

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: THOMAS YOUNG, ET AL.; Appellants v. KIRK
FORDICE, ET AL.

CASE NO: 95-2031

PLACE: Washington, D.C.

DATE: Monday, January 6, 1997

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Supreme Court U.S.

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 THOMAS YOUNG, ET AL., :
4 Appellants :
5 v. : No. 95-2031
6 KIRK FORDICE, ET AL. :
7 - - - - -X

8 Washington, D.C.
9 Monday, January 6, 1997

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 1:00 p.m.

13 APPEARANCES:

14 BRENDA WRIGHT, ESQ., Washington, D.C.; on behalf of the
15 Appellants.

16 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the United States, as amicus curiae,
19 supporting the Appellants.

20 ROBERT E. SANDERS, ESQ., Assistant Attorney General of
21 Mississippi, Jackson, Mississippi; on behalf of the
22 Appellees.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	BRENDA WRIGHT, ESQ.	
4	On behalf of the Appellants	3
5	ORAL ARGUMENT OF	
6	MALCOLM L. STEWART, ESQ.	
7	On behalf of the United States, as amicus curiae,	
8	supporting the Appellants	21
9	ORAL ARGUMENT OF	
10	ROBERT E. SANDERS, ESQ.	
11	On behalf of the Appellees	31
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 95-2031, Thomas Young v. Kirk Fordice.

5 Ms. Wright.

6 ORAL ARGUMENT OF BRENDA WRIGHT

7 ON BEHALF OF THE APPELLANTS

8 MS. WRIGHT: Mr. Chief Justice, and may it
9 please the Court:

10 This case arises because the State of
11 Mississippi, since early 1995, has been conducting voter
12 registration under procedures that have not been submitted
13 for preclearance to the United States Attorney General or
14 to the D.C. District Court, as required by section 5 of
15 the Voting Rights Act.

16 Because the section 5 preclearance requirement
17 is so critical in protecting the right to vote in States
18 such as Mississippi, Congress expressly provided in the
19 National Voter Registration Act of 1993, the NVRA, that
20 States must comply with the Voting Rights Act in
21 implementing the NVRA.

22 Now, the procedures that Mississippi ultimately
23 decided upon in implementing the NVRA established a two-
24 tier or dual system under which citizens who register
25 under the provisions of the NVRA must also register

1 separately to be able to vote in State elections, and a
2 plan that implements the NVRA through that type of dual
3 system reflects a change from the voter registration
4 system that Mississippi had in effect prior to 19 --

5 QUESTION: Well, may I ask you a question right
6 here about that? Suppose from the outset Mississippi had
7 said we're not going to change our State and local
8 registration system from what it's been. We're going to
9 keep it, but here are the changes we're offering to
10 implement for Federal election purposes the NVRA.

11 Could the Department of Justice refuse to
12 preclear such a scheme if Mississippi kept in place its
13 State local registration scheme and had a proposal that
14 met the statutory requirements for the NVRA?

15 MS. WRIGHT: Yes, it could Your Honor. If the
16 procedures that the State adopted were found by the
17 Attorney General or the D.C. District Court to be
18 discriminatory in purpose or effect, that objection could
19 be made, and --

20 QUESTION: Well, even in the face of the fact
21 that the NVRA requirements expressly state that they
22 govern only Federal elections?

23 MS. WRIGHT: Well, Your Honor, in this case --

24 QUESTION: There seems to be some indication in
25 the statute itself that it never -- Congress never

1 purported to require a change in requirements for State
2 and local elections.

3 MS. WRIGHT: It doesn't require that, that is
4 true. It leaves that decision up to the States, but --

5 QUESTION: But you think that the Attorney
6 General can make that a condition of any approval?

7 MS. WRIGHT: Well, it depends in part upon the
8 State's specific history and the practices it had.

9 QUESTION: In any section 5 State you think the
10 Attorney General can insist on that?

11 MS. WRIGHT: Mississippi had a unitary system by
12 statute at the time the NVRA came into effect.

13 QUESTION: Yes.

14 MS. WRIGHT: And we contend that the
15 implementation of a dual system reflects a change from
16 that unitary system.

17 QUESTION: It still does have the same unitary
18 system in place. You can still register for both Federal
19 and State elections the same way you could before the NVRA
20 provisions went in.

21 MS. WRIGHT: But you have a --

22 QUESTION: Now you have an additional option.
23 If you want to use the easier method you can register for
24 Federal elections, but as far as what a citizen of
25 Mississippi can do by way of registering for both State

1 and Federal, it is exactly the same as it was before,
2 isn't it?

3 MS. WRIGHT: Well, our contention is this.

4 QUESTION: Except for the false start. Let's
5 leave the false start out of the mix for the moment.

6 MS. WRIGHT: Leaving the false start out of it,
7 you now have a system under which there is a class of
8 citizens that once registered is not permitted to vote in
9 State and local elections, and that is not a unitary
10 system under any meaningful sense of the term.

11 QUESTION: By reason of the special grace
12 provided by the Federal statute, but the same system that
13 existed for multiple registration prior to the NVRA is
14 still in place in Mississippi.

15 MS. WRIGHT: There was no system of multiple
16 registration, though, because one registration made you
17 eligible for all purposes.

18 QUESTION: Eligible -- well --

19 MS. WRIGHT: And the real purpose of our lawsuit
20 here is to say that whatever choices Mississippi made in
21 implementing the NVRA, whatever plan it decided to adopt
22 ultimately had to be submitted for preclearance so that
23 the Attorney General could review exactly how that
24 procedure was going to be implemented, and there are many,
25 many discretionary choices that a State makes in deciding

1 to set up a system either on a dual basis or, even if it's
2 on a dual basis, there are different ways and different
3 choices that a State makes that will have a major impact
4 on whether the voters --

5 QUESTION: Could you give me a few illustrations
6 of that? One is which State offices will be used for
7 registration. I take it that's one?

8 MS. WRIGHT: That's right, and also, for
9 example, the registration forms themselves. In the, the
10 NVRA forms that are currently in effect and are being
11 handed out at the State agencies do not say anything about
12 limited registration.

13 \ You have forms, for example, that are being
14 handed out at the public assistance agencies that are
15 entitled, Mississippi Voter Registration Application, and
16 nothing on the form tells you that when you fill that out
17 you're only going to be eligible to vote in State and
18 local elections, so it was vital for the Attorney
19 General --

20 QUESTION: In Federal?

21 QUESTION: You mean only vote in Federal
22 elections.

23 MS. WRIGHT: In Federal -- that you would only
24 be able to vote in Federal elections, that's correct, and
25 so it was vital, because of the risk of confusion, and the

1 risk of people believing that they may already be
2 registered for all purposes when in fact they are not that
3 the Attorney General reviewed these procedures, each and
4 every one of them.

5 QUESTION: Well, I can understand that, but to
6 ask the further question whether the Attorney General,
7 assuming the forms make it clear that it's only for
8 registration for Federal elections as the law indeed says
9 is necessary, whether it can go beyond that and say,
10 moreover, State, you have to make this a unitary system
11 now and follow the Federal plan for all, even State and
12 local.

13 MS. WRIGHT: But if there were evidence before
14 the D.C. District Court or the Attorney General that a
15 dual system had been reinstated for the very purpose of
16 discriminating against minority citizens, certainly --

17 QUESTION: Not reinstated, kept, unchanged from
18 the past, but following the new law for Federal elections.

19 MS. WRIGHT: But Your Honor, the cases such as
20 City of Lockhart v. United States recognize that even when
21 a State maintains certain procedures but changes other
22 aspects of its registration system, the procedures that
23 are unchanged themselves may be subject to section 5
24 review.

