

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: TEXAS, Appellant v. UNITED STATES, ET AL.

CASE NO: 97-29

PLACE: Washington, D.C.

DATE: Wednesday, January 14, 1998

PAGES: 1-59

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**Supreme Court U.S.**

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 TEXAS, :

4 Appellant :

5 v. : No. 97-29

6 UNITED STATES, ET AL. :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, January 14, 1998

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 10:07 a.m.

13 APPEARANCES:

14 JAVIER AGUILAR, ESQ., Special Assistant Attorney General  
15 of Texas, Austin, Texas; on behalf of the Appellant.  
16 PAUL R. Q. WOLFSON, ESQ., Assistant to the Solicitor  
17 General, Department of Justice, Washington, D.C.; on  
18 behalf of the Appellee.

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1 PROCEEDINGS

2 (10:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 97-29, Texas v. The United States.

5 Mr. Aguilar.

6 ORAL ARGUMENT OF JAVIER AGUILAR

7 ON BEHALF OF THE APPELLANT

8 MR. AGUILAR: Mr. Chief Justice, and may it  
9 please the Court:

10 The temporary appointment of a master or a  
11 management team with limited powers to assist school  
12 districts that are not achieving the academic goals set by  
13 the State is not a change with respect to voting but,  
14 rather, it is a temporary change with respect to  
15 governance. More precisely, such an appointment does not  
16 result in the de facto replacement of the elected school  
17 board.

18 A review of the statute, which you can find at  
19 pages 90a through 92a of the jurisdictional statement  
20 appendix shows that the board members -- excuse me, shows  
21 that the master and the management team have very limited  
22 powers.

23 They cannot take any action concerning any type  
24 of district elections. They cannot take any action with  
25 regard to the number of board members to be elected, or

1 the method of selecting the board member. That is, they  
2 can't change from single member districts to at-large  
3 districts to cumulative voting, which is available to them  
4 under the Education Code. They may not set a tax rate for  
5 the district. They cannot adopt a budget that's different  
6 than the one that the school board members themselves have  
7 voted for and adopted.

8 QUESTION: If all that is true, Mr. Aguilar,  
9 then you have no problem.

10 MR. AGUILAR: We -- I --

11 QUESTION: Just go ahead and do it, and --

12 MR. AGUILAR: That is correct, Your Honor.  
13 That's --

14 QUESTION: So why are you here?

15 MR. AGUILAR: We're here because in fact, when  
16 this legislation was passed, we submitted all of the  
17 amendments to the Education Code, both those that affected  
18 voting and those that didn't. We just presented it with  
19 all of them. We did not identify these provisions as  
20 being election-related.

21 The Department of Justice, the Attorney General  
22 informed us that they believed that they were, and  
23 requested us to submit further information.

24 QUESTION: That they were?

25 MR. AGUILAR: That they --

1 QUESTION: Were always, or could be?

2 MR. AGUILAR: Well, that they believed that --

3 QUESTION: Might be.

4 MR. AGUILAR: Might be.

5 QUESTION: Might be.

6 MR. AGUILAR: More appropriately stated. So we  
7 answered their questions, thinking that once we provided  
8 them with answers to their questions, that they would  
9 agree with us that in fact they were not election-related.

10 Well, that is not what happened, Justice Scalia.  
11 They in essence precleared the provisions, and I'm talking  
12 about as --

13 QUESTION: They're unwilling to say that none of  
14 these -- none of these might not be?

15 MR. AGUILAR: Their unwillingness -- well, I  
16 guess what they're saying is that they believe, since they  
17 precleared them as enabling legislation, that they -- once  
18 we actually put them into effect in those situations when  
19 we need them, to utilize them, that they will result in --

20 QUESTION: Well, is that what it means? I mean,  
21 I interpret that to mean there is nothing in this enabling  
22 legislation, in and of itself, that's bad, and we just  
23 don't want to say right now whether, as it is later  
24 implemented, something might be bad, which seems to me a  
25 sober thing for the Justice Department to do.

1 MR. AGUILAR: Well, Your Honor, we --

2 QUESTION: We would probably do the same thing,  
3 when a case is brought before us. We don't rush into  
4 things we don't have to decide.

5 You asked them to clear this statute, and they  
6 say, the statute's okay with us. It's just enabling  
7 legislation.

8 MR. AGUILAR: But we didn't ask them to -- we  
9 went ahead and provided them with the information they  
10 requested. We did it, if you will, under protest. We  
11 informed them that we did not think these were election-  
12 related. We tried to make the argument, and we did make  
13 the argument as to why we thought it wasn't. I think the  
14 statute contains --

15 QUESTION: Well, Mr. Aguilar, I share Justice  
16 Scalia's concerns. You want us to say that never, under  
17 any circumstance, under any implementation, could this be  
18 covered under section 5 of The Voting Rights Act.

19 MR. AGUILAR: That's correct, Justice O'Connor.

20 QUESTION: And it isn't even ripe. It hasn't  
21 been implemented. Seems to me that's all the Attorney  
22 General is saying and, like Justice Scalia, what prevents  
23 the State of Texas from just going ahead and implementing  
24 it?

25 If somebody thinks there's a problem, they'll

1 file a suit, and in addition, even if the district court  
2 here were to say, fine, I don't see a problem, it wouldn't  
3 bind private parties. They could always file a suit after  
4 implementation.

5 I mean, I don't know why you're here.

6 MR. AGUILAR: We're here, Your Honor, because we  
7 believe that the statute as written, and as limited by  
8 provision (e) on page 91a, in essence passes that bright  
9 line test that this Court established in Presley.

10 QUESTION: Well --

11 MR. AGUILAR: There is no way -- there's no --  
12 I'm sorry, Justice Kennedy.

13 QUESTION: You began by reciting many of the  
14 things the trustees can do. One of the things the  
15 trustees can do is to appoint other people to exercise all  
16 of the power over the board of trustees under subsection  
17 (9), as I understand it.

18 MR. AGUILAR: That is true.

19 QUESTION: The master can appoint a board of  
20 managers composed of residents that exercises all the  
21 powers and duties of the board of trustees.

22 MR. AGUILAR: That's not correct, Justice  
23 Kennedy. The commissioner, under subdivision (9) --

24 QUESTION: That's not --

25 MR. AGUILAR: The commissioner, under



1 subdivision (9), is the one that can appoint a board of  
2 managers, and we did not challenge provisions (9) and  
3 (10). We are not here today suggesting that that is --  
4 that does not fall within section (5). We have no quarrel  
5 with the Attorney General's assessment with regard to (9)  
6 and (10).

7 QUESTION: So you would submit to the Attorney  
8 General for preclearance<sup>(11)</sup> any proposal to invoke the powers  
9 under (9) and (10)?

10 MR. AGUILAR: Under (9) and (10) we would submit  
11 them. Under (9), I think that's where you have a de facto  
12 replacement, because in fact the commissioner has the  
13 authority to select members of the school -- I mean,  
14 citizens of the school district, residents of the school  
15 district and appoint them as board of managers to replace  
16 the elected board, and they'll have all the power of the  
17 board. I think that is more in keeping with what this  
18 Court had in mind in Presley with regard to the reference  
19 to a de facto replacement, but under no circumstance can  
20 that happen under numbers (7) and (8), because the  
21 legislature has gone out of its way to define away the  
22 problem, if you will, to make sure that it took it out of  
23 the coverage of section (5) by allowing them to have  
24 authority --

25 QUESTION: Could you help me just a little

1 bit --

2 MR. AGUILAR: Yes, Justice Stevens.

3 QUESTION: -- on why (7) and (8) don't raise the  
4 same problem?

5 MR. AGUILAR: There is --

6 QUESTION: Because if you read (7) and (8)  
7 against the (e) over on 91a about all the things the  
8 management team and the master can do, they can direct any  
9 action to be taken, can't they?

10 MR. AGUILAR: They can direct any action to be  
11 taken -- the reason -- let me back up and start at the  
12 beginning, Justice Stevens.

13 The reason a master or a management team are  
14 needed is because there are severe problems with the  
15 school district. For instance, a -- they have schools,  
16 any number of schools that are --

17 QUESTION: Yes, but that's also true of (9) and  
18 (10).

19 MR. AGUILAR: That's correct, but we're not  
20 arguing (9) and (10).

21 QUESTION: I'm really trying to ask you to  
22 explain why you take one position on (9) and (10) and  
23 another position on (7) and (8).

