

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1968

TITLE LACY H. THORNBURG, ET AL., Appellants v.
RALPH GINGLES, ET AL.

PLACE Washington, D. C.

DATE December 4, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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LACY H. THORNBURG, ET AL., :

Appellants, :

v. : No. 83-1968

RALPH GINGLES, ET AL. :

----- :

Washington, D.C.

Wednesday, December 4, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 o'clock a.m.

APPEARANCES:

LACY H. THORNBURG, ESQ., Attorney General of North Carolina, Raleigh, North Carolina; on behalf of the Appellants.

CHARLES FRIED, ESQ., Solicitor General, Department of Justice, Washington, D.C., as amicus curiae in support of Appellants.

JULIUS L. CHAMBERS, ESQ., New York, N.Y., on behalf of the Appellees

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on behalf of the Appellants	
CHARLES FRIED, ESQ.	17
amicus curiae in support of Appellants	
JULIUS L. CHAMBERS, ESQ.	22
on behalf of the Appellees	

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

2 (10:03 a.m.)

3 THE CHIEF JUSTICE: We will hear arguments
4 first this morning in 83-1968, Thornburg against Gingles.

5 Mr. Attorney General.

6 ORAL ARGUMENT OF LACY H. THORNBURG, ESQ.

7 ON BEHALF OF THE APPELLANTS

8 MR. THORNBURG: Mr. Chief Justice, may it
9 please the Honorable Court, this case in its final
10 posture before the Court involves four multi-member
11 House legislative districts and one multi-member Senate
12 district in the State of North Carolina.

13 Two other districts, House District 8 and
14 Senate District 2 are no longer part of this appeal.
15 The primary challenge to the lower court's judgment by
16 the original defendants is based on that court's
17 interpretation of Section 2 of the Voting Rights Act as
18 amended in 1982.

19 The Court found infirmities in each of the
20 districts that were challenged, and ultimately fashioned
21 a remedy requiring the use of majority black legislative
22 single-member districts where they could be drawn, and
23 in each of the multi-member districts as they were
24 constituted originally, they largely followed county
25 lines and consisted of whole counties.

1 From this decision the defendants sought
2 review, and the Solicitor General joined in that
3 request. We ask this Honorable Court to apply Section 2
4 of the Voting Rights Act so as to afford due respect to
5 the intentions of the Congress without endorsing the
6 undue expansion of these intentions by the lower courts.

7 We would encourage a decision that would
8 enunciate definitive yet fair and realistic standards
9 for evaluating the election practices in all
10 jurisdictions, and we do this to the end that this
11 Honorable Court's determinations might acknowledge the
12 right of those jurisdictions to determine their own
13 electoral affairs so long as they neither intentionally
14 or unintentionally deny to any minority group the
15 emphatic opportunity to participate fully and equally in
16 the electoral process.

17 We do so to the additional end that your
18 ruling might foster political unity as opposed to
19 disunity among the electorate.

20 The Panel Court suggested that it was paying
21 adherence to the proposition that no protected class of
22 persons has a constitutional right or statutory right to
23 proportional representation, or to guaranteed political
24 success. But pursuant to Section 2, the Court found
25 that it had been shown by the plaintiffs that North

1 Carolina's political process was not open equally to
2 participation by the racial minorities, and this was
3 purportedly based on the use of certain factors that
4 were denoted by the Senate in the legislative history of
5 the Section 2 amendment.

6 These factors are certainly well-known to the
7 Court and should have been imported to the district
8 court, not as a mechanical checklist of conclusive
9 indicators, but rather a set of guidelines for
10 determining whether the characteristics of the
11 jurisdictions being examined parallel those of
12 jurisdictions examined in the cases to which the Senate
13 referred, particularly White versus Regester, Whitcomb
14 versus Chavis, and Zimmer versus McKeitnen.

15 And, we submit that had the district court
16 applied these factors in the manner intended, giving
17 primary weight all the while to the words of the statute
18 and properly analyzing the cases from which these
19 factors came, then North Carolina would have prevailed
20 in that Court.

21 QUESTION: Well, don't you think they
22 purported to apply them?

23 MR. THORNBURG: I think, Your Honor, that they
24 sought to apply them more as a checklist rather than as
25 an indicator of what actually had occurred, which leads

1 me to call the Court's attention --

2 QUESTION: The answer is, yes, they did
3 purport to apply them?

4 MR. THORNBURG: Oh, I think they purported to
5 apply them but --

6 QUESTION: You disagree with the way they --

7 MR. THORNBURG: Certainly do. And we say, if
8 Your Honor please, that the counties and the districts
9 that are involved in this case certainly in no way can
10 be equated to the counties of Fair County and Dallas
11 County which are the two counties in Texas that were
12 involved in the White decision.

13 Durham County, North Carolina, for example,
14 with a 28.6 percent black registration has had
15 proportional representation in the North Carolina House
16 since 1973. Two of the five county commissioners are
17 black. Two of the four district court judges are
18 black. All of them ran at large.

19 The Chairman of the Democratic Party from '69
20 to '79 and from '83 to present is black, and one of the
21 three members of the Board of Elections from 1970 to
22 1981 was black, when a member resigned and went on to
23 North Carolina State Board of Elections.

24 Wayne County, with a 15.1 percent black
25 registration, has a representative serving his second

1 term. The sheriff of Wayne County, elected by the
2 at-large electorate, is black. One of seven County
3 Commissioners, two of eight District Court judges, a
4 black Senator from '75 through '78, and from '77 to the
5 present a member of the Board of Elections.

6 QUESTION: General Thornburg, is it your
7 position that the court below was required to focus on
8 the individual election districts rather than the state
9 as a whole?