25 QUESTION: It just seems so counterintuitive in

1 the face of language in the statute whereby Congress
2 expresses the intent not to require a change for State and
3 local registration purposes. That's the troublesome part
4 of this case for me, anyway.

5 MS. WRIGHT: But cases such as City of Lockhart
6 recognize -- in that case the numbered post requirement
7 had not been changed at all.

8 QUESTION: That wasn't in connection with the
9 Federal Voter Registration Act.

10 MS. WRIGHT: No, it was not, but it was a
11 situation where one provision that called for numbered
12 post remained unchanged, and the Court held that it
13 nevertheless was a change when the city applied that
14 numbered post requirement to an election system where
15 additional seats had been added, because the Court held
16 that you have to examine a change in the context of the
17 entire election system.

18 QUESTION: Ms. Wright, why --

19 QUESTION: That's fair enough when it's
20 voluntary on the part of the State. Where one change is
21 made voluntarily on the part of the State you can say
22 well, the whole thing gets sucked in, but this is a unique
23 situation in which a certain change is imposed upon the
24 State by the Federal Government.

25 Now, it's one thing to say that the way in which

1 you implement that mandatory change must be cleared with
2 the Attorney General. That's one thing. But it's quite
3 something else to say that because the Federal Government
4 has mandated this change all of your current system which
5 you have not changed at all has to be resubmitted for
6 clearance to the Attorney General.

7 MS. WRIGHT: But Your Honor, the Attorney
8 General is entitled to examine the effect that this
9 particular method of implementation will have on voting
10 and registration in State and local elections.

11 QUESTION: Whatever its effect is is the fault
12 of the Federal Government, so long as the procedures for
13 implementing the Federal scheme themselves are fair.

14 MS. WRIGHT: Well --

15 QUESTION: Now, it may discourage people from
16 voting in State elections who find it easier to register
17 for Federal only, but that's the Congress' fault for
18 applying this new system only to Federal elections.

19 MS. WRIGHT: We argue, Your Honor, that because
20 of the decision in Allen v. State Board of Elections it's
21 clear that even if a change, a particular change is
22 mandated by the Voting Rights Act itself, it is subject to
23 preclearance requirements.

24 QUESTION: Your argument goes considerably
25 further than Allen, which itself went to me to the extreme

1 of construing this statute.

2 QUESTION: May I ask, Ms. Wright, I just want to
3 be sure, I didn't think the questions that Justice
4 O'Connor put to you is presented by this case. We aren't
5 concerned with whether or not the Attorney General would
6 have had a duty to preclear if there had been a
7 submission, are we?

8 MS. WRIGHT: No. That question will arise when
9 and if the procedures --

10 QUESTION: Yes. We don't -- for all we know the
11 Attorney General would just routinely preclear it.

12 MS. WRIGHT: Well --

13 QUESTION: Or perhaps she'd act wrongfully if
14 she refused to, but that's not before us, is it?

15 MS. WRIGHT: The question of actual
16 discriminatory intent or effect is not before this Court
17 and it was not before the court below, and that is why we
18 contend that the Court exceeded its jurisdiction.

19 QUESTION: Is it not true that even if it's
20 perfectly clear that the Attorney General would have had a
21 duty to preclear the existing system, you would
22 nevertheless prevail?

23 MS. WRIGHT: Oh, yes, Your Honor. Yes. I'm
24 simply --

25 QUESTION: Then are you actually asking as well

1 to submit all the changes that weren't made? I thought
2 what you were asking for is that what has to be submitted,
3 the manner in which they carried out the changes required
4 by the voter registration, the motor voter act, and that
5 would be judged against a background in which they didn't
6 change the State officials.

7 But I don't understand -- I agree, I don't
8 understand why they'd have to submit the things they
9 didn't change. I suppose they'd have to submit the things
10 they did change, and then you would argue that those
11 changes are unlawful because of what they didn't --

12 MS. WRIGHT: That's right. We contend that the
13 procedures establishing a dual system, all of them, need
14 to be submitted for preclearance.

15 QUESTION: But isn't all of that premature? I
16 thought the simple point is, there's been a change. Every
17 change has to be precleared, period. Now, the Attorney
18 General may agree with your point of view or disagree. We
19 don't know that at this point.

20 MS. WRIGHT: That is correct.

21 QUESTION: All we know is that we have a change
22 prompted by the Federal law. Everybody concedes that it
23 is a change that needs to be precleared. Why should we
24 look at anything more than that in this case?

25 MS. WRIGHT: Well, we certainly agree that there

1 is no necessity of determining what the ultimate outcome
2 of the --

3 QUESTION: Or even what constitutes a
4 satisfactory submission. That's for the Attorney General
5 to decide in the first instance.

6 MS. WRIGHT: Yes.

7 QUESTION: But it might be important to other
8 members of this Court to know just how far the Attorney
9 General's position goes. It certainly is important to me.

10 MS. WRIGHT: Yes, Your Honor.

11 QUESTION: And in that respect, may I rephrase
12 Justice O'Connor's question?

13 MS. WRIGHT: Yes.

14 QUESTION: It isn't your position that as a
15 practical matter -- as a practical matter, the State must
16 ask for preclearance of its former voting procedures.

17 MS. WRIGHT: It need not submit those
18 procedures, but we do believe that if the State is going
19 to change from its current statutory policy of a unitary
20 system it does need to obtain preclearance for that
21 alteration of its important policy, and that would be part
22 of --

23 QUESTION: So you're saying that as a practical
24 matter the State cannot leave in place its previous
25 precleared procedures without further amendment and

1 alteration of those procedures.

2 MS. WRIGHT: Because it's current -- but that's
3 only because its current system contemplates a unitary
4 system of registration, and I do want to emphasize the
5 very narrow character of the inquiry that we have here.
6 The only inquiry is whether there has been a change and
7 whether, if there has been a change, that change has been
8 submitted to the Attorney General.

9 QUESTION: Even though the change was brought
10 about by the Federal Government.

11 MS. WRIGHT: That's right.

12 QUESTION: And not by the State.

13 MS. WRIGHT: That's right.

14 QUESTION: None of our cases support that, do
15 they?

16 MS. WRIGHT: I believe Allen v. State Board of
17 Elections and McDaniel v. --

18 QUESTION: Was that change brought about by the
19 Federal Government?

20 MS. WRIGHT: Yes. It was an implementation of
21 the Voting Rights Act. Virginia was implementing the
22 Voting Rights Act by providing assistance to illiterate
23 voters, and the Allen case held that the changes providing
24 that there was -- that that assistance had to be given was
25 subject to the preclearance requirement of section 5, and

1 the reason for that is that --

2 QUESTION: But that's not what we're --

3 QUESTION: No.

4 QUESTION: -- we're arguing about here. It's
5 not whether the procedures for implementing the Federal
6 act have to be cleared, but whether there gets sucked
7 along with that the procedures that the State has had in
8 place for many years for registering under the State laws.

9 MS. WRIGHT: Well, we contend that --

10 QUESTION: And that was not involved in any
11 earlier case.

12 MS. WRIGHT: That comes into play, though,
13 because of Mississippi's clear statutory policy of having
14 a unitary registration system.

15 QUESTION: Well, you pick on that and you say
16 that that has been changed.

17 Well, I mean, yes you can say that that's been
18 changed. You could also say, however, if they had changed
19 it to a unitary, or had continued a unitary, you could
20 also say there has been a change because it used to be
21 that you had to, in order to register for the State, do
22 things beyond what the motor vehicle registration act
23 requires.

