

in the

ORIGINAL

Supreme Court of the United States

RALPH HATHORN ET AL.,

Petititioners

v.

MRS. BOBBY LOVORN ET AL

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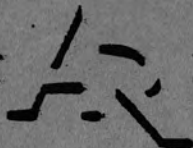
NO. 81-451

Washington, D. C.

April 27, 1982

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REPORTING

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1 IN THE SUPREME COURT OF THE UNITED STATES

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4 RALPH HATHORN ET AL., :

5 Petitioners :

6 v. : No. 81-451

7 MRS. BOBBY LOVORN ET AL. :

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10 Washington, D., C.

11 Tuesday, April 27, 1982

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 11:10 a.m.

16

17 APPEARANCES:

18

19 JAMES C. MAYO, ESQ., Louisville, Miss., on behalf
20 of the Petitioners.

21 WILLIAM BRADFORD REYNOLDS, ESQ., Washington, D.C., on
22 behalf of the United States as amicus curiae.

23 LAUREL G. WEIR, ESQ., Philadelphia, Miss., on behalf
24 of the Respondents.

25

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments
next in Hathorn against Lovorn.

Mr. Mayo, I think you may proceed whenever
you're ready.

ORAL ARGUMENT OF JAMES C. MAYO, ESQ.,
ON BEHALF OF PETITIONERS

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

This case is a Section 5 Voting Rights Act
case up from the Mississippi Supreme Court. The issue
that is before this Court is can the Mississippi Supreme
Court order noncompliance with the Voting Rights Act. A
submission was made -- and I would add, voluntarily made
-- on the basis that we did it on an issue that we
raised before the Chancery Court of Winston County and
made a submission to the Justice Department under
Section 5 of the Act for preclearance on changes in the
method and manner of the election of the trustees of the
Louisville Municipal Separate School District.

QUESTION: Mr. Mayo, you say the issue is
whether the Supreme Court of Mississippi can require
noncompliance with the Voting Rights Act. Do you think
the opinion of the Supreme Court of Mississippi has
ordered noncompliance or has simply refused to order

1 compliance?

2 MR. MAYO: Well, we were placed under -- we
3 have received this letter from the Justice Department
4 telling us that the changes were legally unenforceable.
5 But the decree, the final decree of the lower court
6 ordered the election to remain in force subject to
7 compliance with the Act, and the decision of the
8 Mississippi Supreme Court in 52758 advised us and
9 ordered us and mandated us to ignore the lower court,
10 which required compliance with the Voting Rights Act.

11 QUESTION: Well, where does that leave you?
12 The Supreme Court of Mississippi simply said that the
13 chancellor shouldn't have put in the direction that the
14 election comply with the Voting Rights Act. Do you
15 think that after the decision of the Supreme Court of
16 Mississippi you are no longer free to go into federal
17 court and urge that the federal Voting Rights Act
18 govern?

19 MR. MAYO: Well, I think our relief under the
20 Voting Rights Act as I understand it is we either obtain
21 approval or resubmit to Justice or we go into the
22 District Court of Columbia, is the way I interpret the
23 Act, Your Honor.

24 QUESTION: You don't think you could have gone
25 into a federal Court in Mississippi just for a

1 declaration that the Voting Rights Act did cover it or
2 had not been complied with?

3 MR. MAYO: Not in the face of the fact that we
4 had made the submission to the Justice Department and
5 they had turned us down and said the changes in the
6 election procedure were legally unenforceable.

7 QUESTION: Or could you have sought an
8 injunction in Mississippi federal Court?

9 MR. MAYO: Well, once again, under Section 5
10 there is a three-judge relief that is afforded. But I
11 really feel like, since we had made the submission, that
12 we were limited to two avenues which I have previously
13 stated, either Justice or the D.C. Court in Columbia.

14 QUESTION: Well, wasn't there a federal case
15 filed?

16 MR. MAYO: Yes, sir. But the federal case was
17 not -- which federal case? The one filed by the Justice
18 Department? The one filed by the Justice Department was
19 not filed until just prior to this election last
20 December. Now, the original suit was filed in the
21 district court, but because of the existence of the
22 state law the district court judge sent it back to
23 Mississippi, the Mississippi courts, for a definition
24 under Section 37-7-203.

25 QUESTION: And he dismissed the case?

1 MR. MAYO: He dismissed the case ultimately,
2 not immediately but ultimately.

3 QUESTION: He just sent it back for state law
4 construction, didn't he?

5 MR. MAYO: That's true, yes, sir.

6 QUESTION: How about the federal issue? What
7 happened to it?

8 MR. MAYO: Well, the federal issue --

9 QUESTION: The federal issue would be whether
10 the Voting Rights Act was being complied with.

11 MR. MAYO: At that time in the district court
12 they filed suit -- it was originally filed in the
13 District Court for the Northern District of Mississippi
14 under the one-person, one-vote rule, which was never
15 reached. It was never addressed. It was not addressed
16 by the Mississippi Supreme Court either.

17 QUESTION: I see. Well, didn't the
18 Mississippi court say that if -- didn't it recognize
19 that you could still go to federal court?

20 MR. MAYO: The lower chancery --

21 QUESTION: You wouldn't be in contempt, would
22 you, if you filed a suit in federal court to enjoin the
23 results of the election?

24 MR. MAYO: Well, the lower chancery court said
25 that the avenues that were open, in its final hearing

1 before the second appeal or the appeal from which this
2 is, that we either had to go into the D.C. court, we had
3 to go to Justice, or the Respondents had to take an
4 appeal.

5 The suit was filed by Justice in December,
6 this past December, after the mechanics in the election
7 was pretty far down the road. Just prior to the
8 election they filed in the district court and the
9 district court refused to grant an injunction stopping
10 the election. We had a hearing about the third day of
11 December and the first primary was on December 5th.

12 QUESTION: Well, what does that -- what if the
13 Government prevails in that suit?

14 MR. MAYO: Well, they have asked for -- they
15 have asked for an injunction and they contend that we
16 are in violation of the Voting Rights Act.

17 QUESTION: By doing what the --

18 MR. MAYO: By having an election in the face
19 that we have been denied preclearance.

20 QUESTION: And so -- but if they prevail you
21 will be forced to do what you want to do anyway?

22 MR. MAYO: Well, that may be true. But they
23 have disapproved the scheme that we were mandated to do
24 --

25 QUESTION: I understand.

1 MR. MAYO: -- by the Mississippi Supreme
2 Court.

3 QUESTION: I understand. But you didn't --
4 you're objecting to what the Supreme Court of
5 Mississippi mandated you to do.

6 MR. MAYO: Yes, sir.

7 QUESTION: And so if the United States
8 prevails, you will be relieved of what you wanted to be
9 relieved of in the first place. Is that right or not?

