

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 BEATRICE BRANCH, ET AL., :

4 Appellants, :

5 v. : No. 01-1437

6 JOHN ROBERT SMITH, ET AL.; :

7 and :

8 JOHN ROBERT SMITH, ET AL.; :

9 Cross-Appellants, :

10 v. : No. 01-1596

11 BEATRICE BRANCH, ET AL. :

12 - - - - -X

13 Washington, D.C.

14 Tuesday, December 10, 2002

15 The above-entitled matter came on for oral

16 argument before the Supreme Court of the United States at

17 10:09 a.m.

18 APPEARANCES:

19 ROBERT B. McDUFF, ESQ., Jackson, Mississippi; on behalf

20 of Appellants/Cross-Appellees Branch, et al.

21 JAMES A. FELDMAN, ESQ., Assistant to the Solicitor

22 General, Department of Justice, Washington, D.C.; on

23 behalf of the United States, as amicus curiae.

24 MICHAEL B. WALLACE, ESQ., Jackson, Mississippi; on behalf

25 of Appellees/Cross-Appellants Smith, et al.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ROBERT B. McDUFF, ESQ.	
4	On behalf of Appellants/Cross-Appellees	
5	Branch, et al.	3
6	JAMES A. FELDMAN, ESQ.	
7	On behalf of the United States,	
8	as amicus curiae	22
9	MICHAEL B. WALLACE, ESQ.	
10	On behalf of Appellees/Cross-Appellants	
11	Smith, et al.	32
12	REBUTTAL ARGUMENT OF	
13	ROBERT B. McDUFF, ESQ.	
14	On behalf of Appellants/Cross-Appellees	
15	Branch, et al.	52
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:09 a.m.)

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

6 Mr. McDuff, you may proceed.

7 ORAL ARGUMENT OF ROBERT B. McDUFF

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

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

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

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

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

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

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

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

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

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

3 MR. McDUFF: That's correct.

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

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

10 QUESTION: But you're not the State.

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

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

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

25 Now, if the Attorney General doesn't appeal for

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. McDUFF: I'm sorry?

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

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

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

1 been precleared and it should have been. And the reason
2 it hasn't been precleared is the reason that's been
3 discussed, that -- that they haven't tried to administer
4 it yet and when -- and they -- and the Department has
5 60 days from the time that the State tries to administer
6 it. I mean, I thought that's what the statute says,
7 doesn't it, that they have --

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

10 QUESTION: Yes, enacts or seeks to administer.

11 MR. McDUFF: That is correct.

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

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

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

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

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

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

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

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

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

19 QUESTION: But Mr. McDuff, the --

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

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

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

5 MR. McDUFF: That's correct.

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

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

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

22 MR. McDUFF: Well --

23 QUESTION: By the same token --

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

1 just no need for us to reach it.

2 QUESTION: Well, there are two questions I had.

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

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

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

17 MR. McDUFF: Yes, sir.

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

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

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

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

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

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

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

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

8 And let me respond to one other thing --

9 QUESTION: So I -- I take it --

10 MR. McDUFF: I'm sorry.

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

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

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

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

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

1 other Federal constitutional obstacles are removed.

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

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

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

25 That plan was precleared, and it certainly seems

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

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

11 MR. McDUFF: I'm sorry?

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

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

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

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

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

25 MR. McDUFF: That's correct.

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

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

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

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

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

25 And at most, the case stands for no answer to

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

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

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

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

23 MR. McDUFF: I'm sorry?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 still be facing that injunction.

2 QUESTION: Meanwhile, the legislature will act.

3 MR. McDUFF: Well, that's -- that's wishful

4 thinking. And it --

5 (Laughter.)

6 MR. McDUFF: If it were true, we wouldn't be

7 here I think.

8 QUESTION: Is there any clue, by the way, why in

9 all this time --

10 MR. McDUFF: I'm sorry?

11 QUESTION: Is there any clue why, in all this

12 time, the legislature has not acted?

13 MR. McDUFF: No. I think it was the difficulty

14 of pairing two incumbents, and they couldn't agree. They

15 couldn't agree on how to do it because we lost a seat in

16 Mississippi.

17 Let me make one --

18 QUESTION: They -- they won't have that problem

19 now, will they?

