ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JANICE G. CLARK, ET AL., Appellants v. CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA, ET AL.

CASE NO: 90-952

PLACE: Washington, D. C.

DATE: April 22, 1991

PAGES: 1 - 53

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IN THE SUPREME COURT OF THE UNITED STATES

- X

JANICE G. CLARK, ET AL., :

Appellants :

v. : No. 90-952

CHARLES "BUDDY" ROEMER, GOVERNOR :

OF LOUISIANA, ET AL. :

- 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 12:59 p.m.

APPEARANCES:

ROBERT B. McDUFF, ESQ., Washington, D.C.; on behalf of the Appellants.

JAMES A. FELDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae supporting the Appellants.

ROBERT G. PUGH, JR., ESQ., Shreveport, Louisiana; on behalf of the Appellees.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 90-952, Janice Clark v. Charles "Buddy" Roemer.

Mr. McDuff.

ORAL ARGUMENT OF ROBERT B. McDUFF

ON BEHALF OF THE APPELLANTS

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

This is a case about the enforcement of section 5 of the Voting Rights Act of 1965. Section 5 is the preclearance section of the act and was designed to apply to specific jurisdictions, including the State of Louisiana. It routinely and through a variety of nefarious means denied many of their own citizens the right to vote solely on account of skin color.

In order to prevent this discrimination in the future, Congress exercised its authority under the Fifteenth Amendment and provided in section 5 that a covered jurisdiction may not implement a voting change unless and until it demonstrates to a Federal authority, the Attorney General or the Federal District Court for the District of Columbia, that the change is not discriminatory. By doing so, Congress shifted what this Court often has called the advantages of time and inertia

from the perpetrators of the evil to its victims.

This is a case about voting changes for elections for State court judges. Section 5 covers voting changes for elections for State court judges, just as it covers voting changes for elections of other public officials. This Court twice has summarily affirmed lower court decisions to that effect, the most recent being this past fall in the case from Georgia, and the appellees make no contention that judicial elections are excluded from section 5's coverage.

This appeal raises three issues. First, can voting changes involving the creation of judgeships that have not been submitted for evaluation under section 5 nevertheless be retroactively cleared solely because of the submission and preclearance of later voting changes involving subsequent judgeships in the same election district?

Second, did the three-judge district court err in permitting elections for State court judges pursuant to uncleared voting changes to which the Attorney General objected under section 5 because of his concern about the possibility of racial discrimination?

Third, in the event the district court did err in permitting the elections to go forward, what relief should be ordered by this Court at the present juncture?

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These issues arrive, arise in the following factual context. In Louisiana during the past 25 years the legislature enacted a number of voting changes with respect to judicial elections, most of them involving the creation of judgeships to be elected at large in majority white, multi-member districts. In violation of section 5 State officials implemented many of those voting changes and held elections for many of the judges without seeking preclearance.

At the same time State officials did submit and obtained preclearance for some of the judgeships. As a result in some judicial districts there were combinations of cleared and uncleared judgeships within the same district.

Only in response to this litigation in 1987 did State officials go back and submit all of the prior uncleared voting changes involving the creation of judgeships to the Attorney General for preclearance. Beginning on September 23, 1988, the Attorney General interposed objections to some of the voting changes involving the creation of judgeships in certain specific judicial election districts in the State of Louisiana. State officials did not then take any action to seek preclearance in Federal District Court in the District of Columbia.

QUESTION: Of course he hadn't disapproved any before then, anyway?

MR. McDUFF: That's correct.

QUESTION: I mean, he had always approved them?

MR. McDUFF: That's correct.

After the Attorney General's initial objection the State took no action to seek preclearance in Federal District Court in the District of Columbia. Instead the State proceeded with the 1990 elections, even for the judgeships to which the Attorney General objected. The plaintiffs filed a motion for an injunction to stop the elections and the district court denied the injunction for the most part.

The district -- with respect to some of the judgeships the district court held that the preclearance of later voting changes involving subsequent judgeships in the particular judicial districts retroactively cleared all the prior previously unsubmitted judgeships. With respect to other judgeships that the district court conceded were uncleared, the district court nevertheless permitted the elections to go forward and permitted the winners to hold office for as long as it takes the State to initiate and litigate in Federal District Court in the District of Columbia a section 5 preclearance action.

On November 2, 1990, this Court issued an

injunction pending appeal against some of the elections the district court had permitted to go forward. Finally on January 19, 1991, of this year, 2-1/2 years after the Attorney General initially interposed his objections, the State of Louisiana filed a section 5 declaratory judgment action in Federal District Court in the District of Columbia.

First I would like to discuss the issue of retroactive clearance. Section 5 places upon the covered jurisdictions the burden of notifying the Federal, the Federal District Court for the District of Columbia or the Attorney General of voting changes. In order to prevent circumvention of the act, this Court has made it clear in cases like McCain v. Lybrand and United States v. Board of Commissioners of Sheffield, Alabama, that section 5 submissions must identify exactly the changes that are being submitted to the Attorney General for review, and the Attorney General can never be deemed to have precleared those changes that are not submitted for review. This preserves the integrity of the section 5 process by preventing disguised preclearance and by ensuring that the Attorney General does not unwittingly preclear something that there was no opportunity to examine.

QUESTION: On some cases should we be asking a

different question? Instead of asking the question whether the later clearance automatically preclears everything that preceded it, should we at least in cases where the issue is the number of office holders to be chosen, simple numerical issue, should we instead ask whether the later preclearance moots the fact or the issue that might be raised about the prior clearance?

You said, I think, in your brief that there might, for example, always be, or there is always a potential issue of intent. Well, let's assume for the sake of argument that there was an improper intent the last time the number was expanded. When we get to the -- which were not precleared, and we get to the final expansion, the number is increased again but there is no improper intent. The fact is at that point the intent is to have whatever the later number was, and it doesn't matter whether it had been done in two steps or three steps. The result is going to be the same, and if there is no improper intent to that, doesn't that moot the issue of the prior failures?

