OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

ORIGINAL

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: HOUSTON LAWYERS' ASSOCIATION, ET AL., Petitioners v. ATTORNEY GENERAL OF TEXAS, ET AL.; and LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL., Petitioners v. ATTORNEY GENERAL OF TEXAS, ET AL.

CASE NO: 90-813 and 90-974

PLACE: Washington, D. C.

DATE: April 22, 1991

PAGES: 1 - 58

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

HOUSTON LAWYERS' ASSOCIATION, ET AL., Petitioners v. ATTORNEY GENERAL OF TEXAS, ET AL.; and LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET AL., Petitioners v. ATTORNEY GENERAL OF TEXAS, ET AL. : No. 90-813 : No. 90-974

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Monday, April 22, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

JULIUS L. CHAMBERS, ESQ., New York, New York; on behalf of the Petitioners.

RENEA HICKS, ESQ., Special Assistant Attorney General of

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Texas, Austin, Texas; on behalf of the Respondents.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

C O N T E N T S

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 90-813, Houston Lawyers' Association v. Attorney General of Texas, consolidated with No. 90-974, the League of United Latin American Citizens v. the Attorney General of Texas.

Spectators are admonished to remain silent. The Court remains in session. Do not talk until you get outside of the courtroom.

Mr. Chambers, you may proceed whenever you're ready.

ORAL ARGUMENT OF JULIUS L. CHAMBERS

ON BEHALF OF THE PETITIONERS

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

This is the thirteenth time or fourteenth time that black citizens from Texas and Mexican Americans from Texas have been before this Court to ask for relief against practices of the State of Texas which denied or limited their participation in the electorial process. Some of those cases involved overt practices of the State which directly excluded it. Others involved, as this case does, subtle practices which limited their participation in the electoral process.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

Congress, we submit, sought to address that problem when it amended the rights -- the Voting Rights Act in 1982. And we are here today to ask that the intent of Congress in the amendment in 1982 be carried out. We have in Texas a number of African Americans and Mexican Americans who today are excluded from or limited in the participation in the election of judges in Texas. We ask that they be permitted, as Congress directed, to participate on an equal basis.

The issue here is whether section 2 of the Voting Rights Act as amended in 1982 applies to the election of judges in Texas. The district court held that the plaintiffs had established a violation of section 2 and directed interim relief. The Fifth Circuit with the majority of the court held that section 2 did not apply to the election of judges at all because it read "representative" in section 2(b) to exclude judges.

A concurring opinion held that section 2 applied to the election of all offices including judges. But in its view there was some unique feature of judges in the district court level in Texas which limited or prohibited the application of section 2. It found that judges in Texas or the State had an interest in tieing the electorate to the judiciary -- to the authority of the judges in Texas. And it found that there was some single-

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

person office in the way that judges were classified.

The Government advances another theory, and we submit one that is not permitted by the Voting Rights Act, that in some way the Court should weigh, and in some instances permit, State interest to trump deprivations of rights of minorities in the electoral process. There is nothing in the Voting Rights Act of 1982 that permits that kind of analysis and that kind of weight to be given to the State interest that is being asserted in the case.

With respect to the majority opinion, we rely on the positions that were advanced by the petitioners and the Government in the Chisom case which you just heard.

I would like to turn, unless there is some further question about coverage, to the issues that were raised by the concurring opinion and to the issues that have been presented by the Government brief or amicus brief in this case.

QUESTION: Mr. Chambers, let me ask you one question about the meaning of section 2(a) which was, as you point out, was dwelled on rather extensively by counsel in the preceding case. It said that that embodies the results tests from White against Regester. Now, do you rely for that simply on the use of the word results as a verb in section 2(a).

MR. CHAMBERS: That the section 2(a) covers the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

election of judges or --

QUESTION: No, no, but that -- that it's a results test --

MR. CHAMBERS: Oh.

QUESTION: -- rather than an intent test.

MR. CHAMBERS: I think the language, Your Honor, as well as the legislative history clearly points out as this Court held in Gingles that Congress was acting to make sure that result, rather than intent, would be the factor that would be -- that would enable one to establish a violation of the act.

QUESTION: So you say then that Gingles established the proposition that 2(a) is phrased in terms of results rather than intent?

MR. CHAMBERS: I think Gingles said that Congress, with the amendment in 1982, was establishing result as the basis for establishing a violation. And it suggested in section 2(b) how that result might be established. So I think 2(a) clearly holds -- provides that one can establish a violation here for the election of judges, including trial judges, under 2(a).

QUESTION: If you have a case where there's a blatant discriminatory intent, is there a 2(a) violation? It might be difficult for us to imagine an intent without a result, but could you allege an intent and have that

suffice to state a cause of action under section 2(a)?

MR. CHAMBERS: I would think so, Your Honor. I think that 2(a) covers both intent as well as result. I think that Congress and I think the Fourteenth Amendment was still there when Congress was acting -- recognized that a State may act intentionally and a State may act with discriminatory results, and they wanted to make sure it was covering discriminatory results.

QUESTION: Mr. Chambers, Texas like many States I think that elect judges has decided that it will elect judges at large from the district over which the judges have jurisdiction. Is that right?

MR. CHAMBERS: That's what the State has asserted, Your Honor, yes.

QUESTION: Now, does the Voting Rights Act give the Federal courts the power to change that and require that judges be elected from subdistricts?

MR. CHAMBERS: Yes, Your Honor. Just like it requires that -- permits the courts to direct a State -- establish subdistricts for legislative or subdistricts for members of the school board or city council.

QUESTION: Well, let's suppose it's a single-person office like that of Governor of the State.

MR. CHAMBERS: Yes.

QUESTION: Do you think the Voting Rights Act

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

could require that there be a committee of Governors?

MR. CHAMBERS: Your Honor, on that I -- I'm not certain. I think it would depend of the facts. I think, however, if the question is whether there is ever a single-person office which would not permit that kind of division among the electorate, I think the answer is that -- that possibly yes. But I think that under ordinary --

QUESTION: So you think it could require an entirely -- a complete restructuring of the form of government in the State?

MR. CHAMBERS: No, Your Honor, not as a -- I think that if there is a Governor and that is truly a single-person office, this --

QUESTION: Well, that happens to be the case in all 50 States right now, doesn't it?

MR. CHAMBERS: That's correct, Your Honor. Yes.

QUESTION: Uh-huh. But you think that can be changed by a Federal court?

MR. CHAMBERS: No, I'm not suggesting that at all. What I'm saying is that if there is truly a single-person office, the Voting Rights Act would not permit a court to alter that structure or to direct some alien form of a governmental structure.