24 MR. AGUILAR: Because -- (10) is easy, I think.  
25 That's an annexation. We don't have any quarrel with the

1 fact that that falls within section (5).

2 (9) I think falls within the caveat in Presley  
3 about de facto replacement. I think that probably  
4 satisfies what this Court had in mind.

5 But (7) and (8), that is not a de facto  
6 replacement, and that's the only thing we're talking about  
7 possibly being a reason for it falling within section (5),  
8 because the legislature has said in the limitations found  
9 in subdivision (e) that there are certain things that the  
10 master or management team cannot touch, for instance,  
11 setting of the tax rate, or the amount of money that the  
12 citizens in that --

13 QUESTION: No, I understand that, but Number 1  
14 under (e) is may direct an action to be taken by the  
15 principal of a campus, the superintendent of the district,  
16 or the board of trustees of the dist --

17 MR. AGUILAR: Well --

18 QUESTION: They tell the board of trustees what  
19 to do.

20 MR. ACUILAR: Well, they can tell the board of  
21 trustees what to do with regard to solving the problem in  
22 issue. That is correct, Your Honor. That is --

23 QUESTION: Why is that different from (9)?  
24 That's what I don't quite see.

25 MR. AGUILAR: Because of the limitations they

1 cannot -- if we conceive of the authority of the elected  
2 board members as being a pie, we're not taking the entire  
3 pie away from them the way we are in (a)(9). We may be  
4 taking a portion away, but we're never going to take all  
5 of it away. They still make decisions with regard to how  
6 much total money is spent, how much money is raised, and  
7 anything having to do with elections, whether it be bond  
8 elections, or the --

9 QUESTION: I just don't read the statute that  
10 way when it says you may direct under (7), may direct an  
11 action to be taken by the board of trustees. I would say  
12 you spend the money for the high school and not the  
13 elementary school, or vice versa.

14 MR. AGUILAR: Well, that is -- you're right with  
15 regard to the allocation of the total amount of the  
16 budget. You're right, Your Honor.

17 The master or the management team, in order to  
18 solve the prob -- it may be that the problem is that  
19 they're not spending money appropriately in certain  
20 programs in order to get the school kids to pass their  
21 reading and their math exams that they have to take every  
22 year from grades 3 to 8, and so they'll direct it -- maybe  
23 they ought to emphasize that aspect, and spend money on  
24 those programs, and perhaps teachers in those programs.

25 But they are -- they still don't have the entire

1 pie, if you will. They still don't have all the authority  
2 of the board, because they can't touch elections. They  
3 cannot set the ultimate level of expenditures.

4 For instance, if the school board says that the  
5 budget for next year will be \$50 million, the board --  
6 the -- excuse me, the master or the management team can't  
7 go in there and require them to increase the budget or  
8 decrease the budget. That is something that State law has  
9 given, and this provision reserves to --

10 QUESTION: But he -- but the manager or master  
11 could require that the budget items be reallocated?

12 MR. AGUILAR: Yes, Your Honor. They have to in  
13 order to be able to solve the -- if, in fact, the problem  
14 is the result of misguided, if you will, management in  
15 terms of not spending the money appropriately, they're  
16 spending too much money in athletics and not as much money  
17 on reading and writing and arithmetic, well, then they  
18 have the authority to say you've got to direct more money  
19 to these essential items in order for you all to meet the  
20 State standards with regard to passage rates on the  
21 achievement tests.

22 Yes, Justice Stevens.

23 QUESTION: Could they order one school to bus  
24 children to another school?

25 MR. AGUILAR: I beg your pardon?



1 QUESTION: Could they order busing from one  
2 school to another --

3 MR. AGUILAR: No, they cannot. No, they cannot,  
4 Your Honor.

5 QUESTION: -- spending money? Why not?

6 MR. AGUILAR: Well, because that would be -- if  
7 they're under a court order to bus --

8 QUESTION: No, no, no --

9 MR. AGUILAR: -- they cannot in any way -- they  
10 cannot in any way interfere with that.

11 QUESTION: I mean, just voluntarily adopt a  
12 program, we want to reallocate the students between two  
13 schools, say. Just say, we want to bus the third grade  
14 over to here and the fourth grade back here. Could  
15 they --

16 MR. AGUILAR: Well, I --

17 QUESTION: You know, sometimes they're --

18 MR. AGUILAR: I guess --

19 QUESTION: Boards do concern themselves with  
20 where the children will go to school.

21 MR. AGUILAR: Right. I don't think -- it's  
22 possible that that could happen if, in fact, there's some  
23 reason to do that. In other words, in order to solve the  
24 problem that have them there to begin with, but  
25 ordinarily, no, they wouldn't do that.

1 QUESTION: But that's -- it's fairly  
2 speculative, some of these answers. The Texas courts  
3 haven't interpreted these provisions, have they?

4 MR. AGUILAR: No, they have not, Your Honor.

5 QUESTION: So that just what the law does permit  
6 the masters to do is really not clearly established.

7 MR. AGUILAR: Well, I think that what they can  
8 do is limited by the problem at hand and how they go about  
9 solving it, the creativity of trying to solve that  
10 problem, but that's not where we -- that's not the  
11 argument we're relying on. The argument we're relying  
12 on --

13 QUESTION: Why wouldn't raising more money be?  
14 Is that explicitly excluded?

15 MR. AGUILAR: That is excluded under (e)(6), may  
16 not adopt a budget for the district -- that's on page  
17 92a -- that provides for spending a different amount,  
18 exclusive of required debt service, from that previously  
19 adopted by the board of trustees.

20 What I was trying to say was that we believe  
21 that the statute, when reviewed, clearly shows that we're  
22 not dealing with section 5 coverage regarding changes in  
23 the manner of voting, the candidacy requirements, the  
24 composition of the electorate, the creation or abolition  
25 of an elected office and, indeed, the Attorney General's

1     sole basis for the preclearance as enabling legislation  
2     was the issue of de facto replacement.

3             It's our position that this statute clearly  
4     shows that we can never even get to that point, that in  
5     fact --

6             QUESTION: Mr. Aguilar, this is a rather novel  
7     procedure as far as I know. Has there been any other case  
8     where a State or covered jurisdiction has sought to sort  
9     of jump the gun this way by bringing a noncoverage claim  
10    in the D.C. District Court?

11            MR. AGUILAR: No, Your Honor, and I think  
12    there's a good reason for that. Prior to 1992, before  
13    this Court established its bright line test between what  
14    is a change with respect to voting and what is a change  
15    with respect to governance, I don't think there really was  
16    a good -- a good understanding -- anything that affected  
17    voting in any way, I believe, is the way I would  
18    characterize the pre-'92 law, would be covered by section  
19    5.

20            I think the bright line test laid down by this  
21    Court in Presley in '92 gave us the opportunity and gave  
22    the legislature the opportunity to say, well, how can we  
23    effect these provisions to make sure that they're utilized  
24    quickly when necessary without having to go through the  
25    preclearance route, because it's really not their

1 intention to have any effect on elections, and --

2 QUESTION: Mr. Aguilar, what -- this taking over  
3 the operations of the board is sort of a -- in extremis  
4 remedy. It's the last step.

5 MR. AGUILAR: (9) and (10) are the last steps,  
6 yes, Your Honor.

7 QUESTION: Well -- oh, I'm sorry. You're right.  
8 (9) and (10) are taking over, in your estimation. What  
9 the Government contends might in some circumstances be a  
10 taking over, replacing the board with a director as to  
11 certain issues, that only comes after other remedies have  
12 tried and been failed, right?

13 MR. AGUILAR: That is correct.

14 QUESTION: There's six or seven of them?

15 MR. AGUILAR: There's six of them listed on page  
16 90a, a public notice of the deficiency --

17 QUESTION: Yes.

18 MR. AGUILAR: -- is the first one. The second  
19 one is having a hearing --

20 QUESTION: Right.

21 MR. AGUILAR: -- conducted by the board. I  
22 mean, there are a lot of other interventions, if you will,  
23 not as draconian as (9) and (10).