MR. McDUFF: Not at all, because the Attorney General had no opportunity to examine the discriminatory intent that was involved in the creation of -- or the expansion of the at large system to whatever number you had prior to the most recent change.

QUESTION: No, I realize that. But if you had gone from let's say the original number to the final number without any intermediate steps, and you get to the point at which the final request for whatever the last number is has no improper intent to it, why doesn't that moot out the intent with respect to the intermediate step? It doesn't imply that he is automatically preclearing it. It's just saying it is no longer of relevance to us because maybe there was an intent, an improper intent, to increase the number to five, but we're now concerned with the intent to have a number of seven, let's say. And there is no improper intent with respect to seven.

MR. McDUFF: Because the expansion of the at large system to that level had been motivated by discriminatory intent, and that's exactly what the Attorney General is empowered to stop under section 5. I mean, certainly -- look at it this way. Suppose instead of the Attorney General being submitted the change from five to seven he was submitted the change from five to seven and then also was told, by the way, we never precleared the change from two to five. We also want to submit that to you. Therefore the Attorney General has all of the evidence in front of him, and he looks at the prior evidence of discriminatory intent and says it is clear to me this was improper and I am going to interpose

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an objection. That is perfectly --

QUESTION: Well, what does he do as a practical matter? Let's assume he says I agree with you, I think seven is the appropriate number. I agree with you that there is no unconstitutional or unstatutory intent here. And yet because you failed to preclear the intermediate step when you went from three to five -- what's he going to do, say I will only increase the number to five now?

MR. McDUFF: No, I would think the Attorney General would then -- I mean, obviously he could do what he wanted to, but I think he would object to both changes. I mean, because the system had been expanded --

QUESTION: But he would at the same time be saying I agree with you, seven is the appropriate number, but because you failed in the past we will freeze it at three? What does he do?

MR. McDUFF: No, Justice Souter, I don't think it's a matter of what's the appropriate number. It's a matter of whether the at-large election method was incorporated and expanded for discriminatory reasons. And if it was expanded from two to five for discriminatory reasons, that expansion is invalid, and the Attorney General is not only entitled to but has the duty to object to that. Now the fact that without such evidence the number of seven might be appropriate makes no difference

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in the situation that is discussed in your hypothetical.

QUESTION: Well, but just tell me what he's supposed to do at that point?

MR. McDUFF: He's supposed to object.

QUESTION: Well, he objects, and what should the result be then? That the process is forever frozen at three? That's not what you're arguing for.

MR. McDUFF: Oh, no. The State can then expand its judicial work force, it can expand the number of judges in that district through some election method that complies with the Voting Rights Act and through which it can obtain preclearance.

QUESTION: Well why doesn't it comply with the Voting Right Act if they want to expand it to seven and there is no discriminatory intent?

MR. McDUFF: Because there was a discrimination in the intermediate expansion to the level of five. I mean, you can't divorce the change from five to seven from the change to two to five.

Here State officials never submitted these prior changes until the instigation of this litigation in 1987. Only when the appellants sought to enjoin the fall 1990 elections did the State defendants claim for the first time that the prior changes already had been retroactively cleared. And the district court accepted their arguments

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and invalidated the Attorney General's objection on the premise that the preclearance of an amendment to a State statute necessarily preclears the entire statute and all prior amendments to the statute.

Now that is directly contrary to this Court's opinion 7 years ago in McCain v. Lybrand. There the Court said in unmistakable terms that the submission of a voting change such as an increase in the number of seats in a particular election district covers only the precise change identified in the submission. It cannot be considered a retroactive submission of prior voting changes or prior amendments to a State statute in that election district. McCain also said that deference should be given the position of the Attorney General that the prior change was never submitted, never evaluated, and never precleared.

QUESTION: But McCain did not involve the kind of change that you and Justice Souter have been talking about, just adding another number where a prior number would be included within the later number. They were changes of quite different types, weren't they?

MR. McDUFF: Actually the subsequent change was a change in the number of seats --

QUESTION: Right.

MR. McDUFF: -- plus a couple of other minor

changes. The prior change was the change in the form of government.

QUESTION: Right. So you couldn't say seven includes four. They were quite different items.

MR. McDUFF: That's right, but McCain did not rest either on the dissimilarity of the two changes or any sort of -- the dramatic nature of the prior change.

QUESTION: Yeah, but it's quite reasonable to say that a change in number does not approve a prior change in form. But it is reasonable to say that if you say seven is okay, presumably four is okay.

MR. McDUFF: But, Your Honor, it's not just the number that's at issue here. It's the level of discrimination, whether intent or effect, involving -- involved in the expansion of the at large system. And as the hypothetical Justice Souter and I were discussing demonstrates, it's important for the Attorney General, and section 5 requires, I think, for the Attorney General to be entitled to examine the evidence behind each independent voting change and each independent expansion of the particular election method in that district.

QUESTION: But what difference does it make if the change to four was bad, so long as you know that the increase to seven is okay? Whether it's an increase from four or from five?

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MR. McDUFF: Because you have an election system in that district, and a judicial structure in that district, whose expansion was motivated by discriminatory intent. And I think this is the key point. The Attorney General, under the district court's holding, has no opportunity to examine the discriminatory intent involved in the intermediate changes.

QUESTION: Are you saying in this hypothetical that there are two questions? One is the ultimate number. The other is the mechanism for electing that number.

MR. McDUFF: Exactly.

QUESTION: And it's the second that you're concerned with, and it's the second that you find is a taint that will not go away?

MR. McDUFF: Exactly. And that's the Attorney General's concern. And I think --

QUESTION: That still leaves you with the question of what you're going to do when the State comes back and says okay, you say number four was no good, I still want seven. So instead of increasing me from five to seven, increase me from four to seven. What happens?

MR. McDUFF: Well, the Attorney General objects to the voting changes because he has found discrimination, and then the State has to go back and if it wants to expand the number of judgeships in that particular

election district it has to do it in a way that satisfies the Attorney General or the Federal District Court of the District of Columbia that section 5 is complied with.

QUESTION: So once it has made the mistake in going from three to four and not getting preclearance, it can never, it can never correct that?