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

21 now.

22 QUESTION: So --

23 MR. McDUFF: But I still think there's --

24 there's been no indication thus far that any action is

25 going to be taken in that respect.

1 I reserve the remainder of my time for rebuttal.

2 QUESTION: Mr. Feldman.

3 ORAL ARGUMENT OF JAMES A. FELDMAN

4 ON BEHALF OF THE UNITED STATES,

5 AS AMICUS CURIAE

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

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

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

17 MR. FELDMAN: It's --

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

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

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

25 MR. FELDMAN: Well --

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

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

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

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

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

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

20 QUESTION: It isn't --

21 MR. FELDMAN: It --

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

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

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

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

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

14 QUESTION: Yes.

15 MR. FELDMAN: In the --

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

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

25 QUESTION: If it now seeks to vacate --

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

7 QUESTION: Yes.

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

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

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

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

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

14 MR. FELDMAN: I think -- I do think the section
15 5 ground was sufficient to sustain it.`

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

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

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

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

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

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

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

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

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

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

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

6 And therefore, because that whole process was --
7 was approved by the Court in Georgia against the United
8 States, because more information was sought, that that
9 terminated the 60-day clock then, and it did not -- the
10 plan was not precleared some days later when -- when the
11 60-day period would have expired.

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

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

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

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

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

20 MR. FELDMAN: I --

21 QUESTION: -- that you can harmonize them.

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

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

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

15 (Laughter.)

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

18 QUESTION: Isn't that --

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

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

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

1 to 1967.

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

11 QUESTION: Thank you, Mr. Feldman.

12 Mr. Wallace.

13 ORAL ARGUMENT OF MICHAEL B. WALLACE

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

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

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

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

1 be enforced.

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

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

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

19 MR. WALLACE: I think not, Your Honor, and I
20 think that's because of the very strange system of divided
21 jurisdiction that Congress consciously created back in
22 1965 when it said, we will let the District of Columbia
23 deal with statutory questions. We will let the court back
24 home deal with constitutional questions. That's been in
25 the act from day one, and it's given this Court trouble

1 from day one.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 constitutional issues unnecessarily?

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

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

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

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

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

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

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

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

22 (Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

15 QUESTION: Or do we?

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

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

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

9 We also point back --

10 QUESTION: No court has ever done it before --

11 MR. WALLACE: No court --

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

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

17 QUESTION: 2c didn't exist then.

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

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

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

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

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

22 MR. WALLACE: There it --

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

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

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

6 QUESTION: Legislative history helps, by the
7 way.

8 (Laughter.)

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

12 (Laughter.)

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

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

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

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

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

11 QUESTION: I assume --

12 QUESTION: Except --

13 QUESTION: Go on.

14 QUESTION: No.

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

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

25 QUESTION: Yes, yes.

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

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

10 MR. WALLACE: The -- the difficulty of figuring
11 out what Congress thought it was doing on this single
12 piece of legislation tacked onto a private immigration
13 bill is very difficult, Justice Scalia. I recognize it.
14 But as we noted in our brief, which did discuss the
15 legislative history, they had thought about this for
16 2 years and specifically considered repealing the 1941
17 act, and they didn't do it. They came back and did
18 something else. And we think under standard rules of --
19 of construction, that means the 1941 act --

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

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

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

4 (Laughter.)

5 MR. WALLACE: So --

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

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

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

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

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

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

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

1 Clause, ordinarily a State court must litigate Federal
2 claims, and this Court recognized their authority to do
3 so in *Grove*.

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

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

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

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

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

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

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

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

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

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

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

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

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

23 If there are no questions, I thank the Court.

24 QUESTION: Thank you, Mr. Wallace.

25 Mr. McDuff, you have 5 minutes left.

1 REBUTTAL ARGUMENT OF ROBERT B. McDUFF
2 ON BEHALF OF APPELLANTS/CROSS-APPELLEES BRANCH, ET AL.

3 MR. McDUFF: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

25 Here the orderly processing of this litigation,

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

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

10 JUSTICE STEVENS: Thank you, Mr. McDuff.

11 The case is submitted.

12 (Whereupon, at 11:08 a.m., the case in the
13 above-entitled matter was submitted.)
14
15
16
17
18
19
20
21
22
23
24
25