10 MR. THORNBURG: Yes, Your Honor. We contend
11 that a lot of the use of the statistics that appear in
12 this record involve statewide statistics as opposed to
13 statistics in these particular districts.

14 QUESTION: Do the precedents, do the cases
15 from this Court indicate that that is a requirement?

16 MR. THORNBURG: As we read them and understand
17 them, Your Honor, that this --

18 QUESTION: That you look at the individual --

19 MR. THORNBURG: I believe you use the words,
20 "intentionally local appraisal," and we contend that the
21 court did not do that in this case as regards these
22 districts, and for example, in Wayne County where you
23 have an at-large electorate electing the sheriff, he
24 went in to his second term with 63.5 percent of the
25 popular electorate.

1 QUESTION: Well, do we have to apply a clearly
2 erroneous standard to the review of the factors found by
3 the court below?

4 MR. THORNBURG: Your Honor, we do not feel
5 that the clearly erroneous, the Rule 52 standards,
6 should be applied in this case to proscribe your
7 reviewing the facts in the case. We contend that what
8 is before the Court is a mixed question of law and fact,
9 and that in order to appropriately determine the case,
10 you have to apply -- you have to look at the facts as
11 found and apply them as the law appropriate to those
12 facts.

13 QUESTION: Well, specifically, what are the
14 legal errors that you believe were made below?

15 MR. THORNBURG: We simply say that the court
16 failed to apply the wording of the statute and rather
17 than taking the statute which deals with access and
18 opportunity to participate in the electoral process,
19 clear wording, it simply found the various factors
20 without making a causal connection and applied those,
21 and simply did not apply the law, and fashioned a remedy
22 which is specifically proscribed by the statute where it
23 says that nothing in this should be interpreted, nothing
24 in the section should be interpreted to establish a
25 right to have members of a protected class elected in

1 numbers equal to their proportion in the population.

2 This is precisely what the district court did
3 by way of fashioning a remedy in this case. We contend,
4 if Your Honor please --

5 QUESTION: I suppose you can do things as a
6 remedy for constitutional rights that you just couldn't
7 do in the absence of a remedy -- in the absence of a
8 violation. You really, fundamentally disagree with the
9 finding of the violation?

10 MR. THORNBURG: Yes, we do. We say that if
11 you take this -- take the statute and apply it to these
12 facts, if Your Honor please, that you come out with a
13 different result.

14 QUESTION: And no violation of the statute?

15 MR. THORNBURG: That's correct, Your Honor.
16 That is our contention. And we contend that by applying
17 the law as the court did and by fashioning the remedy in
18 the manner in which it did, that it expanded the scope
19 far beyond the intent of Congress in the passing of this
20 Act.

21 These facts, as found by the court, will
22 demonstrate that blacks in these challenged districts
23 have run for office, are always competitive, and often
24 win. In fact, no elected black incumbent member of the
25 General Assembly who has offered for re-election has

1 ever been defeated.

2 Blacks receive Democratic Party support for
3 their candidacy. They hold positions of power and
4 leadership within the party structure, and they have
5 equal access to the process and to the at-large scheme
6 and had achieved proportional representation at the time
7 of this trial in each of the districts with the
8 exception of Mecklenburg County.

9 We consider, of course, that voter
10 registration as indicated by the facts in the case
11 should be brought up to the Court. In this case, for
12 '80 to '82 statewide registration among whites decreased
13 by 112,000 but increased by 12,000 in the black
14 community.

15 It's true that blacks in the challenged
16 districts fall below whites in most of the socioeconomic
17 indicators, but the electoral success of the blacks in
18 these districts in the various offices, and their
19 membership on the Board of Elections and in party
20 position and so on indicates that the socioeconomic
21 factors are no longer an obstacle to their participation,
22 meaningful participation in the political process, and
23 we suggest that it defies common sense to count these
24 factors as indicia of unequal participation when the
25 direct evidence as exists in these districts shows to

1 the contrary.

2 I will call to the Court's attention also that
3 none of these counties is a Section 5 county. Only 40
4 of our 100 counties are so covered. The United States
5 Attorney General required the creation of numerous
6 single member legislative districts in these counties,
7 and his determinations were never contested by North
8 Carolina in any legal proceeding and were immediately
9 implemented when those suggestions were made.

10 QUESTION: Mr. Attorney General, I gather you
11 suggest you are entitled to an outright reversal, not
12 further proceedings?

13 MR. THORNBURG: We would hope for an outright
14 reversal, Your Honor, but certainly we would -- whatever
15 the Court suggested --

16 QUESTION: Well, if it were to go back, if it
17 were to go back, for what purpose?

18 MR. THORNBURG: If it were to --

19 QUESTION: Enough to say there had been an
20 error made in the application of the law and that we
21 should send it back, how to apply it, as we say?

22 MR. THORNBURG: Yes, Your Honor. We would of
23 course appreciate a reversal with an interpretation of
24 the statute and how to apply it, and in these
25 multi-member districts, of course, we would then

1 continue with the multi-member legislative delegations
2 as they existed.

3 North Carolina has historically placed a
4 tremendous amount of importance in our counties and
5 county lines and so on, since Colonial times as a matter
6 of fact, and that was the primary basis on which these
7 various districts were drawn and it has no foundation in
8 racial tainted motivation of any kind, the district
9 courts have.

10 QUESTION: If there was an outright reversal,
11 then the Legislature would have to start all over again,
12 would they?

13 MR. THORNEBURG: They would -- I believe, if
14 Your Honor please, maybe my colleagues to my left can
15 verify it, but I think the General Assembly in the last
16 session passed a statute which said that if the case is
17 reversed it simply goes back in these districts, these
18 five districts that are under consideration to the
19 multi-member legislative districts.

