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3 LEAGUE OF UNITED LATIN :

4 AMERICAN CITIZENS, ET AL., :

5 Appellants :

6 v. : No. 05-204

7 RICK PERRY, GOVERNOR OF TEXAS, :

8 ET AL.; :

9 TRAVIS COUNTY, TEXAS, ET AL., :

10 Appellants :

11 v. : No. 05-254

12 RICK PERRY, GOVERNOR OF TEXAS, :

13 ET AL.; :

14 EDDIE JACKSON, ET AL., :

15 Appellants :

16 v. : No. 05-276

17 RICK PERRY, GOVERNOR OF TEXAS, :

18 ET AL.; :

19 and :

20 GI FORUM OF TEXAS, ET AL., :

21 Appellants :

22 v. : No. 05-439

23 RICK PERRY, GOVERNOR OF TEXAS, :

24 ET AL. :

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Washington, D.C.

Wednesday, March 1, 2006

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

APPEARANCES:

PAUL M. SMITH, ESQ., Washington, D.C.; on behalf of Appellants in No. 05-276.

NINA PERALES, ESQ., San Antonio, Texas; on behalf of Appellants in No. 05-439.

R. TED CRUZ, ESQ., Solicitor General, Austin, Texas; on behalf of Appellees.

GREGORY G. GARRE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Appellees.

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

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in No. 05-204, League of United Latin American
5 Citizens v. Perry, and the consolidated cases.

6 Mr. Smith.

7 ORAL ARGUMENT OF PAUL M. SMITH

8 ON BEHALF OF APPELLANTS IN NO. 05-276

9 MR. SMITH: Mr. Chief Justice, and may it
10 please the Court:

11 The Texas legislature passed a new
12 congressional districting map in 2003 for only one
13 reason: maximizing the number of Republicans who would
14 represent the State of Texas in Congress. Even though
15 the existing lawful map already had 20 of 32 districts
16 which strongly favored the Republicans, lawmakers went
17 to extraordinary lengths to lock in control of 22
18 districts, moving around 8 million people into new
19 districts, abandoning concerns about compactness,
20 wherever necessary, and most importantly, segregating
21 the population by race and by politics into 32
22 districts which are extremely noncompetitive.

23 CHIEF JUSTICE ROBERTS: So your -- your
24 statement that it was for one reason only means it
25 wasn't for any discriminatory reason on the grounds of

1 race or ethnicity?

2 MR. SMITH: Your Honor, the finding of the
3 district court, which we're relying on here, was that
4 it was purely for discrimination based on partisanship
5 rather than on the basis of race.

6 Now, they started out by trying to engineer
7 the defeat in the -- in the legislative process,
8 engineer the defeat of the six Democratic Congressmen
9 who had managed to be elected in Republican-leaning
10 districts because they were moderate to conservative
11 and they were, as the district court put it, able to
12 appeal to voters to split their tickets and vote for
13 them in 2002.

14 By the end of the legislative process, they
15 went further and decided to take the risk of
16 eliminating one of only four districts in the State in
17 which African Americans had an opportunity to elect
18 candidates of their choice and also to eliminate one of
19 the Hispanic opportunity districts in south Texas.
20 Now, in the latter case, they did try to replace that
21 with another Hispanic opportunity district, but that
22 was the one that we've called the land bridge district,
23 District 25, which spans 300 miles, linking up urban
24 concentrations of Latinos in Austin and in McAllen down
25 on the Mexican border.

1 JUSTICE SCALIA: You think that's no good.

2 MR. SMITH: Your Honor, we --

3 JUSTICE SCALIA: Not -- not even to prevent
4 retrogression, which would violate section 5.

5 MR. SMITH: Your Honor, the retrogression
6 problem was created by the fact that they had gotten
7 rid of a much more natural -- naturally occurring --

8 JUSTICE SCALIA: But that was done for
9 political reasons, not racial reasons.

10 MR. SMITH: Exactly, Your Honor, and that's
11 the argument that was made and rejected expressly by
12 this Court in *Bush v. Vera*, that we had to make an ugly
13 minority district rather than a compact minority
14 district because if we did it the other way, a nearby
15 incumbent would lose his seat. That was precisely the
16 argument that was made there, that it was really
17 incumbency protection, and we had to make it this ugly
18 district to send that excessive racial message in order
19 to protect other nearby incumbents, an argument which
20 is mirrored here exactly and -- and as to which I
21 notice the -- the State of Texas offers no response.

22 JUSTICE SCALIA: But what -- what is your
23 proposal? What -- what is -- what is a State to do if
24 -- assuming there is a political motivation in drawing
25 its districts, perfectly valid political motivation

1 let's assume, and the result of that redrawing is that
2 it would eliminate a majority minority district, what
3 -- what is the State supposed to do?

4 MR. SMITH: I think the State has to stay
5 within the constitutional confines of the Shaw v. Reno
6 doctrine which would require it not to go so far in the
7 pursuit of its political agenda that it creates a
8 district -- has to -- has to create a minority
9 opportunity district somewhere that would otherwise
10 violate Shaw.

11 Now --

12 JUSTICE KENNEDY: But what's the -- I'm -- as
13 Justice Scalia, I'm interested in the section 25
14 problem. The briefs --

15 MR. SMITH: District.

16 JUSTICE KENNEDY: -- for your co-counsel
17 don't talk much about it, and it's -- it's a problem
18 for me.

19 Justice Scalia's point was let's assume --
20 and I have some doubt about it. Let's assume that
21 there's a valid reason for redoing section 23. That
22 means you need another district to avoid retrogression.