24 QUESTION: Right, draconian is the word, and you  
25 would hope, I expect, never have -- never to have to use

1 that, wouldn't you?

2 MR. AGUILAR: We would hope that the school  
3 boards, and we believe that the vast majority, the  
4 overwhelming majority of elected school board members of  
5 all 1,056 school boards in Texas are dedicated to making  
6 sure that their school districts --

7 QUESTION: Right. I would hope so.

8 MR. AGUILAR: -- meet the standards that the  
9 State has --

10 QUESTION: Well, I guess you have used it.

11 QUESTION: But would you say for sure that you  
12 know that in at least one case you're going to have to  
13 take over?

14 QUESTION: Well, indeed, you have.

15 MR. AGUILAR: Well --

16 QUESTION: Texas has in one case.

17 MR. AGUILAR: We have in one case.

18 QUESTION: We have some evidence of that.

19 MR. AGUILAR: The -- we made mention of the fact  
20 of the Wilmer-Hutchins Independent School District, where  
21 we --

22 QUESTION: Well, can you tell us, what were the  
23 powers that the master was directed to exercise in this  
24 Dallas district?

25 MR. AGUILAR: Well, if I may go outside the



1 record, I certainly can answer that question.

2 Basically the master -- the management team went  
3 in to try to, on the one hand increase the pass rate and  
4 drop-out rate of certain schools in that district, and on  
5 the other hand make sure that --

6 QUESTION: Well, was the master directed to  
7 exercise powers (1) through (7), or (1) through (9), or  
8 was it that specific? In other words, there's -- we're  
9 talking about this lodging that the Solicitor General made  
10 with us just a few days ago where the special master was  
11 in fact appointed for this district near Dallas --

12 MR. AGUILAR: Correct.

13 QUESTION: -- or in Dallas County, and I want to  
14 know, was the master appointed and was he specifically  
15 directed to exercise statutory powers that were  
16 specifically listed under (a) (1) through (10)?

17 MR. AGUILAR: No, Justice Kennedy, that's not  
18 the way it works. He was -- the commissioner was  
19 authorized to appoint the master under (a) (7), and then  
20 under (a) (7) the powers that he can appoint are  
21 circumscribed or limited under (e). In other words, they  
22 have the authority to go in and fix the problem, but --

23 QUESTION: Well, was he specifically appointed  
24 under (a) (7) and not under (a) (8)?

25 MR. AGUILAR: That is my recollection, yes.

1 There's no other way that you can appoint a master, Your  
2 Honor, under our scheme. It certainly wasn't an (a)(9).  
3 It was not a board of managers, and so it's (a)(7) that  
4 deals with an appointment of a master.

5 QUESTION: Could you, before you finish, explain  
6 how you got into this Court?

7 As I read the statute it says, when a State --  
8 paraphrasing it, when a State enacts or administers a  
9 measure that affects voting, then the State can go to the  
10 special three-judge court and ask for a declaration that  
11 it doesn't affect voting in a racially discriminatory way.

12 Well, you're saying this is a measure that  
13 doesn't affect voting, so if you think it's a measure that  
14 doesn't affect voting, how did you get into this Court?  
15 How can you say to the Court, we invoke your jurisdiction  
16 because we have a measure here that we think affects  
17 voting, but we want you to say it doesn't affect voting.

18 MR. AGUILAR: Yes, Justice --

19 QUESTION: How do you get into the Court on that  
20 kind of a theory?

21 MR. AGUILAR: Let me explain. We got into the  
22 Court because we were precleared, if you will, against our  
23 will, because we didn't think these measures, (7) and (8),  
24 were affecting voting.

25 The Attorney General basically told us that

1 you've got to preclear any utilization of (7) or (8)  
2 before we can say anything about it, therefore putting us  
3 in the process, the section 5 process.

4 We think that that -- that that legal  
5 determination can be reviewed by a three-judge panel.

6 QUESTION: Why? I mean, why can't -- if you --  
7 maybe you have some regular declaratory judgment action.  
8 You can just go file -- I don't know if you do or not, but  
9 I don't see how this -- how you get within this statute on  
10 the theory that you don't affect voting. At least that's  
11 the trouble that I'm having.

12 I don't see why a State -- this seems to be a  
13 statute set up for States that believe they have measures  
14 that do affect voting, and they believe that those  
15 measures are not discriminatory.

16 MR. AGUILAR: Your Honor --

17 QUESTION: Is there any authority or anything  
18 that a State --

19 MR. AGUILAR: Well, no. As I answered Justice  
20 O'Connor, we have no -- this has never been done before as  
21 far as we know, and what I mean by that is, we don't know  
22 of an instance where a State has gotten a ruling from the  
23 Attorney General that a provision falls within section 5  
24 when the State believes, after applying Supreme Court  
25 precedent, that it is not part of section 5. That's why

1 we've --

2 QUESTION: All right. So why would you think  
3 the judges -- the other side thinks it does affect voting,  
4 so you can understand why they wouldn't raise it, but if  
5 you're a judge -- you're the one who's invoking the  
6 Court's jurisdiction.

7 MR. AGUILAR: We're invoking the Court's --

8 QUESTION: So you say, judge, I want you -- to  
9 tell you something. We're here because we have a statute  
10 that affects voting. By the way, we don't.

11 MR. AGUILAR: Well --

12 QUESTION: I mean, how -- on those circumstances  
13 why wouldn't the judge say, the person who's invoked our  
14 jurisdiction concedes we don't have it?

15 MR. AGUILAR: The --

16 QUESTION: So we don't have to go further.

17 MR. AGUILAR: The -- what we did with the court  
18 below was, we said that this is a section 5 issue with  
19 regard to the coverage question. We believe that every  
20 preclearance action certainly comes with the predicate  
21 question of whether this is a change affecting voting. I  
22 think that if --

23 QUESTION: How do we get around the statute's  
24 language?

25 MR. AGUILAR: I beg your --

1 QUESTION: How do -- my problem is how to get  
2 around the statute's language.

3 MR. AGUILAR: Well, I think we're relying on  
4 this Court's decision in Allen. This Court was able to  
5 get around the statute's language and allow for private  
6 plaintiffs to file an action on the coverage question and  
7 then enjoin a covered jurisdiction from proceeding with  
8 the enactment.

9 We're suggesting that the language in the  
10 rationale of Allen gives us the right to come before the  
11 three-judge panel in the District Court of the District of  
12 Columbia in order to review an erroneous -- what we  
13 believe, in -- with all due respect is an erroneous legal  
14 determination with regard to the coverage question by the  
15 Attorney General. I think --

16 QUESTION: Mr. Aguilar, I think when I asked you  
17 the question, has a pure coverage action ever been brought  
18 before, you were candid and said no, but hasn't the  
19 coverage issue been tied to a routine section 5 case where  
20 the District says, we don't think this racially  
21 discriminates and, moreover, we don't even think it  
22 affects voting? That kind of claim has been brought.

23 MR. AGUILAR: Absolutely, Your Honor. We were  
24 involved in that kind of claim previously. There's no  
25 question about that.



1           What we're trying -- if we can -- the logic is,  
2   if we are entitled to bring an action in the district  
3   court that raises both the predicate question and the  
4   question of purpose and effect, then we believe that we  
5   also have, under the logic of Allen, the right to bring  
6   the coverage question only when we are in a situation  
7   where we have, for lack of a better term, been induced to  
8   get preclearance by the Attorney General on an issue that  
9   we don't believe falls within -- on an enactment we don't  
10  believe falls within section 5 to begin with, based on our  
11  reading of Presley.

12           We believe that this Court attempted to draw a  
13  distinction in Presley between those enactments that  
14  respect voting and those that do not, and we are  
15  attempting to bring to this Court, and initially to the  
16  court below, a declaratory judgment seeking a declaration  
17  that in fact the legal judgment of the Attorney General  
18  with regard to the application of Presley is incorrect,  
19  and the only --

20           QUESTION: Why couldn't you have waited till,  
21  say, the first case? The first case comes up, then you  
22  can do what is not uncommon.

23           That is, you say, here's this case, and what we  
24  want you to rule on in this case, you'll be able to see  
25  that under these, whatever it is, (7) and (8), this is not

1 simply not now, but not ever, so get it the way the  
2 statute has worked so far.