24 MS. WRIGHT: Well, we do argue --

25 QUESTION: I mean, that's a loaded question.

1 You say they -- you focus on this unitary as though that's
2 the center of the universe. I don't know why --

3 MS. WRIGHT: What we argue, Your Honor, is that
4 the State has been highly selective in deciding which
5 provisions of existing Mississippi law it must continue to
6 comply with and which it cannot change. We believe that
7 the important State policy of a unitary registration
8 system is clearly far greater in importance to the State
9 than the provision of an attesting witness requirement in
10 a mail-in form, which is really the only provision here
11 that Mississippi has identified as a bar to implementing
12 the registration --

13 QUESTION: I don't agree --

14 MS. WRIGHT: -- on a unitary basis.

15 QUESTION: If you ask me what would constitute
16 the least change that Mississippi could make in order to
17 comply with the Federal law, I would say it is precisely
18 what Mississippi did here, leave its current registration
19 procedures entirely in place.

20 If you want to register for State and Federal
21 localities at the same time, you just follow what
22 Mississippi has had in place for years, and add to that
23 what the Federal Government has required to be added:
24 motor vehicle registration for Federal elections. That
25 seems to me the minimal change possible from the State

1 system.

2 MS. WRIGHT: We would argue from the perspective
3 of the voters it certainly is not the least change
4 possible, because if you think about election day the
5 registrars are now required to keep two sets of poll
6 books, one for NVRA registrants only allowed to vote in
7 Federal elections, and one for other registrants.

8 Presumably if you go into the voting booth you
9 have to get a separate ballot, because if there are both
10 Federal and State elections on the ballot you can't be
11 permitted to vote that ballot, and so these types of
12 changes, these types of --

13 QUESTION: No problem. Just register under the
14 State procedures and you don't have to worry about that.

15 MS. WRIGHT: But Your Honor --

16 QUESTION: Just the way it was before.

17 MS. WRIGHT: But because the NVRA does require
18 that the States administer these procedures, the State, we
19 contend, has an obligation to identify exactly how it
20 wants to go about implementing the NVRA and obtain
21 preclearance for all of those decisions specifically
22 spelled out in a proceeding either before the Attorney
23 General of the United States or the D.C. District Court,
24 and that is what has not happened here.

25 I'd like to reserve the remainder of my time.

1 QUESTION: Well, may I ask you a fact question?
2 I thought it had happened in the sense that the procedures
3 that were outlined in the original submission for the
4 application of the new Federal act are, in fact, the ones
5 that are being followed. I thought the contention was
6 that the changes in the old State procedures which were
7 outlined in that submission were not followed. Am I wrong
8 as a matter of fact?

9 MS. WRIGHT: Well, the -- yes. We are arguing
10 that the system that was submitted to the Attorney General
11 by the Secretary of State in December of 1994 was a system
12 that contemplated a unitary --

13 QUESTION: Oh, I realize that.

14 MS. WRIGHT: -- set of procedures.

15 QUESTION: That if you take the totality of the
16 submission, that totality in fact has not been followed.

17 MS. WRIGHT: That's right.

18 QUESTION: The provisions of that totality have
19 not been followed.

20 MS. WRIGHT: That's right.

21 QUESTION: But with respect to the provisions
22 for the implementation of the Federal act, have they been
23 followed or not?

24 MS. WRIGHT: We believe that Mississippi is
25 following the provisions as they respect Federal

1 elections.

2 QUESTION: Okay, so the only fact difference,
3 then, is it didn't make changes to conform its old State
4 system to the new procedures which it, which everybody
5 agrees it's following for the limited Federal
6 registration.

7 MS. WRIGHT: But there are further differences
8 because of -- by necessity, when you implement a dual
9 system you have to make changes in your practices to take
10 into account the fact that you now have two separate sets
11 of registration requirements that may result in confusion
12 for voters. So we say that as a package the decision to
13 implement these procedures on a Federal-election-only
14 basis really need to be submitted and reviewed on that
15 basis.

16 QUESTION: When -- well, I just wanted to ask
17 about your benchmark view. If the interim January to
18 February 10th, if that was not the system that Mississippi
19 ever lawfully adopted, then why shouldn't our only
20 benchmark be what was before the Federal act became
21 effective?

22 MS. WRIGHT: Well, we contend that it's not
23 necessary to determine the status of those early 1995
24 procedures in order to dispose of this case, but we do
25 contend that Mississippi was actually implementing a

1 unitary NVRA plan, and that it could not make a change
2 from that system that was in effect in the early part of
3 1995.

4 QUESTION: From an unlawful system, they just
5 couldn't treat that as a nullity and say, we had a pre-
6 January 1 system and a lawful post-January 1 system?

7 MS. WRIGHT: We contend no, because you simply
8 cannot treat as a nullity the registration of thousands of
9 voters who registered under the assumption that they were
10 eligible for all elections. That would be --

11 QUESTION: Why not just give them notice? Just
12 give them notice that their, what they registered for
13 counts only for the Federal elections?

14 MS. WRIGHT: Preclearance would have to be
15 obtained for a change that makes such a dramatic
16 difference in the registration status of so many voters.
17 That's part of our contention.

18 QUESTION: Ms. Wright, as I understood your
19 submission, it is not that the whole State was acting de
20 facto this way, although unlawfully. It's that only a
21 certain number of counties were. I don't know how you can
22 possibly leap to the position that the entire State of
23 Mississippi, which is what is at issue here, that the
24 entire State of Mississippi was de facto operating under a
25 unitary system.

1 MS. WRIGHT: Well, we contend that even though
2 only some of the circuit clerks put voters actually on the
3 rolls for all purposes, the unitary NVRA plan was actually
4 being implemented on a State-wide basis, because in each
5 of these counties when you went into the agencies the
6 forms that you were being given and the procedures that
7 were being followed were to the knowledge of the voters
8 procedures registering you for all elections, and that was
9 going on in every county regardless of whether the circuit
10 clerks immediately put you on the rolls for all purposes,
11 and that's how we say there was in fact State-wide
12 implementation here.

13 I'd like to reserve.

14 QUESTION: Very well, Ms. Wright.

15 Mr. Stewart.

16 ORAL ARGUMENT OF MALCOLM L. STEWART

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

18 SUPPORTING THE APPELLANTS

19 MR. STEWART: Mr. Chief Justice, and may it
20 please the Court:

21 The point I would like to stress from the outset
22 is that the potential discriminatory effects of
23 Mississippi's current system with which the Department of
24 Justice is most concerned are not in any sense the product
25 of Federal compulsion.

1 That is, the NVRA does require the States to
2 take certain steps, but it leaves the States with
3 substantial discretion in other respects not only as to
4 the initial decision as to whether NVRA registrants will
5 be entitled to vote in State and local elections, but also
6 with respect to subsidiary decisions regarding the forms
7 that will be used, the procedures by which people will be
8 registered.

9 And I want to emphasize as well that we think we
10 are not being fanciful or alarmist in suggesting there may
11 be a substantial problem with telling thousands of people
12 in Mississippi that they are registered to vote in
13 Mississippi when in fact they are not eligible to cast
14 ballots for any Mississippi official.

