

OFFICIAL TRANSCRIPT

ORIGINAL

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: RONALD CHISOM, ET AL., Petitioners
v. CHARLES E. ROEMER, ET AL.;
and
UNITED STATES, Petitioner
v. CHARLES E. ROEMER, GOVERNOR OF LOUISIANA, ET AL.

CASE NO: 90-757 and 90-1032

PLACE: Washington, D. C.

DATE: April 22, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RONALD CHISOM, ET. AL., :

4 Petitioners :

5 v. : No. 90-757

6 CHARLES E. ROEMER, ET AL.; :

7 and :

8 UNITED STATES, :

9 Petitioner :

10 v. : No. 90-1032

11 CHARLES E. ROEMER, GOVERNOR OF :

12 LOUISIANA, ET AL. :

13 - - - - - X

14 Washington, D.C.

15 Monday, April 22, 1991

16 The above-entitled matter came on for oral
17 argument before the Supreme Court of the United States at
18 10:02 a.m.

19 APPEARANCES:

20 KENNETH W. STARR, ESQ., Solicitor General, Department of
21 Justice, Washington, D.C.; on behalf of the
22 Petitioner United States.

23 PAMELA S. KARLAN, ESQ., Charlottesville, Virginia; on
24 behalf of the Petitioners Chisom, et al.

25 ROBERT G. PUGH, ESQ., Shreveport, Louisiana; on behalf of

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear first this
4 morning in No. 90-757, Ronald Chisom v. Charles Roemer,
5 consolidated with 90-1032, United States against Charles
6 Roemer.

7 General Starr.

8 ORAL ARGUMENT OF KENNETH W. STARR

9 ON BEHALF OF THE PETITIONER UNITED STATES

10 GENERAL STARR: Mr. Chief Justice, and may it
11 please the Court:

12 This case brings before the Court an important
13 issue of the coverage of the Voting Rights Act. The
14 specific question is whether the results test of section 2
15 of that act applies to the election of judges. In its en
16 banc opinion in the LULAC case, which will be argued next,
17 the Fifth Circuit held that judges are not covered by the
18 results test. The court's reasoning was that section 2(b)
19 of that statute, added in 1982, by its terms applies to
20 the election of representatives, and in the court's view,
21 the elected judges are not representatives. As a result
22 of the opinion in LULAC, the Fifth Circuit panel in this
23 case, which involves a challenge to the at-large election
24 of two justices of the Louisiana Supreme Court, ordered
25 this lawsuit dismissed.

1 In our view the Fifth Circuit, with all respect,
2 is wrong. It is wrong in light of the text of the Voting
3 Rights Act, including its comprehensive definition of vote
4 and voting set forth in section 14(c)(1), in light of the
5 structure of the statute, including section 5, the
6 preclearance provision, which all admit covers the
7 election of judges, and in light of the elaborate history
8 of the Voting Rights Act at the time of its original
9 passage and the 1982 amendments.

10 The Fifth Circuit also, we believe, erred on
11 what it viewed as a basic point. That is not only are
12 judges covered by the terms of the statute, when they are
13 elected they are candidates for public office, and that is
14 what the Voting Rights Act covers. But it is also wrong
15 as to the meaning of the term "representatives." We think
16 that for two reasons. The first is that Congress provided
17 no definition of the term "representatives." There is no
18 indication that Congress was using this as a term of art.
19 And judges who are elected are quite literally
20 representatives within the dictionary meaning of that
21 term.

22 And, as Judge Higginbotham pointed out in his
23 concurring opinion in LULAC, judges who have been chosen
24 by the people and are directly accountable to the people
25 are in a very real and practical sense representatives.

1 And we see that in the Louisiana system. That
2 is the candidates for a seat on the Louisiana Supreme
3 Court are involved fully in the political process in the
4 very basic sense of getting themselves elected to public
5 office. And that's what the Voting Rights Act is all
6 about. It's about voting, and it's about elections. And
7 whatever, the very important, the lofty function, the
8 solemn responsibility of that justice, once the justice is
9 in office, the plain fact remains that to get into office
10 in Louisiana the justice had to get himself elected.

11 QUESTION: General Starr, there is some
12 authority for the proposition that there is no one-vote
13 one-person requirement in election for judges. How do you
14 think a vote dilution claim is made out in the absence of
15 that, if applied to judges?

16 GENERAL STARR: The line of authority, and it is
17 clear that judges are not covered by the one-person one-
18 vote principle, is inapplicable here. And I think the
19 Court can see that both in terms of the function of that
20 body of law and what that body of law was designed to get
21 at, and it can see it most clearly in this Court's
22 decision in White against Regester. Because there, in
23 analyzing the Texas districting scheme, the Court rejected
24 a one-person one-vote challenge, but at the same time
25 credited and upheld an attack to the minority dilution

1 effect in the two counties -- in Dallas County and Bayer
2 County. The two are entirely distinct lines of authority
3 seeking to get at different themes.

4 QUESTION: But if the judges are representatives
5 in the way that you have described, then ought we to
6 rethink that line of authority and indicate that one-
7 person one-vote does apply to all representatives? It
8 seems to me that, to the extent you say judges are
9 representatives, that it may undercut the rationale of the
10 line of authority which suggests that one-person one-vote
11 is inapplicable.

12 GENERAL STARR: I respectfully disagree, and we
13 certainly are not urging that. And I disagree for this
14 reason. Think of a large State with perhaps quite small
15 predominantly rural counties. The law is, and I think the
16 law is sound in this respect, that a State as a matter of
17 policy can make a determination that each county should
18 have a judge, even if the numbers don't justify that.

19 So too, it may very well be that even though the
20 numbers may not justify in terms of population the large
21 number of judges in an urban district as opposed to a
22 suburban district that perhaps is less litigious,
23 nonetheless States can determine to order their on
24 structures in ways that are responsive to the needs of the
25 people.

1 That strikes us as very sensible, and this Court
2 itself in White against Regester said those same kinds of
3 State interests and State policies permit greater
4 deviations in State legislative redistricting than is the
5 case in congressional districting, which requires almost
6 mathematical exactitude.

7 QUESTION: Well, what is the test then in a vote
8 dilution claim if it applies to judges?

9 GENERAL STARR: The test in a vote dilution
10 claim is whether there is in fact, under the totality of
11 the circumstances as set forth in section 2(b), less of an
12 opportunity for minority persons to participate fully in
13 the political process and to elect candidates of their
14 choice. It is what Congress did in --

15 QUESTION: Less than what, General Starr? You
16 said there can be less than other peoples have -- than
17 other people have. You say that people in one county can
18 have much greater opportunity to elect a judge than people
19 in another county. Less than what? It seems to me you
20 need a standard for dilution. You don't know what watered
21 beer is unless you know what beer is, right?