3 MR. AGUILAR: Well, let me explain it this way,  
4 Your Honor. Once we were precleared as enabling, then --  
5 if we were to ignore -- if we were to ignore their  
6 determination and just say, well, we think they're wrong,  
7 we're just going to go ahead and enact, and just utilize  
8 this whenever we want to because there's no way it falls  
9 within section 5, in all likelihood we will either get  
10 sued by private plaintiffs, or we'll get an enforcement  
11 action from the Attorney General.

12 If we get sued by private plaintiffs, in all  
13 likelihood we will lose on our --

14 QUESTION: Well, let me interject, because  
15 there's one thing you could have done. You say, okay,  
16 we're going to be delayed a little the first time we do  
17 it, but then we'll be home free, so you could have brought  
18 the case the first time. The first time you were  
19 contemplating -- whatever.

20 MR. AGUILAR: Oh, I see. Instead of opting --

21 QUESTION: And take advantage of the expedited  
22 whatever that both the district court said it had and the  
23 Attorney General.

24 MR. AGUILAR: Well, if you're saying that back  
25 at the time when we presented the entire Education Code

1 and then identified those areas that were election-related  
2 for preclearance that we should have taken this issue and  
3 gone to the District of Columbia -- is that --

4 QUESTION: No. I mean the first time that  
5 you --

6 MR. AGUILAR: Actually --

7 QUESTION: -- had whatever you had in that  
8 district near Dallas.

9 MR. AGUILAR: Oh, I'm sorry. The reason we  
10 didn't do that, Your Honor, was because we wanted to act  
11 quickly. We did not want to have to wait for a year or  
12 two to get a judicial resolution of whether this was a  
13 change affecting voting, or whatever, and --

14 QUESTION: And there -- it didn't take a year or  
15 two, did it, in the case that we have? It took a few  
16 months.

17 MR. AGUILAR: With regard to preclearance of  
18 the --

19 QUESTION: Yes.

20 MR. AGUILAR: -- Wilmer-Hutchins? It took 90  
21 days, and during that 90-day period of time -- again, I'm  
22 going out -- well, actually, we mention this in our  
23 briefing before this Court and the court below.

24 During that period of time IRS and FBI agents  
25 were going in raiding the district offices because they

1 suspected some financial goings-on. We could not do  
2 anything as a State to reach in there and fix the problem  
3 so that the schoolchildren would have --

4 QUESTION: Mr. Aguilar, the law moves slowly. I  
5 have never heard the argument before that a case is ripe  
6 because if I have to wait until it's really ripe in order  
7 to litigate this issue it's going to take a couple of  
8 years.

9 I mean, that's not an argument that makes the  
10 case ripe now.

11 MR. AGUILAR: Well, let me --

12 QUESTION: What is it that you were compelled to  
13 do by having to wait until one of these horrors actually  
14 happened in order to litigate it now, something like in  
15 Abbott Labs.

16 The drug company's primary conduct was  
17 immediately affected. They were put to the choice of  
18 either printing on the labels the ingredients, as the rule  
19 required, or else being liable for an enormous amount of  
20 damages as well as penalties. Now, that's something very  
21 substantial.

22 What does it cost you to wait until the thing  
23 happens, other than time?

24 MR. AGUILAR: Well, federalism is ultimately our  
25 greatest concern, Justice Scalia. We believe that if

1     these enactments -- if we're correct, and they're truly  
2     not --

3                 QUESTION: Do you think it's truly not an  
4     individual freedom? I mean, you're raising the federalism  
5     concern of the State, but that seems to me no different  
6     from the individual freedom concern of the private citizen  
7     who's affected by a rule, and the private citizen has to  
8     wait until the rule bites.

9                 MR. AGUILAR: Well, we're also concerned  
10    about -- well, our concern is with federalism. If we  
11    don't fall within the purview of section 5, then we should  
12    not have to incur the burdens of section 5.

13                We believe that this is a process where --

14                QUESTION: But there's a time and place to  
15    decide that, and this isn't the time. If Texas thinks  
16    they have a crisis in a school district and they're going  
17    to appoint a management team, then go ahead and do it, if  
18    you're satisfied it isn't affecting voting. Do it.

19                If the Attorney General has a complaint, they'll  
20    file it. If some private individual has a complaint,  
21    they'll file it. I just don't see how Texas belongs here  
22    now.

23                MR. AGUILAR: Well, Your Honor, if we were to do  
24    that -- that's what I was trying to explain earlier. If  
25    we were to do that and just ignore what has happened with



1 us before the Attorney General, then in all likelihood we  
2 would get, I think, private litigation, or private  
3 plaintiffs filing a lawsuit saying, wait a minute, you  
4 can't bring the master or management team in because this  
5 is a change affecting voting, and you haven't precleared.

6 And I think the first thing that will happen is,  
7 in all likelihood we'll lose a preliminary injunction  
8 because, of course, the Attorney General's judgments are  
9 accorded deference by the courts, and it will again delay  
10 the process that we're trying to institute, and that is  
11 quickly move in and try to --

12 QUESTION: Well, but when you did -- when you  
13 did apparently submit something to preclearance in the  
14 Dallas district it took essentially a couple of months.  
15 The law says they have to act within 60 days, doesn't it?

16 MR. AGUILAR: It took them 90 days, Your Honor.  
17 We -- I personally phoned and asked for them to expedite  
18 it, and in fact we got, on the sixtieth day, more  
19 questions asked, and 30 days later we got a result.

20 The fundamental -- our fundamental position is  
21 that when you apply Presley to this statute, to the words  
22 of this statute, we -- we're of the opinion that it does  
23 not fall within section 5, because it's certainly not  
24 election-related, and it's certainly not the abolition or  
25 creation of a -- of an office.

1           And finally, the only other thing it could be  
2       would be a de facto replacement. And what we're arguing  
3       is, it can never be a de facto replacement, because the  
4       State, in the provisions, has reserved enough, we believe,  
5       authority to the school board members -- you see, the  
6       school board continues to meet, continues to debate,  
7       continues to vote on important items like tax rates, like  
8       school bond elections, like the amount of money to be  
9       spent on the school for the following years. Those are  
10      areas that our master or management team don't have any  
11      authority for.

12           So it is right, from the perspective of we have  
13      a statute that needs to be interpreted. We have a wrong,  
14      and the wrong to us is an incorrect determination by the  
15      Attorney General that this falls within section 5, seen  
16      through the prism of Presley, and the immediate impact on  
17      us is that it's a federalism one mixed up with the fact  
18      that there is delay in trying to get State processes that  
19      our legislature, elected by the people, wanted to put in  
20      place in order to strengthen our schools. Everybody's  
21      concerned with stronger schools.

22           QUESTION: Well, I don't think -- I don't see  
23      how waiving the magic word federalism alters the ripeness  
24      analysis.

25           MR. AGUILAR: I'm not suggesting that it

1     magically alters it, Your Honor. I'm just saying that it  
2     is in the ripeness analysis you've got to consider the  
3     federalism concerns when there has been an incorrect  
4     determination that an enactment falls within section 5  
5     when in fact it doesn't.

6             This Court itself in Presley, in Allen, in  
7     Katzenbach, all of those cases, been consistent in saying  
8     that section 5 is a draconian measure. That was passed  
9     for good reason. We're not disputing that, but what we  
10    are saying as with regard to these two provisions they do  
11    not fall within the rubric, within the coverage of section  
12    5. Then we have a federalism issue here, the very same  
13    federalism issue that this Court has consistently noted in  
14    all of these cases.

15            Thank you very much.

16            QUESTION: Thank you, Mr. Aguilar.

17            Mr. Wolfson, we'll hear from you.

18            ORAL ARGUMENT OF PAUL R. Q. WOLFSON

19            ON BEHALF OF THE APPELLEE

20            MR. WOLFSON: Mr. Chief Justice, and may it  
21    please the Court:

22            For two reasons we think the district court was  
23    not empowered to decide the merits of Texas' request for a  
24    declaratory judgment in this case. First, as that court  
25    actually concluded, the case was not ripe for a judicial

1 decision in both the Article III and the prudential senses  
2 of ripeness and, second, the court in our view lacks  
3 statutory jurisdiction to decide this kind of case, which  
4 raises only the question of coverage under section 5 and  
5 does not actually request preclearance.