15 The question of what forms are being used, what
16 process of notification is given to NVRA registrants, is
17 not simply a technicality. It really goes -- potentially
18 at least goes to the heart of whether Mississippi's
19 current system is --

20 QUESTION: Well, even if we agree that the
21 State's proposals to administratively and by State law
22 implement the requirements of the new Federal act have to
23 be submitted to the Attorney General for preclearance, do
24 you also take the position espoused by Ms. Wright that the
25 Attorney General may require the State to go to a -- the

1 same system for its State and local voter requirements?

2 MR. STEWART: If the State had made clear from
3 the outset that it intended to implement the NVRA on a
4 Federal election-only basis, it would then have submitted
5 the procedures --

6 QUESTION: Well, the procedures it did submit to
7 the Attorney General contained within them a proposal for
8 changing State law to go to a system that would be the
9 same for Federal as well as State, but I thought the
10 Attorney General's own requirements and that of Federal
11 law in this area did not permit the Attorney General to
12 act on something on the basis of laws that had not been
13 passed.

14 MR. STEWART: That's correct. The Attorney
15 General did not --

16 QUESTION: So the Attorney General, instead of
17 acting on this, should have just said we can't act on it
18 at this stage.

19 MR. STEWART: Well, the submission --

20 QUESTION: Shouldn't it?

21 MR. STEWART: No, I don't believe so.

22 QUESTION: No?

23 MR. STEWART: Well --

24 QUESTION: That's what the Federal law requires.
25 They don't have to do that?

1 MR. STEWART: The Attorney General certainly
2 could not appropriately have purported to preclear
3 legislation that had not been passed.

4 QUESTION: But that's what it purported to do.

5 MR. STEWART: With respect, Your Honor, I don't
6 believe that's the case. The --

7 QUESTION: I was surprised it dealt with it at
8 all. I would think that the normal thing would be to send
9 it back to the State and say, this law hasn't passed.
10 We're not in a position to act on it until it does.

11 MR. STEWART: But the submission did include the
12 draft legislation, but it also included procedures for
13 implementing the NVRA beginning on January 1, 1995, and in
14 our view the unmistakable tenor of the whole submission
15 was that those procedures presupposed a regime in which
16 NVRA registrants would be eligible for State and local
17 elections as well.

18 QUESTION: Well, of course it did, but it also
19 quite clearly and on its very face presupposed a new
20 statute that hadn't been passed.

21 MR. STEWART: Again, with respect, the statute
22 was included, but the submissions did not make clear that
23 passage of a statute was essential to treatment of NVRA
24 registrations.

25 QUESTION: Well, you're not contending that the

1 Attorney General wouldn't have known from the submission
2 that the statute had not, in fact, been passed?

3 MR. STEWART: We knew from the submission that
4 the statute had not been passed. We didn't know from the
5 submission that passage of the statute was a prerequisite
6 to treatment of NVRA registrants as eligible to vote in
7 State and local elections.

8 QUESTION: How could that not be --

9 MR. STEWART: Well --

10 QUESTION: -- when you had State law that said
11 this is how you register for State --

12 MR. STEWART: Well, one of the respects in which
13 this record is fairly hazy is --

14 QUESTION: You don't have to be a very good
15 lawyer to figure that out. You have State law that says,
16 this is how you register for State elections.

17 MR. STEWART: In fact, Mississippi has never
18 identified with any clarity the precise State statute
19 which is supposed to bar the treatment of NVRA registrants
20 as eligible to vote in State and local elections.

21 There is no State statute which says, voter
22 registration applications --

23 QUESTION: You don't need one that bars it. You
24 need one that authorizes it. People don't get the ability
25 to vote unless there's a law that says they don't have it.

1 They need a law that says they do have it, and the only
2 law in effect is one that said this is how you get to vote
3 in Mississippi, and then you get this submission from
4 Mississippi which says, we are now going to let people
5 vote in State elections on the basis of this new Federal
6 law, and you see that in the Mississippi statutes -- you
7 get this from the Secretary of State, right?

8 MR. STEWART: That's correct.

9 QUESTION: And you see the Mississippi statute
10 doesn't permit this. I cannot imagine that you people at
11 the Justice Department did not know -- did not know that
12 this thing required legislation which had not yet been
13 passed.

14 MR. STEWART: No, what we knew was that the
15 State had begun to adopt the plan outlined in the
16 submission as of January 1, 1995, and again, this is not a
17 situation in which the State could decide at a later date
18 what elections these people were registered for.

19 It's essential that a person who comes in to
20 register be told what elections he is eligible to vote in,
21 so it wouldn't have been appropriate at all for the State
22 to tell people you're eligible to vote in all elections
23 and then decide at a later date, after the fate of the
24 legislation was determined, whether in fact that would be
25 the case.

1 To return for a second to Justice O'Connor's
2 question, I think if Mississippi had told us from the
3 outset we plan to do this for Federal elections only, the
4 Attorney General in deciding whether to issue preclearance
5 would have had to decide first whether there was
6 discriminatory purpose.

7 But leaving that aside, the Attorney General
8 would have had to determine whether the overall system
9 contemplated would leave minority voters in a worse
10 position than they were before the passage of the NVRA,
11 and in making that determination, the Attorney General
12 could properly consider the likely ancillary effects on
13 voting in State and local elections.

14 QUESTION: Well, that certainly isn't clear from
15 the language of the act that Congress passed, which seemed
16 to leave in place, if States chose, their existing system
17 for State and local elections. I thought that was pretty
18 clear from the face of the law.

19 MR. STEWART: Again, we're not -- we acknowledge
20 that the NVRA itself does not require these procedures to
21 be used in State and local elections, and we're not
22 arguing that the Attorney General has some blanket
23 authority to require that as a matter of her own
24 discretion. What we're saying --

25 QUESTION: Well, I thought that was what Ms.

1 Wright argued, and I thought you were arguing in support
2 of her.

3 MR. STEWART: I don't understand that to be
4 Ms. Wright's position, and it certainly isn't ours. I
5 think our position is that in determining whether
6 minorities will be worse off after Mississippi implements
7 the NVRA, the Attorney General could consider not only the
8 likely advantages to minority voters of expedited
9 registration procedures in Federal elections, she could
10 also consider whether the methods by which Mississippi was
11 registering NVRA voters would be likely to confuse them
12 and thereby dissuade them from --

13 QUESTION: So there is a significant possibility
14 that Mississippi cannot implement the motor voter -- MRV
15 statute without also changing precleared, preexisting
16 procedures for elections, for State election registration?

17 MR. STEWART: I would say a theoretical
18 possibility, but I think Mississippi --

19 QUESTION: I think it's a significant
20 possibility based upon the comment that you've -- and the
21 explanation you've just given us.

22 MR. STEWART: Well, at least our primary concern
23 at this point is that the method by which Mississippi is
24 implementing the NVRA creates a particular risk that NVRA
25 registrants will be dissuaded from registering separately

1 for State and local elections, because the forms on their
2 face give the message that the registrant is eligible to
3 vote in all elections.

4 QUESTION: Well, the way to cure that is simply
5 to deny the preclearance with respect to the simple
6 implementation of the Federal act. That doesn't require
7 you to go any further than that.

8 MR. STEWART: Again, all we want at this --

9 QUESTION: Isn't that so?

10 MR. STEWART: Yes, I think that is so. All we
11 want at this point is the opportunity to view the
12 submission and to determine whether there are any likely
13 discriminatory consequences, and with respect to the
14 consequence that I have just outlined, the possibility for
15 confusion based upon the forms and procedures, it
16 certainly would be a sufficient response for Mississippi
17 to reformulate those forms and procedures so that the
18 likelihood of confusion is diminished or eliminated.

