a judge, because of the deference to  
21    Congress and lots of things that have already been said this  
22    morning -- but if I analyze the record and conclude that the  
23    record does not show that these covered jurisdictions are any  
24    worse than some other jurisdictions -- it may not be all the  
25    other states, but some other states -- where does that leave me?

1 MS. CLARKE: Again, Your Honor, I don't think there's  
2 a requirement that this court seek a surgical precision, or a  
3 requirement that --

4 THE COURT: I just said it wasn't very surgically  
5 precise.

6 MS. CLARKE: Right. There's no requirement for  
7 perfect calibration. But I think it would be certainly rational  
8 for Congress to have concluded that Section 5 remained  
9 necessary, given the record showing ongoing discrimination and  
10 real meaningful differences between covered and noncovered  
11 jurisdictions.

12 THE COURT: So there have to be real meaningful  
13 differences between covered and noncovered?

14 MS. CLARKE: We need to show that the coverage  
15 provision bears a legitimate sweep, is the language used by the  
16 Supreme Court, plainly legitimate sweep to the problem.

17 And the Katz study which has been referenced earlier I  
18 think underscores the meaningful differences between covered and  
19 noncovered jurisdictions. There's a higher success rate of  
20 Section 2 cases brought in the covered jurisdictions. More than  
21 one half of those cases were brought in covered jurisdictions  
22 even though less than 25 percent of our nation's minority  
23 population resides in the covered jurisdictions. Findings of  
24 high levels of racially polarized voting in Section 2 cases  
25 brought in covered jurisdictions relative to noncovered

1 jurisdictions. Indeed, 90 percent of all Section 2 cases  
2 showing an RPB rate of 80 percent or higher were in -- that  
3 those Section 2 cases in the covered jurisdictions.

4 THE COURT: But that legitimate sweep has to be tied  
5 to current circumstances.

6 MS. CLARKE: Indeed, Your Honor. And I think we --

7 THE COURT: Because it is, after all, a test under  
8 4(b) that is way out of date. But we -- taking Mr. Bagenstos's  
9 argument, the way out of date test happens to also, for some  
10 reasons, but happens to also mirror the current circumstances in  
11 terms of which jurisdictions are engaged in the worst  
12 discrimination.

13 MS. CLARKE: Indeed. And again, I think Congress was  
14 very careful in looking at this question. There were state  
15 reports presented into the record, 11 covered jurisdictions that  
16 were carefully analyzed. The problems on the ground were  
17 carefully assessed between '82 and '06. And state reports  
18 offered on some noncovered jurisdictions, including Arkansas,  
19 Oklahoma, Tennessee, and Wisconsin. And the records of  
20 discrimination revealed in those reports simply paled in  
21 comparison to the overwhelming evidence of ongoing  
22 discrimination in the covered jurisdictions.

23 I think that evidence yielded from the Katz study is  
24 especially notable, given the fact that Section 5 was in place  
25 and doing work to block and deter much of the discrimination

1 happening in covered jurisdictions. And as Your Honor noted,  
2 the observer provision also underscores the notable differences  
3 between covered and noncovered jurisdictions. 98.7 percent of  
4 those jurisdictions certified for coverage are Section 5 covered  
5 jurisdictions.

6 So, again, as Representative Sensenbrenner noted, coverage  
7 is not predicated on statistics alone. It was not the chief  
8 evil that Congress sought to address in renewing Section 5 and  
9 keeping that coverage provision intact. They renewed Section 5  
10 based on a record of ongoing problems, some of which I'd like to  
11 highlight for the Court, because it hasn't been wrestled with by  
12 plaintiff.

13 A lot of the evidence before Congress showed and  
14 underscored the point that the case-by-case method simply  
15 remains inadequate, that Section 2 alone is not enough to ferret  
16 out and block and deter the ongoing discrimination. The Supreme  
17 Court, in recent case of LULAC v. Perry, for example, observed  
18 in the state of Texas severe, what they described as especially  
19 severe and ongoing discrimination; found the congressional  
20 redistricting plan there to violate Section 2 and to bear the  
21 mark of intentional discrimination that in its eyes rose to the  
22 level of an equal protection violation.

