

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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

CASE NO: 97-1396 c. 2

PLACE: Washington, D.C.

DATE: Monday, November 2, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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VICKY M. LOPEZ, ET AL., :
Appellants :
v. : No. 97-1396
MONTEREY COUNTY, ET AL. :
- - - - -X

Washington, D.C.
Monday, November 2, 1998

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
1:00 p.m.

APPEARANCES:

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

PAUL R. Q. WOLFSON, 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 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 97-1396, Vicky Lopez v. Monterey County.

5 Mr. Avila.

6 ORAL ARGUMENT OF JOAQUIN G. AVILA

7 ON BEHALF OF THE APPELLANTS

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

10 The question before you is whether a voting
11 change is required to be precleared prior to its
12 implementation within a section 5-covered jurisdiction.

13 Section 5, plain language, its purpose,
14 administrative interpretation, and congressional
15 ratification, answer that question in the affirmative.

16 The State of California's statutory construction
17 argument would undermine the broad purpose of section 5 as
18 articulated by this Court.

19 QUESTION: Well, but if it's a fair reading of
20 the statute it has weight in its own right, doesn't it,
21 even if it might be contrary to some earlier decisions of
22 this Court.

23 MR. AVILA: Yes, it would. If there's any
24 ambiguity in the plain language of the statute then you
25 would look at, not only at prior precedent, but also you

1 would look at the structure, the overall structure of the
2 act, that is, the interrelationship between sections 4 and
3 5, and also you would look at the Attorney General's
4 longstanding interpretation of the act, and the
5 legislative history, which confirms Congress' awareness
6 and ratification of that interpretation.

7 And when you look at the focus of section 5, it
8 is on the covered jurisdiction and whether its voting
9 practices have changed, irrespective of the source of the
10 voting change, but the State's construction would immunize
11 a covered voting change so long as a State enacted a
12 superseding statute, even if that statute was never
13 subjected to preclearance.

14 This construction would create what has been
15 described as a loophole the size of a mountain. Two
16 examples of such loopholes are:

17 1. Counties could evade section 5 review by
18 securing courtesy legislation at the State level.

19 2. Section 5 review of redistricting plans
20 would be circumvented.

21 On the other hand, a harmonious interpretation
22 of the statute is achieved by construing section 5
23 consistently with section 4.

24 QUESTION: Well, the courtesy legislation point,
25 I mean, I guess you have to acknowledge that a covered

1 county can do some nasty things which it hasn't tried to
2 do before by getting the State to acknowledge State-wide
3 legislation. No?

4 MR. AVILA: That's correct. The problem,
5 however, is that the State's argument, if adopted by this
6 Court, would result in major loopholes in the section 5
7 preclearance provision and, in this particular instance,
8 it would immunize the county's voting changes from section
9 5 review.

10 QUESTION: If you appeal the plain language,
11 what do you do when the State adopts a general provision
12 of legislation? Does each county within the State that
13 happens to be covered have to clear that piece of
14 legislation? My understanding is that it's simply the
15 State that preclears it and when that happens the county's
16 okay.

17 MR. AVILA: If -- the focus is on the voting
18 changes that occur within the covered jurisdiction. If
19 the State enacts a statute that affects voting changes
20 within our covered jurisdiction, either the State or the
21 county can submit either the -- the legislation for
22 section 5 preclearance.

23 QUESTION: Why wouldn't --

24 QUESTION: But if you're appealing to the plain
25 language, does the plain language suggest that either the

1 State or the county can do it?

2 MR. AVILA: The plain language of section 5
3 would suggest that either a covered State or a political
4 subdivision, but, however, the responsibility, the primary
5 responsibility would be on Monterey County to make sure
6 that it submits any voting change, irrespective of its
7 source, when it effectuates a voting change in that
8 covered county.

9 QUESTION: I'm not sure I understand you. What
10 plain language is it that you're relying on? Is it the
11 seek to administer?

12 MR. AVILA: Yes, it is, and the seeks to
13 administer refers, in fact, to the act of administering,
14 not, as the State argues, to an administrative act.

15 Again, the focus is on the covered jurisdiction
16 and whether its voting practices have changed.

17 QUESTION: Suppose the State has not -- pardon
18 me. Suppose the county has no discretion. You shall
19 consolidate the judicial district. Does the State -- does
20 the county seek to administer such a provision? It's not
21 asking. Seek means advice. I might seek your advice.

22 The State isn't really -- or the, pardon me.
23 The county really isn't asking to do anything. It's being
24 told by the State to do it. Let's assume no discretion.
25 Let's assume the State has no different options.

1 MR. AVILA: That interpretation, seeks to
2 administer means seeking to implement. As this Court in
3 the first opinion, it stated --

4 QUESTION: Well, it's not seeking to do
5 anything. It's just ministerially complying with a
6 command from the State.

7 MR. AVILA: It is implementing a voting change.

8 QUESTION: But it's not seeking to in the sense
9 of wanting to, of asking to. It's simply obeying a
10 command from the State.

11 MR. AVILA: Well, even if it obeys a command
12 from the State, when it effectuates voting change within
13 that covered jurisdiction it has to be submitted for
14 section 5 preclearance, otherwise you're going to create
15 huge exemptions, especially in States that have -- that
16 include covered section 5 counties, like North Carolina.

17 QUESTION: You say a huge exemption, but it's
18 perfectly arguable from the language that that's what
19 Congress intended.

20 MR. AVILA: It is a re -- it is one
21 interpretation. However, the Attorney General, which is
22 charged with the central enforcement of this section 5,
23 could also have another reasonable interpretation, and
24 that reasonable interpretation in the past has been
25 deferred to by this Court, especially in matters --

1 especially in terms of interpreting its regulations as
2 they apply to matters affecting voting, and in Presley
3 that was the case.

4 In Presley, section 5's broad scope as it
5 relates to election matters was given a very broad scope,
6 and that -- and the Attorney General in this case has been
7 interpreted --

8 QUESTION: Well, but isn't there an argument on
9 the other side, that here we deal with national and State
10 relations, and that since this does impinge on them, it
11 should probably not get a terribly sweeping
12 interpretation.

13 Here Congress has stepped into the State -- the
14 State local business.

15 MR. AVILA: Yes, but that balance, that balance
16 between -- that delicate balance that was struck by
17 Congress back in 1965 between a State's sovereignty and
18 the Federal interest in eliminating the blight of voting
19 discrimination, that was struck in 1965, and it's been
20 reratified, or ratified three times.

21 QUESTION: Precisely, so let's look at the
22 language and not some cry for a very broad interpretation
23 of it.

24 MR. AVILA: It is not a cry for a very broad
25 interpretation. In fact, what we're seeking to do in this

1 case is just merely maintain what's been going on since
2 1965.

3 And that is, when you have the Attorney General
4 reviewing redistricting plans for 1970, 1980, and 1990
5 from North Carolina, New York, and California, which are
6 States that contain covered counties, when you look at
7 that, and you look at the Congressional Record that's
8 cited in our briefs, you find that in fact in the 1982
9 reenactment of the Voting Rights Act you find explicit
10 references in the Senate report that say, while -- quote,
11 while North Carolina as a State is not subject to section
12 5, the legislation in question affected North Carolina
13 counties which are covered, and therefore it should have
14 been precleared.

15 And when you look at another page reference, at
16 page 14 in that Senate report, it explicitly refers to
17 letters of objection, which they found to be compelling
18 evidence for reenacting section 5, and one of those
19 letters of objection on page 11 of that Senate report is
20 the 1981 redistricting plan for North Carolina.