10 MR. MAYO: I think sooner or later either the
11 district court or the D.C. court or some court will have
12 to ultimately solve the problem, and we will more than
13 likely go into --

14 QUESTION: But you're asking us to.

15 MR. MAYO: Yes, sir. And the reason is
16 because I just do not feel like that the results that
17 were ordered by the Mississippi Supreme Court -- first
18 of all, it's in violation of the Voting Rights Act in my
19 opinion; and secondly, it does not -- the results of the
20 election speak for itself.

21 Historically in the city of Louisville and in
22 Winston County we have never elected a black person. On
23 the old board we had one black trustee. Mrs. Veterine
24 Williams, who is a Petitioner in this cause, is a black
25 trustee.

1 QUESTION: Suppose a state is going to
2 implement a change in a voting procedure that has not
3 been cleared, and some private citizen objects to that
4 implementation without clearance and files a suit in the
5 state court saying -- asking the court to enforce the
6 Voting Rights Act. Under the Voting Rights Act is the
7 three-judge court relief the exclusive means of
8 enforcing the Voting Rights Act?

9 MR. MAYO: As far as the Act itself, I believe
10 the only remedial provision of that statute is the
11 three-judge panel. I think perhaps they've even
12 stripped the district court from that remedial -- I
13 believe it specifically says --

14 QUESTION: Right. How about a state court?

15 MR. MAYO: -- a three-judge panel.

16 I do not believe a state court could usurp the
17 authority vested in the three-judge panel by the
18 statute. But I think that the state courts are subject
19 to the federal law under the supremacy clause of the
20 Constitution, and if an issue comes up on the Voting
21 Rights Act, I think all of the decisions that I read and
22 that I have cited in my brief put the burden on the
23 covered jurisdiction to comply with the Act and to seek
24 the approval.

25 QUESTION: Mr. Mayo, may I ask you what relief

1 the Government seeks in the federal case that's been
2 filed?

3 MR. MAYO: At the temporary hearing, they
4 asked to eliminate the runoff procedure. That was the
5 sole issue that was before the District Court for the
6 Northern District of Mississippi, was just eliminate the
7 runoff provision.

8 QUESTION: So they don't challenge the
9 boundary lines for the five single-member districts?

10 MR. MAYO: They did not challenge the boundary
11 lines for the five single-member districts.

12 QUESTION: Mr. Mayo, along the same lines, the
13 Attorney General did not challenge either the order that
14 there be elected a school board member from each of the
15 five districts, right?

16 MR. MAYO: That is correct.

17 QUESTION: And your clients are the incumbent
18 board members.

19 MR. MAYO: Yes, ma'am.

20 QUESTION: And they didn't want to have this
21 new procedure implemented, I assume.

22 MR. MAYO: That is correct.

23 QUESTION: So when the Attorney General came
24 in and filed an objection your clients were pleased,
25 because they didn't want to implement it anyway, right?

1 MR. MAYO: That is almost correct.

2 QUESTION: And that's why you didn't go on to
3 federal court, because you didn't want to get this
4 clarified because your clients were content to just have
5 the Attorney General's objection stand, right?

6 MR. MAYO: Well, immediately after the
7 Attorney General's objections we were taken back into
8 chancery court, and as soon as Judge Love rendered his
9 final decree calling for his decree of election to
10 remain in force subject to the compliance, we were
11 immediately appealed and jurisdiction removed to the
12 Mississippi Supreme Court in 52-758.

13 QUESTION: May I ask you about the statute
14 that requires the majority vote. That is a separate
15 statute, is it not, from the statute that requires the
16 election of a board member from each separate district?

17 MR. MAYO: Justice O'Connor, that is
18 37-7-217.

19 QUESTION: A separate statute.

20 MR. MAYO: Yes, ma'am.

21 QUESTION: So presumably the two are
22 severable, and if the provision for a majority vote is
23 not permitted and people can be elected by a plurality,
24 then under the state law of Mississippi would the
25 separate district election still stand?

1 MR. MAYO: That issue -- the Supreme Court of
2 Mississippi and the lower court did rule in favor of the
3 runoff, the majority -- I mean, the runoff vote
4 requirement.

5 QUESTION: Well, what if that runoff vote
6 requirement were stricken? Is it related in any way to
7 the separate district vote provision?

8 MR. MAYO: Well, the provision of Mississippi
9 law in municipal separate school districts does -- they
10 are related and they do require a runoff.

11 I was of the opinion that perhaps Justice in
12 filing a suit thought that they might solve a problem
13 and enable blacks to be elected in a plurality type
14 vote. I personally don't agree with that. I don't
15 think that's the proper way to elect --

16 QUESTION: Well, is the runoff provision
17 severable from the other requirement, the separate
18 election?

19 MR. MAYO: If you just totally ignore it and
20 it were stricken. But in the provision for the election
21 of trustees in the municipal separate school district
22 statutes, 37-7-203 and 37-7-217, they are related,
23 unless they are stricken by a court. There's no
24 decision that I know of that separates them.

25 (Pause.)

1 The facts in this case are really not in
2 dispute in the record as the record speaks at all.
3 Prior to 1960 there were three -- in 1960 we annexed the
4 entire county and the city wanted to maintain control,
5 so three were appointed and two were elected. Of
6 course, the Voting Rights Act was passed in 1965.

7 In 1964, just prior to it, the legislature
8 passed a local and private bill which said in any county
9 where 14 and 15 intersect, which is Winston County. And
10 it was because of Section 90(p) of the Mississippi
11 Constitution and because of another related case
12 involving some of the same language, it was not sought
13 to be put into effect until Petitioners filed a suit,
14 and we were ultimately mandated to do so by the
15 Mississippi Supreme Court.

16 In anticipation, we submit that all the
17 decisions that I have cited in my brief -- Perkins
18 versus Matthews, Allen versus U.S., and then the most
19 recent one, McDaniel versus Sanchez, which was decided
20 June the 1st, which we incorporated into a petition for
21 rehearing -- require us to make the submission, and we
22 made that submission.

23 And counsel opposite in his brief asked for
24 the relief to be prospective in nature, but we like the
25 language in Perkins versus Matthews that with a good

1 faith compliance by us with the Act that we feel that
2 the decision of this honorable Court should be remedial
3 or retrospective, because we sought before this Court a
4 stay, both prior to the granting of certiorari and after
5 the granting of certiorari, and before the elections
6 were held and after the elections were held and the
7 trustees adjudicated into office. And this Court on two
8 occasions denied that stay.

9 So one of the reliefs that we are asking is
10 that the prior election be vacated, the trustees removed
11 from office. And I realize that down the road we will
12 have to comply.