QUESTION: Well, would you say that the officer of Governor as you understand it is what you call truly a

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

single-person office?

MR. CHAMBERS: I'm saying it may be, Your Honor. And I don't have --

QUESTION: You -- your --

MR. CHAMBERS: The Governors that I know today would certainly be single-person officers.

QUESTION: So, you're -- all -- you're just reserving the situation for Governors that you don't know anything -- governorships that you don't know anything about.

MR. CHAMBERS: Well, I'm -- yes, Your Honor, but I'm also thinking about cases like the City of Mobile, where we had three commissioners who arguably were single-person officers. And this Court approved or the low court approved of a division of those offices in order to ensure that minorities in Mobile would have an opportunity to participate in electoral process.

All I'm saying is it is not a per se rule. I think that what I know of Governors in the State of -- of States around this country, they would be occupying single-person offices. I just don't want to say that under no circumstances would a particular office which they may be a single-person office, could be challenged under the Voting Rights Act. That's all I'm saying.

I'd like to turn to the assertions that there

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

were State interests that warranted not applying section 2 to the situation in Texas. First, I would point out that section 2, as enacted by Congress, requires a type of analysis that does not permit a per se exclusion for the application of the act. The Congress was trying to provide protection for minorities who were limited in their participation in the electoral process. And the Congress set up a structure for an analysis. And the only place where you really begin to look at State interest is under one of the factors that Congress listed, which talks about tenuousness of a State practice.

Here if the plaintiff put this issue into consideration, the Court is to look and see whether the assertive State practice is tenuous, and if it finds it is or if it finds it's not, that's just the factor that the -- that the Court is to look at and make a determination in the totality of the circumstances whether there is in fact vote dilution. It is never, I submit, a bar to one's establishment of a dilution and a particular electoral process.

Second, here there was no evidence offered I submit that warranted a court deciding that it would bar -- that as a State's interest -- application of section 2. If we go through and look at the actual State practices that were involved, we'll see that there is no

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

justification for really asserting -- that there is some strong, significant State interest. For example, we hear that tieing the jurisdiction to the electorate in some way promoted accountability. But district judges in Texas have Statewide jurisdiction, not just county jurisdiction.

They had issued decisions that affect the whole State. For example, a decision in the district court just the other day reconstructs the whole method for financing education in Texas.

QUESTION: Well, is that because they have jurisdiction in other counties or just because a lawsuit can be brought into the county in which they have jurisdiction which has parties to it that would be in from other counties?

MR. CHAMBERS: Your Honor, I think it's somewhat -- it's some of both, because the other point I was going to make is that district judges in -- in Texas can be assigned to other districts in order to, for example, help with docket control.

QUESTION: By what? The Chief Justice?

MR. CHAMBERS: By the Chief Justice, by the administration -- the Chief Administrator of the courts, et cetera.

QUESTION: By the -- the Chief Justice of the Supreme Court of Texas?

MR. CHAMBERS: There is a -- that is one possibility, and I'm saying there is -- there are also nine administrative divisions of the court. And that administrator, for example, can assign judges from one county to another county to help with docket control. So --

QUESTION: With -- within the administrative division?

MR. CHAMBERS: Yes, Your Honor. So they -- they are not --

QUESTION: I suppose the -- you're really arguing a question of remedy, I suppose, in a way. Would -- do you think the remedy question if before us?

MR. CHAMBERS: No, Your Honor.

QUESTION: Do you think -- so the question of whether or not these counties in Texas much be subdivided into one-judge districts, that isn't -- that isn't the question before us.

MR. CHAMBERS: No, Your Honor.

QUESTION: I would think that from what you said that you would say that that would be the -- that would have to be what the remedy is.

MR. CHAMBERS: Your Honor, I think there are a number of different remedies that can be considered by the court below. And I think that the State of Texas is given

the first opportunity to submit a proposal if the Court decides that the act applies and if the court below decides that we have established of section 2 or that the district court's findings adequately support a liability --

QUESTION: What -- what was it you disagreed with the Solicitor General on?

MR. CHAMBERS: The Solicitor General suggests that the -- because we are dealing with judges, we should in reviewing this case weigh more heavily the State interest in having this particular type of structure. And my problem is and I think the petitioners submit that that is not first of all contemplated by section 2. What the -- and I pointed out earlier that section 2 contemplates that particular interest being weighed, and the courts evaluation of whether there is a tenuous State practice.

QUESTION: But I don't -- I don't suppose that we really -- that we really need to pass on this -- your -- the disagreement between you and the Solicitor General.

MR. CHAMBERS: Except, Your honor, the Solicitor General suggests that the case should be remanded to the district court for further findings under some, I submit with all due respect, unannounced standard for weighing the State's interest in a judicial election case.

QUESTION: Well, I would -- I would think that

that would be a question of remedy though.

MR. CHAMBERS: Well, it may be, and if -- at best where that interest is to be considered would be in the remedial stage. But the Solicitor General has suggested that it may be a factor that should weigh heavily in the liability determination. And our position is it is not that kind of factor that should be weighed, and there's no basis for remanding the case.

QUESTION: Well, Mr. Chambers, you take the position that under the -- the term "totality of the circumstances" that it doesn't mean totality -- that you can't weight the State's interest as part of the totality.

MR. CHAMBERS: No, Your Honor. What we say is that the State's interest comes in as a tenuous factor consideration or a factor to consider as to whether it's tenuous as the --

QUESTION: It can't come in as one of the circumstances to be weighed?

MR. CHAMBERS: It's weighed as a tenuous factor is what I'm saying. It --

QUESTION: Well, where does it say that can only be tenuous? I don't understand.

MR. CHAMBERS: In --

QUESTION: Why isn't it just one of the circumstances?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. CHAMBERS: Your Honor, there are seven factors that are set out in the Senate guidelines for evaluating a section 2 client. There are two additional factors that the Congress said were not to be weighed as heavily or to be given as much weight as the seven factors.

Those two factors include whether a State practice is tenuous. That's -- and that's where you weigh that. There was an effort in Congress to --

QUESTION: Where do we find the guidelines in the statute?

MR. CHAMBERS: In the statute, Your Honor, there are seven factors in the guidelines that -- not the guidelines but the Senate report on the amendment of section 2. There is a listing of seven factors plus the two others that I have --

QUESTION: Are -- you're -- are you referring to a particular committee report or to a --

MR. CHAMBERS: It's the Senate committee report, Your Honor, and if I'm not mistaken it begins on page -- I would like to submit page of the Senate report --

QUESTION: Uh-huh.