21 So we have this history of administrative
22 interpretation and this history of congressional
23 ratification of that interpretation, and so when we -- and
24 in addition to that, when you look at the overall
25 structure of the act and the interrelationship between

1 section -- sections 5 and section 4, we find even more
2 compelling reasons for maintaining the status quo.

3 In Katzenbach, this Court stressed the
4 interrelationships between sections 4 and 5, and stated
5 that section 5 was designed to march in lockstep with
6 section 4.

7 In Katzenbach and Gaston County, this Court
8 approved section 4's statutory framework which suspended
9 State literacy laws in section 5-covered counties, even
10 though the State itself was not a designated jurisdiction.

11 In other words, all literacy tests that were
12 suspended in the covered counties were products of State
13 law.

14 QUESTION: Well, one of your arguments is the --
15 what -- the risk of what you refer to as the courtesy
16 legislation, that in fact if State law itself is a means
17 to avoid section 5, the usual State capitol log-rolling
18 will simply mean that the counties will get the
19 legislature to enact what they want.

20 Is it an answer to that to say that a line
21 should be drawn between legislation which affects only a
22 covered county and general legislation which in fact
23 affects every county in the State, which I understand is
24 the case here?

25 Is the risk sufficiently reduced in the case of

1 bona fide State-wide legislation so that we should
2 dismiss -- in a case like this we should dismiss the
3 concerns about courtesy legislation?

4 MR. AVILA: Yes, because in fact the State of
5 California has a choice here in enacting State
6 legislation. When we look at the 1979 State statute we
7 find that California in fact directed its legislative
8 effort towards one county. The statute specifically
9 mentions Monterey County.

10 QUESTION: Well, there's two things there.
11 Justice Souter can certainly protect his own question.
12 The premise of his question was that there was State
13 legislation which applied to more counties than Monterey,
14 and he said, would that be a difference.

15 And then you say, well, this 1979 statute
16 applied only to Monterey. That doesn't really quite
17 answer his question as a principle of law.

18 MR. AVILA: Yes.

19 QUESTION: Why don't you answer the question,
20 first as to whether or not his suggestion about the
21 principle is accurate, then you can say whether or not the
22 principle applies here.

23 MR. AVILA: The principle of law is that when
24 you have a State-wide statute that has -- that affects
25 voting changes throughout the State, and four of those

1 counties in California are subject to section 5, those
2 State statutes would have to be submitted for section 5
3 preclearance.

4 QUESTION: Well, but that's the issue.

5 MR. AVILA: Yes.

6 QUESTION: I mean, that's the issue, and one of
7 your reasons for saying that they must be is that unless
8 the general legislation is so submitted with respect to
9 those counties, legislation at the State level will simply
10 be used as a cover for what in fact is local
11 discriminatory efforts.

12 MR. AVILA: That's correct.

13 QUESTION: My suggestion was that perhaps if you
14 have a genuine, bona fide legislative act intended to
15 cover the whole State that really does cover the whole
16 State, that you don't have that concern, and why isn't --
17 why would you have that concern in the case of State-wide
18 legislation?

19 MR. AVILA: We would have that concern, if I
20 understand the -- your question, because it might still
21 have mischief in other counties.

22 For example, if --

23 QUESTION: You're saying that it might lack
24 intent to discriminate but have the effect.

25 MR. AVILA: That's correct, and really that's a

1 question for another proceeding, because here we are still
2 in the enforcement stage of section 5, and that issue
3 would be best addressed when you're reviewing the
4 substantive determination of whether a State-wide statute
5 has a discriminatory purpose, or has a discriminatory
6 effect.

7 QUESTION: Could I ask you to identify what
8 relief you actually want? This has had a complicated
9 history, the justice and municipal courts in Monterey
10 County. What precisely are you now asking?

11 Are you trying to get preclearance of the
12 California State law in 1979 consolidating municipal
13 courts into a single district, or the county ordinance
14 that same year, or both? It isn't clear to me.

15 MR. AVILA: We are trying to -- both. The quick
16 answer is both. We are trying to basically enforce this
17 Court's first opinion, which stated --

18 QUESTION: Well, yes, fine, but I'm trying to
19 pin it down. You want preclearance, in effect, of the 1979
20 county consolidation ordinance.

21 MR. AVILA: That's correct.

22 QUESTION: And the 1979 State law to the same
23 effect.

24 MR. AVILA: That's correct, and that's the
25 premise of our argument, because --

1 QUESTION: And even if you get some kind of
2 preclearance and review in the meantime, State law has
3 changed again, and has totally eliminated judicial
4 districts.

5 MR. AVILA: Well --

6 QUESTION: There's a constitutional amendment
7 now that eliminated Justice of the Peace courts, and
8 there's a State law increasing municipal judges from seven
9 to nine in the county, and that was precleared.

10 MR. AVILA: Yes, it was. The 1983 State statute
11 was precleared.

12 QUESTION: Yes.

13 MR. AVILA: The -- what is important, however,
14 is that --

15 QUESTION: So at the bottom line, what are you
16 trying to get?

17 MR. AVILA: The bottom line is that the 1983
18 preclearance merely involved the preclearance that this
19 Court found from -- going from three districts, three
20 judicial districts to one county-wide district and in
21 fact, on November 1, 1968, we had nine judicial districts,
22 and the 1983 State statute cannot be read to have
23 precleared those nine districts into three districts,
24 because there's no reference, the Attorney General had no
25 notice --

1 QUESTION: But under State law today it has to
2 be one judicial district, so --

3 MR. AVILA: That's correct.

4 QUESTION: -- what's available at the end of the
5 line? I just don't see.

6 MR. AVILA: Well, the basis for that one
7 judicial district is that if that judicial -- if that
8 county-wide district is to be precleared, it was only
9 precleared or approved from the change from three judicial
10 districts to --

11 QUESTION: Please tell me what it is at bottom
12 you're trying to get. Are you trying to go back to some
13 separate district system --

14 MR. AVILA: No.

15 QUESTION: -- or separate elections? What is it
16 you're trying to achieve at the end of the day? Just tell
17 me.

18 MR. AVILA: At the end of the day we're trying
19 to have an election system that complies with the
20 substantive provisions of section 5.

21 QUESTION: Well, what do you say that is? Is it
22 by separate districts, or a single 1983 judicial district?

23 MR. AVILA: It could be a combination. That
24 would be a best -- a remedy. It could be a combination of
25 districts. It can be a combination of multi-member --

1 QUESTION: There's nothing that you're trying to
2 get, then? Well, I -- in concrete terms, I'd like to know
3 what you are seeking.

4 MR. AVILA: Well, what we're seeking is --
5 basically what we're looking at is either a districting
6 plan or a multi-member districting plan.

7 QUESTION: Well, State law's eliminated multi-
8 member districts now.

9 MR. AVILA: But if we have a -- but if we have a
10 substantive determination that the at-large election
11 system, or that the conversion from nine districts to six
12 judicial districts is in violation of section 5, then the
13 district court is best able to address that particular
14 question as far as a remedy is concerned.

15 QUESTION: So Monterey County could be excluded
16 from this general State legislation, under your view?

17 MR. AVILA: Yes, it could. In fact -- in fact,
18 Monterey County, the State legislature has enacted State
19 legislation that affected just Monterey County, so we're
20 not asking --

21 QUESTION: I thought it was -- I thought it was
22 they had enacted -- revised the justice court system for
23 the entire State.

24 MR. AVILA: That's correct. Now, we're not --
25 we're not requesting at this point to get back into the

1 justice courts. Basically what we're asking for is to
2 secure compliance with section 5.

3 And what I'd like to do is --

4 QUESTION: Well, but as a -- it seems almost
5 like you're avoiding answering. Are you seeking, then,
6 municipal courts, or do you want to go back and have some
7 Justice of the Peace courts, too?