13 Thank you.

14 CHIEF JUSTICE BURGER: Mr. Reynolds.

15 ORAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS, ESQ.

16 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

17 MR. REYNOLDS: Mr. Chief Justice, may it
18 please the Court:

19 This case is here on a writ of certiorari to
20 the Mississippi Supreme Court to review that court's
21 judgment ordering the election of trustees to the
22 Louisville School District to proceed under changed
23 election procedures without first obtaining preclearance
24 under Section 5 of the Voting Rights Act and
25 notwithstanding an objection to the changed procedures

1 by the Attorney General of the United States.

2 The ultimate issue is whether the Mississippi
3 court erred in mandating implementation of the voting
4 change in the absence of Section 5 preclearance. Before
5 addressing that question, which we believe requires an
6 affirmative response, Respondents have raised the
7 threshold question whether this Court can properly reach
8 the Section 5 inquiry in light of the procedural history
9 of this case.

10 Very briefly, that procedural history is that
11 the Louisville School District since 1960 has embraced
12 the whole of Winston County, Mississippi. The school
13 board in 1960 consisted of five trustees, three of whom
14 were appointed by city officials of Louisville and two
15 of whom were elected at large by qualified electors
16 outside of Louisville.

17 In 1964 the Mississippi legislature enacted
18 legislation applicable to the Louisville School District
19 requiring each of the trustees to be elected from a
20 different one of five supervisory districts. Believing
21 this legislation to be a special law which is prohibited
22 by the Mississippi constitution, the city officials of
23 Louisville did not implement that change in 1964, or
24 indeed thereafter. And in 1975 the Respondents
25 commenced this action in chancery court of Winston

1 County seeking enforcement of the '64 statute.

2 The chancery court ruled that the statute was
3 indeed a special law which violated the Mississippi
4 constitution and declined to enforce it. An appeal was
5 taken to the Mississippi Supreme Court and that court
6 reversed, concluding that the constitutionality of the
7 '64 statute could be saved without doing violence to
8 legislative intent by removing by court order the phrase
9 limiting the act's applicability only to the Louisville
10 district.

11 The case was then remanded to the chancery
12 court for further proceedings not inconsistent with that
13 opinion. Petitioners sought rehearing in the
14 Mississippi Supreme Court and raised for the first time
15 on rehearing the question of the applicability of
16 Section 5 of the Voting Rights Act to the '64 statute as
17 modified by the Supreme Court's decision. That
18 rehearing was denied without any mention whatsoever of
19 the Section 5 issue, and this Court denied certiorari.

20 On remand the chancery Section ordered an
21 election to be held pursuant to the '64 statute, set
22 forth procedures to govern that election, and then
23 entertained the Section 5 question and ruled
24 specifically that the election of all five trustees from
25 supervisor districts was an election change requiring

1 preclearance under Section 5, and then ordered that that
2 change be submitted to the Attorney General of the
3 United States for Section 5 review.

4 It was submitted. The Attorney General
5 objected to the majority vote requirement in the new
6 election procedures. Following that, the chancery court
7 denied a motion to eliminate or sever the majority vote
8 requirement and simply to allow standing the Mississippi
9 statute relating to election of five trustees. It said
10 it would not -- it could not sever that because the
11 statutory framework in Mississippi required that that
12 particular requirement did indeed apply to the
13 Louisville School District.

14 And since that couldn't be severed, the
15 chancery court reiterated that the election under the
16 '64 statute was subject to compliance with the Voting
17 Rights Act. That prompted Respondent's second appeal to
18 the Mississippi Supreme Court, and on that second appeal
19 the Mississippi Supreme Court, relying on the law of the
20 case doctrine, reversed as to the part of the decree
21 that required compliance with Section 5.

22 Now, Respondents' claim is that, as I
23 understand it, is that the first decision of the
24 Mississippi Supreme Court on rehearing was a final
25 judgment on the federal question as to Section 5

1 applicability at the time that it was rendered and it
2 came to this Court on certiorari, and thus the argument
3 is made that because that was a final judgment at that
4 time and certiorari had been denied, that this Court is
5 precluded now to take up the federal question on the
6 applicability of Section 5.

7 There is, however, in response to that,
8 there's nothing at all in that first Mississippi
9 decision to suggest that it embraced a final disposition
10 of the Section 5 issue. Indeed, that first decision did
11 not even speak to the Section 5 issue, and that -- the
12 contention that it did dispose of the federal question
13 comes up, if at all, only with respect to the much later
14 reference the second time around by the Mississippi
15 Supreme Court to law of the case.

16 Our view is that until that second decision,
17 neither the parties, nor indeed the chancery court which
18 on remand reviewed the federal question, or indeed this
19 Court were alerted to the Mississippi Supreme Court's
20 post hac characterization of its first ruling. Indeed,
21 that first ruling by its terms was certainly susceptible
22 to the understand by everybody that it was a non-final
23 decision as to Section 5, it didn't speak to it, and
24 that the Section 5 question was one that was available
25 to the parties to litigate in chancery court on remand,

1 which indeed they did.

2 Surely if the first decision is one that does
3 not by its terms give anybody an indication of finality,
4 the parties cannot be barred from Supreme Court review
5 of the federal question, nor can this Court be estopped
6 from ruling on that issue in the absence of notice that
7 it was indeed a final judgment at the time that it came
8 here the first time.

9 QUESTION: Mr. Reynolds, that's basically a
10 question of Mississippi law, isn't it, the extent of the
11 application of law of the case or collateral judicial
12 estoppel?

13 MR. REYNOLDS: Well, the Mississippi law as I
14 understand it on law of the case is that it applies
15 where you have a legal -- a disposition of a legal issue
16 that was finally determined. And what I think -- I
17 think you're right that it is an application of
18 Mississippi law.

19 But if there is nothing in the first
20 Mississippi opinion at the time that it's rendered,
21 decision at the time it's rendered, to give an
22 indication that there was a final judgment on the merits
23 of the federal question issue at that time, we think
24 that this Court is not precluded nor are the litigants
25 precluded from re-addressing that or addressing that

1 issue when it comes up now on this grant of certiorari.

2 QUESTION: Well, that wouldn't be true if we
3 were talking about res judicata in many states, would
4 it, where the rule is that anything that was litigated
5 or might have been litigated is barred? And as to stuff
6 that might have been litigated, you would have no notice
7 that the judgment affected that, because the judgment by
8 definition wouldn't speak of it. It hadn't been
9 litigated.

10 MR. REYNOLDS: Well, I think, though, that in
11 terms of whether or not you had a final judgment at that
12 time that would bar reaching the federal question at
13 this time, that it's different than the res judicata
14 situation. And our view is that the issue on the merits
15 is properly here and that the grant of certiorari was a
16 proper grant.

17 On the merits, the decision of the Mississippi
18 court I think did mandate that this election go into
19 effect prior to any preclearance. And in doing so, that
20 was error if the change, the voting change in question,
21 was a covered change under the Voting Rights Act. We
22 have briefed the question as to whether it was a covered
23 change.