MR. CHAMBERS: But it's -- it's listed in the Gingles decision as well.

QUESTION: Uh-huh.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. CHAMBERS: Where the court talks about the seven factors plus the two factors that are not weighed as heavily as the seven factors. And that's what I'm talking about.

QUESTION: But they're -- but they're not exclusive. They're not like the seven dwarfs.

(Laughter.)

QUESTION: The statute says totality of the circumstances --

MR. CHAMBERS: They are not --

QUESTION: -- and presumably any other circumstances can be brought in, right?

MR. CHAMBERS: They are not exclusive, Your Honor. But I would point out on page 179 of the Senate report, the Senate does reject State interest as a factor that ought be advanced as a defense in a section 2 proceeding.

QUESTION: And it -- the Senate rejected it?

MR. CHAMBERS: Yes.

QUESTION: You mean the Senate committee?

MR. CHAMBERS: And Senate report points out that it's not --

QUESTION: The Senate committee --

MR. CHAMBERS: Yes.

QUESTION: -- didn't think it was good. But the

Senate adopted language that it said totality of the circumstances.

MR. CHAMBERS: And the Senate also --

QUESTION: Which is pretty all inclusive, isn't it?

MR. CHAMBERS: This Senate also included this listing of seven factors plus the two that I mentioned.

QUESTION: Sure --

MR. CHAMBERS: As guidelines.

QUESTION: So they are included within totality, but everything else is included within totality as well.

MR. CHAMBERS: Your Honor, I don't think that the State's interest is an appropriate defense, and I think that the Senate report shows that it is not a defense that would bar the establishment of a section 2 claim.

Again, Your Honor, what we are looking at is whether a particular State structure limits the ability of minorities to participate equally in the electorial process. And if it does, then the Court is required to proceeded with some kind of relief. It may take into consideration at the remedy stage the State's interest that may be asserted here in this proceeding, but not in deciding that we do not establish a section 2 violation.

QUESTION: You say the question is whether it

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

limits. And I assume you heard the previous argument. What is your answer to the question that we asked General Starr -- that is limits as compared to what? You -- you need something to compare with whether -- whether the minorities are being treated unequally as compared to some standard. What -- what is the standard that you're -- that you're proposing?

MR. CHAMBERS: I think Professor Collin pointed out the appropriate standard that ought to be considered. If the State, as the State in Texas, has set up a system that says that there will be 59 judges to 2.4 million population, and some other counties that says that there may be 3 judges for 200,000 population. If we point -- if we demonstrate that there is a percentage of minorities in that district, for example, the 200 district, who could elect a representative or could elect a judge, we give the Court an appropriate standard for measuring whether the minorities in that particular district and whether the Court should direct some kind of relief.

It's the same kind of approach that the Court followed in Gingles. It may be that one-person, one-vote -- one-person, one-vote doesn't apply to the election of judges but using the same standards that the State has adopted for making its assignments of judges, we have a measuring device to begin deciding whether the --

QUESTION: So you -- you would one-person, one-vote essentially as the standard --

MR. CHAMBERS: Yes --

QUESTION: -- or the measuring -- measuring device whether it's constitutionally required or not.

MR. CHAMBERS: Your Honor, if the State in this particular county has decided that we will assign three judges for whatever reason -- you raised a question earlier about whether, for example, the caseload -- whatever the reasons are being advanced to deny minorities an opportunity to participate effectively deprives them of equal protection, which the Voting Rights Act is designed to address.

QUESTION: All right, so it is your position that one-person, one-vote is the standard. Whether it's constitutionally required or not, you're saying that Congress adopted that in 2(b).

MR. CHAMBERS: Your Honor, we're not here arguing whether the one-person, one-vote principle should be changed or reversed with respect to judges. I'm accepting for purposes of this case today -- and that's all we need to advance -- that in Texas we may have 200 people per 300 -- 200,000 people per 3 judge in one county, and 59 for 2.5 people in another county. And I'm saying in those counties where we have minorities who

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

could elect a judge, we use that standard that the State has employed to measure whether the minority votes are submerged.

QUESTION: Yes, but if -- there may be wide differences in the population of the districts that elect, say, the Louisiana judges. But if there aren't any minorities in any of those districts, section 2 doesn't even come into the picture.

MR. CHAMBERS: It may not and one may not be able to establish a violation in that section.

QUESTION: Yes, yes, although the one-man, one-vote principle would certainly get to it.

MR. CHAMBERS: It would if it applied to the election of judges.

QUESTION: But your -- section 2 requires dealing with the claim that minority voting interest is depreciated.

MR. CHAMBERS: That's correct, Your Honor. And I'm saying that we use a standard for measurement that may be applicable to the --

QUESTION: And that may not be -- that may not correct every disparity in population between districts.

MR. CHAMBERS: That's correct, Your Honor. It may not. Even the -- and the remedy that may be devised here may not correct that kind of disparity either. What

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

we're suggesting is there must be a remedy that would permit minorities to participate equally in the process.

QUESTION: So you're saying if I understand you that any numerical ratio that fits within the range the State now tolerates is an appropriate numerical ratio when we're trying to devise a remedy for your purposes.

MR. CHAMBERS: Well, I'm not certain about the remedy. I'm using this analogy for purposes of deciding whether minority votes are submerged, and suggesting that if the Court finds that they are, the case goes back to the district court for a determination of the appropriate remedy.

QUESTION: But you're saying whether -- whether they are or not is in part a question -- is in part dependent on the numerical factor. And if we can find any numerical factor within a ratio -- I should say within the limit which the State now tolerates that would support our argument, that is the appropriate numerical ratio for that case.

MR. CHAMBERS: For the analogies --

QUESTION: And that would also be the appropriate numerical ratio in devising a remedy. Isn't that correct?

MR. CHAMBERS: It may, Your Honor, but I would point out again that when the Gingles case was decided, we

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

had that analysis for purposes of deciding whether there was a deprivation of section 2. The remedy, however, differed. What we are asking for at this stage is to use a standard for assessing whether minority votes are submerged within a particular district. And if it finds that it is, that the votes are submerged, it finds a violation. And it sends the matter back to the district court for determination of the appropriate remedy. It may use that standard. And it may use some other standard.

QUESTION: Yes, I understand.

