IN THE SUPREME COURT OF THE UNITED STATES

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

BEATRICE BRANCH, ET AL., :

Appellants, :

v. : No. 01-1437

JOHN ROBERT SMITH, ET AL.; :

and :

JOHN ROBERT SMITH, ET AL.; :

Cross-Appellants, :

v. : No. 01-1596

BEATRICE BRANCH, ET AL. :

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

Washington, D.C.

Tuesday, December 10, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES:

ROBERT B. McDUFF, ESQ., Jackson, Mississippi; on behalf of Appellants/Cross-Appellees Branch, et al.

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

MICHAEL B. WALLACE, ESQ., Jackson, Mississippi; on behalf of Appellees/Cross-Appellants Smith, et al.

C O N T E N T S

P R O C E E D I N G S

(10:09 a.m.)

JUSTICE STEVENS: The Court will hear argument in Number 01-1437, Branch against Smith, and the cross-appeal of Smith against Branch.

Mr. McDuff, you may proceed.

ORAL ARGUMENT OF ROBERT B. McDUFF

ON BEHALF OF APPELLANTS/CROSS-APPELLEES BRANCH, ET AL.

MR. McDUFF: Justice Stevens, may it please the Court:

For 40 years, ever since the decision in Baker versus Carr, State court judges, like Federal judges, have played a role in addressing constitutional problems stemming from malapportionment. This was reflected in Scott versus Germano in 1965, and again in Growe versus Emison in 1993 when the Court said not only that State judges play a role, but they are preferred to Federal judges as agents of reapportionment.

In this congressional redistricting case from Mississippi, the Chancery Court of Hinds County, acting with the blessing of the Mississippi Supreme Court, stepped into the breach and adopted a plan when the legislature defaulted. That plan has been enjoined by the Federal district court, and the United States Department of Justice has said not once, but twice that it was

postponing the statutory time period for preclearance under section 5 of the Voting Rights Act so that even now, nearly 1 year after the plan was adopted and submitted, no preclearance decision has been made. A Federal court order is in place telling State courts they may not hear congressional redistricting cases.

QUESTION: Now, did -- did Mississippi appeal from the injunction?

MR. McDUFF: They did not, Your Honor, but we did. And we were allowed to intervene in this case to defend the State court judgment, which my clients had a right to seek, and which they did secure redistricting the State of Mississippi.

QUESTION: But -- but the issue is whether the State was still pursuing the -- the redistricting that was the subject of the application to the Attorney General, and whether it was doing so or not depended upon whether the State was appealing from the Federal injunction. If the State accepted the Federal injunction, it no longer was pursuing the -- the reapportionment.

MR. McDUFF: I don't -- I don't know -- I respectfully disagree, Justice Scalia. This is a State court order, and the Attorney General of Mississippi has no right to refuse it or not, and he certainly has no right to undo it.

QUESTION: Well, and he also has no right to ignore a Federal injunction --

MR. McDUFF: That's correct.

QUESTION: -- unless he -- unless he appeals it. He has every right to appeal it. He represents the State, and he chose not to appeal it.

MR. McDUFF: That's correct, but -- but unlike the situation -- but we -- I guess my first answer is, we did appeal it, and so the injunction is --

QUESTION: But you're not the State.

MR. McDUFF: -- is subject to being overruled.

QUESTION: The problem with that is that you're not the State.

MR. McDUFF: That's correct. But unlike a situation where, for example, an injunction is issued against a criminal law, or regulatory provision that the Attorney General, or the State defendants have some discretionary authority to enforce, and where it makes sense that if they do not want to appeal, no one else should be allowed to appeal if they're not -- if they don't care enough about enforcement, this is an order that the Attorney General, and the State defendants are required to obey, assuming Federal obstacles are eliminated.

Now, if the Attorney General doesn't appeal for

whatever reason, it makes sense to allow the people who secured the judgment in State court to intervene and defend that. Otherwise --

QUESTION: Why does it make sense under a statute in which the action of the State is by -- by definition crucial?

MR. McDUFF: Because the action of the -- the action of the State here is the action of the State courts, and they have issued an injunction. The Attorney General cannot undo that.

QUESTION: But if we're talking about section 5, the language of section 5 is whenever a State shall enact or seek to administer any voting qualification, et cetera. And because the State is not currently seeking to administer anything, enact, I take it means legislation. Seek to administer could be the executive, but the executive, since it's not appealing the injunction, isn't currently seeking to administer anything.

MR. McDUFF: I think -- I think the executive is seeking to administer it just as much as he was back when the plan was first submitted. If the Federal obstacles are removed -- the constitutional injunction, and the preclearance obstacle -- the State defendants are going to abide by the order of the chancery court, and submit this plan --

QUESTION: But we would -- we would not require the -- the State or the -- the Federal courts to do a vain -- or the Attorney -- the Federal Attorney General to perform a vain act. What use would it be for him to approve the reapportionment when the State Attorney General is still subject to a Federal court injunction which he has not appealed and therefore cannot ignore? What possible good would it be for the Attorney General to -- to approve the -- the apportionment?

MR. McDUFF: To remove the section 5 obstacle as quickly as possible, consistent with the 60-day deadline in the statute, so that once the constitutional obstacle is removed, the plan can be in force.

QUESTION: But the constitutional obstacle won't be removed as long as the Attorney Genèral doesn't -- doesn't appeal the Federal court injunction.

MR. McDUFF: Well, that -- that is assuming that -- that my clients don't have standing, and I think we clearly do as parties who secured the State court judgment. Otherwise, you would be in a situation where the Attorney General could unilaterally nullify the State court injunction simply by not defending it. That's one reason my clients were allowed in this case, was to defend the State court injunction they secured.

QUESTION: Mr. McDuff, can I ask you what is the

status of the State court litigation? Is there an appeal pending there?

MR. McDUFF: There is an appeal pending filed by the State court intervenors challenging the chancery court's plan.

QUESTION: And how do you explain the failure of the Mississippi Supreme Court to rule on that appeal?

MR. McDUFF: That -- the briefs have been filed. No oral argument is scheduled. I think -- I -- I don't know, but I think the Mississippi Supreme Court is waiting to hear from this Court what it should do because it is looking at a Federal court order telling it it has no business in congressional redistricting. And the -- the --

QUESTION: Well, excuse me. `Is our decision going to affect that Federal court order?

MR. McDUFF: I'm sorry?

QUESTION: Is our decision going to affect that Federal court order?