20 We are a large and not a homogeneous state in
21 the State of North Carolina, and we feel that each of
22 these districts must be viewed individually and
23 evaluated individually under any statute, according to
24 the particular characteristics that they exhibit.

25 QUESTION: What is the major error, you think

1 the district court made in concluding that there was a
2 violation of the statute?

3 MR. THORNBURG: We think the district court
4 simply ignored the facts in the case.

5 QUESTION: I know, but what's the principal
6 way it did that?

7 MR. THORNBURG: By ignoring access to the
8 political process which we contend exists, and the facts
9 show, it's just a fundamental error, Your Honor.

10 When you look at the facts and apply the law
11 as written by Congress, you just don't have the facts to
12 support the decision that the district court made.

13 QUESTION: May I just inquire, I also have a
14 little trouble, as Justice White did, in getting the
15 heart of your theory. With respect to each of the
16 districts, the district court did make some factual
17 determination.

18 I take it you don't challenge any of those;
19 you just say they're not sufficient to justify the.--

20 MR. THORNBURG: Yes, Your Honor.

21 QUESTION: They went through district by
22 district and talked about polarized voting and one thing
23 and another. That part you accept?

24 MR. THORNBURG: That sort of thing, but we
25 say, if you apply all of that, given all of that, and

1 take those facts as found by the court, which the facts
2 that the court found are based on the record, but when
3 you apply the law to those facts then you don't come out
4 with the result that district court did..

5 QUESTION: Is that because -- your basic
6 point, as I understand it, is if the net result of all
7 the voting is something that roughly equals proportional
8 representation, then as a matter of law there can't be a
9 violation of the statute?

10 MR. THORNBURG: No, Your Honor. That's not
11 what I intended to say. That is just one of the
12 indications. We say that you have to look as the
13 Congress did, in lifting the White versus Regester
14 language, you have to look at the totality of the
15 circumstances and make a final decision based on all
16 this and all of these access points, participation
17 points and so on that you have where blacks are holding
18 elective offices, where they hold offices in party
19 machinery, where they participate in the electoral
20 process, taking all that into consideration, do they
21 have equal access to the electoral process, which this
22 is what the law requires.

23 It doesn't place any -- as we read it, it
24 doesn't place any affirmative burden on the State to do
25 anything particularly except to be certain that

1 everyone, regardless of race, creed or color, has an
2 equal opportunity to participate.

3 QUESTION: In what?

4 MR. THORNBURG: In the electoral process, Your
5 Honor.

6 QUESTION: In the processes, it says --
7 doesn't the statute say, "and to elect"?

8 MR. THORNBURG: Let me quote Senator Dole on
9 that.

10 QUESTION: Well, let's just quote the
11 statute. What is it?

12 MR. THORNBURG: All right. The statute says,
13 a violation is established if based on the totality of
14 the circumstances it is shown that the political process
15 or processes are not equally open to participation by
16 members of a class of citizens protected, and that its
17 members have less opportunity than the members of the
18 electorate to participate in the political process and
19 to elect representatives of their choice.

20 QUESTION: And to elect?

21 MR. THORNBURG: Yes, Your Honor, and we say
22 that that should be interpreted so as to -- not
23 susceptible to the interpretation of election outcome
24 but means that members of a minority have a right to
25 vote, a right to register, a right to have their vote

1 fairly counted, and that North Carolina in these
2 districts has been doing that.

3 QUESTION: Why do you think the cases
4 emphasize racially polarized voting?

5 MR. THORNBURG: Certainly racially polarized
6 voting is important in the overall decision.

7 QUESTION: Why is it? Why is it?

8 MR. THORNBURG: By virtue of delusions,
9 submergence, or whatever the effect that you choose to
10 attach, which of course would occur.

11 QUESTION: But even with polarized voting,
12 why, everybody's vote is counted. Nobody is denied a
13 vote.

14 MR. THORNBURG: Nobody is denied a vote. The
15 benefit is so submerged and subdued and diluted that it
16 has no effect. But, that is not the case here.

17 QUESTION: Well, let's just assume that the
18 court was correct in finding that there was severe
19 polarized voting in this case.

20 MR. THORNBURG: If you used the district
21 court's interpretation, you could call it correct. But
22 what the district court interprets polarized voting as,
23 Your Honor, was simply if more whites vote for whites
24 and more blacks vote for blacks, then you automatically
25 have polarized voting.

1 QUESTION: I understand your position, but if
2 there were severe polarized voting in this case, you'd
3 have a much tougher case, with these multi-member --

4 MR. THORNBURG: If that were correct. We do
5 not believe it is correct.

6 And if I may save the remainder of my time,
7 Your Honor, for rebuttal.

8 QUESTION: Well, I can ask the Solicitor.

9 THE CHIEF JUSTICE: Mr. Solicitor General.

10 ORAL ARGUMENT OF CHARLES FRIED, ESQ.

11 AMICUS CURIAE IN SUPPORT OF APPELLANTS

12 MR. FRIED: Thank you, Mr. Chief Justice, and
13 may it please the Court:

14 The formulation in the new Voting Rights Act,
15 Section 2, was the product of intense political and, may
16 I say, intellectual struggle. The outcome of that
17 struggle should be quite familiar to this Court since it
18 simply adopted the standard, the legal standard
19 formulated by this Court in *White v. Regester*.

20 Our concern in this case is one thing only,
21 that adjudication under this new Voting Rights Act be
22 lawful, that it be constrained and disciplined by
23 appellate court review which enforces the standard that
24 Congress enacted.

25 Now, Congress chose a middle path between two

1 extremes. On one hand was the extreme represented by
2 the constitutional minimum of intentional
3 discrimination, and that was rejected. On the other
4 hand was the extreme of leaving the district courts at
5 large to engineer electoral outcomes as they thought
6 best on racial or group lines.