23 And even after a remedial plan was put in place from the  
24 Section 2 case, Section 5 remained necessary because state  
25 officials sought to limit early voting under that remedial

1 district in a way that would have been discriminatory for  
2 minority voters. So but for voters on the ground mounting a  
3 Section 5 enforcement action after the Supreme Court's Section 2  
4 ruling, discrimination would have been rampant there.

5 The Charleston, South Carolina, another very recent case,  
6 found the county board of elections to employ a discriminatory  
7 method of election system that harmed minority voters. And even  
8 after the Section 2 remedy there, officials for the school board  
9 of elections sought to put in place the same discriminatory  
10 system. And because the Justice Department interposed a  
11 Section 5 objection, the discrimination was blocked there.

12 Plaintiff has placed a great deal of attention on barriers  
13 to the ballot box. In this particular court case, the court  
14 made findings, judicial findings of intentional discrimination  
15 that violates the Fourteenth and Fifteenth Amendment experienced  
16 by minority voters. The Court observed that black voters  
17 received different treatment inside polling places relative to  
18 white voters. That's judicial findings from a federal court.

19 In the state of Mississippi we have the PUSH case, where a  
20 federal court found discriminatory use of a dual registration  
21 requirement against minority voters. And even after the  
22 Section 2 case there, Section 5's protections remained necessary  
23 several years later when the state sought to revive this  
24 discriminatory dual registration requirement.

25 The record abounds with examples, Your Honor. And some of

1 the evidence shows repetitious violations among the covered  
2 jurisdictions. In Arizona, Louisiana, and Texas --

3 THE COURT: Does it also show repetitious violations  
4 by noncovered jurisdictions?

5 MS. CLARKE: No, Your Honor. For example, the covered  
6 states of Arizona, Louisiana, and Texas all adopted state  
7 legislative plans that drew Section 5 objections every decade  
8 since they've been covered. This record stands again in stark  
9 contrast to the evidence that was presented to Congress about  
10 the problems in noncovered jurisdictions.

11 Counsel for the government referenced the Kilmichael,  
12 Mississippi, another recent example of officials employing --  
13 decided to cancel elections in the face of significant minority  
14 population growth. And this is also a pattern that we see  
15 throughout the covered jurisdictions today, that in those areas  
16 where the population of blacks and Latino voters is growing is  
17 precisely the moment where officials step in with discriminatory  
18 devices and actions, to cancel out their newfound political  
19 power, necessitating the need for Section 5 in many of these  
20 areas.

21 We have also evidence of the evasion of compliance with  
22 Section 5's requirements. The state of South Dakota, for  
23 example, failing to submit voting changes for an extended period  
24 of time. And Section 5 declaratory judgments also doing work to  
25 block discrimination.

1           One recent example comes out of the state of Louisiana,  
2       where they sought to preclear before this court a discriminatory  
3       redistricting plan that eliminated a majority black district in  
4       the city of New Orleans and made other discriminatory  
5       reductions. And after seeing the writing on the wall, they  
6       restored that opportunity district and withdrew the declaratory  
7       judgment action.

8           But in looking at the evidence, Your Honor, we've got to  
9       look beyond just objections, to also the work of Section 5  
10      enforcement actions, declaratory judgments, and Section 2 cases  
11      working in tandem with Section 5 to root and ferret out ongoing  
12      discrimination.

13          Finally, Your Honor, I would come back to your point about  
14      how long do we need Section 5's protections in place, and just  
15      note that this again was another question that Congress looked  
16      at very carefully. Representative Gohmert introduced an  
17      amendment that would have limited reauthorization to 10 years,  
18      and that also was soundly rejected after careful debate and  
19      deliberation among Congress, by a vote of 134 to 288.

20          Congress concluded that Section 5's protections remain  
21      necessary for another 25 years, in part so that we could get  
22      through two redistricting cycles and really assess how much  
23      progress we're making. It's during redistricting periods where  
24      we tend to see a spike in the number of objections and a  
25      drop-off in the middle of the decade. So 25 years will really

1 allow Congress to come back to the drawing board and figure out  
2 how much progress we've made and whether or not we continue to  
3 need Section 5.