24 We think it's undisputed, first, that there
25 was an election here that was involved. Second, this

1 election change, even though it occurred by legislation
2 prior to '64, did not go into effect until after
3 November of '64, and this Court's decision in Perkins v.
4 Matthews, Justice Brennan's decision, makes it clear
5 that a change which goes into effect after '64 is one
6 that is a covered change notwithstanding that it's
7 pursuant to legislation that was passed prior to '64.

8 And then the only other question that really
9 relates to whether it's a covered change is whether or
10 not this is a court-ordered change as opposed to a
11 legislative change. I think that on that, first, it's
12 clearly legislative. The Mississippi Supreme Court,
13 when it held the statute constitutional, did so with
14 some modification or redrafting of that statute, but did
15 that after it determined that its change was fully
16 consistent with the legislative intent.

17 But beyond that, this Court has never held
18 that a court-ordered change by a state court would be
19 immune from preclearance. The most that we have heard
20 is in the East Carroll Parish case that there are some
21 court-ordered changes pursuant to the federal court
22 reapportionment plans that might be immune from Section
23 5 preclearance.

24 But as to state court changes, it's never been
25 held that that doctrine would apply, and so even if this

1 were by some stretch to be considered a state court's --
2 I mean, a court-ordered change, it would not be immune
3 from Section 5 review. We think that, given the fact
4 that the question of whether it's a covered change is
5 one that has to be resolved in favor of coverage, that's
6 the extent of the inquiry by the Mississippi court, and
7 if you rule that it is a covered change the Mississippi
8 court was in error to order the election to go into
9 effect prior to preclearance. And we do think that's
10 the effect of the order and it has to be reversed.

11 QUESTION: Mr. Reynolds, may I ask you a
12 question. Does the record tell us, or if it doesn't can
13 you tell us, what happened at the election? Were there
14 five people elected by majority vote?

15 MR. REYNOLDS: There were -- well, there was
16 one runoff. There were four -- four people were elected
17 without runoff and in one district there was a runoff
18 and there was an election by majority vote. So that the
19 majority vote requirement did take effect in the past
20 election as to one of the five districts.

21 QUESTION: Is that what is in issue in the
22 federal case, just that one district?

23 MR. REYNOLDS: No, the federal case relates to
24 the voting change, not to the past election. And the
25 Attorney General objected to the majority runoff

1 requirement. In fact, he objected before the election
2 to the majority runoff requirement.

3 QUESTION: But in that litigation, is it not
4 fair to predict that it will not affect four of the
5 people who now hold office, no matter what happens to
6 it?

7 MR. REYNOLDS: Well, no, I don't think that
8 would be necessarily the case, because all the people
9 that are elected now are being elected from supervisor
10 districts, which is different from the prior arrangement
11 where you had three appointed and two elected, but not
12 elected by any defined supervisor district.

13 So if you were to set aside the election
14 because it had not been precleared, it would affect all
15 five of them.

16 QUESTION: Would that mean then that the three
17 people appointed by the city and the two elected from
18 outside the city would then be returned to office?

19 MR. REYNOLDS: I think that if one were to set
20 aside the election that would, unless there were some
21 other accommodation, that that would probably be the
22 result.

23 QUESTION: Well, why shouldn't there just be a
24 new election free of the specific thing the Attorney
25 General objected to? Why would you have to go back to

1 the old system?

2 MR. REYNOLDS: I think that that would be
3 another way that it could be done.

4 QUESTION: Well, another way, another way.
5 What should a district court do? Hasn't there been a
6 decision lately indicating that perhaps a court
7 shouldn't go any farther in correcting a plan than the
8 extent to which the Attorney General objected?

9 QUESTION: You just objected to the majority
10 vote, didn't you?

11 MR. REYNOLDS: That's correct.

12 QUESTION: You didn't object to the single
13 member districts.

14 MR. REYNOLDS: That's correct, that's
15 correct.

16 QUESTION: Well, why would you -- why would
17 you set aside the entire system? You would just say, a
18 new election without a majority vote, and there was no
19 majority vote necessary in some districts.

20 MR. REYNOLDS: Well, I think that the decision
21 I think you're referring to is Upman.

22 QUESTION: I think it is.

23 MR. REYNOLDS: And the question really is
24 whether the objection by the Attorney General as to a
25 submitted plan, if it identifies that portion that is

1 objectionable, whether that would permit preclearance of
2 the rest of the plan. I'm not sure -- I don't believe
3 that the Upman case really decided that issue. The
4 manner that the law now is is that an objection --

5 QUESTION: You're submitting that if you
6 object to any provision in a new statute the entire
7 statute is suspended?

8 MR. REYNOLDS: That's right, if the entire
9 statute is objectionable.

10 QUESTION: That has not been decided. You're
11 quite right, that hasn't been decided. I know that's
12 your submission.

13 MR. REYNOLDS: Right. No, I don't think that
14 has.

15 QUESTION: Mr. Reynolds, let me hold you a
16 minute. Tell me again, what is the status of the
17 federal suit in Mississippi?

18 MR. REYNOLDS: It's actually been held in
19 abeyance. The Government went in for a TRO. The court
20 denied a TRO, and that case is now pending until
21 disposition of this case..

22 QUESTION: Well, you still have that case
23 available, however this one is decided, do you?

24 MR. REYNOLDS: That's correct, that is still
25 an available forum to go in and to continue the question

1 of setting aside the election or -- in that case we ask
2 that there be a severability of the majority vote
3 requirement, and I think that that is one way the Court
4 could reach the result.

5 But I do think that the objection as such
6 would go to the whole plan as submitted, rather than the
7 --

8 QUESTION: Is that what you're asking be done
9 in the suit presently going on in the federal district
10 court? You're asking the court to just sever the
11 majority vote provision?

12 MR. REYNOLDS: We asked in the federal
13 district court that the court simply restrain the
14 majority vote requirement, enter a TRO as to the
15 majority vote requirement, and allow the election to
16 proceed, but not with that requirement. And the court
17 responded that it did not feel it had the authority to
18 engage in that kind of judicial legislation of the plan
19 that was submitted and so it declined to do it on a
20 TRO.

21 QUESTION: The district court declined?

22 MR. REYNOLDS: The district court, and said at
23 the same time that there was not a sufficient showing of
24 irreparable injury to stop the election. But the
25 request was to ask them simply to stop that portion

1 going into effect that related to the majority vote.

2 QUESTION: Do you think that request -- do you
3 think the district court's reaction to the request was
4 consistent with Upman?

5 MR. REYNOLDS: Was consistent with Upman?

6 QUESTION: Shouldn't it have let the action go
7 ahead, go forward, pursuant to the request without the
8 majority vote requirement?