7 What the Congress adopted was, if you like, an
8 effects test, but effects on what? Effects on
9 participation, on process, on opportunity.

10 Now, if fidelity to that standard is to be
11 enforced, then whatever nuances there may be in closer
12 cases, it is our position that here, certainly in three
13 and perhaps in all of the five contested districts, but
14 certainly in three of them, we believe that that
15 standard of access, of process, of opportunity has been
16 met as a matter of law.

17 QUESTION: Mr. Fried, do you think that the
18 Court is required to make a separate vote dilution
19 finding as to each district? Is that a legal
20 requirements?

21 MR. FRIED: That is a legal requirement. This
22 Court has said so over and over again. The legislative
23 history, the Senate report, makes it quite clear that
24 the importance is district by district.

25 QUESTION: And by doing that, did the court

1 below effectively do that in this case?

2 MR. FRIED: The court below certainly
3 addressed each district, but the court below also seemed
4 to be very impressed with overall statistics in the
5 State of North Carolina and we think may have been
6 misled by its attention to those overall --

7 QUESTION: It should have focused on electoral
8 success of black candidates in each district over a
9 period of time?

10 MR. FRIED: If I may, Your Honor, I would say
11 electoral opportunity as evidenced by very great
12 electoral success over time. Now, the reason we say
13 that the congressional standard, the White v. Register
14 standard, if you will, was met as a matter of law in
15 three of those five districts is that in all of those
16 districts over a protracted period of time, in a couple
17 of them over nearly a decade, black representatives
18 equaled or exceeded the percentage of black citizens in
19 the population.

20 Nor was this black success achieved by
21 contrivance or through sufferance of the majority, but
22 if you like, in the old fashioned way through politics,
23 through participation in party politics, in some cases
24 by blacks serving as chairmen of the local majority
25 political parties.

1 QUESTION: We were addressing, Mr. Solicitor
2 General, the total of the racial population are the
3 registered voters in each category.

4 MR. FRIED: We were addressing the harder
5 case, because we think even on the harder case the case
6 is made out, which is the population. If it were
7 registration then we could have an argument about
8 whether that registration was in some sense unfairly
9 depressed.

10 But even if you take population, these factors
11 are made out in those three districts. But the thing we
12 find most striking is that the single member districts
13 which seemed so dear to the heart of the appellees and
14 the district court, if the multi-member district had
15 been broken up into single member districts, the result
16 would have been not an increase in black opportunity and
17 participation but a decrease, since the number of
18 representatives, black representatives would have been
19 the same.

20 Yet, the black citizens living outside of the
21 favored super-majority single-member districts would
22 have been, on the district court's hypothesis voting
23 patterns, deprived of an opportunity which they
24 manifestly enjoyed under the State's previous
25 multi-district system.

1 QUESTION: Is there any evidence in this case
2 of barriers to registration that existed in the past?

3 MR. FRIED: On the contrary, Your Honor. The
4 district court specifically found that there had been
5 assiduous efforts to remove such barriers. Now, I would
6 in the last moments simply like to say that there is
7 some confusion suggested by appellees that we are
8 arguing for a standard of tokenism because we speak of
9 minorities not being locked out or shut out of the
10 electoral process.

11 When we do so, we do so only in quotation
12 marks, quoting either Mr. Armand Derfner or Senator
13 Kennedy, when those proponents of the Act were saying
14 we're emphasizing that the Act spoke of opportunity and
15 access.

16 Our language is more generous and more
17 cautious. We say it must be equal access and equal
18 opportunity.

19 QUESTION: Mr. Solicitor General, are you
20 still of the view that Senator Dole's views are
21 particularly persuasive, or have you switched now to
22 Senator Hatch?

23 MR. FRIED: Not at all. We think, as we say
24 in our brief and I would very much direct the Court's
25 attention to note 12 of page 8 of the brief, that it is

1 the views of Senator Dole which ought to be given
2 particular weight in interpreting the formulation which
3 was arrived at.

4 We do not, and I don't believe in our brief do
5 we ever attach particular significance to the views of
6 Senator Hatch. It's Senator Dole that we rely on, at
7 least Senator Dole as he spoke in the Senate.

8 I thank the Court for its attention.

9 THE CHIEF JUSTICE: Mr. Chambers.

10 ORAL ARGUMENT OF JULIUS L. CHAMBERS

11 ON BEHALF OF THE APPELLEES

12 MR. CHAMBERS: Mr. Chief Justice and may it
13 please the Court:

14 The issue presented here by the Solicitor
15 General and by the State, I think can be put simply,
16 whether the election of the five black candidates in
17 1982 in four of its challenged electoral districts,
18 forecloses any possibility for finding that blacks in
19 the challenged districts have been denied an equal
20 opportunity to participate in the electoral process.

21 I don't think that anyone would seriously
22 argue that the facts in North Carolina prior to 1982
23 would warrant a finding that black votes in each of the
24 challenged districts were substantially diluted. And
25 so, the State and the Solicitor General now contend tht

1 because five blacks were elected in these challenged
2 districts in 1982, that should foreclose a determination
3 that there was a violation of Section 2.

4 The State and the Solicitor General asked the
5 Court to ignore that in two of the districts no black
6 was ever elected to the State House.

7 QUESTION: Never elected to what?

8 MR. CHAMBERS: To the State House of
9 Representatives, House District 8 and Senate District 2.

10 The Solicitor General and the State asked the
11 Court to ignore all the other factors that the district
12 court looked at, reflect on the history of
13 discrimination.