6 Because the district court disposed of the case  
7 on ripeness grounds, I'd like to turn to that issue first.

8 QUESTION: Mr. Wolfson, before you do, I don't  
9 see that they're truly separate, because if you're right  
10 about ripeness, then there can never be this kind of  
11 action, because when it's ripe there will always be the  
12 actual --

13 MR. WOLFSON: Right. I mean, I suppose  
14 theoretically if the State were actually -- if it were  
15 actually implementing one of these sanctions and for some  
16 reason it wanted to go to the three-judge district court  
17 and say, well we -- you know, we really want you just to  
18 decide the issue on coverage. We -- you know, we don't --  
19 because we don't --

20 QUESTION: Isn't that extremely hypothetical? I  
21 mean, if you went and you've done it, or you've got the  
22 plan and you say, please preclear it, as soon as you do,  
23 the moment you do we'll do it, why would you ever want to  
24 engage in that kind of --

25 MR. WOLFSON: I don't --

1 QUESTION: -- hypothetical exercise?

2 MR. WOLFSON: I don't think you -- I mean, the  
3 only reason why I think you might is if there were  
4 evidence of discriminatory intent and you wanted to come  
5 outside of section 5 by saying that you didn't have to --  
6 it wasn't covered at all, but I --

7 QUESTION: The reason you'd want to do it is you  
8 don't want to play this game every time. I mean, are you  
9 taking the position that even when there is a -- an actual  
10 implementation of this plan in a certain district, the  
11 State of Texas cannot come into the D.C. District Court  
12 and say, we think this is okay because it is simply not a  
13 change in voting?

14 MR. WOLFSON: They can raise the --

15 QUESTION: Because nothing under this statute is  
16 a change in voting.

17 MR. WOLFSON: They can raise -- I think that if  
18 they invoke the jurisdiction -- well, they can raise that  
19 in the courts in two ways.

20 First of all, of course, they can actually  
21 implement it, and then -- and then raise that as a defense  
22 if a private party or a -- or the Attorney General brings  
23 an action under section 5 in a local district court.

24 But if they go -- the way we read the statutory  
25 jurisdiction, if they go to the three-judge court in the



1 District of Columbia and they say -- if they invoke the  
2 jurisdiction of the court for preclearance actions they  
3 can also say, and we don't think this is a change  
4 affecting voting, so we don't have to be here, but that's  
5 once they invoke the jurisdiction of the district court in  
6 a properly presented preclearance action.

7 QUESTION: What about Allen? I mean, that  
8 certainly gave a broader construction of the availability  
9 of an action under this statute than one might expect.

10 MR. WOLFSON: I think that's true. I think that  
11 there are factors, though, in this situation -- I mean,  
12 Allen relied on the notion that there was no other way,  
13 really, that a private party could --

14 QUESTION: But how -- what's that got to do with  
15 jurisdiction, the fact that there's no other way that a  
16 private party could do it?

17 MR. WOLFSON: Well, in that case Allen really  
18 was sort of an implied cause of action case, I think,  
19 where the -- the Court might not decide it on that way  
20 today. It might be viewed as an Ex parte Young type  
21 action, or a section 1983 action since Maine v. Thibedaux,  
22 but at that time I think the Court was saying there was  
23 subject matter jurisdiction under 1343, and there was an  
24 implied cause of action under section 5, and then the  
25 Court said, well, looking at the statute as a whole we

1 think they need a three-judge court.

2 Here we have --

3 QUESTION: Well, Mr. Wolfson, the Attorney  
4 General encouraged Texas to submit this new law to it, to  
5 the Attorney General for preclearance, and the Attorney  
6 General looked at the first six categories of sanctions  
7 and said, fine, that's not the problem. You can implement  
8 it.

9 Now, could Texas have gone to the district court  
10 in the District of Columbia and said, as to the first six  
11 sanctions, look, we want to file this and get it  
12 determined right now. It's not an implementation of  
13 voting changes.

14 MR. WOLFSON: Right. That would be a --

15 QUESTION: Would that have -- would the court  
16 have had jurisdiction to do that?

17 MR. WOLFSON: I think it might. I think that  
18 would be what we call a preclearance of an enabling --  
19 enabling legislation before --

20 QUESTION: But that's what they're arguing for  
21 sections (7) and (8).

22 MR. WOLFSON: I think --

23 QUESTION: I mean, I have trouble with your  
24 juris -- your no subject matter jurisdiction argument.

25 MR. WOLFSON: I think as to (7) --

1 QUESTION: Why can't the court just say it isn't  
2 ripe, and that's the end of it?

3 MR. WOLFSON: I think -- well, the court did say  
4 it isn't ripe, and our view is that this Court can --

5 QUESTION: Well, why can't we? I mean --

6 MR. WOLFSON: You can.

7 QUESTION: I just -- I think your subject matter  
8 jurisdiction argument is very troublesome.

9 MR. WOLFSON: I'm certainly happy for the Court  
10 to resolve the issue on ripeness. I think that -- I do  
11 think that if Texas -- first of all, in terms of  
12 preclearing enabling legislation, we're not aware of any  
13 situation in which a covered jurisdiction has gone to the  
14 three-judge district court in the District of Columbia and  
15 asked for just enabling legislation to be precleared  
16 before it's ever been implemented, and I think just as --

17 QUESTION: But you can understand the State's  
18 concern. If the Attorney General is going to take some  
19 extreme position -- maybe not this Attorney General, but  
20 someone in the future, and say that some absolutely  
21 innocent law in a section 5 area nevertheless requires  
22 preclearance, why shouldn't the State be able to go to the  
23 district court here and say, look, this just doesn't  
24 implement it at all?

25 MR. WOLFSON: I mean, there are many

1 occasions -- there are many occasions on which, of course,  
2 parties want to have their rights adjudicated  
3 definitively, and there are even occasions on which the  
4 other side wouldn't mind having that done, determined by  
5 the courts.

6 QUESTION: Yes, but the Attorney General would  
7 be right in there opposing it, because it's I'm assuming a  
8 situation where the Attorney General is taking a very  
9 unrealistic view of it.

10 MR. WOLFSON: Right, but the fact is that in  
11 our -- in a system of the Federal courts that we have the  
12 courts can't resolve a controversy in advance of -- can't  
13 resolve a dispute like that in advance of a --

14 QUESTION: Well --

15 MR. WOLFSON: Of a concrete case of controversy.

16 QUESTION: But you know, in Allen the court  
17 found some way. They said this was the only way this  
18 could be done, even though it was a rather circular way.

19 MR. WOLFSON: And that's not the case here.

20 QUESTION: Why isn't it the case here?

21 MR. WOLFSON: Well, there are -- well, if the  
22 State really -- if the State implements -- if the State  
23 finds it necessary to go so far --

24 QUESTION: On Justice O'Connor's hypothesis.

25 MR. WOLFSON: Okay. Right.

1 Well, I -- I mean, in Allen, though, there was a  
2 ripe controversy. I mean, I think that's an important  
3 difference, but --

4 QUESTION: Yes, but let's assume that the  
5 doctrine of ripeness would prevent many of this kinds of  
6 suits from being brought. You're saying not only is it  
7 not ripe, but the district court simply had no  
8 jurisdiction, and that, I think, is dubious under Allen.

9 MR. WOLFSON: Well, again, I think that in terms  
10 of the district court's jurisdiction there are a number of  
11 factors that one has to take into account. First, it is a  
12 waiver of sovereign immunity problem. The Court has to  
13 find an express waiver of sovereign immunity for a suit  
14 against the United States, and that -- in Allen the Court  
15 didn't look at it that way.

16 QUESTION: Mr. Wolfson, can you explain that to  
17 me, because I had thought that in 702 the United States  
18 was waiving immunity for nonmonetary claims en masse.

19 MR. WOLFSON: But this is not -- I think Morris  
20 v. Gressette really resolves that this is not an  
21 Administrative Procedure Act type claim, and it has to  
22 fall within --

23 QUESTION: But I can see that the way --  
24 although 702 is in the APA, I didn't think it was limited  
25 to the APA.