4 THE COURT: What are the two redistricting cycles that  
5 we're talking about?

6 MS. CLARKE: The present redistricting cycle that  
7 we're entering now.

8 THE COURT: Which we would label by what year?

9 MS. CLARKE: 2011 to 2013, in large part. And 2021 to  
10 2023. So two redistricting cycles to really assess whether  
11 progress will continue on an upward trajectory, or whether we'll  
12 continue to see a pattern reminiscent of what we've seen in the  
13 past. Jurisdictions were abandoning overt means of  
14 discrimination and resorting to subtle and sophisticated forms  
15 of discrimination that have the same desired effect, canceling  
16 out minority voting strength.

17 So in closing, Your Honor, I would just note that in Rome  
18 the plaintiffs mounted an attack on the Section 5 preclearance  
19 provision that was premised much on the same claim that  
20 plaintiffs present now, that things have changed. And while  
21 Congress noted progress then, they noted that a bleaker side of  
22 the picture still exists.

23 Again, in 2006, in the face of ongoing discrimination,  
24 Congress was faced with a similar choice: Turn its back on the  
25 progress, stand down, or confront the evidence of ongoing

1 discrimination. And after very careful deliberation they chose  
2 to renew Section 5 and make real the guarantees afforded by the  
3 Fourteenth and Fifteenth Amendments. And we think that's a  
4 judgment that this court should give deference to.

5 And I think Congress was especially surprised that the  
6 problems remain as severe as they have, but at the end of the  
7 day, after careful study, they chose to renew Section 5 by a  
8 tremendous bipartisan margin. And we hope that's a judgment  
9 that this court will give deference to. Thank you, Your Honor.

10 THE COURT: Thank you, Ms. Clarke.

11 Mr. McDonald.

12 MR. MCDONALD: Your Honor, I'm going to try my best  
13 not to be repetitive. But I would like to respond to one of  
14 your questions: How much longer will we need Section 5? I  
15 think that if the constitutionality of it is upheld, that if  
16 Congress were to extend it again, it would have to compile the  
17 same kind of record that it did in 2005 and 2006.

18 But I also recall the words of the great American poet Bob  
19 Dylan, how many years can a mountain exist before it's washed in  
20 the sea, and how many years have some people gotta live before  
21 they have the right to be free. The answer, my friend, is  
22 blowing in the wind.

23 I think that we don't know the ultimate answer to that  
24 question because we remain human beings. We remain capable of  
25 much that's disinterested, much that's noble, much that's ideal,

1 but we also are the victims of our own experience, our own  
2 needs, our own biases and prejudices.

3 I think the real answer to the question is that the best  
4 way we can go about securing the equal right of all people to  
5 vote and participate in the democratic process is to have strong  
6 laws that are fully enforced. I think that the necessity of  
7 that is critical now because we stand on the cusp of a  
8 redistricting process that's not going to simply affect Congress  
9 or state houses and senates, but counties, municipalities,  
10 school boards, and public service districts that elect their  
11 boards.

12 I think it's absolutely critical in the covered  
13 jurisdictions that we have Section 5 oversight, because I am  
14 convinced that without that we will see substantial  
15 retrogressions and the diminishment of the ability of language  
16 minorities and racial minorities to participate effectively.

17 THE COURT: I appreciate that, but that sounds more  
18 like a plea to Congress than a plea to this court. What you're  
19 convinced of.

20 MR. MCDONALD: I think that Congress proceeded on  
21 those assumptions, and as Your Honor has pointed out frequently  
22 during the course of the exchanges, the courts must give  
23 deference to Congress because it's given by our U.S.  
24 Constitution the authority to implement the Fourteenth and  
25 Fifteenth Amendments by appropriate legislation. And I don't

1 think the court can second-guess the conclusion of Congress, the  
2 overwhelming conclusion that the extension was appropriate  
3 legislation to implement the Fourteenth and Fifteenth  
4 Amendments.