14 QUESTION: Those are both multi-member
15 districts, 8 and 2?

16 MR. CHAMBERS: Eight is a multi-member
17 district.

18 QUESTION: How many?

19 MR. CHAMBERS: Four.

20 QUESTION: And two?

21 MR. CHAMBERS: Two is a district where the
22 Court found the State had carved out a black residential
23 area so that it would reduce the percentage of blacks in
24 each district.

25 QUESTION: Is that a single member district?

1 MR. CHAMBERS: It is a single member district,
2 yes.

3 QUESTION: Mr. Chambers, help me on those two
4 districts. I understand that your opponents, they don't
5 contest those any more?

6 MR. CHAMBERS: They now advise that they don't
7 contest those two, but I am talking about the initial
8 thrust that the State and the Solicitor General
9 presented, included those two and also included
10 Mecklenburg County with House District 36 among others.

11 QUESTION: What about the three districts that
12 the Solicitor General now particularly disagrees with
13 the -- or disagrees with the district court order?

14 MR. CHAMBERS: I will talk about that right
15 now, Your Honor.

16 QUESTION: All right.

17 MR. CHAMBERS: I would first of all, though,
18 like to ask the Court to look at the Plaintiff's
19 Exhibits 4-A through 10-B, as a beginning of how the
20 district court proceeded --

21 QUESTION: Where do we begin?

22 MR. CHAMBERS: I'm sorry. That's in the
23 Plaintiff's -- or Joint Exhibit Volume 2.

24 QUESTION: What page? That's all right.
25 We'll find it.

1 MR. CHAMBERS: It begins with Plaintiff's
2 Exhibit 4-A. And that reflects the House District 36.
3 And the other exhibits that follow talk about the other
4 districts and have -- we can use this as an example.

5 In House District 36 we have a substantial
6 concentration of black voters within that district who
7 would make up, or should be able to affect the results
8 of, with respect to two districts, representatives in
9 that district.

10 They would constitute more than 60 percent of
11 the representative or the electorate in those
12 districts. What the State has done, it has merged these
13 blacks in a large, exceptionally large electoral
14 district so that their votes are now reduced from the
15 60-some percent to 30-some percent, and in fact, in
16 Mecklenburg County less than 30 percent.

17 In that position they are not able to control
18 of effect any -- determine the outcome of any election.

19 QUESTION: Is this -- how many are elected
20 from this district?

21 MR. CHAMBERS: Eight.

22 QUESTION: Eight.

23 QUESTION: And how many black members were
24 elected from District 36?

25 MR. CHAMBERS: Your Honor, prior to 1982,

1 none. In 1982, one person was elected.

2 QUESTION: And no election since then?

3 MR. CHAMBERS: There was an election in 1984,
4 but that was under the plan directed by the court.
5 While I'm on that, Your Honor, I should point out that
6 the Solicitor has argued that there was a reduction as a
7 result of the plan ordered by the court. That is not
8 true.

9 In fact, in Wayne County, which I think the
10 Solicitor General is using, in Forsythe County, House
11 District 39, two blacks, two black districts were
12 established as a result of the plan submitted by the
13 State, and two black representatives were elected.

14 QUESTION: I thought, Mr. Chambers, that the
15 focus of the Solicitor General's brief was on House
16 Districts 39, 23 and 21.

17 MR. CHAMBERS: That's correct.

18 QUESTION: Rather than 36, is that right?

19 MR. CHAMBERS: That's correct, and I was -- if
20 you look at House District 23, that's reflected in the
21 Plaintiff's Exhibit 6-A. That is Durham County.

22 House District 39 is in Plaintiff's Exhibit
23 5-A, and House District 21 is in Plaintiff's Exhibit
24 7-A. And in each instance we see a substantial
25 concentration of blacks who under normal practices in

1 this country would be able to affect the results of
2 elections, and the determination of who would be their
3 representative.

4 But when you merge these districts together
5 with the other factors that the Court looked at, their
6 votes are substantially diluted. So in Durham County
7 where we had a black --

8 QUESTION: And what was the election success
9 experienced in those three counties, in those three
10 districts, 39, 21 and 23?

11 MR. CHAMBERS: In 1975 a black was elected in
12 House District 39. But between that period and 1982
13 there were some blacks appointed but -- two blacks were
14 elected in 1982, which the Solicitor General and the
15 State used as the basis for saying there could possibly
16 be no dilution because in their position, blacks were
17 elected in proportions higher than their representation
18 in the community.

19 QUESTION: And if there were single member
20 districts doing the best you could for the blacks in 39,
21 you probably couldn't have more than two?

22 MR. CHAMBERS: You would have two districts.

23 QUESTION: Mr. Chambers --

24 QUESTION: With safe majorities?

25 MR. CHAMBERS: With safe majorities.

1 QUESTION: Mr. Chambers, I understood the
2 Solicitor General to say that if these districts were
3 broken up, that blacks would have less opportunity to be
4 elected. I suppose that might depend on the way they
5 were broken up, but what is your response to that?

6 MR. CHAMBERS: Your Honor, that is what I was
7 just referring -- that is not the position that I think
8 -- that is not accurate.

9 In House District 39, with the districts
10 broken up, two black, majority black representative
11 districts were established by plans presented by the
12 state. In House District 23 one majority black district
13 was established, and the same in House District 21.

14 But the other point, Your Honor, that we
15 should look at is --

16 QUESTION: You don't want any further breaking
17 up of those districts?

18 MR. CHAMBERS: No. We do not advocate any
19 further breaking up of House District 23 or House
20 District 21.

21 QUESTION: Any more than --

22 MR. CHAMBERS: Any more than the Court
23 approves.

24 QUESTION: Has the Legislature acted, or do
25 you merely have the court approval?

1 MR. CHAMBERS: The Legislature presented --
2 developed these plans and presented them, and the
3 district court approved the plan presented by the
4 Legislature.