1 MR. WOLFSON: I think our view is that the --  
2 that this case has to be resolved only within the  
3 confines -- the jurisdiction is only within the confines  
4 of section 5 itself, and that it's really an exclusive --  
5 exclusive mechanism.

6 QUESTION: But that wasn't what was done in  
7 Allen.

8 MR. WOLFSON: Well, in Allen -- in Allen --

9 QUESTION: In Allen the Court went into 1343.

10 MR. WOLFSON: That's right, but again that  
11 was -- I mean, at that time I think the Court did not view  
12 actions against the States as raising the same sovereign  
13 immunity concerns that -- as it might now or as it does  
14 against suits against the United States. The only basis  
15 for jurisdiction for this type of claim is section 5  
16 itself, and that, for the reasons we give in our brief,  
17 that's not -- we don't find it to fall within section 5.

18 QUESTION: No, but Mr. Wolfson, as I understand  
19 it, even on your own argument, if they had gone into the  
20 D.C. court and said, we want preclearance, it's quite true  
21 we asked for preclearance from the Attorney General and we  
22 got it only, as it were, 90 percent of the way, we're  
23 coming in here and we're asking for preclearance 100  
24 percent of the way -- i.e. with no such condition as this  
25 enabling legislation, condition 9. And by the way, we

1 also don't think we're covered. On your theory, it seems  
2 to me, they could have gotten exactly what they wanted if  
3 they had in effect come in and pleaded in that form.

4 MR. WOLFSON: Well, if they were -- I think if  
5 they sought that --

6 QUESTION: Is -- am I right?

7 MR. WOLFSON: Well, once they're implementing --

8 QUESTION: Because you said, you know, if they  
9 come in and they ask for preclearance and then they say,  
10 as it were, as an afterthought, by the way, we don't think  
11 we're covered at all, this declaratory issue may be taken  
12 out.

13 So I take it on your view, the court would have  
14 had jurisdiction if they had simply approached it in that  
15 particularly formal way.

16 MR. WOLFSON: I think if they were doing that  
17 before the statute had ever been implemented, or before  
18 there was ever any -- in a situation where there was no  
19 expectation it would be implemented in the future, there  
20 would be a serious prudential ripeness concern there. I  
21 think it would be the same --

22 QUESTION: No, but I'm talking about  
23 jurisdiction.

24 MR. WOLFSON: Right. I think that if --

25 QUESTION: I mean, the statutory jurisdiction.

1 MR. WOLFSON: Right. I think that probably  
2 would be within statutory jurisdiction, just as --

3 QUESTION: Well then, why isn't the statutory  
4 jurisdictional argument here, then, one of pure formality?  
5 The only thing that they fail to do, on your theory, is to  
6 precede their request for this declaration with a  
7 statement in the form, please preclear this.

8 MR. WOLFSON: I think -- well, I think that what  
9 it reflects is that they didn't preclear it -- they didn't  
10 ask for preclearance because -- and I can't speak for the  
11 State, obviously, why they didn't request preclearance,  
12 but that they knew that they weren't going to -- they knew  
13 that it wasn't going to be done immediately, and so there  
14 was nothing to pre -- there was no implementation of it to  
15 preclear.

16 QUESTION: They didn't ask for it because it  
17 might have been granted. This case does differ from --

18 MR. WOLFSON: Well, right, but --

19 QUESTION: -- is the same as Allen in this  
20 respect. Just as we said in Allen there's no other way to  
21 get this, there is really no other way to be sure what  
22 you're going to get is a declaration that none of these  
23 things are within the act.

24 MR. WOLFSON: Right, but I don't think --

25 QUESTION: Because if they ask for preclearance,

1 if I were a district judge I would say, why should I  
2 bother my brains about this, at least in this instance  
3 it's okay. I -- why do I have to reach the more general  
4 question?

5 And that will happen every time one of these  
6 specific requests for preclearance is given. The State  
7 can never be assured that that case will be decided by the  
8 court on the basis that this is simply not a voting  
9 change.

10 MR. WOLFSON: That may be, but I don't think --  
11 I mean, but the section is designed principally for  
12 preclearance, for preclearance actions, and I don't  
13 think -- this is really somewhat hypothetical, but if the  
14 State did bring such an action and got preclearance, I  
15 don't think the State could complain about that. I mean,  
16 they couldn't appeal a judgment preclearing --

17 QUESTION: No.

18 MR. WOLFSON: Preclearing legislation, and  
19 indeed --

20 QUESTION: No, that's the worst part of it.

21 MR. WOLFSON: No, but --

22 QUESTION: Then they'll have to preclear every  
23 other one after that. They --

24 MR. WOLFSON: It wouldn't be the worst part of  
25 it, because then they would have a defense to any action

1 brought by a private party in a local three -- in a local  
2 district court, but that --

3 QUESTION: How can they make a judge advert to  
4 the issue that they want to bring --

5 MR. WOLFSON: I don't think they can.

6 QUESTION: There's no way they can.

7 MR. WOLFSON: I don't think they can.

8 I do want to turn --

9 QUESTION: Just before -- one quick second. Is  
10 it possible that -- assume they don't want to plead it, I  
11 mean, the way that we want them to plead it, which is in  
12 the alternative, in which case they'd come in, but suppose  
13 they do just want to be sure they're going to get  
14 noncoverage, can they bring an ordinary declaratory  
15 judgment action in an ordinary court?

16 MR. WOLFSON: I don't think so. I think that --

17 QUESTION: Why not?

18 MR. WOLFSON: It's -- I think that section 5  
19 is -- well -- I mean -- well, I think that section 5 is  
20 really exclusive, and that they can't just proceed to a --  
21 I mean, I don't think they could proceed to a single  
22 district judge in a -- in district court under the  
23 Declaratory Judgment Act, because I think that section --  
24 really the only way the issues --

25 QUESTION: But section 5 --



1 MR. WOLFSON: -- of coverage can be raised are  
2 those --

3 QUESTION: The jurisdiction of section 5 is to  
4 grant preclearance of changes in affecting voting. If  
5 your argument is there is no change, why couldn't you  
6 bring that action to a single district judge --

7 QUESTION: Yes, that's my --

8 MR. WOLFSON: Well, I think that our view is  
9 that section 5 really is exclusive.

10 QUESTION: It's exclusive as to changes, but is  
11 it exclusive as to claims that there are no change -- by  
12 the district itself that no change has taken place?

13 MR. WOLFSON: I think that it's the only -- it  
14 sets forth the ways in which one can --

15 QUESTION: But what you're saying is, if it's  
16 exclusive, then there's no forum at all --

17 MR. WOLFSON: No, no, no --

18 QUESTION: -- for that kind of action.

19 MR. WOLFSON: I mean, it can be raised --

20 QUESTION: Only if they allege they're making a  
21 change.

22 MR. WOLFSON: It can be raised if they bring  
23 preclearance -- I mean, a similar case is probably City of  
24 Lockhart, where I believe the city argued -- they both  
25 argued for preclearance, and they also said, it's not a

1 change. In other words, it -- they argued it wasn't --  
2 it's a little bit different than this because they weren't  
3 arguing it didn't affect voting, but they argued it wasn't  
4 a change from the previous -- from the cases before.

5 QUESTION: Is that a case that was initiated by  
6 the city? I don't remember.

7 MR. WOLFSON: Yes. It was a preclearance action  
8 in the District Court of the District of Columbia, and  
9 this Court, although this Court found it was a change, it  
10 did -- it did examine it, the lower court did, and this  
11 Court did examine it on direct appeal.

12 I think the -- it is -- this is a very unusual  
13 statutory provision, there's no doubt about it, but  
14 Congress wanted these questions to be brought, I think  
15 within the section 5 confine.

16 QUESTION: Well, are you saying, then, that  
17 under Lockhart if the -- if the three-judge court in a  
18 section 5 action can examine whether or not there was, in  
19 fact, a change, can it also examine whether or not in fact  
20 the change affected voting?