MR. McDUFF: Well, it can go back and submit the change from three to four to the Attorney General or to the Federal District Court for the District of Columbia, and obtain preclearance, if preclearance is deemed appropriate.

QUESTION: Well, is that precisely -- if you go from four to six, say, and that's a bad change, and that's not submitted, and then you go from six to seven and he approves six to seven. He doesn't approve a number of seven, he approves a change from six to seven, thinking that doesn't have an effect. And if he then finds out there is an unapproved prior change he wipes out the whole thing, but they then could resubmit a four to seven change, which would then be appraised on its own merits.

MR. McDUFF: Certainly. Certainly.

QUESTION: Could I ask you, what if we decide that the election was -- permissibly went ahead, and that we say that the district -- the court of appeals or the district court did not need to enjoin the election. Do we

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have to decide the issue you have just been --

MR. McDUFF: Yes, you do, Your Honor, because the district court held that all of these prior judgeships did not even need to be precleared, they had already been precleared, and therefore the district court has said those judges can remain in office. The elections were held, the judges can remain in office throughout their full terms.

With respect to other judges that the district court said, or judgeships the district court said were uncleared, the district court put them on the schedule by which they will only stay in office pending the litigation of the D.C. case, and will have to go out of office if the State loses the D.C. case.

QUESTION: But if the State wins in the D.C., all of these judges are going to be all right?

MR. McDUFF: If the State wins in D.C.

QUESTION: Yeah.

MR. McDUFF: All of these changes will be precleared.

QUESTION: Yeah.

MR. McDUFF: Now, but if the State loses in D.C. --

QUESTION: Well, I know. I know, but what if it's precleared -- if the State wins right across the

board all of these judges, the ones that are in office are going to stay in office.

MR. McDUFF: Well, we --

QUESTION: Isn't that right?

MR. McDUFF: We have asked that the elections be set aside --

QUESTION: I know. I know.

MR. McDUFF: -- because the elections were illegal in the first place --

QUESTION: Well, I know, but if -- you mean the elections would still be declared unconstitutional if the State wins in the district court here in the District?

MR. McDUFF: If the State were to win tomorrow, perhaps the courts could hold that it's okay to leave the status quo in place. But it's -- most of these cases in D.C. take 2 or 3 years, and we don't think these --

QUESTION: Well, I know, but --

MR. McDUFF: -- judges should be left --

QUESTION: But if the State wins there's going to be no violation of the act.

MR. McDUFF: There is a violation of the act now, because the elections went forward without preclearance.

QUESTION: Well, not if we hold that -- not if we hold that the elections -- that, just as a matter of

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equity, just as a matter of equity they didn't need to enjoin the election.

MR. McDUFF: There still -- there still would have been a violation of the act, because State officials implemented it. Now you may hold that it was okay for the district court to let it go forward, but there still was a violation of the act by implementing the uncleared change absent -- by implementing the uncleared change.

QUESTION: Well, so what would you do if the State wins in the district court here in the District of Columbia and that all, none of these needed to be -- they needed to be precleared, but they are now cleared, you still think we would have to go back and set aside the election?

MR. McDUFF: Well, I think you have to go back and set aside the elections now. As I have said, if the State ruled tomorrow you might not have to.

QUESTION: Answer Justice White's question. What would be the situation if the district court cleared all of these changes? Then the elections could stand, could they not, no matter when that opinion came?

MR. McDUFF: The Court certainly could hold that they could stand, yes. I mean, in Hampton County there was the suggestion that even if changes are later cleared, prior elections held under those changes might not be

allowed to stand, but Hampton County left that to the district court.

But the point is we would have to wait, we're going to have to wait probably 2 years before we get a judgment out of the Federal District Court for the District of Columbia, and these illegal elections should not be allowed to stand for that period of time.

QUESTION: Well, is the matter of remedy one that we respond to in equity? Do we apply equitable principles to determine what to do?

MR. McDUFF: Certainly this Court has, and for instance in the Hampton County case, applied equitable principles, but only so far as to say that an unprecleared election should be set aside if the Attorney General's approval is denied.

QUESTION: And if that were done then all criminal convictions that had been obtained in the meantime in any of these courts would be set aside likewise?

MR. McDUFF: Oh, no, not at all, just as all criminal convictions could not be set aside now, even though the elections were held in violation of section 5.

QUESTION: Thank you, Mr. McDuff.

Mr. Feldman.

ORAL ARGUMENT OF JAMES A. FELDMAN

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AS AMICUS CURIAE, SUPPORTING THE APPELLANTS

MR. FELDMAN: Thank you, Mr. Chief Justice, and may it please the Court:

I'd like to first address for a moment Justice White's question. In the action going on, the declaratory judgment action in the District of Columbia, not all of the judgeships that are currently before this Court are at issue. Since the district court -- since the District Court in this case held that some of them had already been precleared, the State did not ask for a declaratory judgment that those should, that those had no discriminatory purpose or effect in the Washington action, and therefore those seats would -- something has to be done with those seats regardless of what happens in the declaratory judgment action.

QUESTION: How many judges are involved in that group?

MR. FELDMAN: I can't tell you the exact number. The number 18 is what is in my mind, but I am not sure that's right.

QUESTION: And if we say that those judges have never been precleared, suppose we accept your argument -- I take you are going to argue that?

MR. FELDMAN: Yes.

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QUESTION: What do we do then about those judges?

MR. FELDMAN: If they should have been precleared, it's our submission that because they should have been precleared and weren't, it will be up to the -- the case would go back to the district court and it would be up to the district court to make a remedial determination of what the best course of action in this case is. It may depend on a number of different factors.

Now some, when I said -- whatever the number is, it involves I think some vacancies, for instance. Well, insofar as it involves vacancies, I think we would suggest that if the seats have never been filled, for instance if they are newly created seats, the district court may reasonably say the State doesn't really need those seats.

QUESTION: I suppose the State would just amend its petition in the court here in the District of Columbia.

MR. FELDMAN: The State could do that, but they haven't because the district court's judgment in this case was that those seats had already been precleared.

QUESTION: Now what about the -- what about those judicial seats that now have incumbents that are among this group?