19 QUESTION: What would be the position of the
20 State of Mississippi if you failed to preclear its
21 implementation of the new Federal statute?

22 MR. STEWART: Well, part of this --

23 QUESTION: Could it go, could elections at the
24 State and local level proceed but not at the Federal
25 level?

1 MR. STEWART: Well, I think part of this depends
2 upon the benchmark that would be used. If, as we've
3 contended, the State initially implemented a unitary
4 system of NVRA registration and then sought to change that
5 system, the appropriate remedy pending submission of a new
6 package of materials would be that NVRA registrants would
7 be eligible to vote in all elections until a change had
8 been submitted and precleared.

9 This Court has recognized often that the
10 question of whether unlawful elections should be set aside
11 is distinct from the question of whether there has been a
12 violation of section 5, so we certainly don't think that
13 the consequence of requiring a new preclearance submission
14 would necessarily or even probably be that any elections
15 would be set aside.

16 QUESTION: Is it your position that in a picture
17 like this the State would be required to preclear twice?

18 Suppose Mississippi took the position, we
19 haven't yet gotten this legislation. We don't know if we
20 will. Could they have let January 1 come and go without
21 filing anything on an interim basis and then waited till
22 they found out what happened with the legislation?

23 MR. STEWART: They could have as far as
24 section 5 is concerned but not as far as the -- well, as
25 far as the NVRA is concerned, they would have been

1 required to implement the statute for Federal elections
2 because of the effective date of the NVRA itself --

3 QUESTION: Yes.

4 MR. STEWART: -- and section 5 would have
5 precluded their doing so without preclearance.

6 QUESTION: Thank you, Mr. Stewart.

7 Mr. Sanders, we'll hear from you.

8 ORAL ARGUMENT OF ROBERT E. SANDERS

9 ON BEHALF OF THE APPELLEES

10 MR. SANDERS: Thank you, Your Honor. Mr. Chief
11 Justice, and may it please the Court:

12 I would like to begin by responding to Justice
13 O'Connor's first question, that being whether base
14 implementation by a State of the requirements of the
15 National Voter Registration Act are subject to section 5
16 preclearance, and I think the answer to that question
17 clearly is no.

18 When the Congress mandates that a State
19 implement the matters set forth in the National Voter
20 Registration Act, the State has no discretion about
21 whether to do that. If the Attorney General is asserting
22 a right of review, that means necessarily that the
23 Attorney General is asserting a right to object to
24 Mississippi's implementation of the congressional mandate.

25 QUESTION: Does that mean that there were no

1 discretionary matters that the State could decide in
2 implementing the motor vehicle registration act?

3 MR. SANDERS: No, Your Honor. There are a
4 couple of areas where the State has a very small amount of
5 discretion.

6 QUESTION: Well, with respect to those, was
7 there a duty to preclear?

8 MR. SANDERS: Possibly. The --

9 QUESTION: Well, yes or no?

10 MR. SANDERS: Well -- all right, I'll say yes if
11 the amount of discretion is considered to be significant.
12 The NVRA --

13 QUESTION: Well, isn't the standard just whether
14 there's a change?

15 MR. SANDERS: Well, to the extent that the State
16 of Mississippi has discretion in implementing the mandates
17 of the NVRA, arguably those discretionary --

18 QUESTION: Should have been precleared.

19 MR. SANDERS: Are subject to preclearance.

20 QUESTION: And they were not.

21 MR. SANDERS: Oh, yes they were, Your Honor, I'm
22 sorry. The --

23 QUESTION: Well, let me ask you, is it your
24 position that there was no duty to preclear, or that you
25 did get preclearance?

1 MR. SANDERS: Well, on parts of it there was no
2 duty. On those parts that are strictly mandatory -- for
3 instance, putting NVRA forms at driver's license
4 stations -- there's no discretion about that. The
5 Congress says, thou shalt do that, and we can't, we
6 can't -- we have no discretion there, and the Attorney
7 General may not veto that part or object under the section
8 5 device.

9 There are -- the Congress also said that you
10 shall put certain of these NVRA forms at certain agencies
11 that provide public assistance. It left it up to the
12 States to determine which agencies fit that description.

13 QUESTION: All right.

14 MR. SANDERS: We made a designation of five or
15 six agencies, and arguably --

16 QUESTION: Was not that designation something
17 you had to preclear?

18 MR. SANDERS: Yes, sir, and it was precleared.
19 That was part of --

20 QUESTION: But it wasn't under your view. If I
21 understood your brief, you said that a certain State
22 official did a rogue act, that the December 20 submission
23 was without any authority, that Ms. Slaughter-Harvey acted
24 on her own without authority, without anybody in
25 Mississippi approving that, so if one takes you -- takes

1 that characterization of it, it is as though the
2 December 20 submission never happened. It was totally
3 unauthorized. It was not Mississippi's submission, and if
4 that's the case, then mustn't there be a legitimate
5 preclearance application?

6 MR. SANDERS: Well, we characterize her actions
7 as both erroneous and partly as a rogue official. The
8 reference to a rogue official was more to -- for
9 illustration. Her action was erroneous primarily to the
10 extent that she purported to submit material that required
11 legislative change --

12 QUESTION: But I thought you said nobody knew of
13 her December 20 letter.

14 MR. SANDERS: No one did. Under section 5 of
15 the Voting Rights Act any responsible State official may
16 make a submission.

17 To the extent that she submitted things that were
18 administratively changed, as Justice Stevens asked about,
19 those were legitimate submissions. Anything beyond that,
20 anything that she purported to submit that required
21 legislative preclear -- or legislative change, simply were
22 not. They were --

23 QUESTION: Well, I thought they indicated on
24 their face that these are legislative proposals that will
25 be submitted but they haven't been adopted.

1 MR. SANDERS: That's correct, Your Honor.

2 QUESTION: I mean, that was clear on the face.

3 But do you take the position that they -- the Attorney
4 General can't preclear the contents of the materials that
5 are handed to people to register for Federal elections --

6 MR. SANDERS: Well --

7 QUESTION: -- so that it is clear to those
8 people that they will be registered only for Federal
9 purposes and not State?

10 MR. SANDERS: All right, let me make clear --

11 QUESTION: I mean, I would think that would be a
12 natural part --

13 MR. SANDERS: Let me make clear --

14 QUESTION: -- of the preclearance part.

15 MR. SANDERS: Those purported changes that
16 required legislative action, we submit, were not properly
17 precleared. They could not submitted for preclearance.

18 Those actions --

19 QUESTION: I'm talking about the materials
20 submitted to the people who come in to get a driver's
21 license, and the language used to explain to the voters in
22 Mississippi the Mississippi position, that you will be
23 registered for Federal elections only.

24 MR. SANDERS: I understand.

25 QUESTION: And to register for the State you

1 have to do A, B, C, and D.

2 MR. SANDERS: Yes, such as the --

3 QUESTION: Now, presumably the Attorney General
4 could take objection to Mississippi's apparent failure to
5 advise voters of the situation.

6 MR. SANDERS: All right. The NVRA form itself,
7 the State has some discretion, arguably, about what to
8 include in that. The Federal Election Commission has the
9 responsibility of setting forth which elements must be
10 contained in the NVRA form. The State of Mississippi may
11 incorporate into that form its own voter
12 disqualifications, such as conviction of certain crimes
13 and so forth. The State of Mississippi did that.

14 That form was submitted to the Attorney General
15 and the Attorney General precleared that form on
16 February 1.

17 QUESTION: He precleared it, or purported to
18 preclear it -- she -- as part of a package which
19 included -- which included -- in a way, you two sides
20 deserve each other.