8 MR. AVILA: We want to maintain municipal
9 courts.

10 QUESTION: Municipal courts.

11 MR. AVILA: That's right.

12 QUESTION: And how -- and in Monterey County, do
13 you want them elected by judicial districts or in one
14 single district, as State law now provides?

15 MR. AVILA: We want -- one of the remedies that
16 we have sought is the election by judicial districts.

17 QUESTION: Thank you.

18 MR. AVILA: And I'd like to reserve my remaining
19 time for rebuttal.

20 QUESTION: Very well, Mr. Avila.

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

22 ORAL ARGUMENT OF PAUL R. Q. WOLFSON

23 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

24 SUPPORTING THE APPELLANTS

25 MR. WOLFSON: Mr. Chief Justice, and may it

1 please the Court:

2 Under section 5 of the Voting Rights Act a
3 covered jurisdiction like Monterey County must obtain
4 preclearance of any voting change that it enacts or that
5 it seeks to administer. This change -- this case involves
6 voting changes that the county seeks to administer.

7 In every election for county judges, Monterey
8 County oversees and implements the process by which the
9 voters are registered, by which candidates are placed on
10 the ballot, and by which the winners are chosen in the
11 election.

12 QUESTION: Isn't that all pursuant to State law?

13 MR. WOLFSON: Well, the county -- the county
14 does have to follow State law in some respects, but the
15 county operates the process. I mean, when we refer to
16 seeking to administer the voting change, we read that to
17 mean, it runs the elections by --

18 QUESTION: Even the entire compliance with the
19 law of another sovereign, the State, you know, put up
20 polling places, that is seeking to administer something?

21 MR. WOLFSON: Yes, it is, and in fact I point to
22 two examples. First, I mean, the court looked at a very
23 similar matter in Perkins v. Matthews, where the State of
24 Mississippi before the Voting Rights Act was enacted had
25 shifted from single member districts to at-large

1 elections, and when eventually the city got around to
2 complying with that State law the court said, the change
3 had to be precleared even though the formal enactment by
4 the higher sovereign did not have to be precleared.

5 Another example, actually that's quite relevant
6 here, is, of course, the literacy tests that occasioned
7 the passing of section 5 of the Voting Rights Act.

8 It's quite clear in this case that those tests
9 were mandated by California State law, and they were
10 implemented throughout the State of California at the
11 county level.

12 QUESTION: You're talking about literacy tests
13 in California?

14 MR. WOLFSON: Literacy tests were required by
15 California State law. They were struck down by the
16 California supreme court in -- I believe in 1970, after
17 section 5 was long enacted.

18 Now, section 5 --

19 QUESTION: How does that bear on this case?

20 MR. WOLFSON: My point is that Congress
21 understood that even though there might be a requirement
22 that -- a requirement of the State sovereign that the
23 county follow some procedures, that the county might
24 nonetheless not be able to do so under section 5.

25 And in situations like California and North

1 Carolina, a very important example that was ostensibly
2 discussed when the Voting Rights Act was initially
3 enacted, it was clear to Congress that there could be
4 situations where a State -- there might be nothing wrong
5 per se with a State law, but the effects that it had in
6 certain jurisdictions did -- might have had an effect on
7 minority voting rights --

8 QUESTION: But I don't see how that bears on the
9 issue of seeks to administer.

10 MR. WOLFSON: Seeks to administer means, it runs
11 the election.

12 Now, if I may address Justice Kennedy's question
13 about, doesn't seek to administer indicate some kind of
14 discretion, or some kind of wanting to administer itself
15 and not just following State law.

16 I think that's a -- seek to administer is purely
17 temporal, and it should be contrasted with enacts. The
18 way that the statute is written is, if any jurisdiction
19 enacts or seeks to administer something, a voting change,
20 then it has to obtain preclearance.

21 Now, Congress didn't say seeks to enact, because
22 the legislature can formally enact it into State law
23 without obtaining the approval of the Attorney General or
24 the district court. That mean, before it's actually
25 implemented it has to then obtain preclearance.

1 QUESTION: Well, but if you couple enact with
2 seek, enact indicates discretion.

3 MR. WOLFSON: I --

4 QUESTION: And here I noticed you told the Chief
5 Justice, well, the county has to do the polling and so
6 forth. The county can't do districts. Districts must be
7 set by the State. Am I right about that?

8 MR. WOLFSON: Well, after the State -- I mean,
9 after the State -- arguably the State has now required --
10 has now required one district --

11 QUESTION: But even before, the districts were
12 set by the State law, were they not?

13 MR. WOLFSON: No. I would say before that.
14 Certainly at the very beginning, in 1968, my understanding
15 is that the county had discretion about how to draw those
16 districts within the county lines.

17 So I mean, getting back to the point, I think
18 that seeks to administer simply means to begin to run the
19 process by which elections are operated. There's no doubt
20 that, on the ground that counties are the responsible
21 authorities for doing --

22 QUESTION: Well, supposing the State of
23 California says there's going to be a 65-mile speed limit
24 on our highways, and the county police are going to
25 enforce it. Now, is that something the county is seeking

1 to administer? They're told by the State they have to
2 enforce the speed limit?

3 MR. WOLFSON: I think that it would be seeks to
4 administer.

5 I mean, there are -- I mean, leave aside the
6 point that the county obviously has great discretion in
7 how it would enforce that, but even so, I think that
8 because the county actually operates the elections,
9 that -- you know, that is the process by which it seeks to
10 administer --

11 QUESTION: And how about the speed limit
12 question?

13 MR. WOLFSON: I would say it seeks to
14 administer, because it is foreseen that the -- by
15 hypothesis that the county patrol are the ones who enforce
16 the State law in that section.

17 I do want to point out that it's a long been
18 settled administrative practice that covered counties have
19 been required to submit for preclearance.

20 QUESTION: Mr. Wolfson --

21 QUESTION: They submit, or the State submits?

22 MR. WOLFSON: It has been both. As a matter
23 of --

24 QUESTION: It has been --

25 MR. WOLFSON: Right. As a matter of -- no --

1 QUESTION: -- both if you're relying upon the
2 text of the statute.

3 MR. WOLFSON: As a matter of convenience --

4 QUESTION: You say shall seek to administer. It
5 says such --

6 MR. WOLFSON: Right.

7 QUESTION: You know, such State or subdivision.

8 MR. WOLFSON: As a matter of convenience, from
9 the point of view of administrative practice, the Attorney
10 General has recognized that when a State law, be it --
11 when a State law that generally affects one or more
12 counties, but say when it affects two or three counties,
13 when a State law passes it is more convenient for the
14 State to submit that for preclearance, it is the burden is
15 ultimately --

16 QUESTION: And that happened here, didn't it,
17 with the one that was precleared?

18 MR. WOLFSON: Yes.

19 QUESTION: It was the State that submitted it,
20 not the county.

21 MR. WOLFSON: That's correct. That's correct,
22 it did happen here, and --

23 QUESTION: May I get back to you, because your
24 time is so brief.

25 What do you see as the bottom line, because as I

1 understand it these ordinances cannot be precleared
2 because the county has already admitted that they are --

3 MR. WOLFSON: Right.

4 QUESTION: They dilute, so these -- submit these
5 for preclearance, they won't make the grade, so what
6 happens?

7 MR. WOLFSON: I mean, I need to be very cautious
8 here, because the Department of Justice has not seen the
9 factual evidence underpinning this, so --

10 QUESTION: But at least the county at a prior
11 turn admitted in the D.C. district court.

12 MR. WOLFSON: I think that there are -- I think
13 that there are a variety of ways, assuming that the county
14 still believed that it couldn't successfully submit for
15 preclearance, and we are not prejudging that question, I
16 do want to emphasize.