QUESTION: Well, what other standard might it --

MR. CHAMBERS: Well, Your Honor --

QUESTION: I'm not trying -- really, I don't -- I don't understand what your position is. I can understand one standard and that's one-person, one-vote. Another standard that's been suggested which you -- which you also refuse to adopt -- you say it may be used but then again it may not -- is not one-person, one-vote, but the minority should not have any less voting power than -- than the most deprived nonminority group in the State. If you have some the district that's 1 to 300 as long as the minority has at least that, it's okay. Now, those are two standards, and I understand both of those. But I don't understand -- you reject each of those as -- as the standard.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. CHAMBERS: Well, Your Honor, the first --

QUESTION: What -- what is the standard you are using?

MR. CHAMBERS: I'm sorry. The question is what is the standard for determining a violation.

QUESTION: Right.

MR. CHAMBERS: And then the next question is, what is an appropriate remedy.

QUESTION: Right. I'm talking about the first question. What is the standard for determining a violation?

MR. CHAMBERS: I'm -- okay, I'm looking at the standard that the State has employed in making its assignment in the first instance for purposes of assessing whether minority votes are submerged. If they are submerged, I'm saying the Court then looks to see what is an appropriate remedy.

QUESTION: What do you mean if they are submerged? And to determine whether they are submerged you look to what? The --

MR. CHAMBERS: Well, for example --

QUESTION: -- the greatest proportion that the State has in any of the districts, is that it?

MR. CHAMBERS: We look at that standard within that county unit to begin with. And in Harris County, for

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

example, where we have 59 judges and 2.4 million people, we know what that variation is and we know that we can have -- we have enough minorities to elect particular judges based on that standard.

QUESTION: Well, you're using a one -- one-person, one-vote standard.

MR. CHAMBERS: Yes, using -- using the percentage of people. Because one-person, one-vote I assume applies across the State, and that would not be applicable, for example, to Jefferson County where we have less that 41,000 people per judge.

QUESTION: So you'd apply it with -- you'd apply one-person, one-vote within the unit?

MR. CHAMBERS: I would apply whatever standard the court -- the State has employed to direct -- to develop that particular system that's being counted for purposes of this analysis.

QUESTION: Well, Mr. Chambers --

QUESTION: Could I ask -- could I ask you, we're reviewing -- we're reviewing the judgment of the Fifth Circuit I take it, and that decision was that section 2 just doesn't cover judges.

MR. CHAMBERS: That's correct, Your Honor.

QUESTION: So it never got around to -- to saying, well, yes, it does cover it, but there -- and then

decide whether there's been a violation.

MR. CHAMBERS: That's correct, Your Honor.

QUESTION: So if we -- if we agree with you, I would think we would just tell the Fifth Circuit they were wrong in saying section 2 doesn't cover it. And then -- then it's going to be up to them to decide whether there's been a violation.

MR. CHAMBERS: To review the district court's finding whether there's been a violation.

QUESTION: Yes, exactly.

MR. CHAMBERS: Yes.

QUESTION: So there has to be a remand if we agree with you.

MR. CHAMBERS: They -- there has to be, but the Solicitor General was asking for a remand for further findings whether there was an adequate State interest which would prohibit the application of section 2. And that's what we are disagreeing with. We think that for sure the case has to remanded for review of the findings as to liability.

QUESTION: So you think he's still talking about coverage?

MR. CHAMBERS: Well, I suggest, Your Honor, that that's what we --

QUESTION: I can't believe that. I didn't think

he was in -- suggesting a remand, that he was suggesting a remand as to reconsider coverage.

MR. CHAMBERS: If -- you can read in the brief, he suggests that State interest may trump the interest of minorities in being able to participate in the electoral process.

QUESTION: Well, that may be in using the totality of the circumstances to decide whether there's been a violation.

MR. CHAMBERS: That's correct, Your Honor, but again I was suggesting that that State interest has to be weighed as part of the tenuousness factor in the -- in the cause analysis of the seven factors.

Your Honor, I would like to reserve some time for rebuttal.

QUESTION: Very well, Mr. Chambers.

Mr. Hicks, we'll hear now from you.

ORAL ARGUMENT OF RENEA HICKS

ON BEHALF OF THE RESPONDENTS

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

I wish to address both the question of coverage and the question of the inapplicability, not an exemption, but the inapplicability of vote dilution at-large challenges to trial judges, the solo decision makers. And

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

I first want to address the question of coverage.

Much to the chagrin of much of the Texas judiciary, many of the people that have intervened on my case, I do not -- I anticipate Mr. Pugh -- I do not adopt the theory of noncoverage that Louisiana has adopted or that the Fifth Circuit adopted. We argued below that the plain statement principle was the way to approach it. The problem is not that "representative" clearly excludes judges. It's that the use of the word "representative" doesn't clearly include them. There is ambiguity there.

There is also some ambiguity I believe in the question of whether section 2(a) of the Voting Rights Act covers intentional discrimination. I think it was Justice Scalia, but I'm not sure who pointed out, that the language certainly doesn't say anything about intent. The language of section 2(a) only talks about results. And I don't believe there's the slightest indication that Congress meant to do away with the intent standard in 1982. But it appears that they did. Of course, there is the protection of the Constitution there. It's been there since 1870 or 1868, depending on whether you use the Fifteenth Amendment or the Fourteenth Amendment.

But nonetheless there may not be an intent standard in section 2 anymore if you read the language literally. If you choose not to read the --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

QUESTION: Well, Mr. -- Mr. Hicks, you -- take a look at the word "results" in section 2(a). Isn't it perfectly possible to read that as "causes"?

MR. HICKS: I'm willing to accept that. I'm just saying --

QUESTION: That really doesn't speak one way or the other then to the question of intent, does it?

MR. HICKS: Well --

QUESTION: You have --

MR. HICKS: There is a problem about causation. And a part of that comes up in the proof in this case about the role of partisan voting patterns.

QUESTION: Well, if you read it simply as causes or eventuates in, then you're simply referred to the phrases beyond that for the substantive meaning of this section. "A denial or abridgement of the right of any citizen of the United States to vote on account of race or color or in controversion of the guarantees set forth in subsection 2."

MR. HICKS: Yes. And -- and I -- I believe the proper reading is that there still is an intent standard. There's no indication that they intended to do away with it.

But that doesn't answer the question about whether the statute is so clear you can tell it covers

judges. I disagree with one of the Justices who answered that the Court -- and I think it was Justice White -- who answered that the Court had decided that the original section 2 in 1965 covered judges. The Court has never decided that. The Court has never addressed that question. In Mobile v. Bolden, without considering coverage of judges, the Court in rather an offhand manner -- I don't mean the analysis was offhand, but the State -- the use of the language was offhand I believe -- in rather offhand manner said that section 2 is coextensive with the Fifteenth Amendment.