21 MR. WOLFSON: The three-judge court can, yes,  
22 and the similar cases, the other Texas case that was --

23 QUESTION: So, then, there isn't any  
24 jurisdictional barrier here.

25 MR. WOLFSON: No, but in both of those cases

1 there was an actual preclearance action brought. It was a  
2 classic preclearance action brought in the three-judge  
3 court where the State was actually -- or the city in  
4 Lockhart, the State in Texas, was actually to implementing  
5 something, and they argued in the alternative, if you  
6 will, that --

7 QUESTION: Well, what if the State simply  
8 wants -- and this question has been asked before, but I'm  
9 not sure I know your answer. What if the court simply  
10 wants a declaration that these changes they've made do not  
11 affect voting?

12 MR. WOLFSON: I don't think that that -- that  
13 there is jurisdiction for just that.

14 QUESTION: Well, under the declaratory -- if  
15 section 5 doesn't afford it, and then why can't you go  
16 into a single-judge district court and --

17 MR. WOLFSON: Well, first of all that's  
18 definitely not -- I mean, that's definitely not what was  
19 done in this case, and so --

20 QUESTION: No.

21 MR. WOLFSON: And so the question in this case  
22 is whether the three-judge court had jurisdiction, and  
23 that would bring it to this Court under the mandatory  
24 direct appeal procedure, but whether or not it could have  
25 been brought in a three-judge --

1 QUESTION: Well, the Government never made the  
2 argument in the district court that it's making here, did  
3 it?

4 MR. WOLFSON: That's correct. I mean, we --

5 QUESTION: So your whole argument's kind of  
6 novel.

7 MR. WOLFSON: We did -- we did -- but the  
8 district court did itself raise doubts as to whether it  
9 properly had statutory jurisdiction, and this Court has,  
10 on other occasions, itself examined whether there was a  
11 statutory basis for jurisdiction.

12 QUESTION: But it's just so unlikely that we'd  
13 end up with a situation where a State wants a declaration  
14 that the law it passed does not affect voting, and to be  
15 told there is no forum in which to get that resolved, that  
16 is a very odd position to take.

17 MR. WOLFSON: I guess our position is, the State  
18 can get that resolved when it is -- when it is -- it can  
19 actually implement the change and require somebody to come  
20 in, in effect, and challenge that.

21 QUESTION: Well, that was the law before they  
22 had declaratory judgments about lots of things --

23 MR. WOLFSON: Right.

24 QUESTION: -- that you just had to wait, but  
25 since the declaratory judgment action, that's no longer

1 true.

2 MR. WOLFSON: But I do want to -- I just want to  
3 say that, I mean, it's not the case that the State has no  
4 forum in which its argument can be tested.

5 QUESTION: Are you saying that the district is  
6 well advised to just go ahead and appoint its master and  
7 wait to be sued?

8 MR. WOLFSON: I think that is an option  
9 that's --

10 QUESTION: They're liable for attorney's fees if  
11 they're wrong, I take it?

12 MR. WOLFSON: We might -- yes. We might --

13 QUESTION: Are they liable for attorney's fees  
14 if they're wrong?

15 MR. WOLFSON: I believe under -- yes, they are,  
16 if a private --

17 QUESTION: Are the contracts and the decisions  
18 and the directions that the special master has given to  
19 the district before the litigation is terminated now at  
20 risk? These contracts are void, or voidable, I take it?

21 MR. WOLFSON: I'm not sure.

22 QUESTION: You're advising this district to go  
23 ahead and implement a section 7 provision without getting  
24 preclearance?

25 MR. WOLFSON: Well, they can also -- they can



1 also ask for preclearance, and we did preclear both in the  
2 City of New York case --

3 QUESTION: Yes. You asked them about six pages  
4 of questions.

5 MR. WOLFSON: And City of New York -- and once  
6 we asked the questions -- well, once we asked questions,  
7 then we expeditiously precleared it.

8 They can also go to the three-judge court in the  
9 District of Columbia and say, we need to do this -- we  
10 need to do this right away, please resolve this issue  
11 promptly, and also please resolve it on the question of  
12 whether it's coverage, and that is open to the district  
13 court, although as I --

14 QUESTION: You don't think the district court  
15 can act any faster? Certainly you'd come in and say, we  
16 want the answers to these questions so we can decide  
17 whether to oppose it.

18 MR. WOLFSON: I --

19 QUESTION: You're certainly not going to just  
20 lie down in this one forum and --

21 MR. WOLFSON: I mean, I do think that the  
22 Attorney General's review is viewed as more expeditious,  
23 and -- but I don't think that -- I mean, I don't think --

24 QUESTION: But it is a significant burden. If  
25 you read through the papers, as Justice Kennedy pointed

1 out, 90 days it takes to process one of -- if that's a  
2 typical request --

3 MR. WOLFSON: Right.

4 QUESTION: -- and if they have an emergency  
5 situation, they really have a difficult problem --

6 MR. WOLFSON: Well, the City of New York case  
7 was done in 22 days. I do want to point that out. I  
8 mean, it's -- we do have a responsibility to be cautious  
9 in this area as to what is or is not a change affecting  
10 voting. I mean, our position is that (7) and (8) on their  
11 face do admit of the possibility that there is a change  
12 affecting voting, and it's possible to see situations  
13 where it could be implemented in a discriminatory way,  
14 and --

15 QUESTION: May I ask you a jurisprudential  
16 question? You having raised this jurisdictional issue, do  
17 you think it's permissible for this Court to decide the  
18 ripeness issue without first deciding whether we have  
19 jurisdiction?

20 MR. WOLFSON: I do. I think that the appeal  
21 provision of section 5, which provides for a direct appeal  
22 to this Court in any appeal, is quite different than, for  
23 example, the provisions in the old -- under the old three-  
24 judge district court, the old three-judge district court  
25 statute where law of a State was -- the constitutionality

1 was drawn into question.

2 I think that the perp that -- under that old  
3 provision, the Court had to engage in this very elaborate  
4 analysis about whether -- was the three-judge court  
5 properly convened, because did they -- or did there have  
6 to be a three-judge court, and then if the -- the end  
7 result under that analysis was basically, if the three-  
8 judge district court ruled on any ground other than  
9 striking down the State statute or upholding it on the  
10 merits, then the case had to go back to the three-judge  
11 district court, really, and then taken back up the court  
12 of appeals.

13 I don't think section 5 provides for such an  
14 elaborate provision. I do think that the expedition of  
15 section 5 is a factor that indicates that the Court can  
16 resolve the cases that were brought up to it directly.

17 NAACP v. City of New York is the leading case on  
18 this point, where in that case there was a motion to  
19 intervene, I think in the -- I think it was in a  
20 preclearance action in the District of Columbia District  
21 Court, and the motion to intervene was denied.

22 That case was brought directly up to this Court,  
23 and this Court said, we can decide that, and I think this  
24 case is similar.

25 QUESTION: Mr. Wolfson, does the Attorney

1 General have any provision for taking immediate action to  
2 allow partial implementation of a law like this pending  
3 its decision on the preclearance request?

4 For example, where the bankruptcy proceeding has  
5 been initiated and people are in the school district  
6 trying to seize assets, and the kids can't go to school,  
7 is there any provision for the Attorney General to come in  
8 and say, well look, we're considering this, but right now  
9 we're going to let you operate with the management team  
10 pending our resolution?

11 MR. WOLFSON: I'm not aware that the Attorney  
12 General's guidelines have anything directly on that point.  
13 I mean, we can preclear parts of things, of course, and so  
14 if, for example, you know, there were a -- if the State  
15 were planning to do two or three different things, say, in  
16 several school districts, and there was an emergency in  
17 one, and -- we could preclear -- we could do partial  
18 preclearance, or we can say, we think that this provision  
19 is precleared, but we need to look a little more closely  
20 at another provision under which you are exercising  
21 authority, so there is that possibility.

22 QUESTION: It seems to me rather puzzling and  
23 somewhat ironic that you are urging that the State of  
24 Texas can proceed, without any preclearance at all, to  
25 implement a section 7 plan when you have gone through the

1 preclearance procedure in the Wilmer-Hutchins district,  
2 and you say, well just go right ahead and take your  
3 chances, but you can't go into the United States District  
4 Court.

5 It seems to me that the Justice Department would  
6 say, of course, go into the district court and we'll  
7 answer this question yes or no as to whether or not  
8 Presley and Etowah applies to a section 7 proceeding.