MR. McDUFF: Well, we -- we are certainly asking this Court to -- to vacate the Federal court order. And --

QUESTION: It's a -- that's the problem I have trying to figure this out. Suppose -- suppose we looked at the preclearance, and suppose I thought that it hasn't

been precleared and it should have been. And the reason it hasn't been precleared is the reason that's been discussed, that -- that they haven't tried to administer it yet and when -- and they -- and the Department has 60 days from the time that the State tries to administer it. I mean, I thought that's what the statute says, doesn't it, that they have --

MR. McDUFF: It says 60 days after it's submitted, it's --

QUESTION: Yes, enacts or seeks to administer.

MR. McDUFF: That is correct.

QUESTION: They have to enact, and this doesn't sound like an enactment. It sounds like something -- seek to administer, and they haven't sought to administer it.

All right. So then we'd send it back.

Then the Department would have to decide whether to preclear it. Well, they may well preclear it. Or what happens next? That's where I'm a little confused.

I mean, it -- the -- the real constitutional issue here -- or one of them anyway -- is assuming there is the preclearance, then has the Mississippi court acted unconstitutionally in assuming authority to issue a plan, whereas previously, the Mississippi court had said you lack -- we lack that authority. And all of a sudden, we have an order here which seems to overrule in earlier

cases, and it doesn't even have an opinion.

In other words, can you help clarify what we should say in this case on the assumption that we ended up thinking it should be precleared?

MR. McDUFF: I think -- I think there are two things we want you to say. First is that the Federal court's constitutional basis for the injunction is wrong, and that Mississippi courts, like courts -- like courts throughout the country, do have a right to adjudicate congressional redistricting cases, at least where the legislature defaults.

And then, second, we are asking you to rule that as a result of the passage of the 60-day period, the plan has been precleared.

If you agree with us on the first issue, disagree on the second, then the -- then the matter will be remanded to the district court and the preclearance process --

QUESTION: But Mr. McDuff, the --

MR. McDUFF: -- will go forward in the Justice Department.

QUESTION: Mr. McDuff, on your first point, which you would like us to decide first, I thought the district court expressly made that a contingent ruling. Didn't it say if we're wrong on that this plan hasn't been

precleared, if we're wrong, then we have this alternate constitutional point. They phrased it that way as if to say, we would like the court to understand that our principle ruling is that this plan hasn't been precleared.

MR. McDUFF: That's correct.

QUESTION: But if we're reversed on that, then we have something else we want the court to know about. So, it seems to me that it was a highly conditional ruling, the kind of ruling, let's say, that a -- that a trial court would make under rule 50, when it conditionally rules on a new trial motion.

MR. McDUFF: I don't know if it was a conditional ruling, Justice Ginsburg. It was an alternative ruling, and we are appealing both grounds. And I think it makes perfect sense to deal with them both in one appeal rather than --

QUESTION: Why? It makes perfect sense to reach the constitutional issue when there's no need to do so? I mean, if -- if we agree -- if -- if we disagree with you on the second point, there's no need for us to -- to rule on -- on the first point. Is there?

MR. McDUFF: Well --

QUESTION: By the same token --

QUESTION: Whether -- whether or not the -- the Federal district court used it as a makeweight, there's

just no need for us to reach it.

QUESTION: Well, there are two questions I had.

First of all, was it proper for the district court to decide a constitutional issue which was totally unnecessary to support its judgment?

MR. McDUFF: The -- I -- I think it was, and I do think it is necessary to reach that issue because otherwise, we're going to go -- if -- however you rule on the section 5 issue, the case goes back down. Hopefully the plan is either declared precleared by this Court or later precleared by the Attorney General. The -- the district court is simply going to reinstate that constitutional ruling. This case will come back up here on appeal, and we'll be into the 2004 election cycle.

QUESTION: All right. That's -- that's true, but look, there's a case, Wise v. Lipscomb --

MR. McDUFF: Yes, sir.

QUESTION: -- which you've seen, and in that case, this Court says, in those circumstances -- which are these -- until clearance has been obtained, a court should not address the constitutionality of the new measure. So, we said specifically, don't address it.

Now, what -- what are we supposed to do about that?

MR. McDUFF: That -- that's correct, Your Honor,

but the cases from which that statement emanates, and the only cases in which this Court has been called upon to apply that principle are Connor versus Waller, and United States versus Board of Supervisors of Warren County, which we discuss at the beginning of our reply brief. But those are cases that are very different from this one. In those cases, the Federal district courts substituted constitutional analysis for the preclearance process and -- and ordered the use of un-precleared plans.

Here the Federal district court enjoined the use of a -- an allegedly un-precleared plan and gave an alternative ruling the same way courts do -- the -- in the same fashion that courts do all the time. And in these circumstances, I think it makes sense to go ahead and deal with both issues on the appeal so we don't have this case bouncing up and down the appellate ladder while, number one, the Mississippi Supreme Court is trying to figure out what to do, and number two, we've got a March 1, 2004 deadline approaching.

QUESTION: Is there any chance the legislature -- which is its job, I take it -- will, in fact, enact a plan during that period of time?

MR. McDUFF: I -- there's certainly no indication that the legislature will, Your Honor. And --

and that's why it is important for -- as -- as the Court said in Growe v. Emison, for State courts to be able to step into the breach, and deal with the problem without the sort of obstacles that the Federal court has imposed here, first on the constitutional grounds, and then second, on the section 2 grounds because we contend the plan has been precleared.

And let me respond to one other thing --

QUESTION: So I -- I take it --

MR. McDUFF: I'm sorry.

QUESTION: -- the State court would have to make the same constitutional determination, or the State court isn't free from making constitutional determinations.

MR. McDUFF: That -- that's right. The --

QUESTION: In fact, just the opposite. It has to.

MR. McDUFF: That's right. But if this Court resolves the issue on the -- in -- in reviewing the Federal district court's injunction, then the State court will not be in the position of having to do that.

And the -- the -- I want to go back to the question of seeks to administer because I think it is very clear that the Mississippi court -- the Mississippi courts adopted a plan to be used in elections as long as the section 5 obstacle is used -- is removed, and any

other Federal constitutional obstacles are removed.

And as -- as the opinion says -- Justice O'Connor said in the opinion for the Court in Lopez versus Monterey County -- the second Lopez decision -- seeks to administer is simply -- it -- it's not necessarily a term of discretion. You can either seek to administer or not, but is a -- it is a -- the seek is a temporal phrase showing that the -- the plan should be submitted prior to its administration.