In Rogers v. Lodge 2 years later, it was stated differently. The Court said section 2 reaches no further than the Fifteenth Amendment. There is a difference there, and it's an importance difference for the analysis of this case. If you go back to 1965, as Mobile v. Bolden pointed out, the legislative history on section 2 is sparse.

This Court has noted that there is extensive debate in the 60 -- during the '65 on the preclearance provisions, the rules about doing away with literacy test, the rules about access to the poll question that were such a horror in the South at that point. And it -- it's clear that in 1965 Congress was trying to do away with a lot of those horrors.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

But there is no indication that Congress in 1965 addressed judges in section 2. It didn't even think about it. It didn't even think about it in 1960 -- in 1982 either. And in 1982, Congress was using a power, the enforcement clause power, which is a much more hemmed-in power, I would say, than the -- its power to straight out announce what the Constitution covers under section 1 of the Fourteenth Amendment and section 1 of the Fifteenth.

So during the 17 years, from 1965 to 1982, there is no -- there's no empirical evidence that section 2 covered judges. There was not a single statutory section 2 case involved -- vote dilution case involving judges reported anywhere in the annals of these cases.

There is not a single effects standard case involving judges, either under the Constitution or the statute, during that 17-year period. There was one case -- Fifth Circuit case that was dismissed. There was no trial of it. The -- 12 beat 6 dismissal at the trial court level. And then it gets up to the Fifth Circuit and then -- the only provisions mentioned are the Fourteenth and Fifteenth Amendments. And the only challenges are clearly intent challenges. They aren't, however it may in retrospect be read to me, they are not White v. Regester kinds of challenges.

And so --

QUESTION: But they -- those cases did -- did hold that judges are covered by section 2(a)?

MR. HICKS: They didn't address it. There's no mention of it. There's not a single case. The only things back in that era -- the 17-year era of whatever the original section 2 meant -- the only cases around was an intentional -- constitute clearly intentional -- no debate about it -- and constitutional case on vote dilution about judges. Then the other things that came up were the Court's summary affirmances of the rule that one-person, one-vote does not apply to judges.

You get to 1982, Congress wants to reinstitute the pre-Bolden rule as it reads it. It has to use its enforcement powers under the Civil Rights Amendment to do that. And it is not free to do anything it wants when it does that. It is not free to not deliberate and just announce a rule. It has to deliberate. That's what Katzenbach v. Morgan, Oregon v. Mitchell say it has to do. It may not have to deliberate like a trial, make a court record, and things like that. But it at least has to -- in Death of a Salesman it talks about attention must be paid. It must pay some attention to what it's doing.

QUESTION: Why is that? What is it -- what is it legislative due process? I thought Congress just has to enact statutes. They -- they must think about them

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

before they enact them?

(Laughter.)

QUESTION: I don't think there's any such principle, is there?

MR. HICKS: I think -- well, the premise of Katzenbach v. Morgan and its progeny is, yes, Congress does have to think about them, if it's enacting statutes that go further than this Court has announced the Constitution goes. It doesn't -- if you want to say it this way -- it doesn't have to think about it if it's enacting a statute that governs Federal employee relations. It doesn't. I -- you don't have to -- as I think you've said so often -- if the plain language covers it, we don't have to worry about whether they thought about it. Whether they thought about it the right way and all that, you don't go behind it. But things are different when you get into the realm of the enforcement clauses of the Fourteenth Amendment. If they aren't different, then Katzenbach v. Morgan is not good law. But Katzenbach v. Morgan I believe is good law.

QUESTION: Or -- or goes further than -- than it seems.

MR. HICKS: Well, I can only have the words. I don't write the opinions, so I can only tell from its words and the way it's been applied that it is premised on

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

the idea that there is some peculiar ability within Congress which is known as the world's greatest deliberative body to deliberate about what it's doing.

And you will find no indication -- a few smatterings -- back -- way back in hearings buried in a table, there might be a listing of a judge. So that's usually about section 5 coverage. But there may be a few smatterings that something about judges will sit, but once you move past that -- once you get into the area where this Court pays some attention to legislative history -- that is, into the committee reports, into the debate about the bill on the -- on the floor of the House and the Senate, there is nothing. And in the --

QUESTION: Does this have to be floor consideration that Congress gives to it or just intensive committee consideration?

MR. HICKS: It has to be -- it doesn't even have to be intensive committee consideration, but some consideration. There has to be some attention paid, and there's none here.

QUESTION: No matter how clear the language is.

MR. HICKS: Well, the language here is not --

QUESTION: If we think they didn't think about it enough, it's ineffective.

MR. HICKS: The hardest question for me is if

they had said -- added the phrase including judges here -- in section 2(b). That would be the hardest question for me. I think it would be a closer question.

But it isn't close here. I don't adopt the view that representatives clearly excludes judges. But I do adopt a view to you that it's at least ambiguous -- at least. We know that they weren't thinking about it. You can tell it's ambiguity if you go look at the Senate report. All of those 23 cases that you don't want to read in the Senate report have to do with executive and legislative arms of the Government, and not a single judge's case. They don't even address the problem of one-person, one-vote.

At least our State judicial systems, if they're going to be intruded on through the enforcement clause powers, deserve to have it considered --

QUESTION: Well, by --

MR. HICKS: -- not just stumbling over them.

QUESTION: Mr. Hicks, why is it more intrusive to apply the Voting Rights Act to State-elected judges than it is to State-elected representatives or supervisors?

MR. HICKS: I guess it's more intrusive, because it's more unexpected. It seems intrusive to us. We didn't expect it. Congress didn't ever indicate to our

legislators. No -- nobody knew that it was happening. It's --

QUESTION: Where is --

MR. HICKS: -- just something that happened through the use of universal language. Justice Holmes, back in 1909, in the American Banana case, said there's a lot of use of universal language in statutes. No -- no such and such will ever happen. Every particular event shall be covered. But that doesn't mean that later everything that might be trapped by that language is trapped. And I think it is most important for your --

QUESTION: Wouldn't it be easy to figure that it applies to all votes? Don't votes mean votes?

MR. HICKS: It would be a --

QUESTION: Isn't a vote for a judge the same as a vote for a legislator or a vote for a dog catcher?

MR. HICKS: As a matter of fact it isn't the same. The vote weighs the same --

QUESTION: Well, why does the average person think of it that way?

MR. HICKS: I don't think so -- not in Texas. The average person --

(Laughter.)

QUESTION: Well, what do they think the vote is restricted to what?

MR. HICKS: They know they vote for judges.

QUESTION: Huh?

MR. HICKS: Well, that isn't even true. All Texas don't know they vote for judges.