5 QUESTION: So, they are in effect?

6 MR. CHAMBERS: They are in effect now, and
7 elections in 1984 were conducted under --

8 QUESTION: But it's still via court order?

9 MR. CHAMBERS: By court order. But even in
10 House District 23 and House District 21, blacks were
11 elected only because blacks single-shot votes, and in
12 doing so they had to forego any opportunity to affect
13 the elections of the other districts, district
14 representatives.

15 So, you see, the concentration of blacks
16 voting for a black candidate, unable to vote for any
17 other candidate, to have any success in electing a
18 representative. Whites don't have to look to blacks for
19 any support in those districts.

20 QUESTION: Are you talking about each one of
21 these districts?

22 MR. CHAMBERS: House District 21 and House
23 District 23.

24 QUESTION: Well, the way it -- under single
25 member districts you're certainly not going to have any

1 chance to influence --

2 MR. CHAMBERS: You do not, Your Honor, but
3 you're also able to elect a representative and determine
4 the person who is representing you. Also, if you look
5 at the --

6 QUESTION: How about past experience in 23 and
7 21?

8 MR. CHAMBERS: In terms of --

9 QUESTION: Until the court adopted this plan,
10 had there ever been a black elected in 23?

11 MR. CHAMBERS: A black was elected in 23 in
12 1973, Your Honor.

13 QUESTION: And since then too?

14 MR. CHAMBERS: Since then.

15 QUESTION: Each --

16 MR. CHAMBERS: Each election since '73.

17 QUESTION: In this multi-member district?

18 MR. CHAMBERS: In this multi-member district.

19 QUESTION: There has been one black elected?

20 MR. CHAMBERS: Well, two different blacks were
21 elected, but only one black per term.

22 QUESTION: I understand that, but you wouldn't
23 get any more under single member districts?

24 MR. CHAMBERS: You would not, but if you look
25 at --

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QUESTION: How about 21?

MR. CHAMBERS: One black was elected to the State House for the first time in 1980.

QUESTION: And since?

MR. CHAMBERS: And since.

QUESTION: And of course under the single member district there has been a black elected. So, how many elections were there, beginning with '80 and then '82, there was a black elected?

MR. CHAMBERS: There was a black elected.

QUESTION: And '84, is under the court plan?

MR. CHAMBERS: Under the court plan.

Under the multi-member districts --

QUESTION: And in District 39, as long as we're going over these three, could you recount what has happened there as well?

MR. CHAMBERS: Yes. A black was elected in 39 in 1980.

QUESTION: And since?

MR. CHAMBERS: And since.

QUESTION: And of course under the single member district there has been a black elected? So, how many elections were there, beginning with '80 and then '82, there was a black elected?

MR. CHAMBERS: There was a black elected.

1 QUESTION: And '84 was under the court plan?

2 MR. CHAMBERS: Under the court plan. Under
3 the multi-member districts --

4 QUESTION: And in District 39, as long as
5 we're going over these three, could you recount what's
6 happened there as well?

7 MR. CHAMBERS: Yes. A black was elected in
8 '39, in 1975, and 1977, I believe. No black was elected
9 in 1978, although a black who had been appointed ran and
10 was defeated. A black ran in 1980 who also was -- had
11 been appointed and was running for re-election and was
12 defeated.

13 Two blacks were elected in 1982, and as the
14 district court found, looking at the substantial block,
15 racially block voting, the success of candidates in each
16 of these elections was substantially adversely affected
17 by the way whites refused to support any black candidate.

18 In each district, Your Honor, more than 81
19 percent of the whites -- well, on an average more than
20 81 percent of the whites refused to support any black
21 candidate in the primaries.

22 QUESTION: Well, don't you have -- to pretty
23 well have to depend on the polarized voting aspect of
24 this case?

25 MR. CHAMBERS: Your Honor, I think polarized

1 voting here is important.

2 QUESTION: Well, you certainly weren't
3 excluded from participating in registering or voting or
4 in the party processes at all, and the party of your
5 choice, you had just as much influence as anybody else.
6 And it's just when it comes to -- and you had
7 candidates, did you?

8 MR. CHAMBERS: Your Honor, recently the
9 structural barriers to registration had been removed.
10 Historically there had been problems, but the district
11 court found more recently, those barriers had been
12 removed.

13 QUESTION: Well, what do you depend on in this
14 case for this conclusion of --

15 MR. CHAMBERS: Those barriers --

16 QUESTION: Of exclusion from access, from
17 non-access. What do you depend on except polarized
18 voting as really important?

19 MR. CHAMBERS: The barriers that had been in
20 effect previously continue to affect the ability of
21 blacks to --

22 QUESTION: How does it do that?

23 MR. CHAMBERS: Well, first of all you have a
24 problem of registration. Blacks still were
25 under-represented in registration as compared with

1 whites. There was a problem of large multi-member
2 districts that cost on an average twice as much as
3 running in a single member district, and with the
4 problems that blacks had and their economic condition,
5 they weren't able to support a candidate.

6 Blacks were segregated residentially and
7 didn't have access to whites. So, the historical
8 practices that existed previously continued to affect
9 the ability of blacks in 23 and 21 as well as 39 and the
10 other districts looked at, to participate equally, and
11 certainly in their ability to elect representatives of
12 their choice.

13 So, looking at the facts overall, at the
14 totality of circumstances that the district court was
15 directed to review, even with the 1982 election, blacks
16 were substantially affected in their ability to
17 participate and to elect representatives of their choice.

