

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: VICKY M. LOPEZ, ET AL., Appellants v. MONTEREY
COUNTY, CALIFORNIA, ET AL.

CASE NO: 95-1201

PLACE: Washington, D.C.

DATE: Tuesday, October 8, 1996

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IN THE SUPREME COURT OF THE UNITED STATES

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VICKY M. LOPEZ, ET AL., :
Appellants :
v. : No. 95-1201
MONTEREY COUNTY, CALIFORNIA, :
ET AL. :
- - - - -X

Washington, D.C.
Tuesday, October 8, 1996

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:59 a.m.

APPEARANCES:

JOAQUIN G. AVILA, ESQ., Milpitas, California; on behalf of
the Appellants.

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

DANIEL G. STONE, ESQ., Deputy Attorney General of
California, Sacramento, California; on behalf of the
Appellees.

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

2 (10:59 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-1201, Vicky Lopez v. Monterey County.

5 Mr. Avila, you may proceed whenever you're -- am
6 I pronouncing your name correctly?

7 MR. AVILA: Yes, Mr. Chief Justice.

8 CHIEF JUSTICE REHNQUIST: Thank you.

9 ORAL ARGUMENT OF JOAQUIN G. AVILA

10 ON BEHALF OF THE APPELLANTS

11 MR. AVILA: Mr. Chief Justice, may it please the
12 Court:

13 The issue before you is whether a district court
14 having enjoined an unprecleared plan can then order that
15 unprecleared plan into effect.

16 The resolution of this issue is controlled by
17 Clark v. Roemer. There, the Court unanimously held that
18 an election based upon unprecleared election changes must
19 be enjoined. Here, the district court ignored Clark,
20 suspended the operation of section 5, and ordered the
21 implementation of the unprecleared plan.

22 QUESTION: Do we know that section 5 necessarily
23 applies here?

24 MR. AVILA: Yes, it does apply. There can be no
25 serious dispute that section 5 applies to judicial

1 elections in Monterey County.

2 QUESTION: But how about the fact this is
3 basically a State statute, and Monterey, the State of
4 California isn't covered?

5 MR. AVILA: We are dealing with county
6 ordinances which have consolidated judicial districts
7 starting back in 1969, the date after Monterey County was
8 made subject to the section 5 preclearance provisions.

9 The applicable State statutes refer and
10 incorporate the consolidations that occurred at the county
11 level, so we had a series of county ordinances -- in fact,
12 a total of about 11 -- that started out with two municipal
13 court districts and seven justice of the peace court
14 districts on November 1st of 1968, and ultimately it
15 winded up with a countywide election system in 1983, and
16 so --

17 QUESTION: But I guess you stipulated with the
18 county that it is impossible to prepare an election plan
19 that doesn't conflict with State law and still comply with
20 the Voting Rights Act.

21 MR. AVILA: That is correct, Your Honor.

22 QUESTION: And if that's the case, then how do
23 you avoid challenging California State law?

24 MR. AVILA: Well, at this particular point,
25 there are still --

1 QUESTION: And how do you do that under section
2 5? I mean, it's a very confusing case.

3 MR. AVILA: Yes.

4 QUESTION: And I really would appreciate your
5 addressing this inquiry that the Chief Justice also
6 inquired about.

7 MR. AVILA: Although we are dealing with State
8 statute, we are also dealing with county ordinances and a
9 consolidations of judicial districts that occurred over a
10 period of time. Section 5 requires the county ordinances
11 as well as the State statutes that specifically refer to
12 events or consolidations of the judicial districts in
13 Monterey County, and these State statutes specifically
14 referred to Monterey County.

15 QUESTION: Well, but if it is the State statute
16 that is the operative law, I think it's just not a case
17 where the Voting Rights Act applied.

18 Surely you wouldn't make the argument if it was
19 the other way around, if the county ordinance mentioned by
20 reference some State law, and then applied -- applied the
21 same rule as a matter of county law. You wouldn't say
22 that the fact that it referred to State law lets the
23 county off the hook.

24 MR. AVILA: That's correct, Your Honor, but --

25 QUESTION: So I don't know why it works the

1 other way here. This is State law we're talking about.
2 The State isn't a covered unit.

3 MR. AVILA: The reason why it doesn't work is
4 because here, Monterey County has the authority to
5 consolidate judicial districts, and it exercised that
6 authority under State law, and so as a result of those
7 consolidations, there were changes which had to be
8 precleared under section 5 of the Voting Rights Act.

9 Even though you may have had a State statute
10 that implicated those consolidations, it nevertheless
11 specifically referred to the consolidations in Monterey
12 County, and in this particular instance, we have a series
13 of county ordinances which the district court back in 1993
14 found had not been precleared and could not be
15 implemented, and until those particular county ordinances
16 are approved, the State statutes, which are dependent and
17 interrelated with those county ordinances, can't come into
18 effect.

19 QUESTION: Mr. --

20 QUESTION: Did State law require Monterey County
21 to consolidate?

22 MR. AVILA: It could, but it didn't in this
23 particular case, and when we look at, say for example --

24 QUESTION: Well, I mean it either does or it
25 doesn't. I'm just not clear whether State law requires

1 consolidation of these local judicial offices.

2 MR. AVILA: The State laws that are under review
3 in this particular case did not. The 1983 State statute
4 was contingent upon the consolidations of three judicial
5 districts in Monterey County, and so it specifically
6 referred to this event that was going to occur in
7 Monterey --

8 QUESTION: So you take the position that the
9 county, Monterey County was free to consolidate or not.

10 MR. AVILA: That is --

11 QUESTION: And what is challenged here was
12 Monterey County's decision to consolidate.

13 MR. AVILA: That is correct.

14 QUESTION: Which was not mandated, according to
15 you, by State law.

16 MR. AVILA: Under the State laws that are under
17 review, are not -- they were not mandated.

18 QUESTION: And there has never been a
19 determination that there is a substantive violation of
20 section 5 of the Voting Rights Act?

21 MR. AVILA: That is correct.

22 Now, the only -- this, of course, is just not
23 merely a failure to preclear. We also have a situation
24 here where, after the district court found these
25 ordinances subject to section 5 of the Voting Rights Act,

1 Monterey County then filed a section 5 judicial
2 declaratory judgment action in Washington, D.C., and
3 subsequent to that filing, we intervened, and as a result
4 of that intervention, as a result of discussion with the
5 Department of Justice, Monterey County decided that it
6 could not meet its burden of demonstrating that several of
7 these county ordinances did not have a retrogressive
8 effect.

9 QUESTION: Well, it withdrew that suit, I guess.

10 MR. AVILA: It did.

11 QUESTION: It dropped the suit, and so that
12 leaves us in a posture, as of now, there's been no finding
13 of a substantive violation of section 5.

14 MR. AVILA: That is correct.

15 QUESTION: Mr. Avila, you're not making an
16 alternative argument which I would have thought you would
17 have made, and I'm beginning to think that I'm missing
18 something or you would have made it, and the argument
19 would be this.

20 Section 5 refers to a jurisdiction which enacts,
21 or which, I think, implements a plan which has not been
22 precleared, so that even if the county took no independent
23 action, and even if the county were doing nothing but
24 administering State law, wouldn't the second clause of
25 section 5 pick it up, so that it would require

1 preclearment even though it was the result of State law
2 and the State is not, as an entire State, a covered
3 jurisdiction?