And here, the Attorney General doesn't have any discretionary authority, and I think it would be contrary to section 5 if he were able to undo the chancery court's order simply by the fact that he didn't appeal this case when he knew we were appealing.

The -- in fact, there's -- wè've referred frequently to the North Carolina preclearance of the plan adopted there by a State court regarding legislative districts. And if you look in the appendix to the NAACP amicus brief, there is the letter of submission sent by the trial judge in North Carolina to the Justice Department where he submitted the plan. The Attorney General didn't submit it. In fact, the Attorney General had opposed imposition of the State court plan during the State court proceedings.

That plan was precleared, and it certainly seems

to me that if the Justice Department can preclear a plan submitted by a State court judge, it cannot come here in this case, and say that a State court judge -- a State court plan from a Mississippi judge is -- has been withdrawn, or has been suspended simply by the simple act of -- simply by the simple fact that the Attorney General did not take an appeal in this case. That was taken by us.

QUESTION: But that was -- that was never an issue in -- in the North Carolina case, was it?

MR. McDUFF: I'm sorry?

QUESTION: That was never an issue in the North Carolina case.

MR. McDUFF: Oh, no, there was not an issue, but I'm just pointing out that -- I mean -- I mean --

QUESTION: Maybe -- maybe Justice shouldn't have taken the -- the request.

MR. McDUFF: The -- the -- oh, I think Justice should -- Justice definitely should consider a submission from a State court judge. Section -- section 5 says --

QUESTION: Sure. But you were making the argument a moment ago that if, in fact, they took the request from the State court judge in North Carolina, they can hardly object here.

MR. McDUFF: That's correct.

QUESTION: And that's a different kind of argument. And -- and since that was not an issue, I -- I don't know that they are precluded, or would be precluded from changing their mind now.

MR. McDUFF: Oh, all I'm -- all I'm saying, Justice Souter, is I don't think they can come in here and say that the fact that the Attorney General did not appeal here --

QUESTION: No, that's -- that's not what they're saying.

MR. McDUFF: -- means that the submission was withdrawn or suspended.

QUESTION: They -- what they did not -- what they did not object to is the fact that it was not the Attorney General who had to submit the request here. That's all. I mean, in -- in the North Carolina case, they were not violating any provision of the statute which required, before it could be precleared, that the State be about to administer it. The statute doesn't say that the person, or the -- the entity of the State that is seeking to administer it must be the one who applies for clearance. That's not what the statute says. So, all that was at issue in North Carolina is whether the -- the administering person has to be the one to seek clearance.

And at most, the case stands for no answer to

that question. It certainly doesn't answer the question of whether, when the State has no intention of administering it, which is the situation here, and was not the situation in North Carolina, the -- the Attorney General, nonetheless, has to reply.

MR. McDUFF: Justice Scalia, I respectfully disagree with the premise that the State in Mississippi has no intention of administering this plan. Once the constitutional obstacle is removed, if it is, and once preclearance is declared, if it is, the State defendants are going to administer their plan -- that plan. They are under a State court order to do so. And it seems to me to say that the Mississippi situation is somehow different from the North Carolina situation is to -- is to exalt the form over the substance.

Certainly in Mississippi the State court judge could have submitted that plan. The State court judge, I guess, could have intervened in the case, in the Federal case, and appealed if the Attorney General didn't. But that would be quite unusual, instead --

QUESTION: Could he have administered the plan? That's --

MR. McDUFF: I'm sorry?

QUESTION: That's the crucial question. Yes, he could do all that, but could he have administered the

plan? If not, his intention to go forward is no indication that the State is -- is seeking to administer the plan.

MR. McDUFF: But -- but, Justice Scalia, the -- the failure of the Attorney General to take an appeal is no indication that he will not administer the plan once the Federal obstacles are removed. I think we have to assume that he will obey the State court order.

QUESTION: But does it remove the Federal obstacle if -- instead of passing on the hypothetical of whether the Federal ground, which is a alternative ground, et cetera is good or bad -- if we just repeated the language from Wise versus Lipscomb, said it's premature to decide this constitutional issue, our cases say not to, but there's an alternative ground here? That would make it clear to everybody, wouldn't it, that the ground on which the Federal injunction rests is the preclearance ground? And then, would the State say, okay, if it's the preclearance ground, we're going to administer it. And then, the 60 days would begin to run, and then you're out from under this strange stalemate.

MR. McDUFF: The -- the 60 days, in our view, Justice Breyer, has already run.

QUESTION: I know that, but if I don't agree with you about that, then would it satisfy what you're

really after which is to get out of the stalemate? You see, we would just simply point out that this is an alternative ground and -- and it has no real -- we're not reaching it because it's -- there's this other ground. In other words, I'm repeating what I've said.

MR. McDUFF: Then I -- I think -- I think --

QUESTION: I'm trying to get you out of the stalemate. I'm trying --

MR. McDUFF: I -- I think that gets us exactly nowhere because the Department has said it is not going to resume the preclearance process as long as the constitutional injunction is in place. So unless it's vacated, the preclearance process --

QUESTION: Are there two injunctions? I thought there was just one injunction and --

MR. McDUFF: I'm sorry. There's one injunction. Two grounds.

QUESTION: -- two grounds. So if we suggest that one of the grounds was premature, then doesn't that do the trick?

MR. McDUFF: Well, I think it does -- it does get the process ticking again. But the problem is at that point, once it is declared precleared, the Federal district court will impose its constitutional injunction, we'll be back up here. The Mississippi Supreme Court will

still be facing that injunction.

QUESTION: Meanwhile, the legislature will act.

MR. McDUFF: Well, that's -- that's wishful thinking. And it --

(Laughter.)

MR. McDUFF: If it were true, we wouldn't be here I think.

QUESTION: Is there any clue, by the way, why in all this time --

MR. McDUFF: I'm sorry?

QUESTION: Is there any clue why, in all this time, the legislature has not acted?

MR. McDUFF: No. I think it was the difficulty of pairing two incumbents, and they couldn't agree. They couldn't agree on how to do it because we lost a seat in Mississippi.

Let me make one --

QUESTION: They -- they won't have that problem now, will they?

MR. McDUFF: No, they won't have that problem now.

QUESTION: So --

MR. McDUFF: But I still think there's -- there's been no indication thus far that any action is going to be taken in that respect.

I reserve the remainder of my time for rebuttal.