21 (Laughter.)

22 QUESTION: The Attorney General purports to
23 preclear something that was never submitted, and you
24 purport to have gotten precleared something that was never
25 submitted. It was submitted as a whole package.

1 MR. SANDERS: Yes, Your Honor. That's what the
2 plaintiffs refer to as the context argument, that the
3 context of the submission was different than the context
4 of the implementation of that which was submitted.

5 There is a very important thing to keep in mind.
6 Section 5 has -- prescribes a 60-day period for reviewing
7 submissions. Section 5 also, by the express language,
8 says that if the Attorney General within that 60-day
9 period decides not to object within that 60-day period,
10 but that the Attorney General receives additional
11 information within that 60-day period, the Attorney
12 General may lodge a conditional objection pending an
13 opportunity to review that additional material.

14 Now, the 60-day period began here on
15 December 20, 1994 and it ended on February 18, 1995. The
16 Attorney -- or, the Department of Justice on February 16,
17 1995, 2 days before that 60-day period ended, wrote a
18 letter setting forth that they believed that what we were
19 doing was instituting a dual registration system, but the
20 Attorney General never did anything to diminish the
21 preclearance that she had granted on February 1, 1995.

22 It cannot be said that on February 16 or
23 February 18, also the day that the 60-day period ended, it
24 cannot be said that the Attorney General at that point did
25 not understand fully the context of what she precleared on

1 February 1.

2 QUESTION: But it can be said, can't it, that
3 what the Attorney General precleared was what you
4 submitted.

5 MR. SANDERS: That's right.

6 QUESTION: And what you submitted does not
7 conform to the law or practice of Mississippi today.
8 That's true, isn't it?

9 MR. SANDERS: Yes. To the extent that the
10 submission included purported changes, or proposed changes
11 of statutory law, you're correct.

12 QUESTION: All right. Now --

13 QUESTION: And is it further true that you
14 concede -- I interpret your remarks this way. Correct me
15 if I'm wrong. Is it further true that you do concede that
16 Mississippi's discretionary acts in implementing NVRA must
17 be precleared?

18 MR. SANDERS: And were precleared, yes.

19 QUESTION: Just that they --

20 MR. SANDERS: Oh, yes.

21 QUESTION: That they must be precleared, must be
22 subject to preclearance.

23 MR. SANDERS: To the extent that they represent
24 significant discretion, they must be precleared. It's
25 like *McDaniel v. Sanchez*, when the Court said that court-

1 imposed election remedies need not be precleared unless
2 there is significant voter jurisdiction input into that
3 plan. It makes that distinction, and I would say the same
4 thing applies here. To the extent that there is
5 significant discretion in Mississippi's input, then it
6 does require preclearance.

7 I'm not certain, however, that the very limited
8 things that we do when we designate which agencies fit the
9 description of public assistance agencies, I'm not sure
10 that that is enough Mississippi input to require those
11 things to be submitted for preclearance, but to the extent
12 that that is enough, they were submitted and they were
13 precleared.

14 QUESTION: Mr. Sanders, wouldn't the most
15 important thing to preclear, perhaps the only thing once
16 Mississippi decides it's going to do a different Federal-
17 only registration, is to tell people who come into the
18 motor vehicle bureau in big letters, this will register
19 you for Federal elections only, and such a thing was never
20 precleared because the first submission didn't suppose
21 there was going to be that system.

22 MR. SANDERS: Well, of course, the National
23 Voter Registration Act doesn't require that we set forth
24 any such disclaimer or warning. It simply requires that
25 we put certain forms at certain locations, and that's what

1 we did.

2 QUESTION: It also says at each voter
3 registration agency the following services shall be made
4 available: assistance to applicants in completing voter
5 registration forms. Now, perhaps assistance to applicants
6 would include an explanation of what's going on.

7 MR. SANDERS: All right. Yes, Your Honor, I
8 don't quarrel with that. The fact is, we are informing
9 people when they come in to register of the status that
10 they will obtain by virtue of that registration, and I
11 don't think the fact that we now inform people, I don't
12 think the conveyance of information is a change within
13 section 5 that requires preclearance.

14 QUESTION: Yes, but the means by which you do
15 that, however you are informing them, has never been
16 submitted to the Attorney General and has never been
17 precleared.

18 MR. SANDERS: Yes, Your Honor.

19 QUESTION: Because the premise of your first
20 submission was that you wouldn't be telling them that,
21 isn't that correct?

22 MR. SANDERS: Well, it just -- the first
23 submission did not contemplate that at all.

24 QUESTION: That's right, so that the Attorney
25 General neither had before her, nor precleared, whatever

1 means you are using to get this information to the voters.

2 MR. SANDERS: Again --

3 QUESTION: That's true, isn't it?

4 MR. SANDERS: That's true, yes, sir, but I would
5 just contend that the transmission of information, helping
6 someone understand his or her voting status, is not a
7 change in any event, especially within the meaning of
8 section 5.

9 I don't think that if a circuit clerk or the
10 Secretary of State wanted to inform someone of what their
11 voting status was, the names of the persons on the ballot
12 or anything else, I don't think that that would require --

13 QUESTION: Oh, but counsel, the adoption of the
14 form that you use for the voter to fill out and so forth,
15 that certainly was a change, wasn't it? It's a new form.

16 MR. SANDERS: Well, it's a new form mandated by
17 the Congress, of course.

18 QUESTION: Right, but was the language -- all
19 the language in the form mandated by Congress?

20 MR. SANDERS: Virtually all of it.

21 QUESTION: Virtually.

22 MR. SANDERS: The FEC requires, or allows us to
23 incorporate into the form those -- as I said, those things
24 that would disqualify --

25 QUESTION: But isn't it fairly clear that if at

1 the time of your submission you had realized what the
2 ultimate outcome would have been, you would have put on
3 that form, this is good only for Federal elections?

4 MR. SANDERS: Well, of course, if the
5 Attorney -- if the Mississippi Attorney General's Office
6 had known at the time that a submission was about to have
7 been made, a lot of things would have been done
8 differently.

9 The fact is here that the Department of Justice
10 interjected itself into the Mississippi matters. It
11 pressured --

12 QUESTION: Well, they didn't interject
13 themselves. Congress passed a statute that requires
14 preclearance when you make changes, and you made some
15 changes. You had a duty to get preclearance, so you
16 triggered the preclearance process.

17 MR. SANDERS: Well, I beg to differ, Your Honor.
18 I believe the Department of Justice triggered this hasty
19 submission. They called and wrote to a person who is
20 employed with the Secretary of State's office on several
21 occasions, prompting them to go ahead and submit a
22 preclearance, and frankly I think it was their behavior
23 that caused this false start, as Justice Scalia referred
24 to it as.

25 It's not the fact that Mississippi has tried to

1 deceive the Department of Justice by any stretch.

2 QUESTION: No, it isn't that, but it seems to me
3 that we're off on sort of a tangent about whether they
4 should or should not preclear a unitary system or not, but
5 it seems to me it's a very simple case. Even the most
6 modest changes under the motor vehicle -- motor voter
7 registration act needed preclearance. They weren't
8 precleared.

9 MR. SANDERS: Yes --

10 QUESTION: Now, whether they should be
11 precleared is -- maybe you're dead right on that. They
12 probably should be.