5 And I must say that I've been doing voting rights cases for  
6 a long time, and I don't have any doubt that if we did not have  
7 Section 5 that we would see enormous retrogressions in minority  
8 voting strength. During the 2000 round of redistricting in  
9 Georgia, for example, the state of Georgia was involved in  
10 several lawsuits and they filed briefs, one in the U.S. Supreme  
11 Court, in which they said that racial minorities should not be  
12 allowed to participate at all in the Section 5 preclearance  
13 process. It's quite extraordinary that the state would take the  
14 position that the very group for whose benefit the statute was  
15 enacted should play no role in the decision-making process.

16 The state also made the argument in the U.S. Supreme Court  
17 that the retrogression standard of Section 5 should be abolished  
18 in favor of a standard based on Section 2. Now, that would have  
19 allowed the state to abolish all of its majority-minority  
20 districts. If we did not have Section 5, I don't think there's  
21 any doubt that minorities would become the victims of  
22 partisanship. The Democrats would have a great interest in --

23 THE COURT: Let me take you back into the  
24 congressional record a little bit, rather than that case and  
25 whatever the record was in that case, which I don't think was

1 before Congress. I think it's your brief that refers to the  
2 alternative to the existing coverage formula, and the fact that  
3 the alternative that was proposed based on current voter  
4 registration and turnout rates would have resulted in only one  
5 state being covered, only Hawaii?

6 MR. MCDONALD: Hawaii. I think that's correct,  
7 Your Honor.

8 THE COURT: How does that cut? We have a coverage  
9 formula that is based on old information, if you will, '64, and  
10 even '68 and '72 information, and it leads to one group being  
11 within the coverage of Section 5. But if current statistics on  
12 those same factors were applied, only one state would be within  
13 the coverage under the formula of Section 4(b). How does that  
14 cut? Does that mean that we should keep on the old rather than  
15 the new?

16 MR. MCDONALD: Well, Your Honor, I think that only  
17 addresses the issue of levels of registration and turnout.

18 THE COURT: That's what the coverage formula is based  
19 on.

20 MR. MCDONALD: That's correct.

21 THE COURT: Testing is not really a part of the  
22 formula as currently would be applied.

23 MR. MCDONALD: But it was designed to identify the  
24 jurisdictions that needed to be covered, and I think that the  
25 record compiled by Congress during all the times it has

1 considered amending and extending the Voting Rights Act, in '70,  
2 '75, '82, 2005 and '6, clearly substantiate the continuing need  
3 for those jurisdictions to be covered. The coverage formula  
4 simply was a way of identifying the jurisdictions that needed  
5 Section 5 supervision, and the subsequent congressional records  
6 have simply confirmed that continuing need.

7 THE COURT: That again is assuming that Mr. Bagenstos  
8 and his colleagues and you are right that the jurisdictions  
9 captured by the coverage formula as it exists wind up closely  
10 mirroring the jurisdictions that should be captured in terms of  
11 where the most discrimination is occurring. Even though the  
12 types of discrimination focus more now on vote dilution than was  
13 true in the past, we're capturing the same group of  
14 jurisdictions which are those most responsible for voting  
15 discrimination.

16 MR. MCDONALD: I believe that's true, and everything  
17 that has happened since the authorization of Section 5 in 1965  
18 has confirmed that.

19 THE COURT: What if we weren't? What if this formula,  
20 looking at the record, it was clear that it was not really  
21 capturing the right group of jurisdictions? In other words,  
22 instead of capturing the nine states -- just focusing on states  
23 for the moment -- under the existing coverage formula, what  
24 if -- let me go back a step.

25 What if the record established that the coverage formula as

1 currently applied captured not the nine states where most of the  
2 voting discrimination was occurring, but four states where a lot  
3 was occurring, three states where only an average amount was  
4 occurring, and two states where a very low amount was occurring.  
5 Would Congress still be rational in choosing the coverage  
6 formula that it has rather than coming up with a more  
7 sophisticated current coverage formula?

8 MR. MCDONALD: Well, I think that the act addresses  
9 those concerns which Your Honor raises. If they're  
10 jurisdictions that don't need to be covered, as you pointed out,  
11 they can bail out.