MR. FELDMAN: Well, it's -- again, it's our

submission that it's going to be up to the district court to make -- it should be up to the --

QUESTION: Well, I know, but you're going to be down there arguing what should be done. So what should be done?

MR. FELDMAN: There -- I think that it might not be possible to make a categorical judgment. That, I think that might be the best I can do right now.

QUESTION: Is that what you're going to say to the district court?

(Laughter.)

MR. FELDMAN: I think that we'll have to -- it's certainly the case that --

QUESTION: Don't decide categorically, just be with us, I suppose?

MR. FELDMAN: No. I think it will certainly be the case that the State of Louisiana will be able to make the showing, actually we mentioned in our brief we thought they would be able to, that they need some of these judgeships in operation in order for their courts to operate.

And it will certainly be -- it will probably be the case that the State will be able to show that. And in the remedial phase of the proceeding the district court reasonably can take that into account and can perhaps even

permit the judges to stay in office until the declaratory judgment action has been completed.

Again, there may be other cases where it's a newly created judgeship where the State can't make a showing that it needs that position filled, and in those cases I think the district court would be best off to enjoin the State from filling those positions.

QUESTION: Enjoin them what? Tell the judges that -- hold a new election, or what?

MR. FELDMAN: No. I would say with respect to seats, for instance, that have never been filled, the district court would reasonably say the State cannot hold an election to fill those seats unless and until it's precleared.

QUESTION: And if there are some that have been filled in this interim time, but weren't precleared, what about the actions taken by those people in the meantime?

MR. FELDMAN: Well, it's our view that whatever -- first of all, whatever actions have been taken by the judges in these seats are valid. That follows from the de facto officers doctrine that this case has recognized in reapportionment cases, in Buckley v. Valeo, for instance, where --

QUESTION: It's -- essentially it's a question of State law, isn't it? I mean, if Louisiana says --

suppose Louisiana -- maybe one of the peculiarities of a civil law State is that it doesn't recognize the de facto doctrine.

MR. FELDMAN: I don't want to speculate about what State law is, but it would seem to me that as far as Louisiana law goes these judges are validly in office, and their acts should be --

QUESTION: All you can really say is that it's not inconsistent with the Voting Rights Act to give de facto recognition to the acts of these judges?

MR. FELDMAN: That's right. And it's not even inconsistent at the remedy stage to permit the -- for the district court to make the remedial determination in its discretion that the judges should stay in office and continue to make valid decisions. What we are saying is that before they are elected a district court should not, under the Voting Rights Act, permit an election to go forward. After all, the Voting Rights Act is keyed to voting and to elections, and the text of the statute specifically talks about preclearance, that voting laws shall not be implemented unless and until they are precleared.

And in those circumstances where the election has not yet been held and where the plaintiff makes a timely motion for an injunction, and if the seats have not

been precleared, as the district court admitted had been the case with some of the seats here, then the district court should grant an injunction at that stage.

QUESTION: Are there ever reasons for a district court not to enjoin an election if the office has not been precleared?

MR. FELDMAN: Well, if you're assuming -- assuming with the question that the plaintiff has made a timely motion, for instance I think --

QUESTION: Well, now, that was one -- equitable considerations, I take it, pertain?

MR. FELDMAN: Well, the only one I can think of is where -- and one of the cases, I don't remember which one, that this Court decided, the plaintiffs came in I think 2 days or 3 days before the election. A district court, I don't think under those circumstances, can be expected to be familiar with the situation and to enjoin an election there. In fact it reasonably couldn't even in that period of time come to a determination that there had been a violation of the Voting Rights Act.

QUESTION: All right.

MR. FELDMAN: But once the district court has come to the determination that there is a violation of the Voting Rights Act, then I think -- of section 5, that the seats haven't been precleared -- then I think that an

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injunction is the appropriate remedy.

QUESTION: And all of the reasons the district court gave, I think there were some five or six, were just improper as a matter of law?

MR. FELDMAN: I think so. I think they all -- I would say yes. The kinds of reasons they gave, that was the convenience of a particular date as the best time to have an election because it's likely to have most participation, well, for example, as to that factor these elections shouldn't have been held at all if the seats weren't precleared. And the question of what date is the right date to hold it doesn't seem to us to be important.

Another factor in this case the district court considered was the reliance interest of the candidates. But if you look at the history of these elections, they had been enjoined almost, they had been enjoined for a long, for quite a while under the section 2 case. And it's very hard to see how there would have been little -- there would have been much of any reliance interest.

Moreover, in the original order that the district court handed down concerning these elections, it said that the people would only be -- that the winning judges would only take office provisionally. And in fact it didn't even say they would be instated in office. It just permitted the elections. And so in those

circumstances, too, I think the reliance interest of the candidates would be weak.

And finally, as the Court pointed out in Hampton County, where there has been a violation of the Voting Rights Act, in fact the uncertainty about the elections could well cut directly the other way, which is it could keep people from qualifying, from entering qualifications for running for office, and doing other things that -- and it might therefore be most preferable to hold the elections -- it would be preferable not to hold the election until the seats have been precleared and it is clear that a legal -- a legally valid election is going to go forward.

QUESTION: Mr. Feldman, why does the Attorney General take the position that it's only the earlier approval that is invalid? I suppose the later approvals are nugatory too, aren't they, if the earlier one was -- I mean, let's assume that the one that was not precleared was going from three to four. What did they submit for after that? They submit clearance to go from four to five, and the Attorney General said you can go from four to five and you can go from five to six.

MR. FELDMAN: That's right.

QUESTION: But since there was never a four, or a valid four, it seems to me those later approvals are

invalid too. He never did approve going from four to five, because he had never approved four. Doesn't the whole, whole house come down? You just pull out one story like that and the rest hangs up there?

MR. FELDMAN: I think so. I think it defies gravity in that sense. When the Attorney General approves the addition of another seat, he is approving that, only that change in voting procedure, and that change is the addition of one seat to the district. Once he has approved the addition of that seat, the State may hold the election and may give it effect.

QUESTION: Doesn't he know then how many judges there are?