9 MR. WOLFSON: Well, I mean, I think that if  
10 there is -- if they're actually implementing it, then that  
11 is by far the preferred procedure, to go into the three-  
12 judge district court. That's the preferred procedure that  
13 Congress set up, and -- but I don't think it's correct to  
14 say that the State has no options.

15 I mean, obviously we prefer that a preclearance  
16 action be brought in the three-judge district court, or  
17 that a submission be made to the Attorney General, but  
18 just as the three -- but in all these situations, we can't  
19 resolve all of these questions in advance, before some  
20 actual implementation is proposed.

21 I mean, the -- certainly, for the reasons I've  
22 explained the three-judge district court can't do that  
23 because of Article III concerns, and the Attorney General  
24 also -- although the Attorney General may be able to  
25 preclear, and often does preclear enabling legislation,



1 the Attorney General often has to wait until some actual  
2 implementation of that is proposed before review -- both  
3 before reviewing that on the merits and also even making a  
4 considered determination as to whether it would be a  
5 change affecting voting.

6 QUESTION: Mr. Wolfson, you're working in the  
7 direction of ripeness, and your time is --

8 MR. WOLFSON: Finally.

9 QUESTION: -- fleeting. Are you going to hit  
10 ripeness directly?

11 MR. WOLFSON: Yes. I mean, I think in effect  
12 the State has asked for an advisory opinion that if the  
13 Commissioner of Education at some point decides to appoint  
14 a master or a management team for a local school district,  
15 then that appointment would not be a change affecting  
16 voting, and I think it is significant that, as the State  
17 has acknowledged, that it's their policy that when a  
18 school district does have performance problems the  
19 Commissioner tries to resolve those problems through less  
20 intrusive sanctions, and we don't know that in the -- now  
21 or in the imminent future the Commissioner will ever need  
22 to go so far as to reach the sanctions under sections 7  
23 and 8. I mean, section --

24 QUESTION: But we know it happened once --

25 MR. WOLFSON: We know it happened --

1 QUESTION: -- so why can't they just amend the  
2 thing and say, look, it happened to us once, and we want  
3 assurance that it will never happen again?

4 MR. WOLFSON: I think that *Renne v. Geary* is  
5 actually fairly clear that that does not -- fact does not  
6 change either the analysis or the result, that that --  
7 that controversy was moot before this complaint was filed.

8 QUESTION: May I ask you one question that kind  
9 of troubles me about the -- your position? The  
10 question -- it seems to me the question of whether the  
11 appointment of a management team or a master is -- affects  
12 voting depends on what the management team or the master  
13 does, exercising -- some of them -- it seems to me some of  
14 the things they do clearly would not affect voting, others  
15 would, so I'm not sure you're going to have the ripeness  
16 the way you've described it until not only the management  
17 team's been appointed but also there's some idea of what  
18 the management team proposes to do that the school board  
19 itself would not have done.

20 MR. WOLFSON: I think -- well, one thing is that  
21 under the Texas law when the Commissioner of Education  
22 appoints a master or a management team he is supposed to  
23 delineate the powers of the master or the management team.

24 Now, I agree we don't necessarily know every  
25 single thing that that master or management team might do,

1 but I think we will have a much better idea when that  
2 happens of what are the totality of the powers of -- that  
3 might be exercised. Now --

4 QUESTION: But they're all going to be the  
5 totality set forth in the statute, I think.

6 MR. WOLFSON: Right, but I think the -- I mean,  
7 that point we may have, we and the district court may have  
8 questions. I mean, the face of the statute, I think,  
9 lends itself to some rather evident questions.

10 For example, the statute says, well, the master  
11 or the management team may not adopt a budget that is  
12 different from the one adopted --

13 QUESTION: Right.

14 MR. WOLFSON: -- by the school board, but it  
15 also says that the master or the management team may  
16 direct the trustees to take any action.

17 Well, may the master or the management team,  
18 although he can't -- he, they, or she can't adopt a  
19 budget himself. Can they tell the district court, tell  
20 the school district we don't like your budget, do a new  
21 one, and what happens -- you know, is that anticipated? I  
22 mean, there are --

23 QUESTION: Can you be more specific? Could you  
24 give us, for example, an example of an act that might be  
25 taken under appropriate instructions, under 7 and 8, that

1 would not go so far as 9 and 10, but which would affect  
2 voting?

3 MR. WOLFSON: I -- right.

4 QUESTION: Because your brother --

5 MR. WOLFSON: Right. I --

6 QUESTION: -- in effect is saying there's no  
7 such thing.

8 MR. WOLFSON: Right. I think that it's possible  
9 that a commission -- the Commissioner might give the  
10 master the full authority on the face of the statute, and  
11 under that situation you might have a situation in which  
12 the --

13 QUESTION: Not authority that would go so far as  
14 9 and 10.

15 MR. WOLFSON: Right.

16 QUESTION: Right.

17 MR. WOLFSON: But still, you might have --  
18 still -- I mean, the -- well, under 9, for example, the  
19 board of managers can just say, I'm going to do a new  
20 budget, you know. I don't care what the school district's  
21 old budget said.

22 Now -- but I think under 8, or under 7 or 8 he  
23 has -- he may have in effect the same power, although it  
24 has to be -- or almost the same power, although it's  
25 exercised in a different way. I think it's important to

1 note the State --

2 QUESTION: Well, how does it work? Let's --  
3 you're talking about budgets.

4 MR. WOLFSON: Right.

5 QUESTION: Can you give me a budget hypothesis  
6 that would --

7 MR. WOLFSON: The State -- the school  
8 district --

9 QUESTION: That would not go so far as 9 and 10?

10 MR. WOLFSON: The school district has a budget,  
11 and the master or the management team takes a look at it  
12 and says, you know, I don't like this budget. I think  
13 that you have to completely rewrite it. You have to make  
14 it 20 percent less, reallocate, you know, less on building  
15 schools and more on teacher training and school books, and  
16 if you don't -- and so you just take this back and write a  
17 new budget.

18 I think that is probably -- that we would think  
19 that is a de facto replacement along with all the others  
20 powers, because even though the school district --

21 QUESTION: Is it any way that it would be a de  
22 facto replacement in a way that would implicate the  
23 discriminatory concerns of the section 5?

24 MR. WOLFSON: It could. I mean, I do want to  
25 say just because it's a --



1 QUESTION: How? How?

2 MR. WOLFSON: Well, I do want to say just  
3 because it's a de facto replacement doesn't mean it does.  
4 I mean, it may --

5 QUESTION: That's right.

6 MR. WOLFSON: It may be perfectly okay.

7 But I do think there are situations -- for  
8 example, suppose that because of demographic changes a  
9 school district for the first time becomes majority  
10 Hispanic, or majority black, or substantial minority such  
11 that the Hispanics and blacks can for the first time  
12 influence who the -- influence the election of the -- of  
13 their elected officials, and then all of a sudden the  
14 Commissioner decides to implement -- decides we don't like  
15 that, you know -- I'm not -- you know, we want to have an  
16 appointee who's responsible to the Commissioner.

17 Now, I'm not saying that has happened or will  
18 happen, but there are --

19 QUESTION: So you're saying the choice of  
20 educational policy, reflected in a budget, can also be a  
21 reflection of --

22 MR. WOLFSON: Of school --

23 QUESTION: Of racial composition, and if you  
24 affect that, then it is a voting --

25 MR. WOLFSON: I think it --

1 QUESTION: It is a de facto replacement that  
2 would be covered by 5.

3 MR. WOLFSON: I think that the --

4 QUESTION: That's your argument?

5 MR. WOLFSON: I think that the budget  
6 reflects -- you know, among other things reflects the  
7 entire policy that the school board, the elected school  
8 board wants. That's what people elect -- when people  
9 elect a school board they elect them in order to make  
10 various policy judgments, some of which are reflected in a  
11 budget, and the master may disagree.

12 Thank you very much.

13 CHIEF JUSTICE REHNQUIST: Thank you,  
14 Mr. Wolfson. The case is submitted.

15 (Whereupon, at 11:07 a.m., the case in the  
16 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:

TEXAS, Appellant v. UNITED STATES, ET AL.  
CASE NO: 97-29

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BY Don Neri Fedirco  
(REPORTER)