12 THE COURT: For states that's not a very easy task.

13 MR. MCDONALD: I think we're going to see more of  
14 that. The first jurisdiction in Georgia bailed out, what, two  
15 months ago, the city of Sandy Springs, and I think the first  
16 jurisdiction in North Carolina bailed out several months ago.

17 THE COURT: But in terms of a state, looking at the  
18 criteria for bailout and the legislative record for the 2006  
19 extension, I'm not sure that I see a state among the nine that  
20 could bail out.

21 MR. MCDONALD: I think that's right. I think that  
22 we're not going to see the states bail out because there are  
23 still jurisdictions that violate Section 5, don't comply with  
24 it, in which there are Section 2 violations. So the states  
25 won't bail out, but I don't think they ought to bail out.

1 I would say, Your Honor, just to go back to, the overriding  
2 significance of having Section 5 remain in effect is not just  
3 the statewide and the congressional level redistricting, not the  
4 fact that states have taken the positions that they don't need  
5 to draw majority-minority districts. If we did not have  
6 Section 5, it's absolutely clear, I think, based on the prior  
7 experience and the most recent statements from the states that  
8 they ought not to have to draw majority-minority districts, that  
9 we would see states and counties and municipalities go back to  
10 their at-large systems, we would see them fragment the minority  
11 populations of majority black districts, which would give  
12 control of those districts to the white majority.

13 THE COURT: To the extent that Congress made that  
14 assessment and determination based on the record before it, then  
15 that would be an assessment that I would give deference to.

16 MR. MCDONALD: Thank you. Well, Your Honor, I think  
17 unless you have any more questions for me, that's the point I  
18 wanted to make.

19 THE COURT: All right. Thank you.

20 MR. MCDONALD: Thank you.

21 THE COURT: Mr. Rein, will it be you?

22 MR. REIN: Yes, Your Honor. Mr. Consovoy initially  
23 addressed the issue of the formula, he has some more to say. I  
24 hope you'd indulge him. I'll try to be brief.

25 THE COURT: I'll indulge him as long as it doesn't

1 wind up being too long.

2 MR. REIN: I know. And we're not going to repeat. I  
3 think that you've asked questions that have really probed the  
4 parties and we greatly appreciate the opportunity to be heard.  
5 So I'm going to just make a few small points in response.

6 The government suggested that you could decide this case by  
7 analyzing Shelby County and assuming there was some basis on  
8 which Congress could have found that Shelby County should be  
9 subject to preclearance individually. Of course, Shelby County  
10 was not analyzed individually, it's subject to preclearance by  
11 the 1964 formula, along with everybody else. I don't think we  
12 can litigate Shelby County -- I think you've said that before --  
13 because Shelby County is one of the many, many jurisdictions  
14 that fall within the coverage of the renewed Voting Rights Act.

15 THE COURT: I'll have to admit that while I understand  
16 the legal principles and precedent that are being relied on to  
17 say that I could look at Shelby County alone. And if the act  
18 was constitutional as to Shelby County based on the facts before  
19 Congress and now before me relating to Shelby County, then you  
20 lose. There's a certain discomfort that I have with that  
21 approach, given the fact that this is clearly, and can't be any  
22 mistake about it, a facial challenge, not an as-applied  
23 challenge, and no discovery to probe the facts with respect to  
24 Shelby County was permitted. So I do have a little bit of  
25 discomfort, but I understand what Mr. Bagenstos is relying on

1 when he says that.

2 MR. REIN: And he's got the decision in Lane, which  
3 kind of indicates if a statute has some applications that are  
4 constitutional and some not. But I think that here the base  
5 question is no application can be appropriate unless it meets  
6 the standard, which we say is Boerne, and whether you say it's  
7 rational basis or the like, but the base question, can there be  
8 preclearance, applies to all the jurisdictions.

9 THE COURT: And to the extent that cases have dealt  
10 with either the facial constitutionality of the Voting Rights  
11 Act or of an extension of the Voting Rights Act, they haven't  
12 gone off on this assessment of the particular jurisdiction, be  
13 it South Carolina or the city of Rome, that was before the  
14 courts.