QUESTION: Well, what office is it restricted to?

MR. HICKS: Excuse me?

QUESTION: What office is it restricted to and doesn't apply to anybody else?

MR. HICKS: As used by Congress?

QUESTION: As used by the people of Louisiana?

MR. HICKS: The normal -- a normal person in Louisiana or Texas?

QUESTION: Yes.

MR. HICKS: They vote -- they actually vote for all these people.

QUESTION: Well, don't they think that they all -- a vote is a vote?

MR. HICKS: I believe so, but by and large --

QUESTION: Where do you get the -- look how many years it took them to draw this line.

MR. HICKS: I'm sorry. I don't understand.

QUESTION: How many years did it take Louisiana to figure that judges weren't included?

MR. HICKS: Well --

QUESTION: '80 -- wasn't it '82?

MR. HICKS: I'm sorry. I --

QUESTION: The bill -- the Voting Rights bill was passed, they didn't think judges were included?

MR. HICKS: I don't believe anybody thought judges were included. There was no case --

QUESTION: Well, when did they suddenly decide to litigate it?

MR. HICKS: Well, when they were sued they had to litigate it, because they didn't anticipate this.

QUESTION: A long time.

MR. HICKS: It did take a long time, and I think that's more an indication --

QUESTION: Somebody had to dig way down to figure --

MR. HICKS: Well, I think it works the other way, Your Honor, with all due respect. I think what that indicates is the plaintiffs didn't think they were covered. They didn't sue. There weren't any vote dilution effects test suits until after 1982. And if section 2 originally had covered it -- given the claims that the State judicial system is the last bastion of white supremacy in the South which I don't think is so -- but given that claim and given the claim that it is such a crucial institution, I would have thought that would have

been the primaries of focus, but it was not.

QUESTION: Well, there were certainly some section 5 suits, weren't there?

MR. HICKS: There --

QUESTION: And wasn't it held that the section 5 requirements applied at judges?

MR. HICKS: The court -- this Court has summarily held that. I don't know if it did it because there was an intent prong involved or effects prong in the challenges that came up.

QUESTION: Well, it's a little strange to then say section 2 doesn't apply if any change in the election scheme or the voting scheme has to be cleared under section 5, then it's a little odd --

MR. HICKS: It doesn't seem odd to me, Your Honor, because the attention at the trial court level was about change. I mean -- I'm sorry -- at the congressional level in 1965 -- was about change. It was about section 5. That's what the focus was on. And if Congress was using its enforcement clause powers to --

QUESTION: Well, but under your test, there wasn't any specific discussion or consideration of judges at that time either. And yet we've said section 5 applies.

MR. HICKS: Yes, you have without, giving

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

plenary review to that question and without looking carefully at the legislative history -- I'm guessing -- the issue wasn't presented to you that way at any rate.

And I do believe that is very crucial for our case for the Court to recognize that when Congress -- when -- it is construing a statute enacted by Congress, they -- it's under its enforcement clause powers and goes beyond the Constitution as announced by this Court that there are some different rules of construction that apply than if it is enacting something like a Federal employee relations act. There is a different set of rules.

Justice Marshall wrote an opinion in a dissent from the Aramco decision about the extraterritorial application of title VII. The broad wording in title VII clearly reached, it seems to me -- I know the Court said that it was ambiguous -- but it seemed to me that it clearly reached American employees working for American companies in Saudi Arabia. The Court found a difference between broad and being specific.

QUESTION: Well, if you apply a clarity test here, I don't know why you're just complaining about judges being covered. It would never have occurred to me that it's entirely clear that to elect representatives of your choice means to elect the Governor of your choice. Do you think a Governor is clearly a representative?

MR. HICKS: I think --

QUESTION: You don't then now deny that the Governor is covered do you?

MR. HICKS: I'm not, no. According --

QUESTION: Why isn't he excluded under your theory?

MR. HICKS: She in our case.

(Laughter.)

QUESTION: Whoever.

MR. HICKS: Because -- because if -- you're thrown back into the legislative history to some extent. I know you don't like that, but I believe you are. And in Gingles, you -- the Court has looked at the legislative history and it is clear that every -- the arms of the executive and legislative Branch were meant to be brought within it.

QUESTION: Well --

MR. HICKS: They're discussed extensively.

QUESTION: Well, it seems to me you're make -- it doesn't matter whether I like legislative history or not, but you're mixing two theories here. If you're saying it has to be said with clarity, then it hasn't been said with clarity with respect to a lot of officers besides judges -- a lot of officers besides judges. And you say as to each of them, we have to go back and pour

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

through the legislative history to see if they're covered?

MR. HICKS: I'm not saying that. I think it's covered. The legislative history covers about just every officer if you go back and look at it. I do think that judges are different. I think that's part of the reason for the argument for the Solicitor -- that the Solicitor General's office has made. They acknowledge that the judges -- that judges are different. I actually believe that petitioners have acknowledged that judges are different.

QUESTION: Elected clerks of court, for example, if there's an -- an election for the clerk of court --

MR. HICKS: They're --

QUESTION: -- is -- is that explicitly in the legislative history?

MR. HICKS: It is an executive function and I believe clerks -- I don't know if they're clerks of court -- were certainly the object of section 2 and section 5 claims, pre-1982. So I believe they're covered. I believe another indication that judges aren't covered is this -- 1982 the amendments were intended to restore the pre-Bolden status of the case law as Congress read it.

QUESTION: Is there any other officer that's in the category of judges -- any other elected officer?

MR. HICKS: Do you mean the category of judges

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

as I would place the category of judges?

QUESTION: Uh-huh.

MR. HICKS: No, I -- the -- I don't think so.

QUESTION: Well, where did they get that unique place from?

MR. HICKS: I believe that this Court has historically recognized their unique place. It is -- this Court has an interdependent relationship with trial judges at the State court level and with all judges at State court level. It relies on them for a lot of rules that it must apply. It relies on trial court judges to take care of a lot of Federal constitutional issues. It relies on trial court judges and other State court judges to address, it seems to me, a lot of issues that will relieve the Court of a lot of --

QUESTION: Well, you want us to make the exception?

MR. HICKS: I believe that in the area of federalism the Court has done this kind of thing before. It has elevated trial court judges -- State court judges, excuse me -- to a little different level.

QUESTION: So these State court trial judges are nonetheless the creatures of the State and not of the National Government.

MR. HICKS: There is no question about that, and

that's one reason they're entitled to some special insulation from encroachments under the enforcement clause powers under the Civil War amendments. That is the reason they have to be attended to some extent. They've just been stumbled across here.