17 It might be that they would turn to single
18 member districts instead of at-large voting. There might
19 be other ways in which section 5 concerns could be
20 accommodated, like resident --

21 QUESTION: But then last time around we were
22 told there was no way that they could do anything other
23 than this --

24 MR. WOLFSON: Right.

25 QUESTION: -- without violating State law.

1 MR. WOLFSON: That's correct, but I think that
2 they're -- first of all, in the end, if State law
3 conflicts with section 5 they have to follow section 5,
4 but I'm not sure that that's the only -- I'm not sure that
5 dividing the county into single districts is the only
6 option they have.

7 QUESTION: Well, what is it --

8 MR. WOLFSON: There could be residency
9 requirements for judges.

10 QUESTION: But isn't that what the district
11 judge was trying to do for years? He says, come up with
12 something that satisfies both Federal and State, and they
13 couldn't.

14 MR. WOLFSON: Well, again I have to say, I think
15 the only question here is whether preclearance is
16 required. The Department of Justice --

17 QUESTION: Yes, but you want to look down the
18 road. This thing has been dragging on for years.

19 MR. WOLFSON: I under --

20 QUESTION: Why can't we look at the bottom line
21 and ask what we're talking about?

22 I guess bottom line from your perspective is
23 violate State law and mandate single member districts.

24 MR. WOLFSON: If, but only if, it's determined
25 that the State law would be retrogressive.

1 QUESTION: Why -- why --

2 MR. WOLFSON: I don't think that single member
3 districts is the only way. There are other options.
4 There may be other options. We have not looked at it, and
5 I cannot --

6 QUESTION: Well, the district court couldn't
7 come up with any. Mr. Avila couldn't come up with any.
8 What do you have in mind?

9 MR. WOLFSON: Well, there are situations, for
10 example, where a county is -- where there's at-large
11 voting but judges are required to reside in different
12 parts of the county, so that that might not violate the
13 elector -- the separation of electoral and jurisdictional
14 bases.

15 I don't know whether that's been explored. I
16 don't believe it has, but if that were submitted to us we
17 would certainly examine that to determine --

18 QUESTION: So what is the common sense --
19 suppose California's right, suppose.

20 Look, we don't want, says California, to
21 discriminate against anybody. We're trying to change our
22 judicial system.

23 We don't want 98,000 people called justice
24 judges. We want municipal judges, and there'll be one
25 municipal judge in each county, or four. That's all we're

1 trying to do. Look at it up, down, and sideways. We're
2 not trying to do anything else, no discrimination.

3 Now, California says there should be, if that's
4 true, a fairly simple, efficacious manner of bringing it
5 about.

6 Now, in your opinion, what is that efficacious
7 manner, consistent with the law, if what they say is true,
8 we're not trying to discriminate, we're trying to help our
9 judicial system function better.

10 MR. WOLFSON: I think that there are -- I mean,
11 dividing it into districts could be one way. If -- that
12 doesn't --

13 QUESTION: How can you divide it into districts
14 if there's only like one municipal judge --

15 MR. WOLFSON: There's 10 judges. There's 10
16 judges on this municipal court, and so dividing it into
17 districts could be one way of making sure that there's no
18 retrogression and also having -- not having a situation
19 where you had before, consolidation where there were 200
20 people for each judge.

21 You could still have consolidation that would
22 give you the benefits of a more efficient judicial system,
23 but it might not be fully at-large.

24 Thank you.

25 QUESTION: Thank you, Mr. Wolfson.

1 Mr. Stone, we'll hear from you.

2 ORAL ARGUMENT OF DANIEL G. STONE

3 ON BEHALF OF THE APPELLEES

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

6 The district court's dismissal of this section 5
7 coverage case was quite correct, and we submit that it
8 should be affirmed by this Court. The --

9 QUESTION: Mr. Stone, I can't help but ask, was
10 the issue of laches explored in the district court this
11 last time around?

12 MR. STONE: It was raised in our motion to
13 dismiss as one of the grounds on which the case should be
14 dismissed, but the district court did not reach it, and
15 there were several other issues as well that the court
16 found it unnecessary to reach.

17 QUESTION: I'm having just a little bit of
18 trouble hearing you.

19 MR. STONE: Oh, I'm sorry. The question related
20 to whether laches had been raised, and I indicated that it
21 was a ground in our motion to dismiss, but that the
22 district court had not reached it.

23 This case presents a situation that was not
24 contemplated by section 5, and it's a situation for which
25 the preclearance requirement provides no meaningful

1 remedy. Here, if the appellants are correct, then the
2 practical result would be no election for anybody with
3 respect to municipal court judges in the County of
4 Monterey indefinitely.

5 The district court, the coverage court, could
6 enjoin elections under the current system to be sure, but,
7 as everyone now agrees, the county has no authority, no
8 remaining authority to conduct elections pursuant to the
9 1968 status quo system, and the county has no authority,
10 as Justice O'Connor pointed out, to at this point create
11 new justice court districts, to merge districts, or do
12 anything.

13 QUESTION: Well, it can get that authority from
14 the district court, I assume, if the district court should
15 determine that that is the only way to bring the county in
16 compliance with section 5.

17 MR. STONE: Well, we suggest --

18 QUESTION: Does the district court prescribe it,
19 even if it's different from what exists elsewhere in the
20 State?

21 MR. STONE: We suggest that the district court
22 cannot in a coverage case suspend the constitution of a
23 noncovered jurisdiction, that its remedial power
24 necessarily, even if we're talking about the Washington,
25 D.C. district court upon a finding of --

1 QUESTION: Cannot suspend the constitution of a
2 noncovered jurisdiction within the covered jurisdiction?

3 MR. STONE: Correct.

4 QUESTION: Why not? Why can't -- I mean, this
5 is what I don't understand on your side of the case.
6 Assume you're right, California is just trying to
7 implement some perfectly reasonable reform of the justice
8 system, but they say that if you implement it in Monterey
9 County it will have a retrogressive effect in respect to
10 discrimination.

11 Now, you think one thing, they think the other.
12 Why wouldn't everyone long ago have gone to the D.C.
13 circuit, where their job is to work this out?

14 I mean, that's what I don't understand why --
15 why this has gone on for several years arguing -- I don't
16 get it, in other words.

17 It seems like a typical argument. California
18 has a law which it thinks is absolutely perfect. They
19 think, as applied to Monterey County it has a
20 discriminatory effect.

21 The statute says, when a county administers a
22 law -- you know, a covered statute -- that may have any
23 change in voting at all, they're supposed to go to the
24 D.C. circuit, so why aren't you in the D.C. circuit?

25 MR. STONE: Well, your question suggested a host

1 of answers, but initially we now have from the United
2 States Government as amicus a concession that noncovered
3 jurisdictions have no obligation to preclear anything.

4 The State of California is permitted, they say, as --

5 QUESTION: Yes, well, the State has no
6 obligation, they say, to preclear its law even as it
7 affects Monterey County.

8 MR. STONE: Correct.

9 QUESTION: But Monterey County still has an
10 ordinance of its own and wants to administer the State law
11 so it can seek preclearance.

12 MR. STONE: Well, under the United States'
13 theory it is required to seek preclearance, not --

14 QUESTION: Yes.

15 MR. STONE: -- only of its own ordinances but of
16 a State enactment.

17 QUESTION: Uh-huh.

18 MR. STONE: Or in this case a State
19 constitutional amendment --

20 QUESTION: That's what they say.

21 MR. STONE: -- that it did not initiate it, it
22 has no authority to initiate it, and it can't change --

23 QUESTION: But if they're right, then they'll
24 have to seek preclearance, and if the Federal law
25 prevails, it can prevail over California State law,

1 presumably.