15 MR. REIN: That's correct, Your Honor. And I think  
16 they looked at what Congress looked at, which is an overall  
17 assessment: Where are there flagrant abuses and what do we need  
18 to do to cure them, and tried to determine has that been found.  
19 And that's certainly what the Court suggested in NAMUDNO. So I  
20 think there's no basis for that kind of analysis where we have a  
21 trial of Shelby County. That's a 3(a) problem. That's a  
22 situation of bail-in. You can try an individual, you can  
23 determine that that individual jurisdiction has violated  
24 Fourteenth and Fifteenth Amendment rights, and they can be  
25 subject to preclearance.

1 But Congress made it clear the mechanism for that is a  
2 judicial trial based on the activities of that jurisdiction.  
3 There's nothing in this record that singles out Shelby County  
4 before the Congress and says that's not part of the formula,  
5 it's not just a designation of Shelby County. I just wanted to  
6 mention that, and I think Your Honor understands that point.

7 A lot has been said about Section 2 cases. There's one  
8 point in that and we can -- I'm not going to argue the counts  
9 anymore and what they do or don't show. But one thing that's  
10 interesting about Section 2 is it highlights the fact that the  
11 target of preclearance is ingenious defiance. That is, it  
12 targets not just a bad system, because the government tells us  
13 there were bad things being done in districting prior to the  
14 enactment. Congress didn't provide for reclearance, it provided  
15 for preclearance.

16 What I mean by that is those existing systems, had they  
17 been not appropriate and in violation of the Fourteenth  
18 Amendment, were dealt with by Section 2. They weren't dealt  
19 with by preclearance. Preclearance deals with the problem of  
20 repetitious ingenious defiance. A few isolated anecdotes, but I  
21 think you can search that record and say is there a pattern, has  
22 it been established that post Section 2 cases, there's recurring  
23 need to object under Section 5.

24 That might be a different kind of finding. That's not  
25 really before the Court. And it really is important to note

1 that the evil being attacked by preclearance, as opposed to the  
2 statute as a whole, was continuous shifts that were designed to  
3 evade prior mandates. Congress has some confidence in Section 2  
4 because Section 2 is the vehicle through which you can attack --

5 THE COURT: But isn't that continuous shifting  
6 precisely what supports, if you will, looking at vote dilution  
7 and new means of discrimination that have arisen and evolved  
8 over the years, rather than being locked in, as to some extent  
9 you suggest, to the original focus of the Voting Rights Act?

10 MR. REIN: I think to the extent that you want to say  
11 this enactment is based on Fourteenth Amendment vote dilution --  
12 and I don't want to reargue where it falls -- and that Congress  
13 independently assessed that we have a new problem and that  
14 problem needs to be the subject of preclearance, yes, you can  
15 make that argument. I think that shift would then suggest,  
16 well, where's the formula analyzing that kind of activity as  
17 opposed to the kind of activity that was originally addressed.  
18 And that creates an enormous problem.

19 THE COURT: If -- and I may be stepping on your  
20 colleague's rebuttal argument --

21 MR. REIN: If I'm wrong he'll correct me.

22 THE COURT: That's right. But if Mr. Bagenstos and  
23 others are correct that this coverage formula, whether by  
24 happenstance or logic, captures the jurisdictions of most  
25 concern, then is that good enough?

1 MR. REIN: Well, if one says is there a happy  
2 accident, the question is what did Congress find in Katzenbach?  
3 Congress found the points of flagrant violation. If you just  
4 accidentally say, well, gee, maybe it's true, although we don't  
5 know because the record never tried to answer this question,  
6 looking at the evil we perceive today, which is really in  
7 redistricting and dilution, have we captured it? We'll throw it  
8 at a dartboard and maybe we're right.

9 THE COURT: The record will say something on that, and  
10 if the record -- if what the record says to Congress, and in my  
11 review then to me, if the record says yes, the right  
12 jurisdictions are still the covered jurisdictions, then what's  
13 the problem?