MR. FELDMAN: He does know how many there are. But if you look at the regulations, for instance, they specifically provide that a State when it makes its submissions must identify that all of its prior judgeships have been precleared and that -- and therefore he can reasonably assume that the prior ones already have been precleared when he makes a decision just that the addition of that one would not violate the Voting Rights Act.

QUESTION: Thank you, Mr. Feldman.

Mr. Pugh, we'll hear from you.

ORAL ARGUMENT OF ROBERT G. PUGH, JR.

ON BEHALF OF THE APPELLEES

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

In this case there is no question that Louisiana added additional judges because Louisiana needed additional judges for caseload management, just as every other State in the Union and just as the Federal system needs judges from time to time for caseload management. In addition in this case there is no question that Louisiana had no discriminatory intent in adding judges. Never been any claim that any of these judges were added to these districts because Louisiana intended to discriminate against anybody.

Further in this case, there is no question that the Justice Department 81 times precleared additional judgeships up through 1988. Every time Louisiana requested an additional judgeship it was granted. There was never any problem with it.

QUESTION: Well, but there are some times you didn't make the request.

MR. PUGH: Yes, sir. There were times when we did not make a request. Most of those times involved -- in those cases we didn't, and later in most of them there were additional judgeships which were precleared. The example set forth in the brief is in Caddo Parish, my home parish, where there were four judges that predated the

Voting Rights Act, there was a fifth judge added who was precleared, there was a sixth judge added who was not precleared. Subsequently we went back to them for seventh -- for having seven judges, no problem, eight judges --

QUESTION: Well, when you knew you hadn't precleared the sixth, though?

MR. PUGH: Well, I don't know that it was known, Your Honor. The record really isn't clear as to why they want it. Given the random nature through the districts and given the -- as has been found --

QUESTION: Well, didn't you have to certify when you went for the seventh that you had precleared all your prior changes?

MR. PUGH: The 1987 regulations provide for that, Your Honor. All of these were pre-1987 submissions. So what the three-judge court held on these situations is that when the Attorney General cleared a statute creating an ultimate number of judicial seats in a particular district, that preclearance constituted approval of all the seats necessary to reach the ultimate number of judicial positions in that district.

The case is very different from the McCain v. Lybrand case. There what was unprecleared was the 1966 total change in the form of government. In 1971 there were additional people added, and, too, and there were

changes in the residency districts. And that was precleared. And the question presented in the jurisdictional statement, in the brief on the merits by the appellants, and in the brief by the United States is did this subselentio preclear that change from at large, and the Court said no, it didn't.

But that situation is not presented here. We have added additional judgeships and those judges -- approval of those additional judgeships constituted approval of the earlier ones. That's the only logical, the way to look at it, as you pointed out, Justice Scalia. Otherwise, to take my example of Caddo Parish, we might be left with five judges rather than nine, and maybe not even that, because once the Attorney General has precleared having nine judges, but not the sixth judge, by their theory, if we go back to four judges is that a change? It's a mess with any other approach.

QUESTION: What is it -- I beg your pardon. What is it exactly that you ask for when you ask for clearance? Do you say in effect here is the amended statute, please preclear the scheme which that statute will provide if approved by you? Or, conversely, do you say we want to add one more judgeship?

MR. PUGH: There are several preclearance submission letters in the record, Your Honor. As I

recall, two of them say here is an act, and the others say that we're asking for a preclearance in an increase in judges.

QUESTION: Just mentioning the number that you want to add?

MR. PUGH: Yes, sir. And the acts included. And the three-judge court found as a fact, which of course for this Court to overrule it would have to hold as clearly erroneous, that the nature of the Louisiana system where it is amended and reenacted, and the nature of the letters submitted, and the response by the Justice Department, all of them showed that the Justice Department did in fact preclear this by -- by preclearing the later number. So, as I said, most of these involve that situation.

I believe it was Justice White who asked how many judges are affected. There are 25 seats in 18 of our 40 judicial districts where there was a later judgeship addition precleared. So that if this Court were to hold that none of these, that the three-judge court erred, that would put those 25 judges in danger, serious danger.

QUESTION: And you have -- those aren't included in the -- those aren't included in the -- your action here in the District of Columbia?

MR. PUGH: No, sir. Because the three-judge

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court held that those were precleared, we didn't have to bring them up there. Additionally, they also were complaining about the first -- about some appellate judges, including the entire First Circuit, and that's 12 judges, plus an additional four judges, all of which the three-judge court held were precleared.

QUESTION: Why haven't you gone back to the -- now that the Attorney -- you know that the Attorney General has a different view than you do, why haven't you asked that these prior uncleared positions be cleared?

MR. PUGH: Well, we have now, Your Honor, and he said he won't.

QUESTION: Oh, I see.

MR. PUGH: And let me move into that, if I may give you one more statistic just so you'll know what's involved here.

QUESTION: So does he say what the consequence is to his refusal?

MR. PUGH: He says that they are not precleared and therefore they can't, the election is improper and those judgeships --

QUESTION: I would have thought then you automatically right and there would have added those judges to your action in the district court.

MR. PUGH: Well, what happened, Your Honor, is

we went back to the Attorney General and asked him for preclearance. Once it was found out these weren't precleared --

QUESTION: Yes.

MR. PUGH: -- after this action was brought, we asked him for preclearance and it wasn't granted. And then the three-judge court deemed that these judges were precleared, so we haven't asked that the D.C. court preclear them because the three-judge court has precleared them, and that question is before this Court. Obviously if this Court holds that the three-judge court erred and those aren't precleared, I am sure the next day there will be an amendment filed.

QUESTION: Yes.

MR. PUGH: But as of this point we didn't ask them because it has been granted.

But you asked why the Attorney General disapproved these, and the problem -- and that's really what's the issue of this case, and Mr. McDuff said it. What matters is not -- and I'll quote him from his oral argument a few minutes ago -- "what matters is not the number, what matters is whether we're expanding a discriminatory system. What the Attorney General is doing is, he said in his letters time and again we don't object to the number per se, of judges per se. We don't object

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that you need additional judges. They don't want us to continue electing judges under our current system. But that's not what section 5 was for. That's not what Congress held it was --

QUESTION: What do you mean when you say "under our current system," Mr. Pugh?