4 Wouldn't that be enough to create the section 5
5 violation?

6 MR. AVILA: Yes, it would, Your Honor. If you
7 have a State statute that enables the county to take a
8 particular course of action --

9 QUESTION: Well, I'm not talking about enabling
10 it to take a course of action. I'm saying, if you had a
11 state statute that required it to take a course of action,
12 even though the State wasn't covered, and even though the
13 county alone was a covered jurisdiction, by following that
14 State law, the second clause of section 5 would require
15 preclearance, wouldn't it?

16 MR. AVILA: That's correct, it would.

17 QUESTION: But you say that the State law
18 authorized but didn't require consolidation, is that
19 right?

20 MR. AVILA: The 1983 State statute was in
21 essence based on a contingency of consolidation of three
22 judicial districts which the county board of supervisors
23 at that point authorized, and duly adopted an ordinance
24 consolidating these three judicial districts, but --

25 QUESTION: Was the county free, after the

1 enactment of the State statute and after consolidating, to
2 go back to the preconsolidation regime?

3 MR. AVILA: It was not free under State law to
4 go back to the status quo ante, and the reason why is
5 because the justice of the peace courts were eliminated in
6 1993 under a State proposition, and at the time of 1968,
7 there were two municipal court districts and seven justice
8 of the court -- justice of the peace court districts, and
9 to go back to that procedure was deemed to be unfeasible
10 by the district court, and for that reason the district
11 court found it compelling to issue an order to require an
12 election based on an interim plan for the June 1995
13 election.

14 QUESTION: And it was also true that there was a
15 State statute that required countywide courts, isn't that
16 correct?

17 MR. AVILA: I'm sorry, Your Honor.

18 QUESTION: Isn't there also a statute, a State
19 statute that requires that the courts be countywide, or am
20 I wrong about that?

21 MR. AVILA: Under the State statutes and the
22 constitution, State constitution, you could have a
23 countywide municipal court district.

24 Along -- in addition to that, you could also
25 have municipal court districts, several municipal court

1 districts within the county as long as they met certain
2 criteria, as long as they didn't divide municipalities, as
3 long as they contained over 40,000 --

4 QUESTION: Are there such counties in California
5 where you have -- unlike this county that now has just one
6 district, are there counties in California that have
7 multiple judicial districts?

8 MR. AVILA: There are some counties in
9 California that do have multiple court judicial districts.
10 For example, Los Angeles County, Alameda County, San Diego
11 County. Many of the large urban areas have multiple
12 municipal court districts, and Monterey County, back in
13 1968, did in fact have two --

14 QUESTION: So the State law that we're dealing
15 with that ratified or approved the consolidations is not
16 part of a Statewide plan. It's just peculiar to this one
17 covered county, is that not right?

18 I mean, that law that deals with the
19 consolidation is not like the constitutional provisions
20 that are also in this picture.

21 MR. AVILA: That's correct.

22 QUESTION: But to the extent that California
23 approved what had been done by the county, that's peculiar
24 to this one covered county.

25 MR. AVILA: The State statute specifically

1 refers to Monterey County. It auth -- the State
2 constitutional provision authorizes the legislature to
3 create countywide municipal court districts, to create
4 multiple municipal court districts if so desired.

5 In fact, in some of these counties you have --
6 in San Diego County, for example, you have a municipal
7 court district that in fact divides municipal boundaries,
8 so there are various variations that are permitted under
9 State law.

10 QUESTION: As I take it, what this case presents
11 to us is not the question so much what the court should
12 have done, or might have done, but the question of whether
13 what it did do was wrong, and you're saying what it did do
14 was per se wrong.

15 MR. AVILA: Yes, Your Honor.

16 QUESTION: It was clear error.

17 MR. AVILA: Clear error.

18 QUESTION: Yes, and that's the only issue before
19 us, I take it. If we agree with you, back it goes, and
20 people will have to figure out what to do next.

21 MR. AVILA: That's precisely our point. If the
22 Court reverses the district court refusal to enjoin its
23 unprecleared election change, then on remand, the district
24 court would then be required to conduct an evidentiary
25 hearing to determine what alternative should be

1 implemented, because it can't go back to the --

2 QUESTION: Well, it's possible that the only
3 thing before the court at the time it acted was the
4 allegation that no preclearance had been obtained, and
5 perhaps the only thing the court could do was just say,
6 that's right, get it precleared.

7 MR. AVILA: Yes. That was one --

8 QUESTION: Nothing else.

9 MR. AVILA: That -- no.

10 QUESTION: Nothing else.

11 MR. AVILA: There were other alternatives that
12 the district court could have explored.

13 QUESTION: Well, I'm not sure there are. Like
14 what?

15 MR. AVILA: Well --

16 QUESTION: I mean, at that stage, with no
17 substantive violation of section 5, what more can the
18 court do except say, okay, get preclearance?

19 MR. AVILA: Well, for one thing the district
20 court could have continued to extend the terms in order to
21 permit the State --

22 QUESTION: Well, even that isn't so clear, is
23 it?

24 MR. AVILA: Well, in this particular case the
25 district court did -- after the issuance of this Court's

1 stay did extend the terms until further order of the
2 district court and further order of this Court.

3 QUESTION: Are you actually disagreeing? I
4 thought your position is, they have to preclear, they
5 didn't, and under Clark, what a district court is supposed
6 to when they don't preclear is say, hold everything.
7 Nothing happens. No election, no nothing until you go and
8 preclear. Am I right?

9 MR. AVILA: Ordinarily that would be correct.

10 QUESTION: And isn't that what you want to
11 happen here?

12 MR. AVILA: Yes.

13 QUESTION: And you're saying he didn't do that,
14 but under Clark, he should have done it.

15 MR. AVILA: Yes.

16 QUESTION: You're -- but you have to add one
17 fact to it, extend the terms of judges elected under a
18 plan that the court believes may be unconstitutional. I
19 mean, the court was concerned about the constitutionality
20 of the plan under which the judges currently sitting were
21 elected, wasn't it?

22 MR. AVILA: Yes, it was, Your Honor.

23 QUESTION: So that -- that's quite a significant
24 factor as to whether a realistic option is to let those
25 terms continue.

1 MR. AVILA: Well, there was ample opportunity
2 that was provided to the district court in order to
3 resolve and address that question.

4 QUESTION: But your case, as I understand it,
5 does not depend upon our so assuming, because all you
6 want, in theory, and all -- as I understand it, all that
7 it would take for us to resolve this case, and all that it
8 would have taken for the district court to resolve the
9 case was to order, just as Justice Breyer suggested a
10 moment ago, no election under this plan.

11 What happens next may be a very serious State
12 problem, but that's not what you require the district
13 court to get into. All you are asking from the district
14 court is, enjoin the election. Enjoin the application of
15 an unprecleared plan, period. Isn't that correct?

16 MR. AVILA: That is --

17 QUESTION: And that's all you want us to say.

18 MR. AVILA: At this point, yes, it is, Your
19 Honor.

20 The reason why at some point -- maybe not at
21 this particular juncture, but the reason why we're here is
22 because there hasn't been preclearance since 1969, and the
23 State and the county have not come forward with a proposed
24 solution since 1993.

25 QUESTION: But would you not agree that your

1 position would be different if, instead of the district
2 judge -- instead of saying, well, I think there may be a
3 violation of equal protection under Miller and so forth,
4 if the judge had held a hearing and found that the plan in
5 effect was unconstitutional, then we'd have a different
6 case, wouldn't we?

7 MR. AVILA: That's correct, and I --

8 QUESTION: Of course, he did not do that, but
9 they just sort of assumed it might be.

10 MR. AVILA: And at a minimum we wanted to have
11 an evidentiary hearing so that we could present various
12 alternatives and the district court could then determine
13 whether in fact the 1994 was unconstitutional, but that's
14 not the issue here.