14 MR. REIN: Well, I think -- I would think that if this  
15 formula somehow hit it, you'd have to determine that, you'd have  
16 to look through. And I think our position is it doesn't, it  
17 doesn't accurately assess the current situation; it's just based  
18 on history, and it really doesn't differentiate other  
19 jurisdictions which have been the subject of Section 2  
20 litigation, constitutional litigation. I don't think Congress  
21 set out to do that task. I don't think that that's the basis.  
22 That's not where the pattern is found.

23 So Mr. Consovoy may want to add, but I think the idea of  
24 random happiness I don't think is the standard of review here  
25 when you're looking at the formula.

1 THE COURT: It's not a very comforting standard.

2 MR. REIN: And it goes on for 25 years, and therefore  
3 one would have to say that it's not only been found that these  
4 jurisdictions are, let's say, the most flagrant dilution  
5 violators, but it's likely they will be for the next 25 years.

6 THE COURT: I think it only has to be some likelihood,  
7 because no one can perfectly accurately predict the future.

8 MR. REIN: And I'm not demanding that. But there were  
9 factors involved in the selection of the jurisdictions in 1964  
10 that suggested they had a long history and were likely to  
11 continue. We don't have those same factors in dilution. The  
12 kind of voting patterns that lead people to see whether they can  
13 gain advantage can exist all over the country, and they do.  
14 Polarized voting is not a phenomenon unique to the South. So  
15 that would have had to be analyzed.

16 I do want to say just one word about the standard. Just  
17 point out what the Supreme Court has said, because I think that  
18 is significant. In Boerne itself, you have to ask how was  
19 Katzenbach viewed in Boerne. And on the most important of the  
20 three prongs of Boerne, congruence and proportionality, here's  
21 what the Court said.

22 It said, "While preventive rules are sometimes appropriate  
23 remedial measures, there must be a congruence between the means  
24 used and the ends to be achieved." That's the congruence and  
25 proportionality test. "The appropriateness of remedial measures

1 must be considered in light of the evil presented." And what do  
2 they cite? They cite Katzenbach, because it asks that question:  
3 What was the relationship?

4 So I think that it's fair to say that Boerne is an  
5 elaboration, a precise elaboration of the teaching of Katzenbach  
6 about the method of review. And I thought that was worth  
7 bringing to the Court's attention.

8 Now, you've asked about the bulk of the evidence before the  
9 Congress, and I think that when I said that Congress acted with  
10 some amount of effort and deliberation, I wanted to be fair to  
11 the Congress. But the real test is not how hard they tried, but  
12 what was the probative value of the evidence that they produced.  
13 What does it address and how effectively does it address it?

14 THE COURT: Would you agree there's a pretty broad  
15 standard as to what's probative, given the language in  
16 Katzenbach and what Congress undertakes in these kinds of  
17 assessments?

18 MR. REIN: It's not bound to rules of evidence.

19 THE COURT: They can look to anything.

20 MR. REIN: It can look to anything. The type of  
21 evidence is very different. The legislative process, one of its  
22 virtues is that it's not confined to the kind of evidence we  
23 have in court. We're not disputing that. But what it proves is  
24 a different question from how did you get it.

25 And I think we're not fighting about could they have taken

1 into account all the testimony they received and the various  
2 studies that were kind of quasi hearsay. Yes, they can. But  
3 what does it show when it's all said and done? That's the  
4 issue.

5 I think that one of the things that certainly Boerne states  
6 and I think is important is that you can't base legislation and  
7 a sweeping remedy, an intrusive remedy, on isolated acts. You  
8 have to show a pattern that suffices to do it. If you look at  
9 the RFRA case, there the Court said, well, it's possible, it is  
10 possible that there are some neutral statutes that are actually  
11 intended to suppress free exercise. So somewhere in the vast  
12 realm of things that could be brought under the RFRA, there may  
13 be some constitutional violations, but there's no pattern that  
14 warrants the kind of intrusion that was before the Congress and  
15 passed in the RFRA by an overwhelming majority.

16 So I think, without trying to test your patience anymore,  
17 those are things that weren't in the original argument. And I'd  
18 be happy to answer any further questions.