QUESTION: Mr. Feldman.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE

MR. FELDMAN: Justice Stevens, and may it please the Court:

It's our position that the State court redistricting plan was not precleared on either of the two occasions that appellants --

QUESTION: Mr. Feldman, let's assume that we agree with everything you say in your brief, and we agree it's not been precleared. Isn't the -- will the injunction that's now in place prevent further preclearance? One of the reasons for not preclearing before was there's this injunction standing --

MR. FELDMAN: It's --

QUESTION: -- and that's still an obstacle, isn't it?

MR. FELDMAN: If it's clear that this injunction is -- rests only on section 5 grounds, and not constitutional grounds, that certainly would --

QUESTION: The only way to make that clear would be to vacate the --

MR. FELDMAN: Well --

QUESTION: -- the other ground. Is that right?

MR. FELDMAN: The -- what the injunction actually says is something like the injunction will last until, and unless there is a constitutional plan that's precleared. And insofar as it uses the word constitutional, and we know the views of the district court about that, I think that as long as that -- that word, constitutional, is there, that -- that that remains an obstacle to administering the plan.

QUESTION: So unless that injunction is vacated, we're at a stalemate.

MR. FELDMAN: At least that part -- at least the injunction has to be modified to remove the word constitutional.

QUESTION: Well, but that's -- that's dictum. I mean, what the district court said about that is -- is dictum.

QUESTION: No, it's part of the injunction itself.

QUESTION: It isn't --

MR. FELDMAN: It --

QUESTION: It says until a constitutional plan is -- is precleared, but what is a constitutional plan was not before the court. Now you may well know how the district court is going -- going to rule on it, but you

don't know that the district court will be affirmed in that ruling, or -- I don't -- I don't see how the -- the constitutional ruling is embodied in the injunction.

MR. FELDMAN: If the Court made clear, I think, that -- that the -- that this injunction couldn't rest on the ground that Article I, section 4 of the Constitution was violated by the -- by the State court plan, then I think it would be ripe for a preclearance.

QUESTION: Wouldn't -- wouldn't it also be ripe -- wouldn't the time run simply if -- if the State moved to vacate the injunction?

MR. FELDMAN: Yes. If a State moved to vacate the Federal court injunction?

QUESTION: Yes.

MR. FELDMAN: In the --

QUESTION: Because at that point wouldn't it have signified that it was, indeed, attempting to administer the plan?

MR. FELDMAN: There -- well, there's really two grounds on which we think the injunction is -- is relevant. There's a narrower ground, which I think it -- primarily the -- the argument so far has been concerned with, which is that the State was no longer seeking to enforce the plan because it didn't appeal it. And that --

QUESTION: If it now seeks to vacate --

MR. FELDMAN: -- if the State took action, they're still not appealing it, but I suppose, after this Court's order, if they went back to the district court, and said, in light of this Court's order, we're trying to seek to enforce it again, and if they had the ability to do that, then that -- then that would be eliminated.

QUESTION: Yes.

MR. FELDMAN: There is a broader ground, however, because the -- insofar as the injunction is a injunction that's based -- rests on constitutional grounds, it's the Department's position that -- that the preclearance -- the section 5 uses the terms seek to -- seek to administer. It says it may be enforced once the Attorney General acts, and it talks about voting changes that are in force and effect. And all of those things point to a contemplation by the statute of a change going to the Attorney General when it's ready to be -- ready -- ready to go into effect, when there's no present legal obstacle. As long as there's a present legal obstacle other than a section 5 injunction to its current administration, then the Attorney General -- it's too early -- it's too early to go to the Attorney General.

QUESTION: Okay. Then that goes back, I guess, to the earlier suggestion. If -- if this Court indicated that, in fact, the alternative ground was prematurely

raised, wouldn't that respond to the -- to the second --

MR. FELDMAN: I think -- as I said, I think it's clear that if the -- if the Court made clear that this -- this injunction rests on section 5 and doesn't rest on the proposition that it violates Article I, section 4 for the -- for the plan to go into effect, then it would be ripe for a preclearance at that point.

QUESTION: Of course, we have a doctrine that we don't decide constitutional issues unless we have to. Do you think that doctrine should have applied to the district court in this case because the section 5 ground, as I read the opinion, was -- was self -- was sufficient to sustain the objections?

MR. FELDMAN: I think -- I do think the section 5 ground was sufficient to sustain it.`

QUESTION: And therefore it was really wrong for the district court to reach out and unnecessarily decide a constitutional question.

MR. FELDMAN: I -- you certainly -- the -- the only reason I would hesitate for that, before I'd quite go that far, is district court was faced -- if you put yourself in the situation that the court was, with very tight deadlines -- and there are -- even -- although courts should avoid deciding constitutional questions when possible, there may be some extreme circumstances where --

QUESTION: But those deadlines -- you've demonstrated in your brief that the -- the clearance hadn't occurred. I mean, if -- if we agree with your position on the preclearance, the deadlines were not a real obstacle.

MR. FELDMAN: I -- I agree. And actually I -- I do think the district court certainly could have said and -- and perhaps should have said, this is a constitutional issue. Especially, it's a novel constitutional issue that raises novel questions that haven't been addressed before, and the section 5 ground was sufficient to sustain the injunction.

QUESTION: But the district court -- didn't -- isn't that what the district court said when it said this is our alternative holding in the event that on appeal, it is determined that we erred in our February 19 ruling? It seems to me that that's a contingent ruling. If we're right about that it hasn't been precleared, then this doesn't come into play.

MR. FELDMAN: I -- I guess only insofar as when you read the actual order of the court, it says a -- this -- this shall go into -- the State may not enforce the State court plan until the State -- there's a constitutional plan that's precleared. And if you read that word --

QUESTION: But one -- one could agree with the court, what it was intending to do and give effect to what it was intending to do, and if we should hold, if we should agree with the court, that there's no precleared plan, then it would be appropriate to vacate the decision to the extent that it rests on the constitutional ground.

MR. FELDMAN: I -- I think that may -- that may well be right. I -- I don't disagree with that.

I'd like to go to, actually the first -- the first alleged preclearance which is supposed to have occurred 60 days after the plan was initially submitted to the district court, and that preclearance did not occur -- was initially submitted to the Attorney General. Excuse me. That preclearance did not occur because on February 14th, before the 60-day period had expired, the Attorney General sent the State a letter saying, I need more information before I can preclear this plan. That procedure, under which the Attorney General did that, was specifically held valid by this Court in Georgia against the United States, and the Court in Georgia specifically held that that stopped the 60-day clock from running.