15 QUESTION: Then why didn't you bring a complaint
16 saying it's unconstitutional?

17 I mean, why -- you said you would like to have
18 had a hearing, but as I understand it, and I may be wrong
19 on this, you had no pleading before the court claiming
20 that the preceding plan was in fact a violation either of
21 section 2 or of the Fourteenth Amendment.

22 MR. AVILA: I think it's very important to point
23 out that the plan that we're talking about is the 1994
24 precleared plan, which was a proposed plan that was
25 submitted by the appellants and the county to try to

1 resolve this litigation.

2 QUESTION: Yes.

3 MR. AVILA: And it is that plan that the
4 district court felt that after this Court's decision in
5 Miller raised constitutional concerns.

6 QUESTION: Well, that's right, but that plan was
7 limited in its temporal scope --

8 MR. AVILA: That's right.

9 QUESTION: -- as I recall.

10 MR. AVILA: That's correct.

11 QUESTION: So once again, the only thing that
12 the court had before it as a matter of pleading or
13 complaint was a claim that in the absence of that interim
14 precleared plan there was no precleared plan, and
15 therefore no election should be held, isn't that correct?

16 MR. AVILA: That's correct, Your Honor.

17 QUESTION: Yes.

18 QUESTION: Do you know in your study of this --
19 it seems to me over the last 30 or 40 years it probably
20 has come up before that some covered district had in place
21 a plan that arguably is unconstitutional.

22 Then, they changed it, and the change has to be
23 precleared, but under Clark, you just keep the status quo
24 until they preclear it, even if that status quo is
25 arguably unconstitutional.

1 MR. AVILA: That's correct.

2 QUESTION: Has that situation ever come up
3 before, because that would be a relevant precedent.

4 MR. AVILA: Well, the typical procedure is to go
5 back to the status quo, and you cannot challenge --

6 QUESTION: Yes, even if that status quo --

7 MR. AVILA: Yes, you can --

8 QUESTION: You don't go back to it. You just
9 say, that's it. Everything else is frozen.

10 Now, is there instances where you can think of
11 in your experience or research where maybe that status quo
12 was arguably unconstitutional, but still we want the D.C.
13 Circuit deciding these things, not every district court in
14 the country.

15 MR. AVILA: Well, in the -- the 10-year
16 litigation that occurred in the Conner v. Johnson, Connor
17 v. Waller, which started off as a one-person-one-vote
18 violation, which there was established, in fact, a
19 violation, and subsequent court proceedings dealt with the
20 remedial issues, and that would be the precedent that I
21 would cite.

22 I would like to at this time reserve my time for
23 rebuttal.

24 QUESTION: Very well, Mr. Avila.

25 Mr. Jenkins, we'll hear from you.

1 that this isn't ORAL ARGUMENT OF ALAN JENKINS
2 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
3 QUESTION SUPPORTING THE APPELLANTS ing back to what
4 it was when MR. JENKINS: Mr. Chief Justice, and may it
5 please the Court: es and the justice districts. But here,
6 it's not The three-judge court held that the county's
7 electoral system contained voting changes covered by
8 section 5 that had never received preclearance. This
9 Court's precedents clearly require the district court to
10 enjoin elections under that plan. vice Ginsburg out
11 contention As the Court's questions have indicated, first
12 and foremost, a so-called local three-judge court's task
13 is to determine whether changes are subject to be under an
14 preclearance, have been precleared and, if not, to enjoin
15 elections under an unprecleared plan.
16 Justice Breyer, in response to your question, it
17 has been frequently the case that the status quo ante was
18 an unconstitutional or otherwise unlawful plan. For
19 instance, when Congress enacted the Voting Rights Act, it
20 understood that a lot of the plans currently in effect
21 would be unconstitutional either under the Fifteenth or
22 Fourteenth Amendment, one-person-one-vote violations and
23 what-have-you, and that for section 5 purposes they could
24 still serve as the benchmark. That -- require elections
25 under an QUESTION: But Mr. Jenkins, isn't the problem

1 that this isn't a status quo ante?

2 QUESTION: Right.

3 QUESTION: I mean, if we were going back to what
4 it was when they had the district -- whatever, the
5 municipal districts and the justice districts. But here,
6 it's not that we go back to what was and keep it. There
7 is in -- practically for every point of view you can't
8 return. You can't go back to that old way, so there has
9 to be a different way.

10 MR. JENKINS: Well, Justice Ginsburg, our
11 contention is not that the district court necessarily
12 erred in rejecting a particular plan, but that the option
13 that it chose of allowing elections to go forward under an
14 unprecleared plan was impermissible under this Court's
15 decisions.

16 We do think that the district court had some
17 remedial alternatives, some flexibility in determining
18 what to do, but that the course that it took was an
19 unlawful choice.

20 QUESTION: Would we --

21 QUESTION: Well, suppose there are two choices,
22 neither of which involves returning to the status quo.
23 Suppose you cannot return to the status quo. One is to
24 order preclearance, and the other is to require elections
25 under an unconstitutional plan based on race. Which of

1 those do you take? Which is the lesser evil?

2 MR. JENKINS: Well, Your Honor, clearly, I think
3 if the district court had done the full-blown Miller v.
4 Johnson analysis, determined that the 1994 interim plan
5 was unconstitutional --

6 QUESTION: Let's assume that that was the case.

7 MR. JENKINS: Right, and if the only other
8 choice was, if I understand your question, allowing
9 elections under an unprecleared plan --

10 QUESTION: Yes.

11 MR. JENKINS: Then I think elections would have
12 to go forward under the unprecleared plan. If the
13 Constitution were to come into direct conflict with
14 enforcement of section 5, that would affect the outcome,
15 but I think that's quite far afield from the situation
16 that's presented here, as --

17 QUESTION: Mr. Jenkins, why don't you -- why
18 doesn't your answer go this way, that given the
19 unconstitutionality on the one hand, an unprecleared plan
20 on the other, that in fact everything has got to stop
21 until somebody comes up with a constitutional plan?

22 Now, that somebody may be the district court.
23 If the district court has, in fact, had a complaint
24 register -- or filed with it saying the old plan is
25 unconstitutional, the district court finds that it's

1 unconstitutional. It finds no precleared alternative to
2 the unconstitutional plan, then it's clear that the
3 district court has got -- absent anybody's better idea,
4 the district court has got the jurisdiction to fashion a
5 plan. Isn't that the way out of the dilemma?

6 MR. JENKINS: I think that's correct, Justice
7 Souter, but as I understood the hypothetical, the only two
8 choices were an election under an unprecleared plan --

9 QUESTION: Right.

10 MR. JENKINS: -- or an election under an
11 unconstitutional plan.

12 QUESTION: And I guess I'm saying you shouldn't
13 have accepted the choices as being limited to the two
14 because --

15 (Laughter.)

16 QUESTION: Because the third choice is, simply
17 file a complaint saying the old plan is unconstitutional,
18 let the district court adjudicate it, and the district
19 court has got remedial authority.

20 MR. JENKINS: Well, that's certainly correct
21 under the situation that was actually presented in this
22 case. There were a number of alternatives. One
23 alternative could have been simply to prevent elections
24 from going forward and to order that incumbent judges
25 remain in their posts pending preclearance of a permanent

1 change. We don't know that the 1994 interim plan was in
2 fact unconstitutional.