9 MR. REYNOLDS: I don't believe Upman really
10 reached that question squarely. I think that one could
11 argue from Upman that the district court might have
12 taken that step, but I don't think Upman really reached
13 that issue. As I understand Upman, Upman said that when
14 the court is redrafting its own reapportionment plan and
15 it has in front of it an objection from the Attorney
16 General that it should -- that only objects to certain
17 features, deference should be paid to the legislative
18 judgment that is made as to the rest of the plan.

19 And therefore, in its reapportionment activity
20 it should not undertake to redo or redraw those features
21 that are not subject to the objection. And I don't
22 think it really reaches the precise question that you're
23 asking.

24 CHIEF JUSTICE BURGER: Very well.

25 Mr. Weir.

1 ORAL ARGUMENT OF LAUREL G. WEIR, ESQ.

2 ON BEHALF OF RESPONDENTS

3 MR. WEIR: Mr. Chief Justice and may it please
4 the Court:

5 We filed this lawsuit in the United States
6 District Court for the North District of Mississippi,
7 Aberdeen, Mississippi, originally by five people
8 representing the citizens of each one of the five
9 supervisor districts of Winston County, Mississippi. We
10 alleged that the one-man, one-vote rule was being
11 violated and we thought there was no doubt but what it
12 was.

13 It had continuously been done and since even
14 before the Voting Rights Act vast groups of citizens
15 from time to time tried to get that remedied. Even the
16 legislature of the State of Mississippi saw that the
17 one-man, one-vote theory was being violated and they
18 even enacted a statute before the Voting Rights Act took
19 effect.

20 No one was ever successful in court or in the
21 legislature or anywhere else to get relief. So I filed
22 a suit for the citizens of the county. There are more
23 people living outside the city limits than live inside
24 the city limits. There are vastly more students
25 attending the school system that reside outside of the

1 city limits as compared to inside the city limits.

2 When we got to the U.S. district court -- this
3 is back about seven years ago, July of 1975, before the
4 people could ever get a hearing in the U.S. district
5 court. The United States district court ruled as a
6 matter of comity that the federal court did have
7 jurisdiction of the matter, true enough, and that there
8 were federal questions raised there, the one-man,
9 one-vote theory undoubtedly and undisputedly being
10 violated.

11 But he thought that it was better -- and there
12 are many federal decisions to uphold his theory -- that
13 the State of Mississippi in the state courts ought to
14 first be granted the right to pass upon those matters.
15 And he put in his order of July 1, 1975, that he
16 retained jurisdiction and gave the citizens 60 days in
17 which to file a suit in the state court. If they didn't
18 file a suit within 60 days the case was to be
19 dismissed.

20 In his order he cited four federal decisions.
21 You can read it in the record on pages 80 and 81:
22 Meridian versus Bell Telephone Company -- I have the
23 citation that he gave. It's not in the appendix, it's
24 in the record that's come up from the Mississippi
25 Supreme Court. I have it in the brief. It's on pages

1 -- I just made a note of what page it appeared on. 80
2 and 81 is where it appears in the record that came up
3 from the state supreme court.

4 Well, we promptly filed our suit in the state
5 court and we -- they all agreed and we dictated and
6 stipulated into the record that all supervisor districts
7 were in compliance with the Justice Department rules and
8 that all five of the supervisor districts do come into
9 the city limits of the city of Louisville, Mississippi.
10 And it was long after that until any black ever served
11 on the board of trustees for the Louisville Municipal
12 Separate School District.

13 Mr. Mayo made reference to the fact that one
14 had been appointed. It was only after the state court
15 ordered him to submit the matter to the United States
16 Department of Justice that a black ever served on the
17 school board under the appointed system. They got a
18 white person to resign so they could appoint a black
19 lady to serve as school board trustee.

20 She's the one and only lady that has ever
21 served under the appointive system on the school board,
22 and that was only recently, after the court ordered that
23 the plan be submitted to the Justice Department. They
24 got a person to resign and then appointed a black.
25 She's out of office now. She got beat in the election,

1 too, like the other four.

2 All five -- when the people did get a chance
3 to vote and an opportunity to vote, every trustee that
4 was in office ran for reelection also and every one of
5 them got beat in the election, too. And the majority of
6 the people -- like I say, there are more people living
7 outside of the city limits than live inside. There are
8 more people being outside the city limits than inside.

9 But it was not only white people that were not
10 being permitted to vote. The blacks that lived outside
11 the city limits were deprived of their right to vote.
12 The Indians that lived outside the city limits of
13 Louisville, Mississippi, were being deprived of their
14 right to vote just like the white people. And so, when
15 we filed the lawsuit we filed it as more or less a class
16 action in behalf of reds, blacks, whites, and the
17 concerned citizens.

18 Then after this matter got back from the
19 Mississippi Supreme Court ruling that the chancellor
20 must have an election -- and they ought to be
21 congratulated on the opinion they wrote in that case,
22 because they called attention to the bench and bar of
23 the federal point that -- and it's in the appendix,
24 their opinion -- that the one-man, one-vote law must be
25 complied with in the state of Mississippi.

1 However, they said they didn't have to reach
2 that point since there was already a statute that said
3 that they did have to have an election. But if it had
4 not been for the statute they would still have called an
5 election because of the one-man, one-vote theory being
6 violated, in violation of the Constitution of the United
7 States, the state of Mississippi and the laws of the
8 land as announced by this Court.

9 Now, he brought Mr. Mayo -- and one of the
10 Justices here I believe was concerned about, should they
11 put the old trustees back in office in the event of a
12 reversal. Let me call your attention to this factor:
13 The court ruled that the trustees that were serving were
14 never legal trustees at all, and the court order just
15 provided that they could only continue to serve until
16 they could have the election and the election should be
17 held as soon as possible.

18 One order on that is in the record on page 97,
19 and there's another order on page 225 of the record
20 that's brought up from the Mississippi Supreme Court,
21 saying that they were never legal trustees. They
22 certainly weren't at that time, and only over our
23 objection they granted them the power to stay in office
24 until the election can be held.

25 Well, the chancellor, like they say, ordered

1 the matter sent to the Justice Department, the U.S.
2 Attorney General, for his approval or disapproval. That
3 was done on July the 24th, 1979. He did not make any
4 ruling within 60 days one way or the other. The
5 chancellor could have gone ahead and called the
6 election, but he simply wouldn't do it, and it was March
7 28th, 1980, before the Attorney General ever made any
8 ruling.

9 And his only objection, by the way, is not to
10 keep down the election; his only objection was that the
11 plurality theory ought to win as compared to the runoff
12 election.

13 Well, so we go back into court and file a
14 petition with the chancellor saying, all right, we don't
15 care whether they have a plurality election or whether
16 they have a runoff election. That's in the record there
17 on page 249 of the record brought up from the
18 Mississippi Supreme Court. And I believe that petition
19 is printed in the appendix, too.