2 MR. STONE: Well, if California itself, the
3 State, as a noncovered jurisdiction has no obligation to
4 preclear its enactments, and it does not by concession at
5 this point, then how can the State --

6 QUESTION: But it's free to do so.

7 MR. STONE: I'm sorry, Your Honor.

8 QUESTION: It's free to do so if it wants to,
9 isn't it? Couldn't it assume the burden of seeking
10 preclearance?

11 MR. STONE: Well, I suppose so, but then what
12 does that do to its sovereignty?

13 QUESTION: And it did, it did for the 1983 law.
14 The State did seek preclearance.

15 MR. STONE: It did, and it has on and off over
16 history. Certainly we concede that a number of States in
17 the position of California that are not themselves covered
18 but that have covered subdivisions have, for whatever
19 reasons, and I suspect they were often political reasons,
20 attempts to reassure before enacting, perhaps to guarantee
21 themselves that they wouldn't be subject to section 2 or
22 constitutional lawsuits, they have willingly attempted to
23 preclear through the U.S. Department of Justice.

24 QUESTION: But let's assume that the 1983
25 clearance -- statute was precleared. It's been conceded

1 that it was.

2 Does that carry you home on the grounds that the
3 1983 statute permitted the consolidation of the remaining
4 justice courts into the municipal court, and everybody
5 knew that the municipal court was one district then
6 because of the 1979 statute?

7 Do you make any argument that that carries you
8 all the way home, or is that not before us, or --

9 MR. STONE: Well, the district court indicated
10 that the combination of the preclearance of the State's
11 1983 statute and of the county's final ordinance merging
12 the last remaining justice courts into the municipal
13 court, which was also precleared, that that combination
14 put an end absolutely to anything other than a county-
15 wide municipal court.

16 Now, I recognize that appellants have raised
17 arguments that because the county was the acting agent in
18 bringing those last two justice courts into the municipal
19 court, that there was still some preclearance requirement.
20 The district court found there was not.

21 But that was all rendered moot when in 1994 the
22 people of the State of California eliminated State-wide,
23 as Justice Scalia pointed out, any justice courts. There
24 are no longer justice courts.

25 The State of California, a sovereign, uncovered

1 State, is reforming a central component of its State
2 government. It's changing the nature of the judiciary in
3 the State by eliminating --

4 QUESTION: But if the justice courts are turning
5 into municipal courts it doesn't follow that the municipal
6 courts can't sit in districts, so I don't know if the 1994
7 proposition -- I think it was 191 -- works.

8 MR. STONE: Well, in this Court's prior Lopez
9 opinion in 1996 it pointed out that in the State
10 constitutional framework justice courts are for
11 jurisdiction of less than 40,000, and municipal courts are
12 for more than 40,000, and the requirement that a municipal
13 court district have more than 40,000 State residents
14 within it remains after proposition 191, so that a small
15 justice court cannot become, in and of itself, a separate
16 municipal court.

17 QUESTION: Well, what does that add to what you
18 already had from your 1983 statute --

19 MR. STONE: Well, it doesn't add anything
20 except --

21 QUESTION: It seems to me you don't need --

22 MR. STONE: -- if one hypothesizes that had the
23 county not willingly merged these last remaining justice
24 courts, then, as the district court found, by operation of
25 law, once justice courts were eliminated, the last two --

1 had they still remained justice courts in Monterey County,
2 they would automatically have been folded into the
3 existing --

4 QUESTION: But won't they say that still doesn't
5 solve the problem of districting? Okay, so they're
6 municipal court judges. They still want them to sit in
7 districts.

8 MR. STONE: Well, it's not a thing they can
9 have, we submit, because the current district is defined
10 by State law, and the State is not a covered jurisdiction.

11 QUESTION: Well, but of course if the Federal
12 law requires it then State law has to give way in Monterey
13 County.

14 MR. STONE: Well --

15 QUESTION: That's the point.

16 MR. STONE: That is the question, and --

17 QUESTION: Well, I mean, what do you think the
18 Supremacy Clause of the Constitution is all about?

19 MR. STONE: No, you're absolutely correct, if --
20 if the --

21 QUESTION: I mean, if that is the law -- if that
22 is the law, that Federal law requires the election of
23 judges by district in Monterey County, then it doesn't
24 matter that the State law says something else.

25 MR. STONE: Well, except that one has to define

1 the Federal law in a way that it can reach and annul State
2 law.

3 QUESTION: Well --

4 QUESTION: But that's a statutory argument.

5 MR. STONE: Correct. The question is the plain
6 meaning of section 2, and we've shown the Court in our
7 briefs --

8 QUESTION: Mr. Stone, could I ask you a question
9 about the conflict with the California law? As I
10 understand the California law, it requires a county-wide
11 district for judicial purposes, for jurisdictional
12 purposes, but does it speak to the question of how the
13 judges will be elected?

14 In other words, would it necessarily conflict
15 with State law if the county had a rule that said the
16 district shall -- county-wide -- judges have county-wide
17 jurisdiction, but one of the judges must be a resident of
18 a certain part of the county, I mean, divide up the county
19 residentially for voting purposes, something like that,
20 that didn't affect their jurisdiction, would that conflict
21 with State law?

22 MR. STONE: Your hypothetical would involve
23 subdistricts for election purposes?

24 QUESTION: Either subdistricts for election
25 purposes or at least for residential -- for qualification

1 of the judges to live in a certain neighborhood or
2 something like that.

3 MR. STONE: Well, I'm not sure what the answer
4 is to a residential requirement if there were county-wide
5 voting for those people.

6 QUESTION: You think there would have to be
7 county-side voting, though?

8 MR. STONE: Yes. That is a matter of the State
9 constitution, Article VI, section 16.

10 QUESTION: But that does not --

11 QUESTION: That applies to all counties?

12 MR. STONE: Yes. As to all judicial districts,
13 every voter within a judicial district is entitled to vote
14 for every judge of that district.

15 QUESTION: But there are some counties --

16 QUESTION: I see.

17 QUESTION: -- in California with more than one
18 judicial district.

19 MR. STONE: Correct, and for that there are not
20 county-wide elections, but there are always district-wide
21 elections.

22 As I understood Justice Stevens' hypothetical,
23 we had a county-wide court with some divisions or
24 residency requirements within. All I'm saying is,
25 whatever the requirements may be, there would still have

1 to be -- if the jurisdiction of the municipal court
2 district were county-wide, then every voter within that
3 county would have a right under the State constitution to
4 elect the judges thereof.

5 QUESTION: Mr. Stone, this is not in the record,
6 but someone told me recently that in Los Angeles County
7 the superior court judges and the municipal courts have
8 been combined so that there'll simply be one kind of judge
9 there. Do you know anything about that, and is it State-
10 wide, or would that just be Los Angeles County?

11 MR. STONE: It's rather a combination. In June
12 of this year the State constitution was amended to permit
13 what's called unification of municipal and superior
14 courts.

15 If the vote taken in a given county shows a
16 majority of both the sitting municipal court judges and
17 the sitting superior court judges in favor of that
18 unification, at that point the municipal court in that
19 county would be abolished, and apparently that's what
20 occurred in Los Angeles County.

21 QUESTION: Mr. Stone, is there -- in the
22 original pleadings was there both a section 2 and a
23 section 5 case brought here?

24 MR. STONE: There was not. There has never
25 been --

1 QUESTION: So this is just a section 5 case.

2 MR. STONE: Strictly section 5.

3 QUESTION: Well, is part -- I guess the reason I
4 ask this is this. Is part of your argument, or is it
5 implicit in what you're arguing, that the district court
6 would, in fact, have great discretion to fashion a remedy
7 if it found a section 2 violation?