22 GENERAL STARR: Less --

23 QUESTION: You need a standard of watering.
24 What is the standard for watering the election of judges?

25 GENERAL STARR: The standard is less than

1 others, less than nonminority persons.

2 QUESTION: But you have said it's okay to have
3 less of a chance than others in other counties, right?

4 GENERAL STARR: No, in terms of equal protection
5 principles as embodied in one-person one-vote. The point
6 I am trying to make, Justice Scalia, is the line of
7 authority with respect to vote dilution is exactly
8 different, it is distinct. We are talking about a statute
9 passed by Congress. We are not talking about a
10 constitutional standard under the Equal Protection Clause.

11 QUESTION: Could you give me, you know, just
12 what the baseline is? In those elections that are
13 governed by one-person one-vote we know what the baseline
14 is.

15 GENERAL STARR: Right.

16 QUESTION: People are supposed to have, no
17 matter what their race, the same say. Now you say that is
18 not the standard here. What is the -- how do I know,
19 then, when a person of a certain race has gotten less than
20 what he is entitled to?

21 GENERAL STARR: I would commend to the Court the
22 vast body of law that the Senate report in 1982 looked to.
23 It said we have seen the test fashioned by this Court in
24 White v. Regester faithfully applied in no fewer than 23
25 cases. And those cases all involve a totality of the

1 circumstances analysis which, as this Court put it in
2 White v. Regester, is an intensely local appraisal to
3 determine whether minorities enjoy full access.

4 QUESTION: Did they also involve candidates who
5 were subject to the one-person one-vote requirement?

6 GENERAL STARR: Some did, and some rejected one-
7 person one-vote challenges while at the same time
8 vindicating a vote dilution challenge brought by
9 minorities.

10 QUESTION: Did they involve offices that were
11 not subject to the one-person one-vote requirement?

12 GENERAL STARR: I don't think any of those did,
13 but some may. I am not going to say authoritatively that
14 none did. A vast array of offices were involved; some of
15 them were intensely local. I do believe, my best
16 recollection is one-person one-vote did apply.

17 QUESTION: Well, don't make me go back and read
18 all those cases. Just tell me the test.

19 (Laughter.)

20 QUESTION: What is the standard? You know, what
21 is the baseline?

22 GENERAL STARR: The baseline is set forth in the
23 statute, and that baseline is the totality of the
24 circumstances.

25 QUESTION: What does that mean? I don't

1 understand. That means it depends, right?

2 GENERAL STARR: Correct.

3 QUESTION: I do not think that's a baseline.

4 GENERAL STARR: That's the congressionally
5 mandated baseline. It is whether there is in fact a
6 dilution of the effectiveness and the ability of
7 minorities to participate fully in the electoral process
8 and to elect candidates of their choice. That is exactly
9 what this Court said in White against Regester.

10 QUESTION: Well, wasn't, White against Regester
11 was based on the Equal Protection Clause, wasn't it?

12 GENERAL STARR: That is correct.

13 QUESTION: So it was a constitutional law case.

14 GENERAL STARR: That is correct.

15 QUESTION: And what happened to White against
16 Regester in Bolden, do you think?

17 GENERAL STARR: What happened?

18 QUESTION: What happened to it in the Bolden
19 case?

20 GENERAL STARR: In the Bolden case it eventually
21 went back, after this Court's decision in Bolden, and the
22 challenge was rejected.

23 QUESTION: But what happened to the White
24 against Regester, if anything?

25 GENERAL STARR: Oh, they broke up the districts.

1 QUESTION: Well --

2 GENERAL STARR: They were at-large districts and
3 they broke them up.

4 QUESTION: Do you think the vote dilution part
5 of White against Regester survived Bolden as a
6 constitutional matter?

7 GENERAL STARR: Oh, as a constitutional matter,
8 perhaps it did not.

9 QUESTION: Well --

10 GENERAL STARR: But the point is Congress said
11 this is the standard in section 2 --

12 QUESTION: Well, I know, but what was the
13 Congress' authority to pass section 2, the amendment to
14 section 2?

15 GENERAL STARR: The Fourteenth and Fifteenth
16 Amendments.

17 QUESTION: You think it was the Fifteenth?
18 Could it be the Fourteenth, or what?

19 GENERAL STARR: It could be -- I think it could
20 be both. I think it could be both Fourteenth and
21 Fifteenth.

22 QUESTION: Even though Bolden said there was no
23 such equal protection requirement in the Fourteenth
24 Amendment?

25 GENERAL STARR: Bolden said exactly that --

1 QUESTION: So, but Congress has the authority to
2 enforce the Fourteenth Amendment in a way that the Court
3 said wasn't required?

4 GENERAL STARR: Correct. Correct. It can go
5 farther. Now, Congress, as least as embodied in the
6 Senate report which this Court has described as
7 authoritative, believed that, with all respect, the Court
8 in City of Mobile erred. But notwithstanding that, it
9 respected that judgment because this Court is the final
10 authoritative voice on the meaning of the Constitution.
11 But what it did say is we have power to in fact embody
12 that test, which not only is correct and right in our
13 view, but also has shown to be workable. It works. It
14 does not in fact create an untriable, amorphous standard.

15 QUESTION: Does it incorporate, in your view,
16 our holding in Thornburg and Gingles?

17 GENERAL STARR: Does what incorporate? Section
18 2?

19 QUESTION: The totality of circumstances test
20 that you advocate as the correct standard under the
21 section that is here involved.

22 GENERAL STARR: I think Thornburg against
23 Gingles sets forth this Court's reading of what the Senate
24 report factors pointed to. We are not here today
25 quarreling with Thornburg against Gingles, but --

1 QUESTION: Do you think it should be applied to
2 the election of judges?

3 GENERAL STARR: I think that the standards set
4 forth in section 2, and as interpreted in, by this Court,
5 should be applied to the election of judges.

6 QUESTION: But Gingles --

7 QUESTION: No, I asked about Thornburg and
8 Gingles. Should that rationale be applied across the
9 board in interpreting whether or not a judge, or
10 petitioner is contesting the allocation of judgeships have
11 made out a violation under section 2? Do you use
12 Thornburg and Gingles?

13 GENERAL STARR: Well, I think something very
14 important is involved in the election of judges, and this
15 is the State interest and its structure of the judiciary.
16 In this case there is no powerful State interest with
17 respect to at-large elections. That is to say the
18 Louisiana Supreme Court is elected, with the exception of
19 the first judicial district, from single-member districts.

20 But the Senate report, and Thornburg against
21 Gingles noted this, did look to the Fifth Circuit's
22 seminal decision in Zimmer against McKeithen, and there,
23 particularly at page 1305 of that opinion, the Fifth
24 Circuit looked to the State interest and the powerful,
25 compelling nature of the State interest in that particular

1 structure. We do believe that that is a consideration, a
2 factor to be weighed in the totality of the circumstances,
3 as we have sought to elaborate in our amicus brief in the
4 LULAC case.