20 And the petition says that it's immaterial to
21 us, because our interest is the interest in the schools
22 and the children, who are going to teach our children,
23 who are going to be trustees of our schools; and that we
24 also prayed that if the court found it necessary to join
25 the Attorney General in as a party. And he refused to

1 do that.

2 But we agreed in writing and filed it, we'd go
3 along with the Attorney General's ruling on the
4 plurality on May 15, 1980, when we filed that petition.
5 Well, the chancellor said, I'm not going to let him have
6 the election yet. See, it had been since 1960, been
7 that way; still no election. And now it's gone on up to
8 May 15, 1980. The Attorney General's already ruled.

9 The chancellor says, still can't get any
10 election, because the Attorney General said a plurality
11 man has to win, the one that gets the most votes at the
12 first election when the first election's held. And the
13 state law says on school districts, municipal school
14 districts, requires a runoff. So due to that conflict,
15 I can't grant your petition to go along with the
16 Attorney General and have the election.

17 So I had to go back to the Mississippi Supreme
18 Court again with them, and so when we got back up to the
19 Mississippi Supreme Court they required them to hold the
20 election and ordered the first order enforced. And we
21 did finally have the election. They tried to -- and
22 then the Justice Department did come in and file some
23 papers up there at Aberdeen.

24 QUESTION: Mr. Weir, can I interrupt you at
25 this point?

1 MR. WEIR: Yes, sir.

2 QUESTION: On that appeal, can you refresh
3 me? Did the Mississippi Supreme Court pass on the
4 question whether the chancellor was correct in saying
5 that the majority vote requirement could not be severed
6 from the election, or did they just not reach that?

7 MR. WEIR: No, sir. I'll tell you how that
8 came about. Thank you for raising the question. I was
9 going to call your attention to it.

10 Of course, they claim in their opinion that,
11 first of all, the case law had already been decided and
12 therefore that issue could not come before the court.
13 But this sentence appears in the opinion of the
14 Mississippi Supreme Court, which you all have up here,
15 if I understand correctly.

16 QUESTION: This is the latest opinion?

17 MR. WEIR: That's the last opinion, yes.

18 "On oral argument both parties agreed to abide
19 by the statutory scheme requiring a runoff election."
20 In other words, nobody has questioned that in this
21 court, no one has raised that issue. The Justice
22 Department hasn't even raised that issue. Mr. Mayo has
23 not raised that issue.

24 Nobody had raised the issue about whether or
25 not both parties or everybody that was involved in the

1 case agreed that there would be a runoff election.
2 They're bound by it. That question can't even be ruled
3 on by this Court because nobody raised the question.
4 Nobody's raised the point.

5 Does that answer your question? That's the
6 way they disposed of it.

7 QUESTION: Well, in a way it does. But you in
8 the trial court had said you were willing to abandon the
9 runoff election.

10 MR. WEIR: I told him it didn't make us any
11 difference, Judge. See, we had a petition on file, like
12 I say, saying that we don't care whether it's a
13 plurality or a runoff. All we want is an election.
14 We've been deprived of it since 1960.

15 So that's the way the Mississippi Supreme
16 Court disposed of that issue, though, saying that Mr.
17 Mayo agreed right there in open court that there would
18 be a runoff and that I agreed for the other side there
19 would be a runoff. Nobody disputes that fact.

20 But also, there was another reason that they
21 ruled maybe in that manner, because of the law of the
22 case theory, which I'm going to get down to argue if I
23 have time to in just a few moments here.

24 Now, about them knowing about and should have
25 been ready about the Voting Rights Act issue. Their

1 first petition for a writ of certiorari appears in the
2 record on page -- on several pages, especially in the
3 record on page 29.

4 They first filed a petition for rehearing in
5 the Supreme Court and that was the first time they
6 raised the issue about the Voting Rights Act, the
7 one-man, one-vote theory. Then they argued in the
8 petition for rehearing that was denied by this honorable
9 Court, and the Mississippi Supreme Court called
10 attention to the fact that the petition -- this issue's
11 already been ruled on by this court.

12 They argued in their petition for certiorari

13 --

14 QUESTION: We'll resume there at 1:00 o'clock,
15 Mr. Weir.

16 MR. WEIR: Thank you.

17 (Whereupon, at 12:00 noon, the argument was
18 recessed, to reconvene at 1:00 p.m. the same day.)

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1 AFTERNOON SESSION

2 (1:00 p.m.)

3 CHIEF JUSTICE BURGER: Mr. Weir, you may
4 continue.

5 ORAL ARGUMENT OF LAUREL G. WEIR, ESQ. - RESUMED
6 ON BEHALF OF RESPONDENTS

7 MR. WEIR: Mr. Chief Justice, may it please
8 the Court:

9 I want to submit that the Attorney General is
10 not a party to this case. He only got in it in the form
11 of amicus curiae. Actually, he got here to the U.S.
12 Supreme Court -- now, he didn't appear in the lower
13 court and according to the Mississippi Supreme Court
14 opinion everybody agreed to the manner of holding the
15 election.

16 He says in his own brief that his remedy is to
17 file the lawsuit in the district court, have a
18 three-judge federal panel is what it amounts to, and
19 that's on file and active at Aberdeen, Mississippi, in
20 the federal court. And we're not trying to avert the
21 Civil Rights Act or the Voting Rights Act or anything of
22 that nature here.

23 These people have waited all these years to
24 get an election and just now have accomplished that
25 purpose, and I surely would say that the Court should

1 let them stay in in the event of a reversal, because the
2 other group stayed in much longer without any legal
3 authority at all. At least these people were elected by
4 the voters.

5 QUESTION: Mr. Weir, you've referred two or
6 three times to this stipulation as to how the election
7 would be held. Now, did you give us a record reference
8 on that?

9 MR. WEIR: Judge, there's no record
10 reference. You see, in the Mississippi --

11 QUESTION: You mean there wasn't a record of
12 all the proceedings or stipulations?

13 MR. WEIR: Well, no, sir. This is just the
14 opinion of the Mississippi Supreme Court.

15 QUESTION: Well, I know, but is it supported
16 by the record or not? How did they know that?

17 MR. WEIR: Because it was brought out in oral
18 argument before the court, just like right now. They
19 asked the questions to us.

20 QUESTION: What did they ask?

21 MR. WEIR: They asked me if it made me any
22 difference whether the election was by plurality or by
23 runoff, and we told them no.