Later, in Morris against Gressette, the Court held that the Attorney General's substantive determinations under section 5 are not subject to -- are not subject to judicial review at all. And therefore, the

Attorney General's determination that more information is needed, that the information before him was not sufficient to permit preclearance -- to permit him to make the determinations he had to make -- also is not subject to judicial review.

And therefore, because that whole process was -- was approved by the Court in Georgia against the United States, because more information was sought, that that terminated the 60-day clock then, and it did not -- the plan was not precleared some days later when -- when the 60-day period would have expired.

I think for the reasons I said earlier, it also was not precleared at the later period both because the State didn't -- on the narrower ground that the State did not appeal the injunction, and on the broader ground that the injunction was there. And the section 5 process is designed so that something that's ready to go -- the Attorney General should reach his decision on an act that's ready to take effect.

Finally, I'd like to just briefly go to the statutory question of the interaction of sections 2c and 2a(c). With respect to that question, it's our position that the district court, as a remedy here, correctly ordered the districting of Mississippi's congressional delegation, and did not order that they be

elected at-large. And that was required by Federal law, specifically by 2 U.S.C., section 2c, which provides that there shall be established by law single-member districts in each State, and that Representatives shall be elected only from districts so established. That command, it seems to us, is unequivocal, and required the district court, when it was faced with the problem of what to do about Mississippi, to create single-member districts. It would -- did not have the power --

QUESTION: But you could -- you could view it, I guess, if you had to look at it at all -- and I'm not sure we do -- you could say that 2a(c) applies before a plan has been redistricted in the manner provided by State law, and that 2c applies afterwards. I mean, you could harmonize them.

They've been in -- in existence, these two provisions, for a very long time, and we normally don't see repealed by implication, or hold that there is such a thing --

MR. FELDMAN: I --

QUESTION: -- that you can harmonize them.

MR. FELDMAN: I think generally, but I do not think in general these can be harmonized, or at least within the scope of where it's possible for 2c to -- to operate. For -- one reason is that the language,

Representatives shall be elected only from districts so established, is unequivocal, and, in fact, it shows that the earlier portion of 2c that says, there shall be established by law congressional districts in each State, has to mean established either by a court, or by a legislature, or by anyone who acts.

QUESTION: What if it meant just by a court? It would really put a lot of pressure on the legislatures to -- to do what they're supposed to, and to enact these districts by law. It would take a lot of -- a lot of these cases that -- that place the burden upon the district judge to reapportion a whole State would go away. He'd say, if the legislature doesn't ask, all of you guys are going to run at large. Boy, that would -- you know --

(Laughter.)

QUESTION: That would not happen. The legislature would, indeed, do the job it's supposed to.

QUESTION: Isn't that --

QUESTION: It -- it would make a lot of sense to interpret it that way.

QUESTION: Isn't that Mississippi's own default rule? Doesn't Mississippi have that same statute?

MR. FELDMAN: They do have the same statute, which we would view as pre-empted by section 2c. But that was the -- the scheme that was in effect in -- from 1941

to 1967.

The reason why 2c was enacted, and the way to give 2c some effect is that Congress at that time was faced with a situation where there were at least six courts that had threatened to order at-large election of entire congressional delegations in the aftermath of Baker against Carr. And Congress responded to that. The concern specifically was that courts would order at-large elections, and the response was the enactment of section 2c.

QUESTION: Thank you, Mr. Feldman.

Mr. Wallace.

ORAL ARGUMENT OF MICHAEL B. WALLACE

ON BEHALF OF APPELLEES/CROSS-APPELLANTS SMITH, ET AL.

MR. WALLACE: Justice Stevens, and may it please the Court:

It seems that the Court is focusing on the question of preclearance here, and the real problem with the question of preclearance is that the Justice Department has stopped the preclearance process because of the injunction.

Now, we believe that the Justice Department acted properly in so doing. They have a regulation that says, we will not consider premature submissions, and this Court said in Georgia that any reasonable regulation will

be enforced.

Their position is that whenever the State has been told it cannot administer a change, then it cannot be seeking to administer a change within the meaning of section 5, and therefore, this was premature. So they stopped.

Now, the question is what can be done about that, and I think, in all probability, the only thing that can be done about that is for the Attorney General of Mississippi to go down the street to the district court and ask them to preclear the change under section 5 because there does not seem to be any other mechanism whereby anybody can force the Justice Department to get moving on a section 5 preclearance.

QUESTION: But, Mr. Wallace, don't you agree that with the injunction outstanding, the Justice Department would have the same reason for refusing to preclear that it's already given?

MR. WALLACE: I think not, Your Honor, and I think that's because of the very strange system of divided jurisdiction that Congress consciously created back in 1965 when it said, we will let the District of Columbia deal with statutory questions. We will let the court back home deal with constitutional questions. That's been in the act from day one, and it's given this Court trouble

from day one.

QUESTION: How long does it take if you take the -- if you said derail the preclearance procedure before the Attorney General, switch to the D.C. District Court track? How long do those proceedings -- section 5 proceedings -- in the district court ordinarily take?

MR. WALLACE: I've never been in one, Your Honor. I don't know that I could tell you, but I would think it would take close to a year anyway. Now --

QUESTION: Well, then why can't we just do what we'd -- I'd suggested anyway -- I think others did too -- that -- that you -- you -- we'd simply say, look, here's an injunction. It rests on two grounds. Ground one, this plan hasn't been precleared, the Mississippi plan, the court plan. Ground two, it's unconstitutional. You'd say ground two is, A, premature, doesn't really support the issue, it's an injunction -- because it's premature, et cetera. And now you'd have a decision that, I guess, from a legal point of view insofar as we were right about that, would just rest on the ground that it hasn't been precleared.

And since that's the only reason for issuing the injunction, then the Department, if the State of Mississippi wants to put the plan in effect, would preclear it. If the State doesn't want to put it in

effect, well, that's their business. But -- but if they are going to put it in effect, then the Department would have to get busy.

MR. WALLACE: As a practical matter, Justice Breyer, that might get the process moving, because I think I've understood the United States to indicate that they would get moving if that's what the Court did. But under the usual rules of this Court's jurisdiction, it sits to review judgments and not opinions. And the judgment is that -- that the -- that the district court plan shall stay into effect -- shall stay in effect until preclearance of a constitutional plan takes effect. That's true --

QUESTION: Yes, but in affirming that, we certainly can say why we're affirming it. And -- and if we say, yes, the injunction is valid for one reason, and one reason only, we do not reach the other -- the other reason, and there is no basis for reaching the other reason. Certainly we can say that.