3 QUESTION: Well, I mean, I don't know why you
4 give this sort of absolute answer rather than it depending
5 on circumstances. I mean, it might be the case that the
6 status quo ante was arguably unconstitutional. The judge
7 has to decide whether to keep that while they go run and
8 preclear, or produce a new interim plan.

9 Suppose the only interim plan that he's
10 presented with is, give the State just what it wants.
11 Then his choice is, we give the State just what it wants,
12 or we proceed under the old status quo, which was arguably
13 unconstitutional.

14 I mean, I don't know whether -- which is which.
15 Isn't it rather fact-specific, and --

16 MR. JENKINS: I think that -- pardon me.

17 QUESTION: -- circumstance-specific?

18 MR. JENKINS: I think that's correct, Justice
19 Breyer.

20 QUESTION: This is a rather confusing case --

21 QUESTION: I don't understand this.

22 QUESTION: -- and I think we're getting confused
23 about what is the old status quo. I mean, nobody
24 suggested that the old system with the justice courts was
25 unconstitutional. The question is, when they changed from

1 that, was that in violation of section 5.

2 MR. JENKINS: That's correct, Justice Ginsburg.
3 If I can be clear, there was a system that existed on
4 November 1st, 1968, which has not been claimed to be
5 unconstitutional, but which the district court thought
6 would be difficult or unfeasible to return to.

7 QUESTION: Because it involved courts that no
8 longer exist in the whole State of California, for one
9 thing.

10 MR. JENKINS: That's correct, but I think before
11 allowing elections under an unprecleared system the
12 district court was required, among other things, to
13 analyze whether that system, the preexisting '68 system,
14 could have been adapted in some way to accommodate current
15 circumstances. We think there were a number of remedial
16 alternatives that were possibilities, as Justice Breyer
17 says, based on the facts of the case.

18 QUESTION: Did the court have the power to
19 impose any of these remedial alternatives on its own
20 without first making the determination that the extant
21 plan, which would otherwise continue, was
22 unconstitutional?

23 MR. JENKINS: Well, we think so, Justice Scalia.
24 I mean, the 1994 interim plan was a one-time plan, and the
25 elections had already been conducted under that plan, so

1 there was a question as to what would be the further
2 relief that would be ordered so long as no pre --
3 permanent plan had been precleared, but I think the local
4 court had jurisdiction to make that consideration.

5 QUESTION: Well, I'm not sure why, because the
6 court has got jurisdiction to adjudicate a complaint
7 that's brought in front of it.

8 The complaint brought in front of it says, this
9 is an unprecleared plan. The court can adjudicate that,
10 says it is unprecleared, don't use it. I don't see why
11 the court, absent some further pleading before it, has got
12 jurisdiction to do anything.

13 If at that point the party says, or some party
14 says, whoops, if we can't use this unprecleared plan, then
15 we've got to decide what's going to happen to the old
16 plan.

17 If they don't bring a complaint that the old
18 plan is in fact unconstitutional, then I don't know why
19 the old plan wouldn't be followed. If they do bring a
20 complaint that the old plan is unconstitutional, and the
21 court so finds, then the court has got jurisdiction to
22 make any kind of remedial order.

23 Why isn't that the regime that we should assume?

24 MR. JENKINS: Well, Justice Souter, if I
25 understand your question, I agree with you that it would

1 not have been objectionable for the district court to
2 simply say, no further elections, and judges that were
3 elected either under the unprecleared plan that existed or
4 under the interim plan will simply remain in their posts.

5 QUESTION: Yes, but I'm suggesting something
6 more. I'm saying the court shouldn't have done anything
7 more than that.

8 MR. JENKINS: Well, I think under certain --

9 QUESTION: It should adjudicate what's in front
10 of it, and if the only thing in front of it is a section 5
11 claim, it should adjudicate it and stop. Before it goes
12 any further, it ought to have another claim to adjudicate
13 in response to which it would have jurisdiction to grant
14 relief.

15 MR. JENKINS: Well, ordinarily that would be
16 correct, and I agree with you that in order to resolve
17 this case, and to order the outcome that the appellants
18 seek, that's all this Court would have to decide.

19 My point is simply that there was a difficult
20 circumstance presented to the district court here because
21 of the jurisdiction's failure to obtain preclearance, and
22 the possibility that there might be an indefinite period
23 in which no elections --

24 QUESTION: Yes, but that's --

25 QUESTION: That's not the court's problem.

1 QUESTION: That's not --

2 QUESTION: That's the jurisdiction's problem.

3 All the court has to say is, this hasn't been precleared,
4 period, whereupon it's the problem of the jurisdiction to
5 decide what they're going to do with these judges,
6 continue them or come up with some other plan, but I don't
7 know why it's the court's problem.

8 MR. JENKINS: Well, Justice Scalia, in City of
9 Rome this Court held that in fact the fallback remedy
10 essentially under section 5 is elections under the status
11 quo ante system, and as Justice Gins --

12 QUESTION: After a finding of violation. That's
13 a remedy after finding --

14 MR. JENKINS: Well, there was a finding of a
15 violation here, which was the failure to preclear an
16 election system that was covered by section 5, so there
17 was in fact a violation. If I -- there was not --

18 QUESTION: I mean, a violation that the
19 extant -- you know, the system in place, which someone is
20 asking to be stricken down, is a violation.

21 MR. JENKINS: Are you referring to the 1994
22 interim plan, or are you -- which one are you referring --

23 QUESTION: In this case, none. I mean, nobody
24 was challenging any particular plan here. They were just
25 challenging the preclearance.

1 MR. JENKINS: Well, I'd like to leave it with
2 the fact that I think, Justice Souter, you're correct that
3 this Court need not address that question in order to
4 reverse the decision.

5 If I could address briefly the question of --

6 QUESTION: What about the situation of the
7 district judge? The fact that this wasn't precleared, the
8 district court bears some responsibility for that, because
9 the district judge kept insisting, I want you to come up
10 with a plan that satisfies Federal law and State law.
11 Both parties said they couldn't, so the district judge
12 really had something to do with why we have no precleared
13 anything.

14 MR. JENKINS: Well, Your Honor, that's true, and
15 what I was about to address was the question of State law,
16 and I think Justice Souter in his earlier comment was
17 quite correct that section 5 covers attempts to enact or
18 administer voting changes within the covered jurisdiction.

19 This Court in the Sheffield case held that
20 section 5 coverage is territorial, and that State laws as
21 well as local laws cannot be enforced within the
22 jurisdiction as to preclearance.

23 QUESTION: Thank, you, Mr. Jenkins.

24 MR. JENKINS: Thank you.

25 QUESTION: Mr. Stone, we'll hear from you.

1 ORAL ARGUMENT OF DANIEL G. STONE

2 ON BEHALF OF THE APPELLEES

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

5 The questions posed to Mr. Jenkins and Mr. Avila
6 suggest what the State would have suggested independently,
7 which is that the context of this proceeding is a very
8 important focus as well as the scope of a covered
9 jurisdiction once it's determined, by virtue of the
10 statutory formula, that a jurisdiction must seek
11 preclearance of voting changes.

12 The nature of this case, as Justice Souter has
13 suggested, is a complaint for declaratory and injunctive
14 relief. It's called a coverage case under section 5, and
15 the only inquiry in these cases is whether there is a
16 covered jurisdiction, if so, whether that jurisdiction is
17 enacting or seeking to administer a new change which it
18 has initiated affecting voting rights, and then the third
19 question is, did they first obtain the requisite
20 preclearance?