5 QUESTION: It just, it isn't clear to me how you
6 think Gingles would apply in the absence of a one-person
7 one-vote requirement. That was the underpinning of the
8 majority holding in that case.

9 GENERAL STARR: It may not apply in full
10 measure. What I think Thornburg against Gingles was
11 seeking to do was to take the 1982 amendments as
12 elaborated by what the Gingles Court viewed as
13 authoritative, the Senate report, and to analyze that
14 report and then to say how is a case made out in the
15 legislative, that of course was a legislative contest or a
16 legislative districting issue and not a judicial
17 structuring issue. And we do think, for the very reasons
18 that Judge Higginbotham set forth in his concurring
19 opinion in LULAC, that different kinds of considerations
20 are at play and should be considered. And Thornburg had
21 no occasion to consider those.

22 QUESTION: General Starr, do you think that the
23 section 2(b) requirements extend to merit selection
24 retention elections as well?

25 GENERAL STARR: That issue is not before us, but

1 I think it does. What we believe is that the statute
2 applies, period, to any election.

3 QUESTION: Well, how about an election on
4 referendum measures --

5 GENERAL STARR: We believe it applies.

6 QUESTION: -- despite the use of the word
7 representatives?

8 GENERAL STARR: Yes.

9 QUESTION: It's a little hard to argue that a
10 referendum is a representative.

11 GENERAL STARR: Yes, it is, but I would suggest
12 that, very briefly, that the function of 2(b) is to tell
13 us what the 2(a) standard is all about. 2(a) is the
14 critical prohibition in section 2, and section 2 is the
15 heart of this statute, and section 2 speaks very broadly,
16 no voting qualification, no prerequisite to voting, no
17 standard practice or procedure. And then we look again to
18 14(c)(1) to see what the breadth of that is, and it is
19 universal. In fact 14(c)(1) talks about votes for non-
20 candidates. We believe that this is uniformly universally
21 applicable to all elections. Then the way that the
22 standard is to be applied is through a totality of the
23 circumstances analysis. That is what section 2(b) tells
24 us.

25 But the function of 2(b) is not in fact to

1 identify the offices that are covered. And when Congress
2 wants to do that it full knows well how to do it, as
3 illustrated by section 11 of the statute which has an
4 enumeration of specific offices to which that particular
5 provision or prohibition applies.

6 I'd like to reserve, if I may, the balance of my
7 time.

8 QUESTION: Very well, General Starr. Ms.
9 Karlan, we'll hear now from you.

10 ORAL ARGUMENT OF PAMELA S. KARLAN

11 ON BEHALF OF THE PETITIONERS CHISOM, ET AL.

12 MS. KARLAN: Mr. Chief Justice, and may it
13 please the Court:

14 I want to turn first to the question of
15 baselines that has been raised by Justices O'Connor,
16 Kennedy, and Scalia, and give you three ways in which that
17 baseline question can be answered in judicial elections
18 even assuming that one-person one-vote doesn't apply.

19 The first one is concrete from this case. We
20 know already that the State of Louisiana is willing to
21 have single member districts ranging in size from 410,000
22 to over 800,000 justices. That is part of the stipulation
23 with regard to the existing single-member districts.
24 Therefore, if plaintiffs can show that using the State's
25 own criteria for what sorts of populations should be in

1 districts, you can nonetheless draw a majority black
2 district. That would satisfy the first prong of Gingles.
3 We did that in this case.

4 The second way of doing that --

5 QUESTION: Excuse me, but that assumes that the
6 State is taking nothing into account except numbers, and
7 it presumably is also taking into account geography, the
8 nature of the political units into which these districts
9 are drawn. You're imposing upon the State a numerical
10 criterion as the sole criterion.

11 MS. KARLAN: No, that's not the sole criterion,
12 of course, Justice Scalia.

13 QUESTION: It's the sole one you're willing to
14 judge them on. You're saying they use 400 to 800,000 for
15 the other justices, why can't they use it for this one.

16 MS. KARLAN: Well, to begin with --

17 QUESTION: And their answer might be well, we
18 have different geographic regions and there are different
19 --

20 MS. KARLAN: Well, their answer might be, Your
21 Honor, that they don't think that representing black
22 people on the State supreme court is as important as
23 representing Cajuns, which is one of the reasons they have
24 the districts that they have now.

25 QUESTION: That may well be, but you can make

1 that argument about any political arrangement that they
2 make. That there may be a nefarious motive, but --

3 MS. KARLAN: Well, right. And if there were a
4 nefarious motive for this statute it would clearly fall
5 under the Fourteenth Amendment regardless of one-person
6 one-vote's applicability. You can't discriminate against
7 black voters simply because they are not that numerous or
8 because one-person one-vote doesn't apply. Given that, if
9 you ask how do we determine whether there is an
10 alternative structure, and after all, that is what
11 Gingles' first factor asks, is there an alternative to the
12 existing one-person, the existing multi-member districting
13 scheme in which black citizens or Latinos would have the
14 potential to elect the candidate of their choice. That is
15 what the Court says on pages 49 through 50 of its opinion.
16 And I think also that that's the burden of the example at
17 the beginning of Justice O'Connor's concurrence in the
18 judgment. Given that, that is one way of measuring.

19 The second way of measuring is to say all right,
20 the State doesn't have to have equipopulous districting,
21 but let's use that as an illustrative tool. That was done
22 in this case as well. If the State of Louisiana were to
23 have 7 districts with absolutely equal populations in
24 them, it would still be possible to draw a majority black
25 district centered on Orleans Parish and contiguous parts

1 of Jefferson Parish, which are majority black. That was
2 proved at trial by the United States as plaintiff
3 intervenor.

4 QUESTION: But if we had that kind of a scheme
5 we would at least, or the court that has to, that had to
6 draw the district or find the violation would at least
7 have on the numerical issue a principled basis for saying
8 yes, there can be a district of appropriate size. If we
9 don't have some kind of one-person one-vote scheme, what
10 is the principled basis upon which we can weight that
11 particular factor?

12 MS. KARLAN: Well, to begin with in this case,
13 as I already alluded to, the districting size that the
14 State already has. That's a principled basis. If the
15 State of Louisiana --

16 QUESTION: Well, what if the State is not quite
17 to cooperative, and what if the figures aren't quite that
18 neat? Is 10 to 1 okay? One district has a ratio of let's
19 say 900 to 1 judge, and the other would have a ratio of
20 100 to 1 judge? Where do we draw those lines?