8 It could, for example, say the only way to
9 eliminate the discriminatory effect that I find is to, in
10 effect, to require as a remedial scheme four districts,
11 each electing one judge, as opposed to one district from
12 which four are elected.

13 However, is it implicit in your argument that
14 the judge -- that the district court does not have that
15 degree of flexibility under section 5, that under section
16 5 all it can say is, you are supposed to preclear, you
17 haven't, therefore preclear, and that its remedial
18 discretion, its -- the possibility of remedial creativity
19 simply cannot go beyond that kind of yes or no order?

20 MR. STONE: It could include -- I have a couple
21 of answers, but in the section 5 framework, in the
22 coverage case as opposed to an action for declaratory
23 relief in the Washington, D.C. district court --

24 QUESTION: Yes.

25 MR. STONE: In the coverage case, all the

1 coverage court can do is determine whether the challenged
2 change is in fact --

3 QUESTION: So that, I take it, is the reason
4 that you're saying that there isn't anything -- I think
5 you're saying that the court cannot practically do -- it
6 cannot practically order the kind of remedy that the
7 petitioners would like.

8 MR. STONE: That's correct. If the petitioners
9 were -- if the county were required to go to Washington,
10 D.C. and preclear, or attempt to preclear its ordinances,
11 it would be an utterly futile act at this point because
12 the county has no remaining authority to implement those
13 ordinances.

14 QUESTION: Why isn't it -- look, I'm missing
15 something, because it just -- I thought that there's a
16 statute, and what the statute that I have in front of me
17 says is, whenever a political subdivision of a State --
18 now, Monterey County is a political subdivision, right?

19 MR. STONE: Yes.

20 QUESTION: And it's a covered subdivision,
21 right?

22 MR. STONE: Yes, correct.

23 QUESTION: So it says, whenever a political
24 subdivision that is covered shall seek to administer any
25 voting qualification or prerequisite to voting.

1 Now, I take it, in addition to all those
2 ordinances the new State law, maybe with superior
3 counties, everything else, is a prerequisite to voting.
4 I -- there's no argument about that, is there? Or maybe
5 there is --

6 MR. STONE: Well --

7 QUESTION: But I mean, at least I didn't see one
8 here.

9 MR. STONE: It's certainly an alteration.

10 QUESTION: All right -- yes, fine. It says,
11 whenever that happens, what it says the political
12 subdivision is supposed to do is to go to the Attorney
13 General or the D.C. Circuit and get it cleared.

14 That's what the copy, I think, if I'm reading it
15 correctly -- so why isn't that the end of this part of the
16 argument? That is, you're in the wrong court. You ought
17 to be in the D.C. Circuit. It should be precleared.

18 Now, it may be you have the best reasons in the
19 world. It may be that they filed 35 years too late. It
20 may be that there's no way to work out a good remedy,
21 other -- but all this is for the D.C. Circuit to decide,
22 not for the California court.

23 Now, that, I take it, is their basic argument
24 here. Now, what's the response to that argument?

25 MR. STONE: Well, as Justice Souter pointed out,

1 in a section 5 coverage case, one of the issues that is
2 before the district court is whether the voting change,
3 the alleged voting change that is challenged, is in fact
4 subject to preclearance in the first place.

5 QUESTION: Now, but I just read you the statute,
6 I take it, that when you read it on its face it seems to
7 be that it is subject to preclearance.

8 QUESTION: Well, that's the very issue here, is
9 it not?

10 MR. STONE: Precisely.

11 QUESTION: Yes.

12 QUESTION: I mean, that's what this case is
13 about, to say yes or no to that, and if we say yes, then
14 the district court, Federal district court in California
15 has to simply say yes, it's covered, period.

16 MR. STONE: Correct.

17 QUESTION: Then it will be up to the county, if
18 it wants to implement election of judges at all, to seek
19 preclearance, or the State may, according to the Attorney
20 General, the Solicitor General, the State may do it if it
21 wants.

22 MR. STONE: So the question is very much focused
23 on the plain meaning of the phrase, seek to administer,
24 and several of your questions to the appellant said so.

25 QUESTION: That's what I was trying to get to.

1 MR. STONE: If the appellants' interpretation of
2 seek to administer, which is that it encompasses anything
3 and everything, regardless of source, that has any impact
4 within the covered jurisdiction, if that were, that very,
5 very broad interpretation were upheld by this Court, then
6 it would be a direct reversal of Young v. Fordice.

7 In which case, as you'll recall, in Mississippi
8 there was a challenge to Mississippi's implementation of
9 the Federal National Voting Rights Act which very much
10 changed the registration practices within the State, which
11 is a covered State, and this Court said, to the extent
12 that there is no discretion in the covered jurisdiction to
13 make any changes or to select ways in which to implement
14 this, it doesn't require preclearance. It comes from a
15 noncovered source. It --

16 QUESTION: It also came from a Federal source,
17 which was of equal dignity legally with section 5, and
18 that's not what we're dealing with here.

19 MR. STONE: No, I certainly concede that we're
20 not in every respect in the same shoes as the Federal
21 Government, but it seems to me for the narrow purposes of
22 analyzing what seeks to administer means we are in the
23 same shoes, in the sense that neither the State of
24 California --

25 QUESTION: Well, I think it's totally different.

1 If Federal law requires something, that is supreme, and
2 obviously the covered jurisdiction has no choice.

3 This is a State law requirement --

4 MR. STONE: Over which --

5 QUESTION: -- so Federal law can mandate
6 something different.

7 MR. STONE: But the covered jurisdiction
8 likewise has no choice with respect to California law when
9 that law does not reserve any discretion within the
10 covered jurisdiction.

11 QUESTION: Well, it has no choice but to obey
12 the order of the Federal court when the Federal court's
13 intervention is sought.

14 In the meantime, it can't hold any elections.

15 MR. STONE: My point is whether the covered
16 jurisdiction is exercising any kind of discretion.

17 Recall that initially section 5 was designed in
18 conjunction with section 4 to identify -- through a
19 statutory formula to identify those jurisdictions, and
20 they were either States or political subdivisions --

21 QUESTION: The statute doesn't speak of
22 discretion. It says, administer, so our question is, do
23 we read some kind of discretion in there. It says --

24 MR. STONE: Well, we --

25 QUESTION: -- whether it seeks to administer.

1 MR. STONE: And we now have a concession from
2 the appellants that the term, seeks to administer, can
3 reasonably be used to speak of discretionary
4 administrative acts by a covered jurisdiction. This is in
5 their reply brief. It's the first time they've said this.
6 Prior to this --

7 QUESTION: Well, but where does that get you? I
8 mean, of course sometimes when one is seeking to
9 administer something one may exercise discretion in
10 figuring out how to do it. Other times in seeking to
11 administer something one need not.

12 In this particular case, it seems to be
13 nondiscretionary, but I mean, the words, seek to
14 administer, covers both.

15 MR. STONE: Well, I suggest that it presents the
16 Court with an ambiguity, that there are two alternative
17 means of interpreting seeks to administer now.

18 As plaintiffs concede, it could be interpreted
19 to focus simply on the administrative acts executive
20 decisions, anything other than the formal promulgations by
21 a covered jurisdiction.

22 Alternatively, it could be interpreted to be
23 broadly to encompass anything and everything that's
24 different, whether imposed from above or not, and because
25 there's an ambiguity --

1 QUESTION: Well, it could be interpreted to mean
2 anything and everything that's different as a result of a
3 decision made at a non-Federal level. That's a possible
4 interpretation.