21 So in that sense -- in our briefs we use the
22 word technical. I understand that that's a confusing,
23 perhaps a misnomer, but it is a procedural question of
24 whether or not they've done the requisite steps to get
25 Federal approval before implementing something that a

1 covered jurisdiction has initiated.

2 QUESTION: So if it is established in the
3 Federal district court that preclearance was not obtained,
4 and that it's a covered jurisdiction, what, in your view,
5 could the district court do, beyond simply saying, hold
6 everything, get preclearance?

7 MR. STONE: That is the common remedy. It's a
8 declaration that --

9 QUESTION: Nothing more.

10 MR. STONE: Nothing more.

11 QUESTION: On this complaint.

12 MR. STONE: Certainly on this complaint.

13 QUESTION: Well, I take it hold everything means
14 enjoin any further elections.

15 MR. STONE: Well, in Clark v. Roemer this Court
16 very strongly suggested that that may be the case.

17 QUESTION: What should have happened here, in
18 your view? Could the court simply say, I make a finding,
19 a declaration that there has been no preclearance, and
20 that there should be no preclearance, and stop there, or
21 must he further enjoin elections under the unprecleared
22 plan?

23 MR. STONE: In most cases the elections must be
24 enjoined. This Court --

25 QUESTION: What should have happened here in

1 your view?

2 MR. STONE: Well, for several reasons we don't
3 believe the elections should have been enjoined here.

4 Under Clark v. Roemer this Court said that there
5 may be extraordinary circumstances in which an injunction
6 would not be appropriate, and it gave an example, which is
7 one in which the action was filed at the eleventh hour,
8 the election processes were already well-advanced, and
9 that there were equitable reasons why the elections should
10 be permitted to go forward.

11 Here, the complaint was filed in 1991, and it
12 was challenging 1968 through 1983 ordinances. In Clark
13 the Court made the point that there was no showing that
14 the plaintiffs were not diligent. Here, I suggest that
15 quite the opposite fact is true.

16 Furthermore, as the Court has pointed out, there
17 have been intervening State actions. The State is not a
18 covered jurisdiction, and the State has -- for one thing,
19 the people through an initiative measure have eliminated
20 justice courts altogether.

21 The State has also enacted statutes,
22 particularly Government Code section 73560, which state as
23 a matter of State law what the municipal court district is
24 in Monterey County, and --

25 QUESTION: Is it your position that changes by

1 the county pursuant to State law, even if required by
2 State law, need not be precleared?

3 MR. STONE: Yes. The State -- the State is
4 not --

5 QUESTION: And how do you respond to the "or
6 administer" language in the statute?

7 MR. STONE: Well, I believe that -- Justice
8 Stevens, I believe that addresses informal as opposed to
9 formal actions by a covered jurisdiction. The covered
10 jurisdiction may initiate by promulgating a regulation if
11 it's a county --

12 QUESTION: So that in your view, even if
13 Monterey County was covered, if the State legislature
14 enacted a whole bunch of changes, it completely redesigned
15 the jurisdiction in ways that were retrogressive, there'd
16 be no -- no Federal remedy except under section 2.

17 MR. STONE: Exactly. There's always the remedy,
18 and several members of this Court have suggested this,
19 there's always the remedy of proceeding under section 2,
20 or the Fourteenth Amendment.

21 QUESTION: So that in any case of a covered
22 jurisdiction which is less than Statewide, the State
23 legislature basically can preclude any section 5 action
24 simply by enacting a new State statute on your view.

25 MR. STONE: If it --

1 QUESTION: The State can completely defeat the
2 jurisdiction under section 5 and the preclearance
3 requirement.

4 MR. STONE: Well, with respect, Justice Souter,
5 I don't think it defeats the purpose of section 5.
6 Section --

7 QUESTION: Well, if this -- maybe I
8 misunderstood you. I thought if the -- I thought your
9 position was that if the State was not a covered
10 jurisdiction, and only a -- some subdivision of the State
11 was, that if the State enacted a statute which changed the
12 manner of election in the covered jurisdiction, it was not
13 subject to preclearance.

14 MR. STONE: That is our position.

15 QUESTION: Well, then I think it follows -- I
16 mean, that's just an example of a general rule that in any
17 case of a section 5 jurisdiction the requirements of
18 preclearance can simply be eliminated by the adoption by
19 the State of a statute which changes the manner of
20 election in the covered jurisdiction.

21 MR. STONE: I agree with that, too. I just took
22 from the tone of the question --

23 QUESTION: So there isn't much left of section
24 5.

25 MR. STONE: Well, of course there is. The

1 citizens within the covered jurisdiction are still
2 protected against any action of that identified
3 jurisdiction, but the fact that another governmental
4 entity has made some change within its sovereign power
5 that has some effect upon voting rights --

6 QUESTION: Mr. Stone, when did that become --
7 would you just describe to us, when did that become
8 California's position, because -- correct me if I'm wrong
9 about this -- I thought that California had itself sought
10 to preclear changes that would affect -- changes in State
11 legislation that would affect covered counties.

12 MR. STONE: It's true that the Secretary of
13 State's Office for the State of California does submit on
14 occasion -- I don't think it's absolutely every time, but
15 it does submit regularly State statutes and enactments for
16 preclearance, but this Court has never held, and it's been
17 our position throughout this case, to answer your
18 question, that the State is not a covered jurisdiction,
19 and therefore its enactments do not require preclearance.

20 QUESTION: Even though the State has sought such
21 preclearance when its enactments affect -- will make a
22 change in a covered jurisdiction.

23 MR. STONE: It has, Your Honor. The Court is
24 probably aware --

25 QUESTION: So you're saying that California has

1 acted out of an excess of caution, is that your view?

2 MR. STONE: That is exactly what has happened,
3 and also --

4 QUESTION: And not on -- based on its
5 understanding of the law that it was required to seek
6 preclearance when State law changes voting in a covered
7 jurisdiction.

8 MR. STONE: There's a Department of Justice
9 regulation -- I believe it's section 51.23 of 28 Code of
10 Federal Regulations -- which suggests that States have
11 that requirement, and in an abundance of caution the
12 Secretary of State's Office has, as a general matter,
13 attempted to obtain preclearance, but this Court has never
14 held that such preclearance is required of an uncovered
15 jurisdiction, and I would suggest that it's a very grave
16 incursion into principles of federalism to do so.

17 QUESTION: Well, Mr. Stone, I'm not sure that's
18 even an issue here. Was the -- Monterey County free to
19 adopt the plans that it did --

20 MR. STONE: The --

21 QUESTION: -- at the time that it took the
22 actions that it did?

23 MR. STONE: Yes. It's various consolidation
24 ordinances --

25 QUESTION: It wasn't mandated by State law?

1 MR. STONE: No. State law permitted the
2 counties to adopt --

3 QUESTION: But didn't require it.

4 MR. STONE: No, although there's some confusion
5 on the record in that respect. The county through its
6 counsel in its initial motion to dismiss early on in the
7 case, before we were involved at all, indicated that it
8 required legislative permission in advance, and the --

9 QUESTION: But that's not your position here.

10 MR. STONE: I think that's right, that the
11 legislative --

12 QUESTION: And so all of this other discussion
13 about your views of State action and section 5 is not
14 really at issue in this case.