21 MS. KARLAN: Well, Justice Souter, in this case
22 because it's a State supreme court, I would suggest that
23 if the State of Louisiana had one district with 3 million
24 people in it and another district with 12 people in it,
25 that would violate the Equal Protection Clause because it

1 would be arbitrary, regardless of whether one-person one-
2 vote applied. That's what this Court held in Salyer
3 against Tulare Lake Basin Water Storage District. It held
4 that even when one-person one-vote principles don't apply,
5 the State still has to comport with the Equal Protection
6 Clause principles.

7 And I think that those principles allow you to
8 use as an illustrative example -- because that is all that
9 the first prong of Gingles asked, is is there an
10 alternative to the present system which would afford
11 minorities an equal opportunity to participate and to
12 elect the candidates of their choice. If you can show
13 that, that establishes that first prong of Gingles. It
14 doesn't require the State to adopt that as the remedy at
15 all.

16 Indeed, one thing that may be of interest to the
17 Court is that the districts upon which this Court rested
18 in Gingles in finding dilution were not the districts that
19 were ultimately adopted at the remedial phase. Because
20 the State had the right to come back with another set of
21 districts, and as long as those districts fully remedied
22 the violation, the State is free to do what it wants.

23 The second -- the third point I wanted to make
24 about that is that in light of the decision by this Court
25 in Wells against Edwards, that's a summary affirmance. I

1 think that the dissent had the better of the argument
2 there, but you needn't go that far in order to find that
3 there was a mechanism for establishing dilution in this
4 case.

5 The second point I wanted to address is the role
6 of section 2(b), because I think that goes to Justice
7 O'Connor's question about whether referenda are covered.
8 Section 14(c)(1), the definitional provision of the act,
9 says that the word "vote" includes any election at which
10 propositions are voted on, as well as candidates. Now
11 section 2 of the act is the only nationwide prohibition on
12 discrimination, and my answer would be that section 2 in
13 part (a) defines what is prohibited, and part (b) is just
14 one illustration of how to go about proving that.

15 And I'd like to give a concrete example of how
16 you might challenge a referenda. Suppose, for example, in
17 a county that is majority black but in which blacks are
18 segregated in certain parts of the county, you have to get
19 a certain number of signatures to get an initiative on a
20 ballot from each precinct in the county, and there is
21 racial polarization and black people can't get any
22 signatures in a white area. You might be able to
23 challenge that referenda provision for signatures and
24 petitions under the Results Clause because it dilutes the
25 strength there of a black majority. So it's not just

1 election of representatives that is covered by the act.

2 Even if this Court were to hold that the word
3 representatives doesn't include judges, it would still
4 have to grapple with 2(a), which says no voting rights
5 standard practice or procedure, and that includes ones in
6 which no candidate is chosen at all.

7 Finally with regard to the question of merit
8 selection, yes, the Voting Rights Act would apply to merit
9 selections as well because, for example, if the State set
10 up its districts so that no matter what blacks did,
11 whether they voted to retain a judge or to throw him out,
12 they were always outvoted in that retention election by a
13 white block vote, then the structure of the districts
14 could be challenged itself.

15 Lastly I wanted to turn --

16 QUESTION: So would you -- you would take the
17 position that in a State that for instance had five
18 supreme court justices, and they were all elected
19 Statewide, that a 2(b) claim could be made out and the
20 State could be forced to set up a separate district for
21 the election?

22 MS. KARLAN: No, Justice O'Connor. A section 2
23 claim could be made out. The State would retain the
24 ability to come up with a number of other ways of electing
25 that five justice court. They could continue to elect

1 them at large by, for example, using cumulative voting.
2 What that would allow, any group that was greater than 15
3 percent of the population, because 1 over 6 is the
4 threshold of exclusion there --

5 QUESTION: How is that different from
6 proportional representation?

7 MS. KARLAN: It's not proportional
8 representation for two reasons, Justice Kennedy. The
9 first is that it says nothing about who actually serves on
10 the court. We don't claim in our case, and I don't think
11 any petitioners have claimed, that it's a right to have a
12 black person sitting on the bench.

13 QUESTION: Well, what is the object of your
14 cumulative voting exercise?

15 MS. KARLAN: To give black citizens in Louisiana
16 a say on who sits on the supreme court, the same as --

17 QUESTION: And how do you measure that say? Do
18 you measure it by their success in electing candidates?

19 MS. KARLAN: Candidates of their choice. Now
20 this Court has made clear it's not necessarily --

21 QUESTION: Well, candidates of their choice.
22 Isn't that proportional representation?

23 MS. KARLAN: No, it's not proportional --

24 QUESTION: You define proportional
25 representation as just being a racial calculus?

1 MS. KARLAN: That's what the Senate sought to
2 avoid, is the idea that you had to have a token black
3 person on every body in order to, in order to satisfy the
4 Voting Rights Act. But black --

5 QUESTION: No, I think the suggestion here is
6 that members of the black community want to be able to
7 identify a candidate as is theirs. I thought that was the
8 gravamen of your cumulative voting argument.

9 MS. KARLAN: It is, but it's not proportional
10 representation, Justice Kennedy. It's a right to
11 participate in the system equally with all other voters.
12 What Louisiana does today is it gives 410 whites --

13 QUESTION: Well, but if you have an identifiable
14 candidate, regardless of the race of that candidate,
15 representing a racial group, I think that's proportional
16 representation, or otherwise it's just a quibble.

17 MS. KARLAN: Well, I don't think it's just a
18 quibble. I think, you know, this Court recognized in
19 Gingles that there is a certain tension between measuring
20 dilution and forbidding a claim of proportional
21 representation. The way that plaintiffs get around that
22 is we're not claiming a right to proportional
23 representation. We're claiming that the present system
24 dilutes our ability to participate equally, because due to
25 racial block voting, due to a history of discrimination,

1 due to racial appeals and campaigns and the like, black
2 citizens in Louisiana are not able to participate in the,
3 to the same degree that white citizens are able to
4 participate in selecting a supreme court that rules all of
5 them. And that's what the gravamen of the complaint is.
6 It's not a complaint about proportional representation.

7 QUESTION: And you're telling me that it's
8 irrelevant the race of the members who serve on the
9 supreme court of the State of Louisiana in this case?

10 MS. KARLAN: May I have leave to answer that
11 question?

12 QUESTION: You may answer the question, Ms.
13 Karlan, yes.

14 MS. KARLAN: I'm not telling you it's
15 irrelevant. I think it has tremendous symbolic importance
16 and importance in respect for the law. But if the black
17 citizens of Orleans Parish chose to elect a white person
18 to the supreme court, they would be satisfied and we would
19 be satisfied that the law has worked, just as when they
20 elected a white person from the district that was set up
21 after Major against Treen.