19 THE COURT: Thank you, Mr. Rein. I'll give  
20 Mr. Consovoy a couple of your minutes.

21 MR. CONSOVOY: Thank you, Your Honor. I'd like to  
22 answer your question about the happy accident and make one other  
23 point, and that'll be all.

24 The answer is, if there was a happy accident and they  
25 landed on the right jurisdictions, would that be enough? The

1 answer is no. Katzenbach says no. Katzenbach says the formula  
2 has to be rational in theory and in practice. That would  
3 solve -- perhaps solve the practice problem, not the theory one.  
4 One of counsel for intervenors said that Congress used voter  
5 registration and turnout because they were trying to solve a  
6 problem. That's right. The problem was interference with the  
7 ability to cast a vote.

8 There would be no other relationship between those metrics  
9 and that output if that's what Congress was not trying to solve.  
10 That's what the Voting Act tried to solve, that's what the  
11 Voting Act did solve.

12 The only other point I would like to make is you asked what  
13 I think cuts to the heart of the Section 4(b) question. Did  
14 Congress arrive in practice at the right jurisdictions. Counsel  
15 for defendant says you could scrap the formula, if they had  
16 listed these nine jurisdictions, that would be the right ones.  
17 The record demonstrates that's not true.

18 If you look at California, for instance, has twice as much  
19 Section 2 litigation as South Carolina. Illinois has more  
20 Section 2 litigation than three or perhaps four of the either  
21 fully or partially covered jurisdictions. If you look at the  
22 top 10 jurisdictions with Section 2 litigation throughout the  
23 country, five are fully covered, four are either partially or  
24 noncovered, and one is noncovered. Five and five.

25 So at the bottom, when you cut through everything else and

1 you look at Section 2 litigation and racially polarized voting,  
2 which are the two principal sources of evidence for defending  
3 this coverage formula, the evidence splits about equally between  
4 covered and noncovered jurisdictions.

5 I would just conclude with I think the question that cuts  
6 through all the issues in this case, Section 5 and Section 4(b)  
7 and even the Boerne question, which is if this record was  
8 presented to the Katzenbach court, would they have upheld the  
9 statute. And there is nothing in that opinion that suggests,  
10 given how extreme they thought the remedy was under that record,  
11 that it would have survived under this one.

12 Thank you, Your Honor.

13 THE COURT: If this record were the equivalent of the  
14 record before Katzenbach -- in other words, the '65 record -- or  
15 before City of Rome, do you lose?

16 MR. CONSOVOY: Sorry?

17 THE COURT: If this record were the equivalent of the  
18 record before the Supreme Court in City of Rome or in  
19 Katzenbach, do you lose?

20 MR. CONSOVOY: No, we don't lose. If the Katzenbach  
21 record were here now, is that what you're asking, then I think  
22 Katzenbach still holds true. I think Rome is a more complicated  
23 case, as Mr. Rein explained, because they were looking at the  
24 evidence there through the prism of a very recent experience.  
25 As we explained, the same governor of Alabama was still in

1 office when the '75 act was passed. It was a very different  
2 situation.

3 And as you discussed in the 56(f) hearing, there was  
4 nothing wrong with Congress looking at the evidence through a  
5 historical prism. The point of Northwest Austin is that  
6 historical prism is no longer reflective of today's country.  
7 Thank you.

8 THE COURT: All right. Thank you. And thank you all  
9 for the presentations today, for the excellent and lengthy  
10 briefs. And I will be chewing on this. It'll take me more than  
11 a couple of days, obviously. But I'll try to give it diligent  
12 attention. And again, thank you very much for your efforts.

13 Please excuse the sound system. At least for me there was  
14 a ringing that was occurring. I hope it wasn't interfering too  
15 much for any of you or for the audience, but I think everyone  
16 spoke through that obstacle very well today. Thank you.

17 (Proceedings adjourned at 12:50 p.m.)  
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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify  
that the foregoing pages are a correct transcript from the  
record of proceedings in the above-entitled matter.

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BRYAN A. WAYNE