15 MR. STONE: No, I believe they are, Justice
16 O'Connor, because we -- the State is now, as you know, a
17 defendant party. It was made a party for the first time
18 as part of the order that's now on appeal here, and we
19 have argued that because the countywide elections are
20 conducted pursuant to State law, that there's no place for
21 a section 5 proceeding here, the reason being that when
22 the Court in South Carolina --

23 QUESTION: Well, but to the extent that what was
24 challenged here in the complaint was a failure to preclear
25 a change in Monterey County's municipal and justice court

1 setup, that change you say was not mandated by State law,
2 and to the extent we look at that, I assume that the Court
3 would just determine whether it was or wasn't, and if it
4 wasn't would order preclearance.

5 MR. STONE: Oh, I see, Your Honor.

6 QUESTION: Why do we get into all this other
7 stuff?

8 MR. STONE: I misunderstood your question. At
9 the time the ordinances were passed, the county had the
10 discretion --

11 QUESTION: Right.

12 MR. STONE: -- to design the district --

13 QUESTION: And wasn't what the complaint
14 alleged? I mean, that's all that was before it.

15 MR. STONE: But at the time the lawsuit was
16 filed, there was on the books a State statute indicating
17 that the Monterey County Municipal Court District is the
18 entirety of Monterey County -- that's section 73560 of the
19 Government Code -- and there was this change in the
20 State's constitution, Article VI, section 5, which said
21 that there may no longer be Statewide --

22 QUESTION: But that wasn't what the complaint
23 challenged.

24 MR. STONE: No, but the point is --

25 QUESTION: No.

1 MR. STONE: -- that at the time they filed it,
2 20 years after the first of these ordinances, things had
3 changed considerably, and the State during that
4 intervening period had dictated what the Monterey County
5 Municipal Justice --

6 QUESTION: All right, but why doesn't that go to
7 the merits? I mean, what I can't understand about this
8 case is why has it taken 5 years? You didn't preclude
9 that -- preclear the initial matter, so you have to
10 preclear it.

11 So why doesn't the State go to the D.C. Circuit,
12 and they would make their argument, which says because of
13 all the factors you bring up, that these single -- this
14 single unity and the change in all the judges does not
15 abridge anyone's right. It does not have the effect to
16 abridge rights to vote on the grounds of race, and they
17 would argue because of the change in the single district,
18 member district, it does.

19 And then we would have the D.C. Circuit decide
20 all this, take into account your arguments, which are
21 excellent, and their arguments, which are excellent, and
22 then we would get a decision as to whether or not a State
23 does abridge --

24 MR. STONE: Because --

25 QUESTION: -- rights on the basis of race under

1 the circumstances that you outline in your brief.

2 MR. STONE: Our arguments go to whether
3 preclearance is required. They go first of all to whether
4 a statute enacted by a jurisdiction that has not come
5 within the covered formula is nevertheless subject to
6 preclearance --

7 QUESTION: All right, so if you disagree that
8 it's not subject to preclearance --

9 MR. STONE: Right.

10 QUESTION: -- why don't you appeal, the
11 district court's judges to the contrary, to the Ninth
12 Circuit?

13 MR. STONE: The issue is still open in the
14 district court. The district court's order that is under
15 appeal here specifically says, now that the State has been
16 made a defendant on this day, November 1, 1995, it shall
17 have the opportunity to raise defenses --

18 QUESTION: Then why isn't it up to the district
19 court under ordinary precedent to enjoin all elections
20 until it decides that matter, at which point, if you lose
21 you will have to go to the D.C. Circuit, and if you win,
22 you won't.

23 But Clark says this is an ordinary kind of
24 thing. When one side says it is precleared, the other
25 doesn't, you keep the status quo, freeze everything, until

1 the district court decides, and it should decide.

2 MR. STONE: Your Honor, that would have been
3 fine. We would dispute that an injunction should be put
4 into effect until the court is certain that there is in
5 fact a preclearance requirement that was not met. That
6 remains an open question. As the Court said in its
7 November order, the State may have this case dismissed on
8 the basis that preclearance is not required.

9 But your point, Your Honor, about the status quo
10 is very important, because had the plaintiffs and the
11 Department of Justice been content to have an injunction
12 preventing these countywide elections pending
13 preclearance, that would have been fine. That would have
14 been what Clark says to do.

15 They instead urged the court, and the court
16 ultimately did their bidding, to fashion a new order, a
17 remedial order.

18 QUESTION: All right, but can we say bygones are
19 bygones --

20 MR. STONE: We cannot.

21 QUESTION: -- whatever happened in the past,
22 now proceed according to Clark?

23 MR. STONE: No. As Justice O'Connor pointed
24 out, this proceeding is simply to determine whether an
25 enactment is subject to preclearance. Preclearance

1 encompasses not just enactments that harm minority voting
2 rights, it encompasses neutral enactments, and it
3 encompasses enactments that greatly enhance minority
4 rights.

5 Any of those kinds of actions have to be
6 precleared before they can be implemented, so at this
7 point the mere fact that the court found that this
8 consolidation had to be precleared says nothing about
9 whether there's any substantive harm.

10 And because there's no substantive harm yet
11 proven or established and because, as Justice Souter
12 pointed out, there's no constitutional or section 2
13 challenge filed, there's no parallel case, as there was in
14 Allen and Clark and Morse, where the constitutionality of
15 the practices are being challenged, there is -- the court
16 has no basis upon which to fashion any remedial order.

17 QUESTION: Well, is that quite true? Isn't it
18 true that the county, when it dismissed its objection in
19 the D.C. Circuit action, in effect stipulated that they
20 could not demonstrate that there was no retrogression?

21 MR. STONE: Yes. They stipulated that they were
22 unable to --

23 QUESTION: Which at least gives the district
24 court a colorable basis for assuming their ought to be
25 some interim remedy until they get preclearance.

1 MR. STONE: Well, I'm not sure it does, Justice
2 Stevens, because the district court -- this Court has
3 held, in defining the different kinds of actions that may
4 be brought under the Voting Rights Act, it has
5 specifically said that a coverage case such as this, where
6 the only question was coverage, has no jurisdiction to
7 determine either retrogression, which is expressly limited
8 to the District of Columbia courts, or constitutional
9 violations. They are all beside the point.

10 QUESTION: When you say stipulate, Mr. Stone,
11 was there what you would think of as a technical
12 stipulation filed in the district court which stated what
13 you said it stated?

14 MR. STONE: As part of these interim orders that
15 they urged the court to order, to direct, the parties
16 stipulated -- not the State, certainly, but the parties
17 then existing, stipulated that the county was unable to
18 establish that the ordinances, that several of the
19 ordinances, it wasn't specific, were not retrogressive in
20 that they may have had --

21 QUESTION: The parties -- they stipulated that
22 they couldn't bear the burden of proof of proving that
23 they were not retrogressive?

24 MR. STONE: Yes, of proving that several of them
25 were not, and that was all they stipulated. There was

1 no -- normally in the District of Columbia court, if
2 there's a determination of retrogression the court gives
3 some guidance about what it is that's a problem, and
4 perhaps how it can be remedied. Here, we don't know
5 which, if any consolidated --

6 QUESTION: Is it not also relevant that the
7 interim remedy put into effect in December of 1994 was
8 precleared?

9 MR. STONE: That is irrelevant, Your Honor.

10 QUESTION: That's irrelevant.

11 MR. STONE: Yes.

12 QUESTION: May I get clear on, I guess, a
13 further point there that is raised both by your answer to
14 Justice Stevens and your answer to Justice Breyer?

15 In an action like this, in which the issue is
16 whether preclearance is required and whether, if so, it
17 has been obtained, and the court concludes that it is
18 required and it hasn't been obtained, is it your position
19 that the Court can enjoin the -- an election under the
20 unprecleared plan?