QUESTION: Well, it's one thing to say they were unintentionally covered by Congress when it wasn't thinking about it. It's another thing to say that Congress has to have some added justification to -- to cover them than it would have to cover representatives I think.

MR. HICKS: I just think it has to deliberate over it. That's all I'm saying. There has to be some deliberation. I think that State court judicial systems are important enough to deserve some attention from Congress. Congress makes the ultimate judgment on whether it wants to extend its -- the Constitution to reach down into the arms of the State government that are traditionally off limits. But it should exercise that judgment. It shouldn't stumble across it. It shouldn't be an accident. Surely our State court judicial systems are worthy of more attention than that. And I believe --

QUESTION: If there -- if there was some debate about it and -- and you know that they had it in mind, but nevertheless they used the word "representative."

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. HICKS: Well, that would be closer. I think I might lose that case, but they didn't have it in mind --

QUESTION: So you think "representative" is capable of covering judges (inaudible) --

MR. HICKS: It's capable of it. I don't think common people think of judges as representatives. I don't think a lot of informed scholars think of judges as representatives. I don't think judges think of themselves as representatives. I agree that under some -- Jeffersonian democracy theory that they're representative of the people. I don't question that at all.

QUESTION: Jacksonian democracy.

MR. HICKS: Is it Jacksonian? Well --

(Laughter.)

MR. HICKS: I'm talking about the idea of what a representative is.

QUESTION: Jefferson was not at all in favor of electing judges. Jackson was.

(Laughter.)

MR. HICKS: Thank you. I didn't read my amicus briefs as well as I should have.

QUESTION: Their names both begin with J, though.

MR. HICKS: Yes.

(Laughter.)

MR. HICKS: I actually was thinking about what I said and I did mean Jeffersonian because the idea of anybody that's elected is a representative in some sense -- that kind of theory. But at the normal common parlance does not speak of judges as representatives. The courts -- lower courts have -- have in a sense stumbled across that when they refer to judges as not being representatives. And so --

QUESTION: That's all -- I -- you -- I take it you -- then you aren't defending the judgment -- you're defending the judgment of the Fifth Circuit but not its reasoning. Is that it?

MR. HICKS: That's correct. We made this argument that I'm making now below. I have to say I don't think it was as sophisticated as it is now --

QUESTION: We agreed to view -- what you're really saying is that there's a different standard for judging coverage than the Fifth Circuit used.

MR. HICKS: Yes.

QUESTION: So we would have to remand.

MR. HICKS: I don't understand. This -- this is a legal question, not a factual question. I believe ultimately if you disagree with me, you must remand. But I don't believe on the question of coverage you must remand. I -- I think this Court is quite capable of

analyzing this on the legal grounds that I've argued here and reaching a decision.

QUESTION: Mr. Hicks, is it your position that section 2 in its entirely doesn't apply to judges -- not at all? 2(a) doesn't have any application either?

MR. HICKS: I don't think it's necessary to answer that question in this case, because we've been found not to discriminate intentionally, but I think there is no legislative history to indicate that in 1965 Congress intended to get at judges.

I also think though the test for how much they had to have paid attention is different for 1965 because they weren't exercising their enforcement clause powers under section 2, as Bolden has seen it in retrospect. They were just announcing -- regurgitating what the Constitution said. So there is a different standard when they move to the effects test.

But I do emphasize Texas has been found specifically not to have intentionally discriminated in the creation and maintenance of this system. It's only the effects test that matters. And Congress in instituting the effects test and going further than Bolden said the Constitution goes, didn't pay one whit of serious attention to judges.

QUESTION: Of course, one of the respondents

here says that there is more in section 1 than just the intentional discrimination test that -- that -- that you can say that all that section 2(b) contains is the dilution requirement. And that the result test, apart from the dilution requirement, can be found in 2(a).

MR. HICKS: Well, I think there --

QUESTION: Do you disagree with that?

MR. HICKS: I think --

QUESTION: That's Judge -- Judge Ents if you recall his submission here.

MR. HICKS: I think that there is a possibility of bringing section 2(a)'s reach and results. But it only reaches results because of language inserted in 1982. That language again didn't -- when they didn't attend to judges at the State court level. And there are so many reasons why there should have at least been some debate on this if they were thinking about judges -- the application of the one-person, one-vote rule which it doesn't work in this -- in the -- for State judges.

Surely that would have been mentioned. Surely the other differences between judges and others would have been at least mentioned if they had thought they were extending the Constitution further than you have extended it. But they didn't mention it.

I'd like to turn briefly to what has been called

the solo decision-maker exception argument that we have made and that Judge Higginbotham and four other members of the Fifth Circuit found to be persuasive.

I first want to say that it is not an argument for an exception from section 2 for trial judges. There are other aspects of section 2 and section 2(b) than just vote dilution aspects. I am only talking about the inapplicability of the concept of at-large vote dilution challenges to trial judges to solo decision makers. And I don't think there's any question but that trial judges are solo decision makers. They function independently.

This Court in an opinion by Justice Blackmun has recently -- in a different setting -- has recently talked about the difference between appellate courts and trial courts and how trial court functions independently and as a solo decision maker and how appellate courts function in a collective manner.

There is no indication -- in fact Reynolds v. Simms which is the progenitor of all this -- suggests otherwise. But there's no indication that Congress when it enacted section 2 intended to get into destroying the basic choice of the -- the electorate to be represented by the decision -- decision-making body that they elect. Texas has set up, for instance, the legislature. The decisions coming out of there in the form primarily of

legislation it seems to me. Texas -- section 2 can't destroy that choice that the electorate is the whole State of Texas. How it is carved up is different.

But the electorate is the whole State of Texas and the decision that their -- their democratic views are embodied in decisions made by a body representing the whole State of Texas. Texas has chosen for trial judges to say the county is the electorate -- the electorate of the county are the electorate to be represented through the decision of this trial judge.

There is -- there is no way to make out a vote dilution vote challenge in that kind of setting it seems to me. The concept is inapplicable. There may be other challenges that can be lodged under section 2. That wasn't done here. But there may be other challenges that can be lodged. And -- the -- that kind cannot. It would Balkanize the representation. You would have a judge from one section of the town elected by one segment of the community --

QUESTION: So a State could disenfranchise any minority so long as it's willing to pay the price of -- of giving the decision in question to a single official.

MR. HICKS: Well, first of all --

QUESTION: Or so long as it has been willing in the past.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. HICKS: I would think if there were an effort to do that, that would be seen as intentional discrimination. Trying to disenfranchise people is intentional discrimination, and we have not done that.