22 Thank you.

23 QUESTION: Thank you, Ms. Karlan.

24 Mr. Pugh, we'll hear now from you.

25 ORAL ARGUMENT OF ROBERT G. PUGH

1 ON BEHALF OF THE RESPONDENTS

2 MR. PUGH: Mr. Chief Justice, and may it please
3 the Court:

4 At the outset I would like to bring something in
5 focus as to what is before you as distinguished from what
6 isn't before you. We have talked in the last few minutes
7 about constitutional claims. There are no constitutional
8 claims here today. Those were posed below in the district
9 court and they were abandoned in the district court.
10 Nothing on appeal. There is no nefarious motion or idea
11 or motive before you today. The constitutional claims are
12 not here.

13 What is here is that 41 States elect judges, and
14 it's about 41 States that ultimately this decision must
15 consider. There has been a suggestion about a Cajun
16 justice. I don't know him. We do have seven justices.
17 Of the seven justices, two are in fact elected from the
18 metropolitan area of Orleans. They have been so elected
19 since 1879. Every constitution in Louisiana since 1879
20 has provided for this same electoral arrangement.

21 QUESTION: Mr. Pugh, is there some accepted
22 explanation for why some of the seats on the supreme court
23 are geographically -- by geographic regions, and others
24 are at large?

25 MR. PUGH: Yes. In this instance, back in the

1 earlier days, the 1879 period, that was the focal point of
2 the State, in Orleans. And it was believed by the people
3 who convected the constitution at that time that it would
4 be appropriate to have two justices from that specific
5 area, that metropolitan area. But bringing it to date, if
6 I may, in the 1974 constitutional, the 73 constitutional
7 convention which resulted in the election by the people of
8 a new constitution in 1974, every time the issue arose
9 concerning whether or not there should be seven districts
10 it was defeated. It was defeated with the black votes
11 voting primarily against such a concept. As a matter of
12 fact, on the --

13 QUESTION: The proposal was to move from five
14 geographic districts to have all seven by geographic
15 districts?

16 MR. PUGH: Yes, sir. The proposal --

17 QUESTION: And that was --

18 MR. PUGH: The proposal was to have seven
19 districts, as distinguished from having six districts --

20 QUESTION: Six?

21 MR. PUGH: -- and then a combination on the
22 seventh. Now in that connection it was posed at the
23 convention why shouldn't one-man one-vote be applicable,
24 why shouldn't we have seven districts, why shouldn't we
25 provide in the seven districts that they should be equal

1 in population. Black from Orleans don't want that system.
2 The final vote, it was voted with one black voting against
3 it, and that person was from the East Baton Rough Parish.

4 But more up to date, we have recently had that
5 same issue posed to the people across the board of
6 Louisiana. Should we in effect have seven justices on the
7 Louisiana Supreme Court each elected from a different
8 district? What happened to it across the board? Orleans
9 voted 24 percent in favor of it, bearing in mind they had
10 53 percent of the population at that time were black, 53.5
11 in fact. 24 percent voted for the proposition, 76 voted
12 against the proposition, percentage.

13 Let's look at it in the four-parish area. In
14 the four parish area it was 24 percent against -- 24
15 percent for, 76 percent against. Let's look across the
16 State. It was 26 percent for and 74 percent against.

17 QUESTION: What have these numbers got to do
18 with the legal issue here?

19 MR. PUGH: Well, I was trying to illustrate for
20 the benefit of the Court that, as suggested by the Chief,
21 why the districts, and trying to explain that that's what
22 the people want. I will, however, considering my time,
23 like to move on to the rest of the argument.

24 Obviously we have a plain meaning question here.
25 Now, representatives was used, as we all know, as being a

1 suggestion of a word rather than legislators. No question
2 about it. Senator Dole, who drew the so-called compromise
3 amendment, said if we want to use the results test from
4 White, let's use the language from White. And that's what
5 occurred. They didn't use the word "candidate," which
6 would have embraced the judiciary. They didn't talk about
7 public officials, which would have embraced the judiciary.
8 Instead they used one word, representatives. Obviously
9 candidate would have been more than representative.
10 Candidate appears four times within the statute itself,
11 and for reasons only they know they chose not to use that
12 word.

13 Now I'd like to move, if I may, to the question
14 of -- well, obviously I want to make the point that if
15 anybody knows what a representative is, surely Congress
16 would know what a representative was. Now, for 18 years
17 preceding this act or the amendment to this act there were
18 15 cases, admittedly in the one-man one-vote area of the
19 law, holding that judges were not representatives. Not
20 one of those cases has indicated, that I could see, in any
21 of the reports, any of the suggestions, any of the
22 arguments, why would Congress, a body who somebody quoted
23 as being of lawyers, why would Congress ignore the entire
24 one-third structure of all 50 States, except for the
25 reason that it did not want to include judges as being

1 representatives?

2 QUESTION: Mr. Pugh --

3 MR. PUGH: Yes.

4 QUESTION: Is it your position that judges are
5 not covered by 2(b), but are covered by 2(a)?

6 MR. PUGH: Yes, sir, that is my position. And
7 I'll tell you the reason that's my position. First of
8 all, we must talk about, even though this Court in Gingles
9 did suggest, in fact it said that the results test
10 actually took the place of the intent standard. It said
11 it better than I am saying it, but in effect it said
12 intent is out the window, result comes in.

13 Now, it was mentioned a minute ago about
14 referendums. That's not the only thing. You've got
15 annexations, deannexations, you've got polling places,
16 you've got a litany of issue that must fall somewhere.
17 Obviously, I believe everybody would concede that issues
18 are not representatives. They must fall somewhere. They
19 obviously have got to fall, then, under 2(a).

20 QUESTION: Which requires an intent.

21 MR. PUGH: That's right, Your Honor. It
22 requires intent. And I say the intent standard is still
23 there. I believe the intent standard is applicable to the
24 judiciary. Now, if one wants to read it out of 2(a), it's
25 still in the Fifteenth. You can plead either or both.

1 And incidentally, despite the fact that this Court had
2 indicated that intent was out of the window, I would
3 suggest to you that the authoritative, everybody agrees
4 what the Senate report said is authoritative, in one, two,
5 three, four, five, six places in the Senate report it said
6 you could use the intent standard or you could use the
7 results standard under section 2. So there is no doubt,
8 at least I believe, intent can still be used under section
9 2.

10 QUESTION: Because it makes sense, you say? I
11 mean, I agree it makes sense, but how do you get there
12 from the language? I mean, it says -- what it says is
13 that no voting qualification shall be imposed in a manner
14 which results in a denial or abridgement as provided in
15 subsection (b).