13 MR. SANDERS: Well, but I contend they were
14 precleared. The February 1 letter says that they are
15 precleared. The only thing different is the context, and
16 by February 16, well within the 60-day period to lodge a
17 conditional objection, they ratified the original
18 preclearance. There -- I don't think there's any -- there
19 can be any meaningful dispute that they understood on
20 February 16 --

21 QUESTION: Mr. Sanders, if there had been no --

22 QUESTION: You mean the --

23 QUESTION: -- December 20, then do you agree
24 that there would have had to have been a preclearance of
25 what was agreed upon on February 10 to keep the

1 Mississippi system? Forget about -- there had never been
2 any December 20 submission. On February 10 the State of
3 Mississippi knows what it's going to do. Does that have
4 to be precleared?

5 MR. SANDERS: No, ma'am, I don't think it does.
6 I think the fact -- the 60-day period just makes the case
7 stronger, but I think it's beyond dispute that the
8 Department of Justice knew that those statutory changes,
9 or that the law surrounding voter -- Mississippi
10 registration qualification was embodied in State statutes,
11 and that law could not be changed unless those statutes
12 were changed.

13 QUESTION: I'm not talking about the State
14 registration, just the Federal registration.

15 MR. SANDERS: Okay.

16 QUESTION: It's a change. It's something new,
17 forced by Federal law, but still it's a change in the
18 voting practice. Doesn't that have to be precleared? I
19 thought that any change had to be precleared.

20 MR. SANDERS: Well, I think any State-initiated
21 change has to be precleared.

22 QUESTION: But the State is initiating a form
23 that isn't dictated in every particular by Congress.

24 MR. SANDERS: Well, it is largely dictated, and
25 is almost exclusively dictated by the Federal Election

1 Commission. That's what the NVRA requires the
2 Federal -- the FEC to do. The State of Mississippi has
3 very little input into the construction of that form.

4 QUESTION: Then you -- what your answer to me
5 now seems to me inconsistent with the position that you
6 repeated twice in your brief when you said that the
7 statute requires preclearance of any change, and that
8 arguably --

9 MR. SANDERS: Arguably.

10 QUESTION: Yes, but now you're changing your
11 arguably to no.

12 MR. SANDERS: No, I'm just saying -- what I'm
13 saying is, arguably it did. If it did, we got the
14 preclearance. Now, if we want to really examine the --

15 QUESTION: You're not conceding, are you, that
16 the publication of a form is a change in practice or
17 procedure?

18 MR. SANDERS: No, not one that's initiated by
19 the State and subject to section 5 preclearance. No, I'm
20 not.

21 QUESTION: So you're now taking the position the
22 forms did not have to be precleared?

23 MR. SANDERS: No. My position hasn't changed.
24 I just -- I didn't want -- I -- the fact that they were
25 precleared seemed to me to --

1 QUESTION: Yes, but your argument that they were
2 precleared, if I understood you before Justice Ginsburg
3 asked you some other questions, was that the February 16
4 letter in effect ratified the prior preclearance.

5 MR. SANDERS: That's correct.

6 QUESTION: That's surely not a fair reading of
7 that letter, which is asking -- which is telling you in so
8 many words there's been no preclearance.

9 MR. SANDERS: All right. Well, Your Honor, the
10 Attorney General has promulgated a regulation that carries
11 out this part of the language of section 5 -- it's at 28
12 C.F.R. section 51.23 -- that expressly gives the Attorney
13 General the authority to lodge a conditional objection.

14 There's no way you can read the February 16
15 letter to lodge a conditional objection --

16 QUESTION: It says, a review of this matter
17 indicates that the implementation of this dual voter
18 registration system and purge system has not been
19 submitted for review.

20 MR. SANDERS: That's correct, and they suggest
21 that we submit a -- make another submission, but they
22 never do anything to diminish the fact that they
23 precleared those agency selections, they precleared the
24 form, their --

25 QUESTION: But as part of a general submission

1 that you say was improper, and which was clearly not --

2 QUESTION: They were willing to take the bitter
3 with the sweet. They would approve those provisions as
4 part of a unitary system but might not be willing to
5 approve them as part of a divided system that you want to
6 retain.

7 MR. SANDERS: Well, my position is in the
8 February 16 letter all they had to do was say, well, if
9 this is not part of a unitary system, then we hereby lodge
10 a conditional objection and we will resolve it later on.
11 That's what their own regulation says they have the
12 authority to do, and they do not do it.

13 QUESTION: Well, let me ask you a what-if
14 question.

15 MR. SANDERS: All right.

16 QUESTION: What if we don't agree with you and
17 think this whole preclearance bubble -- mess -- doesn't
18 amount to anything. It's a nullity. You're out and
19 they're out. Nothing's precleared. Now what do you have
20 to do?

21 MR. SANDERS: Well --

22 QUESTION: Let's just suppose that's what we
23 think.

24 MR. SANDERS: All right. I certainly would not
25 have to submit any notion that there has been a change of

1 State law. Clearly there has not been. I would not have
2 to submit any of the things that amount to base
3 compliance -- or I mean, that amount to implementation of
4 the base requirements of the NVRA. Again, at most I would
5 have to submit those matters -- the designation of
6 agencies, the construction of the form, and the --

7 QUESTION: And probably forms that make clear to
8 people who register at driver's license time that they are
9 not registered thereby for State and local elections.

10 MR. SANDERS: Oh, certainly I think if this
11 Court were to remand we might make that change, but
12 frankly I do not think that that would be --

13 QUESTION: Might.

14 MR. SANDERS: Well, I do not --

15 QUESTION: You said a moment ago you didn't
16 think that was a practice or procedure.

17 MR. SANDERS: No, I don't. I don't think that
18 it amounts to enough, but certainly --

19 QUESTION: But in your brief you said twice the
20 choice of NVRA forms those agencies would use were
21 administrative changes affecting voting that arguably
22 required section 5 preclearance, and now as I understand
23 your answer to the Chief Justice you're saying you were
24 wrong to say arguably require preclearance because they
25 weren't changes that needed preclearance.

1 MR. SANDERS: Well, I don't --

2 QUESTION: But you said it twice so you must
3 have thought about it.

4 MR. SANDERS: Well, frankly, I mean, I didn't
5 put as much --

6 QUESTION: You think it's an argument, but it's
7 a bad argument is what you're saying.

8 MR. SANDERS: That's correct. Thank you, Your
9 Honor.

10 QUESTION: But didn't you also -- didn't you
11 also in this argument just a moment ago in responding to
12 Justice O'Connor refer to the need to submit something
13 about the forms? You used the word form.

14 MR. SANDERS: Right. The construction of the
15 form the State had --

16 QUESTION: The construction of the form, by
17 which you mean the format and its content?

18 MR. SANDERS: Well, really what --

19 QUESTION: What do you mean by construction?

20 MR. SANDERS: As I indicated earlier the NVRA
21 says that persons may register --

22 QUESTION: May I interrupt you just for a
23 second? Before you tell me that, what -- I just want to
24 know what you meant by the words you used. You spoke of
25 the construction of the forms. What do you mean by

1 construction of the forms?

2 MR. SANDERS: If the State of Mississippi had
3 decided to put a lot of additional material on the form,
4 then we would have been constructing in a material sense.
5 If we had -- I can't think of an example, but if we had
6 put a great deal more material on there. All we actually
7 put on there were those things that would disqualify
8 someone.

9 The NVRA form has a voter declaration section
10 and all the person needs to do is sign his name below this
11 declaration which says, I have not been convicted of these
12 certain crimes, I am over 18 -- in other words, it
13 incorporates Mississippi's qualifications.