MR. WALLACE: And if -- and if the Court does say that, and if the Justice Department does get moving as a result of that opinion, then that will move the process along.

QUESTION: So we're in an unusual -- I mean, this is unusual because I guess we would be reviewing a

reason for the judgment. It's unusual because there's a legislature that doesn't want to reapportion. And the third aspect in which it's unusual is that the Supreme Court of Mississippi, according to some of the parties, has overturned previous cases of that court which said the chancery court lacks the power to enter the plan, and it did it without writing an opinion. It's normal that a court writes an opinion.

Now, is there any likelihood or chance that the Mississippi Supreme Court, before this issue comes back to us, if it does, would explain what the reason is for departing from what seems to be a long precedent?

MR. WALLACE: I suspect the Mississippi Supreme Court can take a hint as well as the Justice Department, Justice Breyer. There was no error in`this injunction, and ordinarily, the Court would not edit opinions on valid judgments. But if the Court does that, then certainly the Justice Department may move. I think the Supreme Court of Mississippi may move.

We moved for a stay at the Supreme Court of Mississippi. That stay was denied. The briefing is finished. There has been no stay order. I presume they will set the case for oral argument in due course. But if they get an opinion from this Court that says, we'd certainly like to know what you have to say, I think I can

say with confidence that they will set the case with -- for -- for argument in due course.

So as -- as Justice Breyer says, it is a strange case. We think it is a case in which the judgment is absolutely correct, and the -- and what the Justice Department has done is absolutely correct under its regulations.

QUESTION: But would you say it's absolutely correct if the constitutional reasoning were wrong, and if they say we won't approve a -- a Mississippi plan that is in violation of our constitutional holding?

MR. WALLACE: The -- as -- as Justice Ginsburg has observed, I think that is an alternative ground in the opinion. I do not think that it affects -- infects the judgment, but it makes a problem, as Mr. McDuff has noted, because even if there is section 5 preclearance down the road, this district court would enjoin it again.

QUESTION: Is it your view that the section 5 ground of decision is sufficient to -- to uphold the -- the injunction below?

MR. WALLACE: We believe that it is sufficient to uphold the judgment below because there is no error in the judgment, and there is no error --

QUESTION: But if -- if that's true, did not the district court violate our rule against deciding

constitutional issues unnecessarily?

MR. WALLACE: I think they did not, although it's a close call. In Ashwander --

QUESTION: Why is it a close call if -- if the judgment is clearly correct on the section 5 ground?

MR. WALLACE: The -- the district court --

QUESTION: It seems to me it's only a close call if you think there's doubt about the section 5 ground.

MR. WALLACE: And that's why the district court set the alternative judgments. I think they thought they were making it easier for this Court. Ashwander doesn't say never decide a constitutional question.

QUESTION: It doesn't -- says you don't do it if it's not necessary, and it clearly was not necessary if they're right on the section 5 ground, which everybody seems to agree they were.

MR. WALLACE: We certainly agree that they were, and if they're -- and if --

QUESTION: The other side doesn't agree they were. Would -- would you bet your life that they're -- that they're right about that?

(Laughter.)

MR. WALLACE: I would be -- let me turn to that, if I may, Justice Scalia, because we believe that they are -- that the Justice Department and the district court

were correct on the section 5 ground. And that goes back to the February 14th letter for more information. As the Assistant Solicitor General has said, that's a standard application of Georgia versus United States. When you have -- when you need more information to decide a section 5 issue, then the Justice Department is entitled to stop the clock and ask for more information, and the clock won't move again until they get more information. This is a -- a straightforward application of a regulation that this Court has already approved.

The district court so found, believed that the request for more information was absolutely valid, and therefore said, there has been no approval, there is no plan in place, and for that reason, we must put in a plan of our own.

QUESTION: Mr. Wallace, there is something unusual about that request for information. It seems to have been triggered by the district court. I'm looking at page 100a of the appendix to the jurisdictional statement where the district court is commenting on this opinion, this opaque opinion, of the Mississippi Supreme Court that says the chancery court has authority, and then says -- this is the end of the first paragraph on the page -- that at the very least, the Attorney General of the United States will consider the implications very carefully and

might perhaps request more information. I'm not aware of the -- of district courts telling the Attorney General how the preclearance process should run. Is this standard operating procedure?

MR. WALLACE: By no means is it standard, Justice Ginsburg. But what the district court was doing in this case was deciding whether or not there would be enough time for the preclearance to be completed before the qualifying date. The intervenors were suggesting we did not need a Federal trial, we should wait for the Justice Department to finish its work.

The Justice Department already had before it a complicated submission from the -- from the Attorney General of Mississippi, which begins on page 228 -- 221a of the appendix to the jurisdictional ṡtatement, and that presented not only the -- not only the congressional redistricting plan itself, but also the decision of the Supreme Court of Mississippi to overrule 70 years of precedent and allow trial courts to do redistricting. So those two issues were already before the Justice Department when the district court wrote.

But all the district court wrote -- said is, we think we better get busy and try this case because this looks like a real hard submission to us, and we're not sure that they're going to be able to decide this case

before our qualifying date. So it's unusual, but it's certainly well within the -- the scope of what the district court was being asked to do. And I think they properly pointed out problems.

And -- and with the help of the district court -- the help, indeed, of the submission that Attorney General Moore had already made, I think the Justice Department properly saw that there were questions that needed to be asked. They asked those questions, and that stopped the 60 days from running.

QUESTION: We also have to reach your issue, don't we? Even if we agree with you on that, we still have to reach the cross-appeal issue, don't we?

MR. WALLACE: I -- I think you do.

QUESTION: Or do we?

MR. WALLACE: I think you do because in -- because once it is conceded that the -- the district court had to impose a remedy in 2002, then the question arises of what that remedy should be. And it was our position in the district court, and it is our position here that the district court should have enforced the law of the State of Mississippi, as Justice Stevens has observed, says that you must have at-large elections, and an act of Congress dating back to 1941 that says you must have at-large elections in these circumstances. That's section 2a(c)(5)

of Title II. We ask for that to be enforced, and that's an issue that I think must be reached in this case regardless.