24 QUESTION: Oh, so they're referring to a --
25 they're referring to a stipulation in the Mississippi

1 Supreme Court?

2 MR. WEIR: Yes, sir.

3 QUESTION: Oh, I thought you said they were
4 referring to a stipulation in the trial court.

5 MR. WEIR: No, sir.

6 QUESTION: No. Oh.

7 MR. WEIR: It was while the argument --

8 QUESTION: Well, what was the response from
9 the other side?

10 MR. WEIR: It was all right with them to have
11 it either way.

12 QUESTION: That was their response?

13 MR. WEIR: Yes, and that's the reason the
14 Supreme Court put it in here. They said: "On oral
15 argument both parties agreed to abide by the statutory
16 scheme requiring a runoff election." Well, I told them
17 it didn't make me any difference in effect.

18 QUESTION: Well, I don't suppose that the two
19 parties could stipulate their way out of the Voting
20 Rights Act. You don't suggest that, do you?

21 MR. WEIR: No, sir.

22 QUESTION: Well, so what is the significance
23 of the stipulation?

24 MR. WEIR: Well, to show that there's no issue
25 between the parties that's now before this Court as

1 compared to a plurality vote or a runoff election. The
2 parties that were involved in the lawsuit in the lower
3 court, there's no issue between them and can't be an
4 issue because they all agreed to it.

5 QUESTION: Well, that may be. But how did the
6 case get here, then?

7 MR. WEIR: Well, that's a good question. They
8 don't state any jurisdictional grounds whatsoever in the
9 petition. And we raised that. They just merely say
10 that the Mississippi Supreme Court ruled against them
11 --

12 QUESTION: Well, somebody, whoever brought the
13 case here, isn't satisfied with the result below,
14 including not being satisfied, with ignoring the
15 objection to the runoff election.

16 MR. WEIR: We objected to the jurisdiction,
17 and when they went to write down jurisdiction they
18 merely say one, two sentences: "The decision of the
19 Supreme Court of Mississippi was entered on June 3,
20 1981, and rehearing denied on July 8, 1981. The
21 petition for a writ of certiorari was filed August 28,
22 1981, and was granted on December 14, 1981."

23 That's all the jurisdictional things they
24 allege in their brief.

25 QUESTION: Well, do you think then that the

1 Petitioners are disavowing their stipulation in the
2 Mississippi Supreme Court?

3 MR. WEIR: Well, certainly they are, Judge.
4 No doubt about that.

5 QUESTION: Well, I suppose what they're saying
6 now is, they could say, well, whatever we stipulated to
7 then, the two parties were acting contrary to the
8 federal law.

9 MR. WEIR: Well, I was going to get down to
10 that, Judge, right shortly.

11 QUESTION: Okay.

12 MR. WEIR: You see, the first petition that
13 came here to this Court, they argued the voting rights
14 statute, you see, and it was plainly and clearly printed
15 in there. And I filed an opposition paper to that
16 petition for rehearing. That's in the court record. A
17 copy of both is in there.

18 And when it got back to the Mississippi
19 Supreme Court, they cited where you all denied
20 certiorari on 441 U.S. 946, but they say it's not your
21 decision that makes the law of the case; it says it's
22 our prior decision that makes the law of the case.

23 QUESTION: The Supreme Court of Mississippi
24 case?

25 MR. WEIR: Yes. And there's law to support

1 that proposition in numerous places, but I would like to
2 just say briefly, it was the same people, it was the
3 same law, the same issues that went up both times, you
4 see. And since the law of the case has been
5 established, then they couldn't go back into this
6 federal question of civil rights.

7 The only way the Attorney General can do that
8 is to go forward with a suit in the federal court at
9 Aberdeen, like he says.

10 QUESTION: So you're saying that this is just
11 like -- under the state procedural rules, the federal
12 issue had already been disposed of.

13 MR. WEIR: Right, and at the time of the
14 second hearing --

15 QUESTION: It's like, if you want to raise a
16 federal issue, some rule that says if you want to raise
17 a federal issue you have to raise it in the trial court
18 first.

19 MR. WEIR: And if you don't you waive it.

20 Another case, Rio Grande Railway versus
21 Stringham, said that since the first judgment settled
22 the issue and disposed of the whole case on the merits
23 and directed what judgment should be entered, there was
24 nothing left for the lower court to do, and then that
25 the question sought to be presented -- that there was no

1 need to grant certiorari relief, because the first case
2 -- the first case decided the law of the case.

3 I have with me a Mississippi Supreme Court
4 decision of Mississippi College versus May holding that
5 on the doctrine of law of the case whatever is once
6 established as controlling legal rule of decision
7 between same parties in the same case the court should
8 not rehear.

9 Now, a very interesting case that this Court
10 ruled on, Webb versus Webb, 101 Supreme Court 1889, in
11 1891 -- page 1891. That was a case with a child custody
12 decree in Florida giving the mother custody, one in
13 Georgia giving the father legal custody. So the U.S.
14 Supreme Court granted a writ of certiorari because full
15 faith and credit hadn't been given to the Florida
16 decree, which was obtained first.

17 When it got up here, though, you said, after
18 looking at the record and seeing that that issue was not
19 raised in the lower court, in the lower state court,
20 then you cannot pass on it, that you have no
21 jurisdiction.

22 QUESTION: Suppose, Mr. Weir, suppose I did --
23 and I'm sure you have done -- a thorough research job in
24 the Mississippi cases. Would I find consistently
25 adhered to this law of the case doctrine? Would you

1 think that's a well-established doctrine in
2 Mississippi?

3 MR. WEIR: In Mississippi, yes, sir. I have a
4 citation in the brief there, I believe --

5 QUESTION: Well, one of them is Ruling Case
6 Law. You got that in citation?

7 MR. WEIR: Yes, I got the whole case.

8 QUESTION: Ruling Case Law? A little old,
9 isn't it?

10 MR. WEIR: Sir?

11 QUESTION: It's a little old, isn't it?

12 MR. WEIR: Well, this particular case was in
13 1961 --

14 QUESTION: But this citation I see is Ruling
15 Case Law, and it's in 198 Mississippi that cites it, in
16 your appendix.

17 MR. WEIR: In the appendix?

18 QUESTION: Yes. It's the opinion, the first
19 opinion of the court. Is that where the rule of the law
20 comes from?

21 MR. WEIR: What page, Justice Marshall?

22 QUESTION: Page 11.

23 MR. WEIR: Page 11.

24 QUESTION: Citing from the first opinion that
25 you've been talking about.

1 MR. WEIR: Well, that was the Mississippi
2 Supreme Court --

3 QUESTION: That's right.

4 MR. WEIR: -- that wrote that.

5 QUESTION: That's where you get this basis?

6 MR. WEIR: No, sir. Justice Marshall, I'm
7 getting my basis first of all from their last opinion.
8 It's not printed in your appendix there, and it says our
9 --

10 QUESTION: Does it rely on --

11 MR. WEIR: Sir?

12 QUESTION: Does it rely on Ruling Case Law,
13 too?

14 MR. WEIR: Yes, sir. That's what it says,
15 that under the circumstances they have no right to alter
16 in any respects something that has already been ruled on.