MR. PUGH: Well, Yes, sir. What I mean is that Louisiana has since 1946 elected judges at large by designated post. That predates the Voting Rights Act. Louisiana in 1976 put in -- and that was, also we adopted it in the Louisiana constitution, which was precleared.

In 1976 Louisiana put in a majority vote requirement which was specifically precleared by the Justice Department. That is our system of electing judges. And 81 times that system was approved, as we tried to preclear additional judges. Now, though, they won't let us have additional judges --

QUESTION: Is there some evidence in the record that indicates that's the reason that the Attorney General declined to preclear?

MR. PUGH: Your Honor, other than Mr. McDuff's statement a few minutes ago, I will cite to you the 9/23/88 Justice Department letter, it is refused because we are seeking to add elective judgeship positions under an election system found to violate section 2. I'll cite

to you the 9/17/90 letter, the State has failed to adopt a racially fair election system.

QUESTION: That was before LULAC was decided.

MR. PUGH: Well, they have said the same thing since LULAC, Your Honor.

QUESTION: Oh, really?

MR. PUGH: In fact if you look at the last footnote in their brief, which is the one that they say that the results test is under section 2(b), not 2(a), they also say that they don't intend to follow what this Court does in LULAC and Chisom, they say because it's a separate section. It's also in their 10/90 letter, and it's in their 11 -- November 20 letter. All in the record.

QUESTION: These are in the record?

MR. PUGH: Yes, sir. Time and time again. They don't -- they're trying to make us change what we have and what has been precleared and what preexists 1965.

QUESTION: Of course if that was wrong, your remedy was in the District of Columbia, not by ignoring the disapproval.

MR. PUGH: I don't believe so, Your Honor. I think that the Justice Department -- that Congress enacted section 5 to get at changes from the present system. That's what this Court has held repeatedly. And if the

Justice Department is not doing that, if the Justice Department is using it for an improper purpose, that doesn't come up in Washington. The Washington proceeding is a de novo proceeding, whether or not there is a purpose or intent to discriminate. No review absolutely whatsoever of what the Justice, the merits of the Justice Department's procedure and whether their objection was proper. It's a de novo proceeding. I think this Court at this time can review it.

Georgia v. United States, this Court reviewed the Attorney General's regulations for preclearances. A majority of the Court said they are fine, a minority of the Court said they are not. But all of you agreed you could review his regulations.

QUESTION: Where did that come from?

MR. PUGH: That was --

QUESTION: How did that get here?

MR. PUGH: That was a three-judge court action in Georgia, Your Honor. It was not a D.C. court action.

Additionally -- and I think Justice White wrote in his dissent in that case, is he said that he didn't agree with the regulations. He said that the Justice Department does not have uncontrolled discretion in this act. That if the Justice Department said we're going to refuse to preclear additional judgeships because we're too

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busy, if they say we're going to only approve 1 out of 10, if they say we're only going, that we're going to disapprove them all because it's a governor of another political persuasion, that that's improper, and this Court can review it.

And I think it's just as improper for them to use section 5 for a purpose that's not in section 5. And I think this Court can review that. No doubt about it. This is a three-judge court appeal under Fuzzari v. Steinberg. The whole matter comes up before this Court. So I think they can.

Mr. McDuff also talked about the Washington proceeding, that the one reason for going ahead and throwing out these elections is it may take 2 or 3 years. Louisiana has already filed a proceeding in Washington for preclearance. The issue has been joined by the Justice Department. Last Wednesday afternoon Mr. McDuff filed an intervention to be added as a defendant, and last Thursday, 4 days ago, there was a status conference in that Washington proceeding. And at that status conference Louisiana announced it would be filing a motion for summary judgment on or before June 7. It's not going to take years, or if it does it's not going to be because of us.

The basis for the summary judgment proceeding is

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going to be that under the Lockhart case and under the Beer case there is no retrogressive change. This Court held in Lockhart that where you -- keeping the system the same, there can be no retrogression. And what's -- all we did is add an additional judge. We didn't change the method that he was elected. We didn't suddenly do some other type of system.

The other problem with the Justice Department's approach in attacking our election system is they say fine, Louisiana, we don't like your system. And again I think that's improper under section 5. But then what do they tell us to do? Go adopt another system. And section 5 wasn't put there to make you adopt something new, and particularly not the sorts of things that it asked us to adopt, the same sorts of things that it wants in the section 2 proceeding.

QUESTION: What did the -- what did the district court in this case -- how did it decide that these positions at issue had actually been precleared?

MR. PUGH: The -- they looked at the submission letters, they looked at the responses by the Justice Department, they looked at Louisiana law in terms of amending and reenacting statutes, and frankly --

QUESTION: Did they suggest that the Justice Department's reasons for refusing to preclear were invalid

or insufficient, or what?

MR. PUGH: No, sir. Because frankly at that point, that was right after -- I think it needs to be put in its time. They did say in a footnote that what the Justice Department is attacking is the system, they are not attacking the number of judges. So they understood that was the question. They did not say whether that was improper. Frankly, at the time -- right after, or right before that decision the Justice Department said we've got LULAC and we're still studying it. We're not really sure what it means and what it's implication is.

QUESTION: Well, what business did this particular court have in -- did they say these judges, they said these judges actually had been precleared, right?

MR. PUGH: Yes, sir.

QUESTION: They had to say that?

MR. PUGH: Yes, sir.

QUESTION: They couldn't say as an original matter that we are preclearing them?

MR. PUGH: That's right. They said they had -- that they had been precleared. I think they could have said --

QUESTION: And what, on what grounds did they say that?

MR. PUGH: Well, Your Honor, they looked -- several. One is that they looked at the -- we had examples of submission letters and we had examples of the Justice Department responses, and we also, they had before them those, as well as the nature of the Louisiana acts about amending and reenacting statutes.

QUESTION: But isn't that kind of funny to say the Justice Department had actually precleared them when the Justice Department now says, now turns down, refuses to preclear these very positions?