5 MR. STONE: I suppose, but I suggest that that's
6 a distinction that can't be found anywhere in the statute.
7 Certainly Your Honor could suggest it's implied, but the
8 statute talks about covered versus noncovered --

9 QUESTION: Well, it seeks to -- it's seeking to
10 administer a State-directed change in election practices.
11 You say that's not covered because it was State-directed.

12 MR. STONE: Yes.

13 QUESTION: But one could say that that's -- in
14 order to get away from the elephantine loophole, that
15 that's a reasonable reading, because you do have to admit,
16 it's a fairly large loophole if you say any covered
17 jurisdiction doesn't have to change -- it doesn't have to
18 get preclearance whenever the State law authorizes it.

19 MR. STONE: Well, we don't admit it's a
20 loophole, because we think it's fairly strange --

21 QUESTION: No, you don't think it's a loophole,
22 but it's a rather large noncovered area of the statute.

23 MR. STONE: Well, it is, but there are, I don't
24 know, what, 40-some-odd noncovered States in the Nation.
25 I mean, if you want to speak of loopholes, obviously the

1 section 5 preclearance requirement has not been imposed by
2 Congress upon everyone.

3 QUESTION: Why have those States that have
4 cleared it in the past in such situations done so?

5 MR. STONE: Well, I -- that would require
6 speculation on my part, Your Honor. I suggest that it may
7 have been political reasons, to show good faith to
8 minority voters within the State, to try to avoid perhaps
9 section 2 or constitutional challenges.

10 QUESTION: Are there many instances in which
11 States have not done so?

12 MR. STONE: Have not done so?

13 QUESTION: Uh-huh.

14 MR. STONE: I can't speak to that. The cases
15 deal with those in which the States have done so
16 voluntarily.

17 QUESTION: Do you know of any where they have
18 not done so?

19 MR. STONE: Well, one of the cases here is the
20 1979 statute in California, which dictated a municipal
21 court district and all parties concede that was not
22 precleared. The State did not seek preclearance of that
23 and I suspect there are a number of other examples. I'm
24 just not aware of what they might be.

25 QUESTION: You don't -- you're not aware that

1 it's a practice in either direction.

2 MR. STONE: No, I accept the United States
3 representation that it's commonplace for jurisdictions in
4 this situation to voluntarily seek preclearance, but I
5 don't think that gets us anywhere as far as a holding of
6 this Court.

7 As you know, all the Shaw cases and the Lawyer
8 case from Florida and the UJO case from New York all came
9 before the Court in the posture of a constitutional
10 challenge, or a section 2 challenge to redistricting
11 plans, and in reciting the history of the case the Court
12 has pointed out that the States, North Carolina, Florida,
13 New York, voluntarily sought preclearance administratively
14 before finally deciding on a districting plan.

15 But there's no holding that analyzes, as this
16 Court is now asked to do, what the plain meaning of the
17 statute is, whether there's a clear statement by Congress
18 that this section 5 is intended to go beyond the covered
19 jurisdictions, and what the Federalism issues might be if
20 such a --

21 QUESTION: Isn't there administrative discretion
22 in the -- was -- my impression was that for quite a long
23 time anyway under some of these ordinances Monterey had
24 considerable discretion, say, to set boundaries, which
25 they could have drawn in different ways, and even where

1 there's one district they'd have discretion as to whether
2 to have a residency requirement, for example, as whether
3 not.

4 So if that word administer means, you have to
5 have some discretion, which I don't know if it does or
6 not, but if it does mean that, isn't there a significant
7 amount here? Why not?

8 MR. STONE: There was historically, Justice
9 Breyer. There -- Government Code section 71040 gave to
10 the counties the discretion to change boundaries as --

11 QUESTION: And now do they have some in respect
12 to, say, imposing residence requirements?

13 MR. STONE: No. I think residence requirement
14 is a State requirement, and --

15 QUESTION: But I'm -- if they wanted to divide
16 it by, in effect districts, by saying you have to have one
17 of the 10 from this -- these blocks, and another of the 10
18 has to live in a different place, could they do that?

19 MR. STONE: I don't know the answer to that.
20 Maybe they could. The State requirement is that everyone
21 who is a justice of that court reside within the court, so
22 if you wanted to parse it even smaller than that, perhaps
23 there is discretion. I don't know.

24 QUESTION: In the counties which do have
25 districts, Los Angeles, for instance -- I assume they have

1 districts -- do those counties set the district lines, or
2 does the State legislature do that?

3 MR. STONE: It could be either way, and I'm not
4 sure precisely in the case of Los Angeles. The statute --

5 QUESTION: Are there any counties in the State
6 of California with multiple judicial districts where the
7 counties set the district lines?

8 MR. STONE: Yes. Yes. There is statutory
9 discretion given to the counties unless the State acts
10 otherwise, and what's happened here is the State has taken
11 over.

12 QUESTION: So then there would be no, really
13 violation of overall State policy for Monterey to do this
14 by compulsion of a Federal court in the D.C. Circuit --

15 MR. STONE: To do --

16 QUESTION: -- or in compliance with the plan.

17 MR. STONE: To divide into subdivisions?

18 QUESTION: In other words, some counties in
19 California do set their own electoral district lines, and
20 therefore it doesn't necessarily contravene State policy
21 to do so in Monterey.

22 MR. STONE: Well, I submit that it does, not
23 only because in 1972 the State Judicial Council and the
24 Chief Justice indicated that they thought that was the
25 better way for Monterey County to operate, but also

1 because much more recently the State has dictated that
2 there be just one municipal court in Monterey County.

3 So the State policy with respect to this part of
4 its overall judicial system has spoken, and has
5 dictated -- all parties are agreed here that the county no
6 longer has any discretion to have a municipal court
7 anything short of county-wide.

8 So my point is that, since we have this
9 ambiguity, then under the cases relating to importance of
10 Federalism, the Gregory v. Ashcroft, the New York v.
11 United States, Will v. Michigan, they say that if there's
12 only an ambiguity, if the most that the plaintiffs can
13 show is an ambiguity, then that falls far short of the
14 requisite clear statement --

15 QUESTION: Can I go back to Justice Kennedy's
16 question for just a moment?

17 The State policy we're talking about of having
18 just one judicial district in the county is a county-
19 specific State policy, not a general State policy, isn't
20 it?

21 MR. STONE: Well, it's -- with respect to
22 municipal courts --

23 QUESTION: Yes.

24 MR. STONE: -- the statute that has county-wide
25 municipal court in Monterey County is county-specific.

1 There's a superior court system, the next layer
2 up and the one which can now be, at the choice of the
3 counties, unified with municipal courts, that's always
4 been county-wide by dictate of the State.

5 QUESTION: It doesn't seem to me so unusual to
6 say that when a State has a county-specific policy
7 relating to a covered county, that there may be special
8 reason for the State law to bow to the Federal law that
9 applies only to that county.

10 MR. STONE: The problem the State has with that
11 is that it takes the presumption which attaches with
12 application of section 5 -- if you're a covered
13 jurisdiction, you're presumed to have had a history of
14 wrongdoing, and you're suspected in the future of making
15 voting changes designed to undermine the voting rights of
16 minority voters.

17 QUESTION: Or having the effect of undermining.

18 MR. STONE: Or having the effect.

19 QUESTION: Yes, but -- that's right, and the
20 State can do that just as readily as the county can.

21 MR. STONE: But the point is --

22 QUESTION: In fact, more readily, because it's
23 not trying to be careful not to undermine it, and that
24 makes it very sensible to clear the State's plans for what
25 it's effect is in the county.