18 QUESTION: Do you defend the definition of
19 polarized voting that the district court expressed?

20 MR. CHAMBERS: Well, I was going to turn to
21 that, Your Honor. In polarized voting, the district
22 court proceeded to analyze what happened there in two
23 steps, which is proper. First it looked to determine
24 whether blacks and whites in fact voted differently, and
25 they in fact do.

1 Second, it then proceeded to determine, as the
2 Congress had directed it to --

3 QUESTION: When you say they in fact do, do
4 you mean in this particular situation, not generally
5 over the country?

6 MR. CHAMBERS: That's correct, Your Honor. In
7 North Carolina.

8 It then looked at the extent to which blacks
9 and whites voted differently. What the Solicitor
10 General and the State have done is, they have taken the
11 first step and said, that's the court's definition for
12 severe polarized voting.

13 I ask you to just look at the district court's
14 opinion, and you'll see how the State and the Solicitor
15 General have misread that opinion, because after looking
16 at whether blacks and whites vote differently, the court
17 then looked at basically three other things.

18 Historically, over 81 percent of whites have
19 refused or failed to vote for black candidates in the
20 primaries. Historically on an average 60-some percent
21 of whites refused to vote for a black candidate when the
22 black is nominated.

23 QUESTION: Historically, back in the 18th
24 Century or when, just the last few years or when?

25 MR. CHAMBERS: We looked at elections from

1 1978 through 1982.

2 QUESTION: That's the period.

3 MR. CHAMBERS: Even where a black is nominated
4 by his party, then, whites failed to vote for black
5 candidates. So in Forsythe County, House District 39,
6 black candidates are nominated by the Democratic Party
7 and yet defeated by whites refusing or failing to vote
8 for black Democratic candidates.

9 QUESTION: Is there party registration in
10 North Carolina?

11 MR. CHAMBERS: Yes.

12 QUESTION: Even though there's a majority of
13 what, Democrats?

14 MR. CHAMBERS: There is a majority of
15 Democrats.

16 QUESTION: And yet you couldn't elect a black
17 Democrat?

18 MR. CHAMBERS: In Forsythe County.

19 And so, the standard that the district court
20 followed in determining whether racially polarized
21 voting existed was consistent with what Congress had
22 directed. The court also looked at another factor.

23 QUESTION: Mr. Chambers, do you think the
24 court looked at all -- in determining the racial block
25 voting, at the intensity of the block voting, to look at

1 factors that might explain the actual interest,
2 difference in interests at stake to determine the
3 intensity of the voting?

4 MR. CHAMBERS: Your Honor, that was not
5 considered necessary by the district court and I think
6 appropriately, because Congress had eliminated the
7 necessity for determining whether intent existed.

8 QUESTION: Not intent, intensity. In other
9 words, the reasons that explain the statistical
10 disparity in the voting, and factor in to some degree
11 electoral success.

12 Do you think the court has to do that in
13 appraising racial block voting?

14 MR. CHAMBERS: Your Honor, here -- I'm sorry
15 -- here the district court did patiently look at the
16 success of black candidates in 1982 and before, and the
17 way that whites voted, first to come to a determination
18 that there was severe and significant racial block
19 voting, and second, to determine whether 1982 was an
20 aberration from what the pattern was.

21 There was a very intense analysis of those
22 factors for the court to arrive at that decision. The
23 court also looked at racial appeals. In 1983 Senator
24 Helms is still presenting racial appeals, like the
25 racial appeals we faced in 1990.

1 So, looking at North Carolina overall, we do
2 have a factual situation very similar to those this
3 Court considered in White versus Regester, and I think a
4 much more appealing case than White versus Regester, and
5 the other cases which have followed it, because we have
6 substantial racial block voting. We have substantial
7 racial appeal. We have substantial submergence of black
8 in each of the districts, District 23, 21, 39 as well as
9 the others, and we have all the factors that make for
10 dilution of black votes.

11 QUESTION: Mr. Chambers, may I ask you a
12 question that probably has a very simple answer but it
13 doesn't occur to me at the moment. How do you know what
14 percentage of whites failed to vote for black voters,
15 and what percentage of blacks did not vote for whites as
16 distinguished from voting for blacks?

17 MR. CHAMBERS: Your Honor, first there were
18 two statistical analyses.

19 QUESTION: Based on what?

20 MR. CHAMBERS: Looking at the composition of
21 districts. If whites constitute 95 percent of a
22 district, looking at census tracts for example, and if a
23 candidate, white candidate receives 95 percent of those
24 votes, statisticians determine that that candidate is
25 receiving 95 percent of the white votes of that district.

1 And if you look at a racially mixed district,
2 and whites constitute a certain percentage of the
3 residents of that district, and white candidates receive
4 a certain percentage of the vote, then there is a
5 statistical determination that whites vote for white
6 candidates in that particular percentage, and the same
7 with respect to blacks in the district.

8 QUESTION: These are estimates, though, aren't
9 they? You really can't tell.

10 MR. CHAMBERS: They are statistics.

11 QUESTION: Voting is secret, isn't it?

12 MR. CHAMBERS: Voting is secret.

13 QUESTION: In North Carolina?

14 MR. CHAMBERS: Fortunately it's still secret
15 in North Carolina. Yet, one can make a determination
16 that whites have supported a candidate in certain
17 percentages and blacks in another.

18 QUESTION: While I've interrupted you, when
19 were all the barriers to registration of blacks removed?

20 MR. CHAMBERS: Well --

21 QUESTION: Removed officially. I know the
22 argument is that there were lingering effects.

23 MR. CHAMBERS: I think officially, Your Honor,
24 the most recent effort was in 1970. There were still
25 problems, as I understand it, of blacks having to pass a

1 literacy test in some districts.