MR. PUGH: They said that the approval of a later position -- of the later positions and the later increase in the number of judges constituted preclearance, Your Honor.

QUESTION: As a matter of law?

MR. PUGH: Well, actually they said a matter of fact based on the, both the nature of Louisiana submission letters, the nature of the Justice Department responses, and they also based it on a hearing, Your Honor. And there again at that hearing the Justice Department said they don't care about the numbers. No matter what information you show us, we're not going to let you add any more judges.

QUESTION: Those letters were not about these. The letters that are in the record were about other

judges. Am I right?

MR. PUGH: Well, they were --

QUESTION: Am I right?

MR. PUGH: Well, they were about some of these, Your Honor. Not every letter was put in the record.

QUESTION: Well, let me see one about one of these.

MR. PUGH: Yes, sir, Your Honor.

QUESTION: Is it in the appendix?

MR. PUGH: Yes, sir, it's in the --

QUESTION: Okay, I'll find it.

MR. PUGH: Oh, I'm sorry. Excuse me. They're in the joint appendix, Your Honor.

QUESTION: I'll find it.

MR. PUGH: Shortly after page 100.

QUESTION: I'll find it.

MR. PUGH: And again, what they said is they want us to adopt limited voting or cumulative voting, or something like that and --

QUESTION: Mr. Pugh, when we, when an agency does something for a wrong reason we normally -- let's say denies an approval for an incorrect reason -- we normally don't give the approval here, but we send it back to the agency. I mean, maybe they have done it for the wrong reason, but there may be a right reason which they haven't

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considered because they have used the wrong one. So simply because the Justice Department used the wrong reason in disapproving, I'm not sure that gives you the remedy of simply deeming that they approved it. They disapproved it for the wrong reason, but don't they still have a shot at disapproving it?

MR. PUGH: Well, I think, in the nature of this statute I think that's questionable, Your Honor, because this is supposed to be a short, 60-day approval process. And for them to say we're going to rewrite the statute and make it say something it doesn't mean, wait until it goes up to the U.S. Supreme Court and come back down, and meanwhile you can't have any election of judges, I don't -- I think that goes beyond the intent of the, what's supposed to be a quick procedure under section 5.

QUESTION: Well, it may well be that the initial election can proceed, but your claim is that having used the wrong reason, the Justice Department is disempowered forever from passing upon the validity of the change.

MR. PUGH: Well, Your Honor, additionally given that they have conceded they have no problem with the addition of the number, that all that they don't like is the fact we elect them in Louisiana at large by designated post, I think they have conceded -- now I guess one could argue that maybe they could try to show some

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discriminatory intent, but I think that's something that they could have done before. We submitted them and then we resubmitted them, and then on the basis of LULAC we asked that they re-reconsider them. And they said each time no, and they said it over and over for the same reason.

The Justice Department doesn't have any other reason. There's no intent issue here. It has never been raised. No problem with having the additional judges. It's just that they don't like our system. And, as I say, they suggest that we go to limited voting, but most of the examples here it's one judgeship within a district that was not approved. And how can you have limited voting for one judgeship? The whole notion is that you -- of limited voting is there are eight at issue and you can only vote for two or three of them. Where there is one there is no way to limit, to have limited voting.

There is no way to have cumulative voting, because there is nothing to cumulate. And even where there are two or three, what would that do to us? It would give us a system where some of the judges or -- reelect all the judges -- excuse me, elect some of the judges all the time, and the rest of the judges part of the time, in that you have the old system for all the existing judges, but for any new judges you've got

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something like limited voting. So you've got to know that for positions one through five you can check each of them, but positions six through eight you may not be able to.

QUESTION: What do you mean by limited voting?

MR. PUGH: Well, what -- the Justice Department suggested that as a remedy. What limited voting is, Your Honor, is that let's say that -- and they're suggesting the section 2 context also. Let's say that there are eight seats at issue. If you can only vote for two of those seats or three of those seats, then statistically speaking if the minority population is a particular percentage then they are guaranteed proportional, you know, to have that number elected. And cumulative voting, if you have eight seats, then they could cast all eight votes for one judge, or four votes for two judges, or whatever. It's a way to get proportional representation.

QUESTION: Well, by limited voting you don't mean subdistricting?

MR. PUGH: No, ma'am. That's another suggestion they had, but I don't know how you would subdistrict one -- say you are going to elect all of them at large except this one that you subdistrict. And of course, all these are anathema to the American system. There is nothing anywhere suggesting, there are 200 -- it came up in this case in the section 2 aspects of the Clark case, there are

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200 jurisdictions out of 86,000 in this country that use limited voting. And if Congress wanted to impose that on the judiciary in section 2, section 5, or some other section, then they would have said so. They would have discussed that.

That's part of the problem with this whole business. Obviously everybody is uncomfortable with subdistricting judges because it brings one-man one-vote in, which Thornburg v. Gingles is a one-man one-vote test. No doubt about it. And so then they come up with these other remedies, limited voting, cumulative voting. But this, Congress surely would have thought about putting something so different that we don't even have much in America. They do have it in Japan, and I think they have it partially in Spain.

If I may turn to, for a minute to the question about the elections, whether or not these elections ought to be overturned. Let's say, which we hope you don't do, this Court determines that we erred, that there was error below in terms of preclearing these positions. This Court said time and time again that it will allow a jurisdiction to go to Washington to seek approval. It said in Perkins v. Matthews, it said it in Berry v. Doles, it said it in Hampton County.

Most recently -- really what this order is

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modeled on in this case, the 150 days, the order says that we go to Washington for approval, and if approval isn't obtained up in the Washington district court and appeals therefrom, that there's 150 days after that action is over with these judges are kicked out of office. That's the exact same order that was done in the Brooks case. And that order came up to this Court also, just as this Court -- this Court did summarily affirm Brooks in its entirety, which included that order which was specifically complained of by the plaintiffs there.