1 MR. STONE: But Justice Scalia, the State has
2 not been identified as a wrongdoer. The preclearance
3 requirement is a remedy for wrongdoing identified by
4 Congress.

5 QUESTION: Right, but once you acknowledge that
6 there need -- that there -- the only wrongdoing that's
7 relevant is past wrongdoing, that there need not be
8 intentional wrongdoing in enacting the new plan -- the new
9 plan may simply have the effect, in good faith and without
10 the intent to discriminate, but it has a bad effect. Once
11 you acknowledge that, I don't see any reason to think
12 that -- any reason in policy why the State's plan having
13 that effect shouldn't be cleared just as well as the
14 county's plan having that effect.

15 MR. STONE: Well, the policy issue goes to the
16 allocation of burdens. If you're a section 5 identified
17 covered county, then it's your burden to go to Washington,
18 D.C. and establish that your -- that the voting change
19 that you desire and that you have fashioned -- the court
20 uses all kinds of terms like fashioned, adopt, seek to
21 undertake and so on.

22 It all suggests that it's the covered
23 jurisdiction's initiative that leads to this voting
24 change, and they have the burden to show that it isn't a
25 bad thing.

1 Why should the State, which has never been
2 viewed a covered jurisdiction under any --

3 QUESTION: No, but you can't say the State has
4 never been a wrongdoer, because it had the literacy test
5 which was wrongful to the extent that it affected counties
6 in which there was this particular result that occurred in
7 Monterey County, and the State was the source of the
8 wrongdoing.

9 MR. STONE: I --

10 QUESTION: So the State is the wrongdoer.

11 MR. STONE: I would very much dispute that. This
12 county has less than 1.2 percent of the State of
13 California population. All four covered counties within
14 the State combined have less than 3 percent --

15 QUESTION: No, but was it not a State statute
16 requiring literacy tests that was the wrong that gave rise
17 to the coverage?

18 MR. STONE: It was not. The test for coverage
19 is two-pronged. One is the existence of --

20 QUESTION: Right, but half of it was by the
21 State and half was the impact in that county.

22 MR. STONE: But the State's literacy test was
23 not a wrong. There were literacy tests across the country
24 at the time the Voting Rights Act was passed. The wrong
25 Congress looked at, and again it was just a formulaic,

1 mechanical wrong, but it was the voter turnout, because
2 Congress recognized that literacy tests were prone to
3 abuse. They had all manner of room for local discretion.

4 So it's not the test. If it were the test, then
5 every State that had a test would be a covered
6 jurisdiction thereafter.

7 QUESTION: Every county in California would be
8 covered.

9 MR. STONE: And every county in California.

10 QUESTION: No, but it was --

11 QUESTION: I don't accept your argument that --
12 you seem to assume that I'm saying the State has to clear
13 it. I don't think the State has to clear it. I think the
14 county has to clear it, and the county is a covered
15 jurisdiction.

16 MR. STONE: But isn't that anomalous when the
17 county can do nothing to change it, and the county is
18 asked to come and defend it. It may not have the desire
19 to defend it.

20 This particular county may be entirely against
21 the State's new law or new policy. It may not have the
22 financial resources fairly and adequately to defend it,
23 and it comes in there without any power to change it, so
24 you would have -- and one needs look no further than this
25 case to see the kind of --

1 QUESTION: Well, it wasn't anomalous. If you go
2 back into history, I take it the history of this was
3 there'd be a lot of places in the south where they vote in
4 a town by district, and say they were 40 percent black and
5 60 percent white, and then soon as you had to let black
6 people vote, what they did was suddenly switch to a system
7 that was a single district, and now it could be in many of
8 those towns they would have said, well, we won't have it
9 ourselves, and lo and behold you discover the State
10 legislature implementing it throughout the entire State.

11 QUESTION: Of course, the State's a covered
12 jurisdiction.

13 QUESTION: Now, historically that was an evil,
14 wasn't it?

15 MR. STONE: Well --

16 QUESTION: No, but in States -- I think there
17 are some States where the State is not a covered
18 jurisdiction, and I take it -- is that --

19 QUESTION: North Carolina.

20 QUESTION: North Carolina I thought was, and I
21 thought that the same problem would exist there, and that
22 that was the history of this.

23 MR. STONE: But the question is whether there's
24 any justification, any constitutional justification, I
25 would submit, for assuming wrongdoing on the part of a

1 noncovered State without approving --

2 QUESTION: It wasn't to assume wrongdoing.

3 MR. STONE: Well --

4 QUESTION: It was to try to cure the problem in
5 the county.

6 MR. STONE: But you have shifted the burdens.
7 If you require a noncovered jurisdiction to come and
8 prove, absent any proof of wrongdoing, you've shifted the
9 burdens in a manner that I suggest is unconstitutional.

10 In Katzenbach this Court pointed out what a very
11 important element it was for Congress surgically to have
12 identified the wrongdoers before imposing the preclearance
13 requirement.

14 QUESTION: Thank you, Mr. Stone.

15 MR. STONE: Thank you.

16 QUESTION: Mr. Avila, you have 3 minutes
17 remaining.

18 REBUTTAL ARGUMENT OF JOAQUIN G. AVILA

19 ON BEHALF OF THE APPELLANTS

20 MR. AVILA: Thank you, Mr. Chief Justice, and
21 may it please the Court:

22 Referring back to a point that was made by
23 Justice Scalia, even a law with a State-wide effect might
24 still have a greater effect on those counties that
25 Congress designated for section 5 purposes.

1 As long as the covered jurisdiction is
2 implementing a change, section 5 applies, and that common
3 sense understanding of the term was reflected in the
4 Court's earlier opinion in this case when, writing for a
5 unanimous Court, Justice O'Connor stated that a section 5-
6 covered jurisdiction must obtain preclearance before
7 "implementing" a voting change.

8 Those were the words used by this Court to
9 describe the operative effect of section 5, and when we
10 look at the administrative practices of the Attorney
11 General in Sheffield, this Court held that the Attorney
12 General's interpretation of section 5 is, quote,
13 persuasive evidence of original understanding.

14 So what we're trying to do in this case is
15 merely maintain what's been going on for the past three
16 decennial redistrictings, and when we look at what -- in
17 fact, what the State of California and the county
18 administers at the local level, we know that the county
19 administers the election machinery and the personnel that
20 actually administer the State elections, and in our brief
21 we cite to numerous State statutes in which the State
22 mandates that a particular election occur, and that the
23 county is directed to administer that election.

24 QUESTION: If the 1983 statute was precleared,
25 wasn't that against a background where there was a single

1 district, and why shouldn't that end this case?

2 MR. AVILA: It does not end the case because
3 when you're talking about reviewing a voting change you're
4 talking about what happened before and what happened
5 after.

6 The 1983 State statute only referred to the
7 conversion from three judicial districts to a single
8 county-wide district. It did not start off with the
9 November 1968 nine judicial district plan, and we do not
10 have the conversion before the Department of Justice or
11 the D.C. court between nine districts --

12 QUESTION: I don't understand. If the 1983
13 statute provided for a single judicial district, and this
14 has been precleared, getting back to Justice O'Connor's
15 question, what's left?

16 MR. AVILA: What's left is the judicial --
17 what's left is the preclearance of nine districts which
18 existed on November 1, 1968, to three districts which
19 existed in 1983.

20 The 1983 State statute only converted three
21 judicial districts into a single county-wide. Whenever
22 you examine voting change, it's examining from what, from
23 what is it being changed from, to what is it being changed
24 to, and that's precisely the point that we're making in
25 this argument.

1 Thank you very much.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Avila.
3 The case is submitted.

4 (Whereupon, at 2:00 p.m., the case in the above-
5 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, ET AL.
CASE NO: 97-1396

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