16 MR. PUGH: That's our answer, as provided in
17 subsection (b), which carries --

18 QUESTION: But subsection (b) provides that it
19 doesn't cover anything except representatives.

20 MR. PUGH: That is absolutely correct, Your
21 Honor.

22 QUESTION: So that leaves subsection (a)
23 covering nothing except representatives.

24 MR. PUGH: Then issues are out.

25 QUESTION: You suddenly jump off there, right?

1 MR. PUGH: Not at all. Issues are out then.
2 Now, what difference then the final analysis make if
3 judges are not under the intent standard, as I contend
4 under 2(a)? Suppose they are not there, what difference
5 does it make? You can certainly still cover them under
6 the Fifteenth Amendment, so the result is still the same.
7 You end up with an intent standard. A State can't say
8 that we're going to, I believe in the words of one of you
9 in one of the cases, that we can't make one out of every
10 10. It was Justice White. You can't create a system of
11 one out of every 10 or try to classify some way. You
12 still have the Fifteenth Amendment to contend with. And
13 that's what I say. If it's not under 2(a), it can't -- in
14 my opinion at least it can't be under 2(b). No way under
15 any stretch of the imagination do I believe that a
16 representative can include the judiciary.

17 If I am correct on that, and I believe I am,
18 then the issue becomes are they out completely? Congress
19 says they're not out. Congress says you can use an intent
20 standard. Now where they're going to get it from, I don't
21 know. But that's what this says. Again, I read --

22 QUESTION: Mr. Pugh, can I ask you a question?

23 MR. PUGH: Yes, sir.

24 QUESTION: In White against Regester the Court's
25 opinion used the term legislators --

1 MR. PUGH: Yes, Your Honor.

2 QUESTION: -- and then Congress substituted the
3 word representatives. Is the word representatives in your
4 view somewhat broader than the term legislators?

5 MR. PUGH: Yes, sir, it is.

6 QUESTION: What is --

7 MR. PUGH: Why they switched from legislators to
8 representatives, I don't know and I doubt seriously if
9 anybody knows except perhaps them.

10 QUESTION: What does it include in addition to
11 legislators in your --

12 MR. PUGH: I think it includes the executives.

13 QUESTION: Includes all the executives. Any
14 elected executive officer?

15 MR. PUGH: It would be someone -- well, I think
16 it's in there for two reasons. One, an executive can be a
17 school board member. And I think there's a great deal of
18 concern about school boards and their operations insofar
19 as Congress is concerned. And I think what they were
20 trying to do is not get in the trap of saying legislators
21 and somebody throwing on an executive hat and saying it
22 ain't me. What they wanted to do with the school boards
23 is fully cover them, whether they were executives or
24 legislators. I can't tell you that that's anywhere in it,
25 because it's not. All I believe is that representatives

1 is broader than legislators. I believe it's much
2 narrower, meanwhile, than is the word candidate, which
3 they could have used.

4 Now the problem, of course, is that, as Justice
5 O'Connor said, the touch tone, that's telephones, the
6 actual method by which you make the determination under
7 Gingles starts off, first threshold is nothing more than,
8 or less than a one-man one-vote standard. It's got to be.
9 You've got to create a district. To create a district
10 that's compact you've got to measure some undiluted
11 district. So you can't get to the first test unless you
12 get by one-man one-vote. You can't get by one-man one-
13 vote unless this Court is prepared to do something about
14 Wells, which incidentally was a Louisiana Supreme Court
15 case. That was the case where an intent was made at that
16 time.

17 QUESTION: You suggest that the Congress didn't
18 use legislator and used representative in order to cover
19 the executive branch?

20 MR. PUGH: I know of no other reason there could
21 possibly be than that.

22 QUESTION: What -- let's just take Louisiana for
23 example.

24 MR. PUGH: Yes, Your Honor.

25 QUESTION: Let's say that section 2(a) could

1 apply to the executive branch in Louisiana.

2 MR. PUGH: Yes, sir.

3 QUESTION: Give me an example of an office to
4 which it would apply that isn't a one-person office, and
5 indivisible office.

6 MR. PUGH: Excuse me, school board.

7 QUESTION: School boards?

8 MR. PUGH: Yes, sir, and I think that's really
9 what --

10 QUESTION: Is that about it?

11 MR. PUGH: Well, that's one of them. That's one
12 that comes to mind. Obviously if you have just an
13 individual that falls in the executive classification, a
14 parish commission would be another one.

15 QUESTION: And you think -- and school boards
16 would qualify as representatives?

17 MR. PUGH: Yes, sir, I would, because I think
18 they have that dual function.

19 QUESTION: And they, school boards are
20 sometimes, they are mostly elected at large, aren't they,
21 or not?

22 MR. PUGH: Yes, they are primarily elected at
23 large. But they certainly have more than an executive
24 function. They certainly have more than a legislative
25 function. They wear both hats, as does, as I indicated, a

1 parish commission.

2 QUESTION: Well, I guess it's -- the Court has
3 been reasonably clear that section 2(a) applies to judges,
4 Mr. Pugh?

5 MR. PUGH: Section --

6 QUESTION: 2(a).

7 MR. PUGH: I believe it applies to judges. The
8 Senate indicates that you can still use an intent
9 standard. I don't know of anywhere else to put it than
10 2(a), because you sure can't put it in 2(b).

11 QUESTION: Well, of course 2(a) itself was
12 amended, as Justice Scalia noted in his question to you,
13 to include the word results and to refer specifically to
14 2(b).

15 MR. PUGH: It trickles down to 2(b). 2(b) is
16 where the test appears. The test to be applied is in
17 2(b). That's admitted by the Justice Department, at least
18 in the brief that they filed in the Clark case, which you
19 are about to hear around 1 o'clock. They have admitted
20 that the results test is 2(b).

21 QUESTION: Well, if 2(a) applies and it refers
22 in 2(a) to the word results, and it incorporates whatever
23 the standard is in 2(b), you have to put a tremendous
24 amount of freight on the word representatives to say
25 somehow you can't look at the totality of the

1 circumstances when it comes to judicial election.

2 MR. PUGH: Well, I put no more freight on it
3 than what Congress apparently did, because that's all they
4 said. They said, of course, as provided in subsection (b)
5 of this section, which is the last provision in 2(a), and
6 was not a provision -- of course, it came up from the
7 House. The House's provision was entirely different than
8 what we currently have with section 2(a) and 2(b).

9 QUESTION: Mr. Pugh, what about -- what 2(b)
10 says is that its members have less opportunity than other
11 members of the electorate not just to elect
12 representatives of their choice, but to participate in the
13 political process and to elect representatives of their
14 choice.

15 MR. PUGH: That's a conjunction, Your Honor.

16 QUESTION: It is indeed. Might judges --

17 (Laughter.)