2 QUESTION: Up to 1970?

3 MR. CHAMBERS: Yes.

4 QUESTION: Let me ask another factual question
5 while you're off the track. In the maps that you called
6 our attention to, for example House District 23 which
7 has three members, there's also information concerning
8 the residence of the members.

9 In each map, there are more residences than
10 there are members, and I'm puzzled. There's six people
11 indicated and only three members. And what is the
12 significance of the residence of the members?

13 MR. CHAMBERS: Your Honor, you're looking at
14 House District 39?

15 QUESTION: Well, I was happening to look at 23.

16 MR. CHAMBERS: Okay, it's 23. Well, we'll
17 look at 23. We have presented here all of the residents
18 -- the residences of all of the elected officials since
19 1978.

20 QUESTION: Well, of all elected officials, not
21 just --

22 MR. CHAMBERS: No, no, all the House of
23 Representatives members and the Senatorial members.

24 QUESTION: Since --

25 MR. CHAMBERS: '78, we're talking about all of

1 the people who were elected.

2 QUESTION: Oh, I see, so that covers more than
3 one term of office?

4 MR. CHAMBERS: More than one term of office.
5 So, what we are depicting here is that with multi-member
6 districts, blacks have limited accessibility to the
7 representatives. As you see here, the representatives
8 are all outside the black residential areas. And that's
9 true in House District 36 as well as House District 23.

10 QUESTION: I was wondering if you were making
11 the point -- it just occurs to me that perhaps if you
12 had single member districts instead of multi-member,
13 maybe you'd have the same number of blacks but they
14 might be different blacks?

15 MR. CHAMBERS: That is possible, Your Honor.
16 What we are talking about, though, is the ability of
17 blacks to relate to their representatives, to insure
18 that those representatives are accountable for the way
19 that they represent the interests of blacks.

20 Where they live outside the district, they
21 first of all are not accessible, and where blacks have
22 to depend on white votes to elect representatives, they
23 aren't necessarily accountable to the black community.
24 We have testimony in the record how these multi-member
25 districts affect the ability of blacks to protect and

1 advance their own interests, and these are factors
2 again, looking at the totality of the circumstances,
3 that the district court looked at very intensely to
4 determine whether vote dilution in fact occurred.

5 Also, if you look -- the Defendants asked the
6 Court to not apply Rule 52 in this particular instance.
7 I think that Rule 52 controls the determination here,
8 and I think is extremely important. First if we look at
9 the fact, we have three native North Carolinians who sat
10 on this case. They knew the facts in North Carolina.

11 Prior to their appointment to the bench they
12 had actively participated in politics in North
13 Carolina. One had served as a dean of a law school.
14 And then they looked very closely at whether there was a
15 real opportunity for blacks to participate in each
16 district, and we have then a careful, intense analysis
17 by three native North Carolinians of what has taken
18 place in each district including the 1982 election,
19 affecting the ability of blacks to participate equally
20 and to elect representatives of their choice.

21 Even in House District 23, where a black was
22 elected since 1973, blacks had to make sure that the
23 candidate running was someone who could appeal to white
24 residents because white votes were necessary for the
25 black to be elected. It was not possible for blacks to

1 get a person elected without extreme single-shot voting,
2 and a candidate who could appeal at least to a limited
3 number of whites.

4 QUESTION: In what district was that?

5 MR. CHAMBERS: House District 23, and that's
6 true as well in House District 21. So, even in the
7 three districts that the Solicitor General has referred
8 to, as well as the State, blacks do not have and have
9 not had an equal opportunity to participate in the
10 electoral process and to elect representatives of their
11 choice.

12 QUESTION: In single member districts you're
13 only going to be able to vote for one candidate?

14 MR. CHAMBERS: Your Honor, that is correct,
15 but you are still able to ensure that you can determine
16 the outcome of that candidate, you can ensure that that
17 candidate is accessible and accountable, and that is
18 what Congress was trying to obtain with the amended
19 Section 2, to make sure that blacks have an equal
20 opportunity to participate with whites in the election.

21 QUESTION: Single-shot voting could never
22 alone elect a black candidate in these multi-member
23 districts?

24 MR. CHAMBERS: That is correct, Your Honor.

25 QUESTION: But, Mr. Chambers, you argue that

1 52-A is applicable. Is that because all these findings
2 are to be treated just as questions -- findings of fact?

3 MR. CHAMBERS: Yes, Your Honor. I would think
4 that --

5 QUESTION: Not as mixed questions of law and
6 fact?

7 MR. CHAMBERS: I don't think so, Your Honor.
8 I would think that under this Court's decision in
9 Anderson versus Bessemer City, that Rule 52 governs the
10 factual determination as well as the ultimate --

11 QUESTION: Well, they do, historical facts,
12 but don't you think the definition of polarized voting
13 is a legal question?

14 MR. CHAMBERS: Your Honor, I think that the
15 Court has already determined --

16 QUESTION: That may be, but even so --

17 QUESTION: It still is a legal question, is it
18 not?

19 MR. CHAMBERS: The definition may be a legal
20 question.

21 QUESTION: And that's one of the things that
22 is attacked here.

23 MR. CHAMBERS: Well, I think that both the
24 State and Solicitor General are -- about the factual
25 determination, whether there was in fact substantial

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polarized voting.

QUESTION: And only first by disagreeing with the definition they think the district court adopted?

MR. CHAMBERS: That's correct, Your Honor.

THE CHIEF JUSTICE: Did you have anything further, Mr. Attorney General?

MR. THORNBURG: Nothing further, Mr. Chief Justice.

THE CHIEF JUSTICE: Thank you, gentlemen. The case is submitted.

(Whereupon, at 10:56 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1968 - LACY H. THORNBURG, ET AL., Appellants V. RALPH GINGLES, ET AL.

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

BY Paul A. Richardson

(REPORTER)