14 QUESTION: Okay.

15 MR. SANDERS: Now -- so Mississippi put
16 Mississippi's qualifications in there. I suppose Alabama
17 put Alabama's qualifications in there. So to that extent
18 it is somewhat different than the base form, from the
19 FEC --

20 QUESTION: So you agree that insofar as you
21 include those, in effect State law conditions and
22 limitations you must submit the form for preclearance.

23 MR. SANDERS: I'm just -- no. I say that
24 arguably if -- I don't know whether just filling out that
25 part and putting our State qualifications is enough.

1 Frankly, I don't think it is. I'm just saying arguably it
2 could be, but I think clearly if we went further than
3 that, if we put other material in there, the more we put
4 into it --

5 QUESTION: Or if you omitted material. For
6 example, if you omitted a statement calling attention to
7 the fact that under Mississippi law this registration
8 would be good for Federal elections only, that omission,
9 as I understand it, would not be something that would
10 require submission for preclearance.

11 MR. SANDERS: Well, I'm not sure that not
12 putting something in there amounts to a section 5 change.

13 QUESTION: Well, you say you're not sure. I
14 thought your position was going to be that you were sure
15 and it was not a section 5 change and you didn't have to
16 submit it.

17 MR. SANDERS: Well, all right. I'll state it in
18 the affirmative. I don't think that not putting that is a
19 section 5 change, correct.

20 QUESTION: Okay.

21 QUESTION: What should we do if we think, well,
22 you haven't submitted the -- I see about 20 pages here in
23 this statute. It has a lot of different procedural
24 requirements, and maybe some are absolutely mandatory,
25 maybe some give you discretion.

1 If we send it back and say you have to preclear
2 those, would there be a lot of argument about what you
3 have to preclear or not? I mean, what would you suggest
4 we do?

5 I imagine what would happen is you'd have to
6 preclear those, and they'd come in and argue that in light
7 of the dual system you have to do something that's
8 virtually impossible. I don't know what they're going to
9 argue, but they're going to argue that that dual system is
10 highly relevant, and you'll argue it isn't.

11 All right, and -- so what in your opinion, if
12 we -- just what Justice O'Connor asked, I think. What is
13 your opinion if we disagree with you that it has been
14 cleared, and we think it hasn't been cleared yet, what
15 should we do?

16 MR. SANDERS: Well, I think at most of course
17 you should just simply remand it. I do not think that
18 this Court should in any way render a decision on --
19 without going back to the district court, but I think
20 still, to the extent that anyone considers that a change
21 has been made, I think that it's still something that
22 section 5, the district court should have an opportunity
23 to look at.

24 If the Court feels that more proof should be
25 developed and so forth through discovery, I mean, that can

1 be done, but the very most that this Court should do is
2 remand to the district court, if that's what your question
3 is. I --

4 QUESTION: Mr. Sanders --

5 QUESTION: Yes. A look at the assistance part
6 seems -- I mean, there seems to be some words here about
7 their having to provide appropriate assistance, your
8 having to, to people. That was the part that seemed the
9 most discretionary when I just glanced at it, but that
10 hasn't been argued fully here.

11 MR. SANDERS: No, that's correct, Your Honor.

12 QUESTION: Mr. Sanders, I'm reluctant, as some
13 others seem to be to say that you have to submit forms for
14 preclearance, because if we adopt that principle we'll
15 have to use it not just in this case but in all cases in
16 the future, and the notion that all forms are submittable
17 whenever you make any change is a rather expansive one.

18 On the other hand, I'm also concerned that the
19 Justice Department ought to be able to protect Mississippi
20 voters from being misled when they register under what is
21 a Federal-only system into believing that they're
22 registered under State law. Then they appear at the State
23 voting place and they find that they can't vote.

24 MR. SANDERS: And Your Honor --

25 QUESTION: If we can't be sure by requiring the

1 forms to be submitted, how can the Attorney General
2 prevent the State of Mississippi from misleading citizens
3 that way?

4 MR. SANDERS: Well, obviously through a
5 section 2 challenge or any Fifteenth Amendment-based
6 challenge, but our position is that the Attorney General
7 should not be able to do that through the device of
8 section 5 preclearance.

9 Again, we do not think that the Attorney General
10 should be able to review, object, or veto any mandate to
11 the State of Mississippi from the Congress, but they have
12 plenty of other options available to it. To the extent,
13 as my good friend Mr. Stewart said, that base
14 implementation of the NVRA might amount to a
15 discriminatory purpose, if it does, then the United States
16 may challenge that in a variety of other ways but not
17 through the device of preclearance.

18 QUESTION: Is there any significance to the fact
19 that the motor vehicle statute has a specific section in
20 it saying that this doesn't limit the application of the
21 Voting Rights Act and doesn't modify it in any way, and
22 doesn't it follow that if you adopt a new form to be used
23 to register voters, that that's a change or practice,
24 blah, blah, blah, within the meaning of section 5?

25 MR. SANDERS: I read that language in the NVRA

1 simply to mean the same -- or I read it the same way I
2 read footnote 29 in Allen, where this Court says that
3 State-initiated changes, even when made to comply with
4 section 5 of the Voting Rights Act, must be submitted for
5 preclearance.

6 I read that language in the NVRA the same way.
7 When the State makes changes itself, they must be
8 submitted for preclearance even though they are part of an
9 NVRA --

10 QUESTION: But the fact that the Federal
11 Government, the Federal statute required them to do some
12 things, made them print a new form with respect to
13 elections, is it not still true that the distribution of a
14 new form to people who are being registered, a form you
15 never used before, is a change in a voting practice?

16 MR. SANDERS: Not within the meaning of
17 section 5.

18 QUESTION: You don't think so.

19 MR. SANDERS: No. I don't think that language
20 in the NVRA was designed to give the Attorney General the
21 right of veto over an act of Congress, over a mandate from
22 the Congress.

23 QUESTION: Well, if the -- without reference to
24 the NVRA, the State of Mississippi decided to have a new
25 form advising voters of the effect of their registration,

1 where they could register and so forth, would that have to
2 be precleared?

3 MR. SANDERS: If it was just a --

4 QUESTION: It's an instruction mailed to all
5 voters with respect to an explanation of registration
6 procedures. You do not have to preclear that?

7 MR. SANDERS: Absolutely not. I mean, there's
8 nothing new about circuit clerks or Secretary of States or
9 any elected official --

10 QUESTION: Suppose it's a new form, new wording,
11 et cetera.

12 MR. SANDERS: It doesn't matter, Your Honor. If
13 it's just designed to convey information to the
14 electorate, no, that's not a change in any sense.

15 QUESTION: This is not a voting practice or
16 procedure.

17 MR. SANDERS: No, of course not. It has nothing
18 to do with a person's ability to vote. It simply is -- if
19 we're trying to inform them of their status, that does not
20 represent a change for section 5 purposes or for any other
21 purposes so far as I can see.

22 That is simply -- I mean, all elected officials
23 have always done what they can to help people -- to help
24 their constituents. That's just currying favor with
25 voters, and that does not represent a section 5 change.

1 If there are no more questions, thank you, Your
2 Honor.

3 CHIEF JUSTICE REHNQUIST: Thank you,
4 Mr. Sanders.

5 The case is submitted.

6 (Whereupon, at 1:57 p.m., the case in the above-
7 entitled matter was submitted.)

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CERTIFICATION

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THOMAS YOUNG, ET AL., Appellants v. KIRK FORDICE, ET AL.
CASE NO. 95-2031

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BY Ann Mari Federico

(REPORTER)