18 MR. PUGH: I'm not being playful, or I shouldn't
19 be in any event. I just say that is a conjunction.

20 QUESTION: Right. Might judges be covered by
21 the first and not by the second?

22 MR. PUGH: Not when the conjunction is there,
23 Your Honor.

24 QUESTION: Well, they're entitled to both.

25 MR. PUGH: Well, they are not representatives.

1 QUESTION: They are entitled to both. If they
2 are denied either one there is a violation.

3 MR. PUGH: Well, let's put it under the intent
4 standard then rather than the results standard, because
5 the results standard says specifically that it's related
6 to representatives of their choice. It doesn't say judges
7 of their choice. It doesn't say issues of their choice.
8 It says representatives of their choice.

9 QUESTION: What does participate in the
10 political process in 2(b) mean, do you think?

11 MR. PUGH: To vote.

12 QUESTION: It's clear to elect representatives
13 of their choice does get you into the dilution issue.

14 MR. PUGH: Yes, Your Honor.

15 QUESTION: What about participating in the
16 political process? Does that --

17 MR. PUGH: That's to vote.

18 QUESTION: To vote?

19 MR. PUGH: To vote and elect representatives of
20 your choice. I still think with the conjunction that it's
21 talking about both things. It's talking about voting for
22 and elect representatives of your choice.

23 QUESTION: Do the justices in Louisiana
24 represent anybody?

25 MR. PUGH: Do they represent anybody?

1 QUESTION: Yeah.

2 MR. PUGH: Well, not in the sense that the word

3 representation is used here. No, sir.

4 QUESTION: Oh, you mean represent means

5 something one place, and something else another place, and

6 something else a third place?

7 MR. PUGH: Well, I can only suggest --

8 QUESTION: Or do we use the common phrase? If

9 the people in this county vote for a judge, doesn't that

10 judge feel that he represents them?

11 MR. PUGH: He may well feel that he --

12 QUESTION: Well, doesn't he in fact represent

13 them?

14 MR. PUGH: He is elected by those people to

15 serve on the court on their behalf. If that --

16 QUESTION: And don't you think that requires

17 one-person one-vote?

18 MR. PUGH: Well, I can only say --

19 QUESTION: Well, I notice you say one-man one-

20 vote. I guess you don't agree with the one-person --

21 MR. PUGH: I apologize. I bet I got a dozen

22 votes there that says for goodness sake, if you don't do

23 anything else, use the word person instead of -- and I'm

24 sorry. I can't read very well, but they're over there. I

25 got that message put to me. Unfortunately it didn't stay

1 with me.

2 (Laughter.)

3 MR. PUGH: I'd like to address another issue, if
4 I may, and that's the issue of not only are we dealing
5 with plain meaning, one of the definitions of
6 representatives of course being an agent. And obviously
7 an executive and a legislator are the agent of the
8 electorate for the purpose of carrying out their wishes.
9 Sometimes they don't always do it, but they are supposed
10 to do it in any event. If they don't do it they're not
11 going to get reelected.

12 Now, another important factor, I think, that
13 plays on this case is the question of this tremendous
14 movement, 41 States that elect judges and not one word
15 said about judges in all of this with the single exception
16 of what was used as judicial districts, and we believe we
17 have resolved that at least by reflecting that more than
18 judges, other than judges get elected from judicial
19 districts. It is true that in some of the preparation of
20 the materials that were submitted to Congress had the
21 success of blacks in judicial races and that thing, but
22 there's no mention when it comes to the concrete evidence
23 of Senate reports about that. If there was to be a total
24 change for the first time in the history of this country
25 to provide that the third branch of government was to be

1 thrust into this voting rights quagmire, it's pretty
2 obvious that somebody would have said something.

3 QUESTION: Mr. Pugh --

4 MR. PUGH: Yes, Your Honor.

5 QUESTION: You don't agree, then, that before
6 the amendments in 1982 judges were covered by the act?

7 MR. PUGH: Yes, sir, they were, because it was
8 intent. And again I think that the intent standard of the
9 original section 2 covered judges. But --

10 QUESTION: So judges were covered under the
11 applicable standard of the act before the 1982 amendment?

12 MR. PUGH: Yes, sir.

13 QUESTION: Well then it wasn't such a dramatic
14 change, as you say, to say that they would continue to be
15 covered after the 1982 amendments.

16 MR. PUGH: Well, I think it's a dramatic change
17 in that they are definitively covered for the purpose of
18 this brand new results test.

19 QUESTION: But so is everybody else brand new
20 covered for the purpose of that results test.

21 MR. PUGH: Representatives are, Your Honor.
22 There's no doubt about that. That's what Congress said.
23 My suggestion is that if they intended judges to be
24 covered, there is other language that could and should
25 have been used, candidate being one of them. But

1 obviously when you, when this Court has said that -- when
2 this Court has said, as it did in the Gingles case, that
3 insofar as intent is concerned that is the test of section
4 2.

5 Well, it would be silly if I were to argue, when
6 this Court says that what section, the original section 2
7 meant was an intent test, when I know there's an intent
8 test in the Fifteenth Amendment to try to stand here and
9 argue that there are two different kinds of intent tests,
10 one statutorily which creates a different set of
11 categories and one constitutional, constitutionally, facts
12 that would create another standard. So certainly I'll
13 have to acknowledge that intent was under the original
14 section 2. And for that reason.

15 The one-person one-vote is where the dramatic
16 change will occur. You cannot follow the Thornburg v.
17 Gingles case unless you apply a one-person one-vote
18 standard. You can't get there without it. And right now
19 judges have been held, by this Court twice and by 13 other
20 courts, as not being under the one-man one-vote -- and for
21 a good reason.

22 QUESTION: Do you think if Bolden had never been
23 decided, and White against Regester was still hail and
24 hearty, do you think that, do you think that this at-
25 large election in Orleans Parish could have been attacked

1 under the standard written about in White against
2 Regester?

3 MR. PUGH: I don't think so.

4 QUESTION: Sir?

5 MR. PUGH: Apparently I should have said yes.
6 (Laughter.)

7 QUESTION: I think so, too. But -- and don't
8 you think --

9 MR. PUGH: If I may be candid enough to repeat
10 my --

11 QUESTION: Don't you think that Congress
12 intended to have that test applied as a statutory matter
13 in section 2?

14 MR. PUGH: 2 or 2(b), Your Honor?

15 QUESTION: Section 2(b).

16 MR. PUGH: No, Your Honor, I do not. I think
17 they would have said so if they intended to. I think it
18 still gets back to we've got the plain meaning problem,
19 we've got the changes of now shoving judges over into one-
20 person one-vote. I just -- large and small of it, you're
21 still back to the word representatives and what does it
22 mean.

23 QUESTION: Well, you still have to get over the
24 notion, you have to convince us that judges aren't covered
25 by the word representative.