I think the United States has the only argument for not enforcing the 1941 act. They claim that it is absolutely incontrovertibly inconsistent on its face. For the reasons that Justice O'Connor has stated, we think it is not inconsistent on its face.

We also point back --

QUESTION: No court has ever done it before --

MR. WALLACE: No court --

QUESTION: -- in all of the years that courts have been operating under this act.

MR. WALLACE: This Court did it under almost identical statutes 70 years ago in Smiley and Carroll and Koenig.

QUESTION: 2c didn't exist then.

MR. WALLACE: There was a 1911 act that said basically the same thing. The 1911 act says you shall elect Representatives by districts, but at the same time it says, but if districts have not be redistricted, then any new Representatives will be elected at large. And that's --

QUESTION: To get your -- to get your result, you have to read, there shall be established by State law

a number of districts, et cetera. And -- and, in fact, it's pretty hard to read it that way, for me it seems, because this thing, there shall be established by law a number of districts, i.e., not at-large, was enacted by Congress in response to courts that had threatened -- courts, not legislatures -- that had threatened at-large elections. And so they were quite unhappy about that in Congress, and they passed this law saying there shall be established by law a number districts. It seems to me their object was certainly court districting, wasn't it, as well as legislative districting?

MR. WALLACE: As difficult as it is to read the mind of Congress, Justice Breyer, I think that while they were clearly unhappy, they were unable to agree in any detail on what ought to be done. And èven on section 2c, there was -- there were people who stood up in both houses of Congress and suggested that this law would not be enforced in States -- in court proceedings, that it was being -- that it was addressing itself to legislatures.

QUESTION: It was repeating the 1911 law that you just mentioned?

MR. WALLACE: There it --

QUESTION: Why -- why did they -- why did they pass it if it didn't do anything but -- but say what the -- what the 1911 law already said?

MR. WALLACE: I think it's -- I think it is difficult to know why they passed it, there being no reports --

QUESTION: Well, you've got to give me some plausible reason. I mean --

QUESTION: Legislative history helps, by the way.

(Laughter.)

QUESTION: I gather the legislative history you've just told us is, as usual, on both sides of this thing. Is that right?

(Laughter.)

MR. WALLACE: We believe it is, Your Honor. As -- as was noted in the Hanson decision in the D.C. Circuit, I think there was gamesmanship on both sides in both houses. Gamesmanship is a word that comes from the Hanson case.

QUESTION: But, Mr. Wallace, one thing isn't, I think, debatable and that is since 2c is on the books, no court has ever resorted to whatever -- was 2a, whatever. Since 2c is there, that's the one that the courts have used, is that not so?

MR. WALLACE: It is -- I don't know that they have enforced 2c. I think most of them have believed that they were acting under this Court's oversight which tells

courts always to read -- always to do single-member districts when they can. But it's certainly true, Justice Ginsburg, no court since 1967 has ordered at-large elections in -- in redistricting cases.

But we believe what -- if you look at the rules of construction, and at what Congress actually did, without trying to speculate on what they were trying to do, they enacted language that had been before this Court in 1911 and was -- and was construed in 1932 to allow at-large elections.

QUESTION: I assume --

QUESTION: Except --

QUESTION: Go on.

QUESTION: No.

Except for one fact, and that is now we have a districting statute which -- which is the later one in time. The -- the districting command and the at-large command are no longer of -- of even weight. The districting command is later in time and therefore, to the extent that there's any conflict, that's got to get some precedence.

MR. WALLACE: That would -- and that is a difference in 1911 because those two parts of the act were enacted at the same time.

QUESTION: Yes, yes.

MR. WALLACE: But if they could be construed consistently in 1911, then I think they can be construed consistently in 2002. And if they can be construed consistently, it doesn't matter which one was enacted first.

QUESTION: Except that there would be no possible reason for reenacting it if they're -- if they're going to be construed consistently, just as they were when they were both enacted simultaneously.

MR. WALLACE: The -- the difficulty of figuring out what Congress thought it was doing on this single piece of legislation tacked onto a private immigration bill is very difficult, Justice Scalia. I recognize it. But as we noted in our brief, which did discuss the legislative history, they had thought àbout this for 2 years and specifically considered repealing the 1941 act, and they didn't do it. They came back and did something else. And we think under standard rules of -- of construction, that means the 1941 act --

QUESTION: Mr. Wallace, do you agree with the -- with Mr. Feldman that in any event the Mississippi statute is out of the picture because that's pre-empted no matter which way we go on this issue?

MR. WALLACE: I think it would be hard to argue that Congress impliedly repealed a 1941 act and didn't

intend to pre-empt a State law that said the same thing. I've tried to come up with that argument, Justice Stevens, but I don't think I can make it.

(Laughter.)

MR. WALLACE: So --

QUESTION: What do you -- what do you answer to the -- the fear that one has to have that redistricting by having all the elections at large is precisely what those who were interested in diluting minority vote would like?

MR. WALLACE: Well, first of all, Your Honor, the -- the answer that I have is that an act of Congress is not subject to the Voting Rights Act, and would be enforced on its face.

But the other answer I have is this. We have a long history over the last 20 and 30 yèars in Mississippi of coming up with remedies which will protect the rights of minority voters. The most common remedy since Gingles is to do single-member districts, but it's not the only remedy. And there are remedies where you can elect people at large and because of the way the election is held, all people running together, not requiring majority votes, not having -- not having anti-single-shot requirements, those have worked in Mississippi. Minorities have been elected in white jurisdictions in multi-member races by using those sorts of procedures.

Congress didn't tell us what sort of procedure to use in an at-large election, and in Young v. Fordice, this Court made clear that whatever procedures you use would have to be precleared. I don't think the legislature will act for all of the reasons we've seen, but the district court would certainly use those remedies. They've used them before. Minorities will be protected.

QUESTION: Mr. Wallace, can I go back to the constitutional issue that the district court decided in this case? Your -- your adversaries say that you do not defend the reasoning employed by the district court, even though you defend their judgment. Do you think that's a fair comment on your position?

MR. WALLACE: I think I defend the reasoning of the district court as far as it went. `I draw a distinction between this case and Growe that they -- they simply said that in Growe, the Supreme Court did not consider this issue, which is true, and therefore we look at the chancery court. It's not the legislature. It can't act.

There is a distinction -- another distinction between Growe and this case, which -- which the district court did not dwell on and we dwell on in our briefs. In Growe, there was a Federal claim before the district court -- before the State court. And under the Supremacy

Clause, ordinarily a State court must litigate Federal claims, and this Court recognized their authority to do so in Growe.