17 A real quick one here would be the case, the
18 Cardinal case from Louisiana says that the Supreme Court
19 will not decide federal constitutional issues raised
20 before it for the first time on review of state court
21 actions.

22 There is another case that's real short here I
23 had to bring to the Court's attention. I believe it's
24 called the Bloeth case. I don't see it right -- I don't
25 see it right handy here, but that was a case where the

1 bill of penalty had been ordered and so the U.S. Supreme
2 Court ruled that even so, since the issue was not raised
3 in the lower court, it couldn't be raised here.

4 Herndon versus Georgia is another case holding
5 -- see, the question of how to appeal to the U.S.
6 Supreme Court becomes significant here, because on
7 appeal it said, we found it unnecessary to review the
8 points made since this Court is without jurisdiction for
9 the reason that no federal question was seasonably
10 raised in the court below or passed upon by that court.

11 None was in this last decision. That had
12 already been decided by the Mississippi Supreme Court,
13 and on you all's refusal to grant the petition for
14 certiorari, and that issue was raised before this Court
15 --

16 QUESTION: Well then, I take it that on the
17 law of the case rationale the stipulation in the oral
18 argument in the most recent appearance before the
19 Supreme Court was irrelevant?

20 MR. WEIR: It perhaps was.

21 QUESTION: Well, it really had no significance
22 if the law of the case -- that's an independent state
23 ground, I take it, you're insisting on.

24 MR. WEIR: Yes. I didn't write the opinion.

25 QUESTION: I understand that, but you

1 certainly have called our attention to the stipulation
2 several times, which really isn't -- in itself is not
3 dispositive. You have to get to the law of the case
4 doctrine.

5 MR. WEIR: The law of the case is what
6 disposes of this case, plus another factor: The
7 Attorney General can't overturn a Supreme Court
8 decision. If he has anything to say about it, his way
9 to say it is to file suit in a federal court and get a
10 three-judge panel, and that's what he's done. He admits
11 that in his brief.

12 QUESTION: Well, it isn't a question -- if the
13 issue were here, it wouldn't be a question of the
14 Attorney General overturning anything. It would be a
15 question of whether the Supreme Court of Mississippi had
16 complied with the federal law.

17 But you say the issue can't even be brought
18 here because of the law of the case.

19 MR. WEIR: Yes, sir, and because it was
20 disposed of in the first decision.

21 QUESTION: I understand.

22 MR. WEIR: And this very Court heard it and it
23 was certainly raised in the petition that was filed up
24 here, and I filed an answer to it in opposition to it,
25 and this Court refused to grant the writ of certiorari.

1 And these questions were clearly raised.

2 You know, there's some interesting things in
3 this particular statute. It reads, "If any government
4 agent desires to have an election district changed" or
5 something. It doesn't say what if a citizen calls on
6 the city or the government and claims they're not
7 obeying the federal law. That's interesting.

8 Also it's interesting, in the Government's
9 brief the fact that he alleges on page 18 there in his
10 footnote -- that was very interesting -- that the latest
11 federal regulations do not say whether or not a decision
12 of a supreme court of a state of the United States can
13 or cannot be binding in reference to the Voting Rights
14 Act. We hadn't briefed that point ourselves, but I do
15 point out that this is pointed out by the Justice
16 Department here.

17 So first of all, the law of the case was
18 established at the time the case was first before the
19 Mississippi Supreme Court and so on.

20 And I enjoyed being with you gentlemen and
21 Mrs. O'Connor.

22 CHIEF JUSTICE BURGER: Thank you, counsel.

23 Do you have anything further?

24 REBUTTAL ARGUMENT OF JAMES C. MAYO, ESQ.

25 ON BEHALF OF PETITIONERS

1 MR. MAYO: May it please the Court, Mr. Chief
2 Justice --

3 CHIEF JUSTICE BURGER: Two minutes.

4 MR. MAYO: I'd like to correct an error in one
5 question that Mr. Justice Stevens asked about the
6 election. There was a runoff in four of the five. The
7 elections were December the 5th and December the 19th.
8 There was a runoff election in four. In district number
9 two there was an exact tie, and by special order the two
10 candidates agreed to have a runoff election on December
11 the 19th. And I wanted to correct that.

12 QUESTION: Could I ask you, what is your
13 answer to law of the case position, just briefly?

14 MR. MAYO: I would say that the law of the
15 case doctrine is not applicable to Section 5 and Section
16 5 compliance.

17 QUESTION: Do you think the Mississippi
18 Supreme Court, not in its last opinion but in the
19 opinion before this, that it decided the Section 5
20 question?

21 MR. MAYO: No, sir, they did not decide it.
22 In 49-446, the first opinion, they did not decide the
23 Section 5. What we did was no different than what the
24 attorneys did in McDaniel versus Sanchez. When we were
25 ordered to do something different, then we had to raise

1 Section 5 or at least call it to the court's attention.

2 And I don't believe that there's a competent
3 attorney in the United States of America representing a
4 covered jurisdiction that would advise his clients, in
5 the face of a disapproval from the Justice Department of
6 the United States when a submission had been made, to go
7 ahead and have an election, regardless of whether it's a
8 plurality or a runoff.

9 QUESTION: You certainly felt obligated to
10 come here.

11 MR. MAYO: Yes, sir. And that is the -- to me
12 that is the key issue, regardless of all the other
13 things that have been argued. That March 28th letter
14 said don't have the election.

15 QUESTION: Suppose whatever Section 5 issue is
16 presented here had been presented in the earlier
17 appeal. Suppose it had and it had been decided
18 adversely to you. Petition for certiorari denied, and
19 suppose there is a law of the case doctrine in
20 Mississippi.

21 MR. MAYO: Well, of course it would be error
22 for the state court to do that.

23 QUESTION: Yes.

24 MR. MAYO: If it had been decided by the
25 Mississippi Supreme Court, even though it was an error,

1 that issue would have been before the court in 49-446,
2 but it was not.

3 QUESTION: But could the state legitimately
4 refuse -- could the state supreme court legitimately
5 refuse to address the question again in this latest
6 appeal?

7 MR. MAYO: I do not believe so, and one of the
8 reasons I have for that --

9 QUESTION: It said it did.

10 MR. MAYO: I like the language of Judge Love
11 when he ordered compliance with Section 5. He said:
12 "The purpose of the Voting Rights Act is to protect
13 people not before the court." And that's in the record
14 at pages 90 and 91.

15 Thank you very much.

16 CHIEF JUSTICE BURGER: Thank you, counsel.
17 The case is submitted.

18 (Whereupon, at 1:18 p.m., the case in the
19 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Ralph Hathorn Et Al., Petitioners V. Mrs. Bobby Lovorn Et Al No. 81-451

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BY Reene Hammond

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