21 MR. STONE: Yes.

22 QUESTION: Okay.

23 MR. STONE: And that's the normal remedy. I
24 believe that's what this Court said in --

25 QUESTION: And that's the extent of it.

1 QUESTION: And that's it, period.

2 MR. STONE: Absent extraordinary circumstances
3 that seems to be the limits of this coverage case court's
4 remedial authority.

5 Now, here in particular, we would argue that the
6 court did not need to enjoin then. For one thing, as we
7 say, the question of whether preclearance was required is
8 now reopened, because the State is now a defendant, and
9 can argue that the State is not subject to preclearance,
10 and that these elections are conducted pursuant to State
11 law at this late date.

12 Secondly, that Clark says that there may be
13 extraordinary circumstances which could come into play.
14 As we pointed out, there was no diligence here. The
15 process -- not in the sense that it was at the eleventh
16 hour and that primaries were going to be held the next
17 day, but in the sense that the State has, since these
18 ordinances, dictated how municipal court elections shall
19 be conducted, those have come to play. Secondly, --

20 QUESTION: Well, how is that relevant, because
21 the State might not have made this disposition with
22 respect to this county if it had known that it was under
23 attack?

24 MR. STONE: No. It's relevant because a
25 noncovered jurisdiction has some substantial say if not

1 dispositive say in the elections as they're --

2 QUESTION: No, but I'm trying to connect that to
3 the lack of due diligence that you were referring to.

4 MR. STONE: Well, it's the fact that they waited
5 20 years, permitted a great deal of time in which the
6 State took several actions with respect to justice and
7 municipal courts in Monterey County, so their diligence --
8 had they filed this action immediately after passage of
9 the first ordinance, or the second, or the third, and
10 taken issue with it at the time, then an injunction would
11 have been against the county, I suppose, at least much
12 more clearly.

13 Now, the State has developed law, including the
14 initiative voted by the entire population of the State, to
15 eliminate justice courts, and that is in the midst -- one
16 point to be made about how much the State is involved here
17 is to look at the remedy which they have sought here.

18 They didn't seek an injunction that would put
19 the status quo -- that is, the 1968 system -- back in
20 effect. They sought an affirmative remedial order by the
21 court which, among other things, annulled or suspended
22 State laws. It annulled or suspended --

23 QUESTION: Yes, but the interim remedy did
24 accommodate the State interest in having countywide
25 jurisdiction. I mean, they were trying to accommodate

1 some of the State interest in the particular remedy they
2 selected, didn't they?

3 MR. STONE: Actually, Your Honor, the State
4 interest is not in having countywide jurisdiction.
5 Mr. Avila was correct that there are municipal courts that
6 are less than county, but the underlying State interest is
7 very much that every voting citizen within a judicial
8 district is entitled to vote for the judges of that
9 district, and that was thrown out the window by the
10 interim plan.

11 Similarly, there's a State interest,
12 constitutional in nature, that no city shall be split in a
13 municipal court district. That was thrown out the window.

14 QUESTION: But only for election purposes, not
15 for jurisdictional purposes. The interim remedy is
16 countywide for jurisdictional purposes as opposed to
17 election purposes?

18 MR. STONE: But that's even worse, Your Honor,
19 than dividing it into --

20 QUESTION: It's almost as bad as letting a judge
21 be assigned to another district. It's almost that bad.
22 At least that's what the district court said.

23 MR. STONE: Yes, and we of course disagree to
24 the extent that it belittled the State's interest.

25 But the point is, there are constitutional --

1 constitutional provisions that were in existence before
2 even Monterey County became a covered jurisdiction. These
3 are 1966, the most recent enactments of Article VI,
4 section 5, and Article VI, section 16. They're 1966.
5 Even if the State were a covered jurisdiction, a coverage
6 question would have to find that those enactments are not
7 subject --

8 QUESTION: Mr. Stone, can I interrupt your
9 presentation for one moment, because I understand you're
10 making arguments that really haven't been decided on by
11 the district court.

12 To what extent does your position rest on the
13 reason given by the district court for the action that's
14 being challenged, namely that it was concerned that
15 Miller, which was decided some 6 months after the interim
16 remedy went into effect, cast constitutional doubt on the
17 interim remedy? Is that essential to -- do you think that
18 that reason was acceptable? Let me put it that way.

19 MR. STONE: That -- yes, Justice Stevens, that
20 in combination with the fact that the interim remedy --
21 and I always put it in quotes -- was issued in the first
22 place, because I believe that Miller --

23 QUESTION: But that's not why the district court
24 set its own remedy aside. They set it aside entirely, as
25 I understand it, on the basis of Miller.

1 MR. STONE: Well, that's correct, on the basis
2 that it was -- substantial questions about its --

3 QUESTION: Right.

4 MR. STONE: -- constitutionality came into play.

5 QUESTION: And my question is, do you think that
6 was a proper way to decide that issue without first
7 deciding whether there was a Miller violation?

8 MR. STONE: Well, the court didn't say there was
9 a Miller violation.

10 QUESTION: No.

11 MR. STONE: But I don't see how it could come to
12 any other conclusion, Your Honor.

13 But let me say that the mix -- what we've been
14 talking about is a normal section 5 coverage case where
15 the only question is whether a statute enactment or
16 informal something that a covered jurisdiction seeks to
17 administer requires preclearance and hasn't yet had it.
18 But when the court decided -- it was very ill-advised, we
19 believe beyond its jurisdiction, but it decided to
20 redesign, reconfigure the county court system in Monterey
21 and to suspend or annul State laws and State
22 constitutional provisions. It then had another order.

23 That changed the mix entirely, and we submit
24 that the court then had jurisdiction to correct its own
25 error, to eliminate this unconstitutional or substantially

1 unconstitutional order and to put things back where they
2 were. The court was trying to return to the status quo.
3 That's why we believe it ordered that there be a one-time
4 countywide election, because when the case first came to
5 this court the judges on the Monterey County Municipal
6 Court had been elected countywide.

7 The court changed that. It changed it in a
8 race-based fashion that it was inappropriate to do and the
9 court's November order points out, we don't accept the
10 retrogression stipulation, meaning we now recognize that
11 that's not our domain, it's for the district court in the
12 District of Columbia, and we're not the section 2 court,
13 meaning all these stipulations --

14 QUESTION: But don't you think that the reason
15 the district judge thought Miller invalidated the plan, or
16 its interim plan, was because the district judge thought
17 that any reliance on race in fashioning the districting
18 would be invalid?

19 MR. STONE: The district court did say that
20 Miller draws into question whether any reliance on race
21 may be invalid, but it didn't go that far.

22 QUESTION: So do you think it's up to us to
23 decide whether the district court correctly or incorrectly
24 construed Miller?

25 MR. STONE: Your Honor, I think the sentence

1 that the court -- that you're citing in the court's
2 decision is certainly subject to some scrutiny and
3 clarification, but that was not necessary to the Court's
4 decision here.

5 In normal cases, including Miller and Shaw, the
6 Court asks about the constitutionality of districting in a
7 context where districting is the normal procedure, and
8 there are normal districting principles -- the decennial
9 reapportionments, for instance.

10 In this case, the traditional districting
11 principle as far as dividing any judicial district in
12 California is, we don't do it. We do not do it.

13 QUESTION: Your position here, Mr. Stone, is
14 that you are satisfied with the November 1995
15 interlocutory injunction, and you ask that the district
16 court's judgment be affirmed?