Here, for whatever reason, the plaintiffs in the -- in the chancery court who are intervenors in this Court did not assert a Federal claim. They made it quite plain, we are proceeding only under State law. We do not want to proceed under Federal law, and that under U.S. v. Term Limits simply doesn't exist. There is no Federal -- there is no State law claim for congressional redistricting. So that's the difference between Growe and this case, and this is -- that's the grounds on which we defend it.

QUESTION: You mean there is no State law requiring redistricting at all?

MR. WALLACE: There is -- there is no State law -- first of all, there is no State law requiring redistricting. There are statutes that talk about how the legislature proceeds, but there is no substantive law that says redistricting shall take place.

QUESTION: So as a matter of State law, the Mississippi legislature is under no duty to -- to redistrict?

MR. WALLACE: It is under no duty to redistrict, and could be under no duty to redistrict because the

redistricting requirement comes only from the United States Constitution. The authority to redistrict comes from the Elections Clause, and the State of Mississippi cannot impose on their legislators any requirement having to do with congressional redistricting. A decision was made by the Framers over 200 years ago that legislators are the people to regulate congressional elections, and if they fail to do it in their job of representing the people, then Congress will do it in its job of representing the people.

QUESTION: Why can't a State just say we require our legislature under State law to conform to the Federal requirements by having a plan by January 15th by going to the chancery court if you don't have a plan, et cetera?

MR. WALLACE: Because at that point, Your Honor, it -- it -- the -- perhaps the legislature could do that.

QUESTION: And if the State of Mississippi says, well, that in effect is what they did, don't we have to take their word for it?

MR. WALLACE: No, I don't think you do, Your Honor. First of all, perhaps they could delegate authority. If the legislature said this problem is too hard for us, we want to delegate it to State courts, then that -- that issue would be tested like any other delegation.

QUESTION: In a State court, and here we have an unexplained judgment without an opinion of the Mississippi Supreme Court which seems to say that's what it is. It doesn't say, but that's the holding of it.

MR. WALLACE: But it -- but when you are dealing with Federal constitutional guarantees and provisions, you do not always take the State courts as -- as gospel even on State law. The district court here said there is no delegation, and as Your Honor knows, there was no explanation of why the writ of prohibition was denied. It really doesn't set much of a precedent for anything, but the district court, which is familiar with Mississippi law, says there is no delegation in this case. We have looked at Mississippi law, and nothing has been delegated.

So the question of whether a`legislature could delegate power to the courts is not here. What we have before us is a case where the legislature has not delegated power to the courts. It has simply done nothing and when it does nothing, the States in that circumstance are powerless to act if we go back to the acts of Congress, and we think we enforce the at-large statute from 1941 as the district court should have done.

If there are no questions, I thank the Court.

QUESTION: Thank you, Mr. Wallace.

Mr. McDuff, you have 5 minutes left.

REBUTTAL ARGUMENT OF ROBERT B. McDUFF

ON BEHALF OF APPELLANTS/CROSS-APPELLEES BRANCH, ET AL.

MR. McDUFF: Thank you, Your Honor.

Justice Breyer, the State of Mississippi does want to put the plan into effect. That was the order of the Mississippi Supreme Court, however brief it was, saying the chancery court's plan will remain in effect until -- unless superseded by a timely plan of the State legislature. The Attorney General submitted the plan for preclearance under order by the chancery court. He has done -- he has not withdrawn the preclearance submission.

QUESTION: The statutory language is not -- is not whether it's in effect or not. It's whether he's seeking to administer it. That's the problem.

MR. McDUFF: And -- and there's nothing about the absence of the appeal here, particularly where we are taking the appeal, that suggests he's not seeking to administer it, Justice Scalia.

And let me mention one other thing along those lines. The language is enact or seek to administer. Now, the lesson of Growe v. Emison, at least we think, is that a State court stands in the shoes of the legislature when the legislature defaults on redistricting, and certainly if the legislature had enacted this plan, and the -- it had been enjoined by the Federal court for whatever

reasons, and the Attorney General had not taken an appeal, but legislative leaders had or intervenors had, I don't think we would say that the preclearance submission was thereby withdrawn. It seems to me the State court is in no different position, and we shouldn't say that the Attorney General's failure to appeal here would withdraw the submission where it wouldn't in the legislative context.

The -- and -- and the plan has been precleared in our view, if not the -- by the first 60 days, certainly by the time of the second 60 days, where the Justice Department said, we're not going to continue to review this plan because of the constitutional injunction.

Well, there's no language in section 5 that stops the 60-day period from running on that ground. That -- it is a statute that admits of no exceptions. There is no regulation that allow -- by which the Justice Department says, we will not continue to -- to consider a -- a plan that has been enjoined on constitutional grounds. And in fact, the Solicitor General has not even said in his brief that that is the regular practice of the Department.

Here there are compelling reasons why it is important for the 60-day period to be removed even if there's a constitutional injunction. Often these cases

are decided under severe time constraints. If a constitutional injunction is imposed, State officials may try to remove it as quickly as possible and restore the plan in time for the election. If the section 5 obstacle is delayed in the meantime, the -- it -- it, in effect, prolongs itself by feeding off the constitutional injunction, and even if the constitutional injunction is vacated, the State still has to deal with this now-postponed section 5 obstacle that will not be removed in some situations in time for the election.

Let me say one other thing about the constitutional ruling, the fact that it was an alternative ground. We think there is doubt about the section 5 ground, as we've suggested here, and particularly given the importance of resolving these cases so that elections can go forward without continued Federal court interference, I think it is crucial for this Court to rule on the constitutional ground, as well as the preclearance ground here.

The rule of Connor, and the rule of the Warren County case are not jurisdictional rules. They're supervisory rules imposed by this Court to ensure the orderly processing of the section 5 issue when it's -- when it's in a case in which other issues are involved.

Here the orderly processing of this litigation,

and the creation of the situation where Mississippi can conduct its elections in 2004 without continued confusion of the type that we had at the last election, that interest favors resolving the constitutional issue now, at the same time the section 5 issue is resolved.

And so for all of these reasons and the reasons set forth in our brief, we respectfully urge that the Court vacate the injunction of the district court on all grounds.

JUSTICE STEVENS: Thank you, Mr. McDuff.

The case is submitted.

(Whereupon, at 11:08 a.m., the case in the above-entitled matter was submitted.)