This is statistical -- a statistically based test that was applied here. And through statistics it was suggested -- ignoring the role which is the overwhelming --overwhelmingly dominant factor -- ignoring the role of partisan politics, using statistics and throwing out that most people vote party ticket one way or the other in these kinds of races, the court statistically said there's some submergence.

QUESTION: You could replace a school board with a single school administrator.

MR. HICKS: Well, we have to --

QUESTION: And there -- and there could be no complaint about that diluting the minority vote.

MR. HICKS: First of all, we would have to go through section 5 of the Voting Rights Act to do that.

QUESTION: And you'd apply different tests there?

MR. HICKS: Well, the Justice Department at the first level would analyze what was going on.

QUESTION: Yes, supposing you're not a covered jurisdiction, then section 2 would apply. I don't think

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

that's allowed on fair response.

MR. HICKS: You're -- you're right. I think though that you can attack those kinds of things as intentional discrimination. You've suddenly -- it's like the tension --

QUESTION: It's not intentional -- it's not intentional. We just decide we've had a school board and minorities have been able to elect two of the school board members out of five. But we're just going to change. We're going to have a, you know, one representative. You would say so long as there's no discrimination that's fine.

MR. HICKS: Well, I --

QUESTION: It's not covered by section 2.

MR. HICKS: I for one would find it impossible to say that wasn't discrimination. This is like the swimming pool cases that the court cited when they shut down in the South it seems to me. I would find it impossible to say --

QUESTION: Oh, you have to take my hypotheticals.

(Laughter.)

MR. HICKS: Okay.

QUESTION: I make them up myself. You have to take them.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

(Laughter.)

MR. HICKS: Okay.

QUESTION: Or a closer case, what if Mobile instead of having a three-member commission, say, it changed to a single mayor -- or single administrator and there were all sorts of good government reasons for doing it. It would be exempt from the act.

MR. HICKS: Well, they wouldn't be exempt from the act.

QUESTION: Exempt from section --

MR. HICKS: They would be exempt from an at-large vote dilution -- not they.

QUESTION: Yes.

MR. HICKS: A challenge there later would be exempt from an at-large vote dilution challenge. There would be other avenues of attack.

QUESTION: But always based on intent.

MR. HICKS: Well, I don't know if they all would have to based on the intent. Footnotes 10 and 12 of Thornburg v. Gingles -- in those footnotes, this Court said there are a host of other section 2 kinds of challenges. In at-large vote dilution challenges it may be available. And I'm not creative enough -- I've gotten into the mindset of being a defendant in this -- these cases now, so I'm having a hard time thinking.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

But I'm sure the plaintiffs would have no difficulty figuring out a section 2 vote -- a section 2 challenge to that kind of action that was not an at-large vote dilution challenge. The Thornburg v. Gingles principles wouldn't mean much. It would be other aspects of the language of section 2 -- even on effects, not just on intent.

And I don't think -- that's the problem with this. We have a -- and I think that's part of the reason for the Court's concerns on the inapplicability of the one-person, one-vote rule in this setting -- you have a structure set up to attack a system where that structure just doesn't fit. It doesn't fit at all. At least Congress ought to have to go back and figure out if that's the structure they want to apply or if they want another.

There might be other situations in which that structure -- something other than that structure might be applied -- numbered post kind of system or something like that.

QUESTION: Thank you, Mr. Hicks.

MR. HICKS: Thank you.

QUESTION: Mr. Chambers, do you have rebuttal? You have 4 minutes remaining.

REBUTTAL ARGUMENT OF JULIUS L. CHAMBERS

ON BEHALF OF THE PETITIONERS

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. CHAMBERS: Thank you, Your Honor.

First, I'd like to note that the Senate factors are reported on pages 29 -- 28 to 30 of the Senate report.

Second, with respect to coverage -- and we call of course attention again to section 14(c)(1), which clearly shows that the act applies to all voting, whatever the position is involved. I'd like to just address briefly the question of single-person office.

And to point out that what we have in Texas, for example in Harris County, are 59 separate judges or 59 judges for the State representing 2.4 million people; 20-some percent or so of those are minority voters. They are unable to elect a representative. And these 59 people, although occupying a position that permits them to make a decision on a particular case, are certainly in positions that can be divided among the electorate to give the minorities a change to elect a representative or to participate more effectively in the process.

There is not case that I know of that goes off on the function of the office once the State decides to make the office elected. What we look at is whether this office is so unique that it cannot be divided among the electorate in order to eliminate the impairment of the minority voters in that particular district. And here clearly these judges can be subdivided to permit

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

minorities to have an effective role or an equal role in the election of judges. That's what we are asking.

And I think that in the concurring opinion suggestion that these were single-person offices which prohibited a vote dilution analysis was simply not following out the objective of Congress in section 2, because these positions, just like the legislative position, can be subdivided and minorities will have a chance to participate more effectively in the -- in the process.

No one suggests that any of the judges subdivided would have less authority than the judges who presently occupy those positions. What we suggest is that they be permitted to vote -- that minorities be permitted to vote to elect a representative member of the -- of the bench.

Closing off that opportunity, we submit, would be contrary to what Congress has suggested in the -- in the statute other than the legislative history of the --

QUESTION: Mr Chambers, do you know of any jurisdiction that today is using cumulative voting for the election of judges?

MR. CHAMBERS: Yes, Your Honor, in the -- our brief we point out two cases in Alabama that has approved of cumulative voting for the election I believe of county

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

commissioners in that particular -- that district. There's also the case that --

QUESTION: Excuse me, the court imposed that you mean?

MR. CHAMBERS: The court approved it was settlement, Your Honor -- that included that method of electing representatives. And then we have the Pennsylvania case that's also cited in material that approves of a limited voting method. And again there is ample literature that points out that cumulative or limited voting would permit the -- a system to adjust or deal with the dilution of minority voters without materially altering the particular structure that's there.

Also, with respect to the legislative history, we would point on pages 13 and 19 of the amicus brief of the Lawyers' committee there is a listing or citation of a number of instances in which Congress looked at the election of judges in considering the 1982 amendment to the Civil Rights Act. So Congress was aware that the -- the proponents were asking for coverage of the most important section of the local governments that continue to affect minority voters.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Chambers.

The case is submitted.

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

MR. CHAMBERS: Thank you.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

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: 90-813 - Houston Lawyers' Association, et al., Petitioners v. Attorney General of Texas, et al.; and 90-974 - League of United Latin American Citizens, et al., Petitioners v. Attorney General of Texas, et al.

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

BY _____

(REPORTER)