So we think that it would be, that the elections ought to stand. We think that, as we have said, that some of these judgeships have been precleared, and the ones that have not been precleared we ought to be going to Washington for those, and that up there -- we believe they are going to be precleared based on the Lockhart case, that there is no doubt about it. This Court has said that what we're concerned about in section 5 is whether there's a retrogressive change. And when you've got, as in Caddo Parish, you add that sixth judge, he is elected the same way as the other five, that can't be a retrogressive change. It's a continuation of the system.

QUESTION: Mr. Pugh, I hate to take you back a little bit, but I'm not clear what kind of mistakes by the Justice Department you would acknowledge do not allow you

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to challenge their refusal to preclear in -- back in the three-judge court. What kind of mistakes can they make?

MR. PUGH: What can they make?

QUESTION: Yes, what kind of mistake can they make which you would acknowledge can only be challenged in the District of Columbia, and not in the proceeding back home?

MR. PUGH: I think if the Justice Department says mistakenly that we intended discrimination when we did not, that that's a de novo matter that goes to Washington. I think --

QUESTION: Only factual -- only factual errors by the Justice Department?

MR. PUGH: I think if the Justice Department makes a decision erroneously on the facts in terms of effects it would make the same, Your Honor. What -- the problem with their argument here is where it's manifestly beyond the reach of the statute that that's something that -- that's what this Court's --

QUESTION: Well, I understand that, but every time an agency makes a mistake of law it's acting ultra vires.(*) I mean, that's the definition of making a mistake of law. So your position is that any mistake of law the Justice Department makes in the preclearance context can be reviewed back in the locality and doesn't

have to be challenged in the District of Columbia proceeding?

MR. PUGH: I don't -- I wouldn't make it that broad. I think that if it's a mistake -- there are minor mistakes and there are major mistakes. And I think that where section 5 so clearly states that it is to -- where there are changes from the present system that are retrogressive, and yet the Justice Department uses it to attack the present system, that that's so manifestly beyond the scope of section 5 that that can be reviewed. It's, as Justice White said, if they said we're going to preclear 1 out of 10.

QUESTION: That really would upset Congress' scheme, though, to challenge the judicial review of the Attorney General into the District of Columbia, wouldn't it, if you adopted a rule like that that said, you know, for gross mistakes a three judge district court could correct the Attorney General?

MR. PUGH: Well, Your Honor, of course you adjoined that dissent about the example that I gave. I guess I would state that, number one.

Number two, again, the District of Columbia proceeding is not a review of the Attorney General proceeding. You have two avenues. You can ask the Attorney General for administrative preclearance, or you

can go to the district court. But if you go here to the Attorney General, you can still go to the district court in the District of Columbia, but as a de novo proceeding. It doesn't review what he did at all.

QUESTION: Well, but don't you think Congress intended, albeit by a de novo proceeding rather than by review of the Attorney General's act, to channel judicial determination of preclearances in the District of Columbia?

MR. PUGH: Yes, sir, but I don't think Congress envisioned that the Justice Department was going to ignore this Court's decisions about what section 5 involves. And I think had Congress envisioned that they would say it could come up here. It cannot come up in Washington. It's a de novo consideration.

So there's no way to review what they did. And they can continue to hold us hostage. I mean, let's assume we win in Washington, these judgeships are precleared. Next year we want to add another judge. Uh-huh. Your system, we don't like it, we're not going to preclear it. We got to go back to Washington. Now maybe we'll get a faster summary judgment in Washington. There is that possibility.

QUESTION: I would think you probably would.

MR. PUGH: But, you know, they have made the

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same argument and they lost in the D.C. court on the -- in the Mississippi case that, you know, wasn't a retrogressive change. And yet they're continuing to make it. I mean, this Court -- I just think this Court's decisions in the section 5 is absolutely clear, and they are doing it. There's -- I don't believe there is any judicial review, in fact there isn't, of their decision in Washington. I think if they're going to be held accountable at all, then they are going to have to be held accountable by this Court reviewing this sort of decision.

Now, again, you don't have to -- maybe I shouldn't say this, but you don't have to take that step here in that the three-judge court held as a matter of fact, which you've got to find clearly erroneous to overturn, that judgeships were precleared. You don't have to do that, but frankly I think you ought to do that. I think --

QUESTION: I wonder if that really was a factual determination. I agree that the district court said it was, but what they said in fact was that since you precleared step B, you impliedly precleared step A. Isn't that what it amounted to?

MR. PUGH: Well, that's -- yes, sir.

QUESTION: Well, if -- that really isn't a question of fact. It's not as if the State was contending

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that we got a letter from the Attorney General saying yes, it's precleared, and the Attorney General says no, I never sent the letter. This is basically a legal question.

MR. PUGH: Well, Your Honor, in McCain v. Lybrand this Court held that the district court was clearly erroneous in determining that preclearance of the 71 act precleared the 1966 act. That was the standard y'all applied in the McCain case. And so I think if it's -- if that's the standard you applied there as to review of the decision you would be applying the same standard here.

And again, if you, their opinion talks about, you know, the facts that they found based on what they saw. So I believe it would be proper.

Additionally, the -- another matter that was raised is whether or not the, de facto these people could continue to serve. Judge Politz wrote an opinion in Chisom v. Roemer where there was an attempt to enjoin the supreme court justice election, and there he pointed out that our research reflects no case where the Louisiana Supreme Court's applied to a judge or justice a question of what do you do when there's a vacancy and that those are uncharted areas.

Finally, if I may, I am counsel of record in, also in the section 2 case. I want to respond to one

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thing you said, Justice Scalia, about participate in political processes, whether or not that expanded beyond elect legislatives of the choice, and if you look again --

QUESTION: You're now addressing yourself to a question raised in an earlier case?

MR. PUGH: Yes, sir. Well, I won't if that -- I'm sorry.

QUESTION: I think that's probably not proper, because you opponent doesn't have any opportunity to respond.

MR. PUGH: Yes, sir. Well thank -- thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pugh.

The case is submitted.

(Whereupon, at 1:57 p.m., the case in the above-entitled matter was submitted.)

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Janice G. Clark, et al., Appellants -v- Charles "Buddy" Roemer, Governor of Louisiani, et al.

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

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