17 MR. STONE: Yes. My point is that the
18 traditional districting principles, as that phrase is
19 normally used in decennial reapportionments, doesn't apply
20 here. The districting principles that apply here --
21 districts are designed for administrative convenience in
22 the justice courts, so the notion of it, maybe -- maybe in
23 a hearing they could prove that it was contiguous, so
24 what?

25 QUESTION: It seems to me that affirmance is

1 inconsistent with your basic argument here, which is that
2 all the Court could do was order preclearance. I mean,
3 how could we affirm?

4 The petitioners asked the court to do things
5 that it couldn't or shouldn't do, and the court went along
6 with it, and you want us to affirm it, and it looks to me
7 like to be consistent with your view we'd have to reverse,
8 or vacate and send it back and say the only thing on this
9 complaint you could do is order preclearance.

10 MR. STONE: Except, Your Honor, that I think the
11 court's most recent order, the November order, was an
12 attempt to correct what it had unfortunately messed up
13 initially.

14 The court should not have issued the December
15 1994 order, which injected race, divided the county, it
16 gave 10 percent of the voters within a judicial district
17 the right and power to elect a judge that is sitting over
18 the whole district --

19 QUESTION: Well, if we should reverse the
20 November 1995 order, that wouldn't necessarily mean
21 approval of the December 1994 order, would it?

22 MR. STONE: Well, but that would then be the
23 status quo, as the Court has used it. That would be what
24 was left. That's the trouble.

25 The court's effort was to correct that and bring

1 things back the way they were initially. I think that was
2 laudable.

3 QUESTION: But you would be free to advance all
4 the arguments you've been making here, including the
5 unconstitutionality of that remedy, because those haven't
6 really been ruled on. Is that not right?

7 MR. STONE: Well, the court has not expressly
8 stated that it's remedy, its '94 remedy was
9 unconstitutional, but as I started to point out, the only
10 purpose for the dividing of this district was race.

11 QUESTION: Yes, I know. If that establishes
12 unconstitutional, it's an easy issue to decide. Surely
13 he'll set aside the order if it's unconstitutional, but he
14 just hasn't so held, or they haven't so held -- there are
15 three judges -- I should say. I think I'm right on that.

16 You still can make the argument. You still may
17 win on this very ground, but that ruling has not yet been
18 made.

19 MR. STONE: Well, and at this point it would be
20 moot, except for the extension of terms, because the court
21 was obviously uncomfortable with its remedy in the first
22 place.

23 QUESTION: Well, if it would be moot, then your
24 answer -- then you're not standing by -- I think you're
25 not standing by the answer you gave a moment ago that if

1 all we do is conclude here that he should have enjoined
2 the use of the plan that he adopted, that that would
3 restore a status quo ante, and the status quo ante is
4 unconstitutional. I think you're now saying it wouldn't
5 restore the status quo ante.

6 MR. STONE: No, it would, because the court has
7 extended the terms. But the court --

8 QUESTION: Oh, because of the court's extension.
9 All right. Well then, isn't Justice Stevens correct in
10 his suggestion that all you have to do, if the case goes
11 back in that posture, is to file an appropriate pleading
12 saying this status quo ante is unconstitutional, and you
13 should vacate any order of the court that establishes it?
14 You -- that's open to you, isn't it?

15 MR. STONE: Well, when the Court held its
16 hearing on Miller, that was the question it wanted to
17 address --

18 QUESTION: Yes, and that's the question -- and
19 that's the question that you can litigate if it goes back
20 in the posture that Justice Stevens and I are suggesting.

21 MR. STONE: Well, that's true, Your Honor,
22 although in the meantime the results of that
23 unconstitutional --

24 QUESTION: That is yet another issue. That is
25 yet another issue, but you can litigate your Miller claim,

1 can't you, if it goes back?

2 MR. STONE: Yes.

3 QUESTION: Yes.

4 MR. STONE: But on the same token, on these
5 facts this Court it seems to me could very quickly and
6 easily find that under Miller, that --

7 QUESTION: Well, we don't -- I don't know what
8 procedural basis we'd have to be deciding a Miller claim,
9 either.

10 MR. STONE: Well --

11 QUESTION: We don't even have a map in the
12 record, I don't think.

13 MR. STONE: Well, actually, I did submit a map
14 which shows that there's no --

15 QUESTION: I couldn't find it. I --

16 (Laughter.)

17 QUESTION: Mr. Stone --

18 QUESTION: I assume one of the lawyers said it
19 was based on race, but --

20 QUESTION: -- how is the Miller question even
21 ripe if we don't know whether the change needs to be
22 precleared, and we don't know the view of the Attorney
23 General or the D.C. Circuit whether there's any
24 retrogression involved in the countywide system?

25 How do you even get to the Miller, which would

1 be something else in place of the system that's been found
2 retrogressive?

3 MR. STONE: Well, the principal reason that you
4 know Miller should annul this interim remedy of December
5 '94 is the point made by Justice O'Connor that no
6 substantive harm to voting rights has been established, so
7 any remedy that brings race in at all, any remedy at all
8 is inappropriate in this Court.

9 QUESTION: But suppose -- let's suppose the D.C.
10 Circuit finds you can't have this change because it's
11 retrogressive. Then what? If that's what the D.C.
12 Circuit finds, how can you counter the retrogression --
13 retrogression necessarily involves race -- without saying,
14 I have to remedy that impact on race? That's what I don't
15 follow.

16 MR. STONE: Well, that's -- it would be a very
17 different case if this were in the district court and if
18 retrogression, a substantive violation had been
19 determined. Then the Court would have options.

20 QUESTION: But we never even have empowered the
21 right decisionmaker, because it's been frozen in -- as I
22 understand it, in the district court within the Ninth
23 Circuit that doesn't have the authority to make that
24 retrogression determination.

25 MR. STONE: Well, it's correct that it hasn't

1 yet gotten to any court in which substantive harm can be
2 determined.

3 QUESTION: Thank you, Mr. Stone.

4 MR. STONE: Thank you.

5 QUESTION: Mr. Avila, you have a minute
6 remaining.

7 REBUTTAL ARGUMENT OF JOAQUIN G. AVILA

8 ON BEHALF OF THE APPELLANTS

9 MR. AVILA: I would like to refer the Court to
10 Conner v. Waller as providing authority for the issuance
11 of injunctive relief and additional relief beyond merely
12 the issuance of a permanent injunction.

13 I would also like to point out that at least in,
14 previously in this Court in Shaw the State is not entirely
15 covered under section 5 of the Voting Rights Act, and only
16 Federal counties, but yet when the State enacts a
17 redistricting plan that affects those counties, those
18 plans that directly affect those counties have to be
19 precleared.

20 And with respect to the remedy we are urging
21 this Court to reverse the district court's use of the
22 unprecleared election change, and so that the court can
23 then conduct whatever evidentiary hearing needs to be
24 conducted in order to determine what should be the
25 appropriate remedy, and the reason why we have to go

1 beyond the injunction is because there has been -- we have
2 to correct the previous effects of elections that were
3 conducted under an unprecleared election system, and that
4 was what the temporary plan did.

5 We have election systems since 1968, up to the
6 time that the complaint was filed, conducted under an
7 unprecleared election system.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Avila.
9 The case is submitted.

10 (Whereupon, at 11:59 a.m., the case in the
11 above-entitled matter was submitted.)

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CERTIFICATION

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

VICKY M. LOPEZ, ET AL., Appellants v. MONTEREY COUNTY, CALIFORNIA, ET AL.
CASE NO. 95-1201

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

BY Ann Marie Federico

(REPORTER)