1 MR. PUGH: Well, I could drag out some
2 dictionaries.

3 QUESTION: Well --

4 MR. PUGH: I don't find it -- I do find cases
5 holding that they are not representatives. I find 15
6 cases that hold they are not representatives. I find two
7 cases in this Court that indicate that. So if they are,
8 they brand new are, and they are today. They ain't been
9 in the past, Your Honor. It appears to me they haven't
10 been in the past. I just don't believe, as Judge King
11 said when I made the same statement in the Fifth Circuit,
12 I just don't believe that you can live with the judiciary
13 not being a one-person one-vote standard and at the same
14 time tie into Thornhill v. Gingles. She said it's not an
15 -- this is an imperfect world.

16 QUESTION: Six of those judges in the Fifth
17 Circuit thought that they were covered.

18 MR. PUGH: Yes, they did, Your Honor.

19 QUESTION: Seven didn't, I guess.

20 MR. PUGH: That's right, Your Honor. I'd call
21 that close. Fortunately I had the seven, Your Honor.

22 (Laughter.)

23 MR. PUGH: It's awful close, and I can
24 understand -- I believe --

25 QUESTION: All those six didn't read the

1 dictionaries.

2 MR. PUGH: Well, not very well.

3 (Laughter.)

4 MR. PUGH: I'm not really sure it was six, but I
5 won't quarrel with the number. I think it was closer than
6 that. As the Court well knows, one of the judges who
7 heard the en banc had put in his papers and they had been
8 accepted, and he didn't vote. The remain -- I think it's
9 one in three voted with Higginbotham. That would have
10 been Politz, that would have been King, and that would
11 have been Davis.

12 QUESTION: Yes.

13 MR. PUGH: And then of course we had the --

14 QUESTION: Dissent.

15 MR. PUGH: -- the chief, who concurred. And
16 incidentally, as kind of a little bit where I got some of
17 these issue ideas from, is I read his concurrent opinion.
18 Of course he, he emphatically said in his opinion that
19 there is no way, or at least in his belief there is no way
20 that you could consider judges as representatives.

21 QUESTION: Yes.

22 MR. PUGH: I think it's the blindfolded lady
23 with a sword and with a scale. That's the constituency of
24 the judiciary. No more, no less. I just don't believe a
25 judge can put on partial robes, and I think we've got to

1 consider the fact that the role of a judge is much
2 different than the role occupied or function occupied by
3 either a legislator or a --

4 QUESTION: Well, of course a State can elect
5 their judges, I suppose, and empower the electorate to
6 throw the judge if they don't like the way he decides
7 cases.

8 MR. PUGH: And that's exactly what is going to
9 happen, Your Honor, if --

10 QUESTION: Well, that's exactly what, that's
11 exactly what happens in Louisiana and Texas, isn't it?

12 MR. PUGH: I don't believe --

13 QUESTION: If the electorate doesn't like how
14 the judge operates they throw him out.

15 MR. PUGH: Well, that's what the law provides,
16 but I guarantee you one thing, not too many of them shed
17 the robes. As a matter of fact, we have almost 90 percent
18 reelection rate --

19 QUESTION: Well, what about that 10 percent?

20 MR. PUGH: Well, they may have been doing what I
21 would hope would never occur, that is to show favoritism
22 to a certain group or to show stupidity in the decisions
23 when they render them. Of course there is a means for
24 getting rid of them, and that means is the ballot box next
25 time they go around.

1 QUESTION: And you don't think that even comes
2 close to suggesting that they are representative?

3 MR. PUGH: No, Your Honor, I don't. I think
4 they are people who must face the public on a periodic
5 basis, because Louisiana, unlike New Jersey and some other
6 States where the judges are appointed for life, we don't
7 have that. We have them --

8 QUESTION: Thank you, Mr. Pugh. I think you
9 have answered the question.

10 MR. PUGH: Yes, I have, and I apologize, Your
11 Honor. Excuse me, sir.

12 QUESTION: General Starr, you have 3 minutes
13 remaining for rebuttal.

14 REBUTTAL ARGUMENT OF KENNETH W. STARR
15 ON BEHALF OF THE PETITIONER UNITED STATES

16 GENERAL STARR: Thank you, Mr. Chief Justice.
17 Very briefly, judges were clearly covered by section 2
18 prior to 1982. There is no indication --

19 QUESTION: Have we held that?

20 GENERAL STARR: No. But it could not be clearer
21 that they were. This is in fact a direct meaning, plain,
22 natural meaning case when we look at the definition. When
23 Congress revisited this statute in 1982 it did not modify
24 the definitional provisions of 14(c)(1). To Judge Gee and
25 his colleagues that was irrelevant because it was buried

1 deep in the statute. That's where we'd look to where the
2 statute was covered, what it was all about.

3 When we then look to the use of representatives,
4 that word found its way into the statute, deep into the
5 untidy legislative process, introduced by Senator Dole in
6 the compromise when the battle was not over coverage, what
7 offices are going to be covered. That issue was at rest
8 in 1965 and has remained at rest. What was at issue is is
9 intent required by this statute or does it suffice to
10 prove results and effects. Not a word in the legislative
11 history about dropping judges suddenly. Whoops, they're
12 gone. They were covered, but suddenly they're gone by
13 virtue of the Dole compromise.

14 The final point that I would like to make is in
15 response to Justice O'Connor's questions about the State
16 supreme court. We do in fact believe that a State may
17 have a very powerful, indeed compelling interest in its
18 structure of government, especially at a State supreme
19 court level, and having each of those justices responsible
20 to, if it chooses to elect them, and accountable to the
21 entirety of the electorate. And in our reading of the
22 Senate report, in our reading of Zimmer against McKeithen,
23 that interest can in fact and should be taken into account
24 in the totality of the circumstances analysis.

25 QUESTION: Well, what does that mean to say it

1 may be taken into account in the totality of the
2 circumstances? Does that mean that a particular district
3 court in Louisiana could say Louisiana can go ahead the
4 way it is, and a particular district court in Mississippi
5 could say no, Mississippi can't go ahead the way it is,
6 and each one would be ultimately affirmed?

7 GENERAL STARR: Perhaps not, because we would
8 have to --

9 QUESTION: Well, perhaps not but perhaps yes?

10 GENERAL STARR: But perhaps yes. Because under,
11 Mr. Chief Justice, the totality of the circumstances, I
12 think Congress contemplated exactly that. It looked to
13 what happened in White against Regester, and it approved
14 of what it saw there.

15 CHIEF JUSTICE REHNQUIST: Thank you, General
16 Starr. The case is submitted.

17 (Whereupon, at 11:03 a.m., the case in the
18 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of: 90-757 = Ronald Chisom, et al.,
Petitioners v. Charles E. Roemer, et al.,

and
90-1032 = United States, Petitioner v. Charles E. Roember, Governor of

Louisiana, et al.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Raymond H. Harteil*
(REPORTER)

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