23 What is -- what is your position as to district 25 on
24 that assumption, based on that assumption?

25 MR. SMITH: I don't think that it makes a

1 constitutional difference under this Court's cases
2 whether or not the reason they decided to place the
3 district there and give it that configuration was
4 because they had a political agenda somewhere else.
5 The -- the fact of the matter is they -- they were
6 deliberately trying to create an Hispanic majority
7 district there, and to do it, they had to go all the
8 way up to Austin and grab 300,000 Latinos and link them
9 up with --

10 JUSTICE SCALIA: Surely, that's not what
11 makes it bad. Even if they created a compact district
12 but with the -- with the intent of creating a majority
13 minority district, that would be a district created for
14 a racial reason. The mere fact that this one happens
15 to be not compact doesn't eliminate the motivation, and
16 -- and I don't see how you can avoid that motivation
17 unless you're going to abandon the -- the prohibition
18 against regression.

19 MR. SMITH: Our point, Your Honor, is that in
20 this situation, doing it this way, the -- the
21 motivation predominates over the other legitimate
22 districting criteria, which I think under Bush and
23 under --

24 CHIEF JUSTICE ROBERTS: Which -- which
25 motivation?

1 MR. SMITH: Well, the -- the racial
2 motivation to create a district -- to -- to reach out
3 as far as they did to capture --

4 JUSTICE KENNEDY: Well, can the -- can the
5 State by its action with one district, i.e., 23, in
6 effect bootstrap itself in a position where it's
7 entitled to use race where -- in a -- in a predominant
8 and I -- I think insulting way and -- and then have a
9 defense?

10 MR. SMITH: Our submission is that they
11 cannot, Your Honor.

12 Now, if I could turn to the partisanship
13 issue, our --

14 JUSTICE BREYER: May I just clarify one thing
15 on that?

16 MR. SMITH: Sure.

17 JUSTICE BREYER: I take it your reason was
18 that in Bush v. Vera, the Court said, of course, they
19 can use race to prevent retrogression. Of course, they
20 can, but if they do, they have to create a compact
21 majority minority district, not an elongated majority
22 --

23 MR. SMITH: Yes.

24 JUSTICE BREYER: That's the -- that's the
25 argument. I have to go back and look at Bush v. Vera.

1 MR. SMITH: Yes, Your Honor, and that they
2 can't say we have to create it in a non-compact way
3 where the race predominates over the other values
4 because we have a political agenda of protecting some
5 other incumbent in a non-minority district.

6 CHIEF JUSTICE ROBERTS: How -- how does that
7 make any sense to say that what you're objecting to is
8 the consideration of race in one situation, but if it's
9 compact and the predominant motive was the
10 consideration of race, that doesn't bother you? That
11 seems to me to be a back-door way to get into a more
12 extensive judicial review of the compactness and based
13 on racial considerations that are, under your view, the
14 predominant factor in each case.

15 MR. SMITH: Well, Your Honor, I think there's
16 a question of what you mean by the word predominance.
17 And I as understand the Court's cases, there are times
18 when the shape and the extra efforts that are made to
19 -- to kind of gather up minority voters as, for
20 example, in Miller v. Johnson where we had a very
21 similar district, where race is said to predominate in
22 a different sense than it does when you simply are
23 creating a minority district to avoid retrogression or
24 to -- to stay in compliance with the Voting Rights Act.

25 Clearly, the Voting Rights Act requires you

1 to create minority districts. It should require that
2 it makes sense that people make efforts to do that.
3 We're not saying you shouldn't do any of those things.

4 We're just saying in this instance, under this Court's
5 cases, you shouldn't be able to use your political
6 agenda to allow you and justify you to do it in a
7 different way which sends this extra message of
8 excessive racial consideration.

9 JUSTICE KENNEDY: And that's a --

10 CHIEF JUSTICE ROBERTS: So you can take race
11 into account if it's compact as a predominant motive.
12 You can't take race into account if it's not compact.

13 MR. SMITH: I think, Your Honor, you
14 certainly can --

15 CHIEF JUSTICE ROBERTS: As a dominant motive.

16 MR. SMITH: You certainly can intentionally
17 create a minority district under section 2 of the
18 Voting Rights Act. I don't know how you could comply
19 with section 2 of the Voting Rights Act if you don't do
20 that in situations where, under the Gingles criteria,
21 that's what you're supposed to do.

22 JUSTICE STEVENS: May I ask? I'm a little
23 puzzled by the -- the questioning. Doesn't everyone
24 agree that the predominant motive in all the districts
25 was political? You agree to that, don't you?

1 MR. SMITH: Yes, Your Honor.

2 JUSTICE STEVENS: And you don't agree that
3 that necessarily makes it valid, that that's
4 necessarily a defense to section 2.

5 MR. SMITH: No, I actually don't agree with
6 that, Your Honor, and you're right.

7 JUSTICE STEVENS: And -- and the problem with
8 section -- with district 23, under section 2 of the
9 Voting Rights Act, is not the motivation. It's the
10 results that have changed. Isn't that correct?

11 MR. SMITH: That's correct, Your Honor.

12 JUSTICE STEVENS: And the question under the
13 district court's opinion is whether the political
14 motive was an adequate defense to what would otherwise
15 be a violation of section 2. Is that correct?

16 MR. SMITH: That's correct, Your Honor.

17 CHIEF JUSTICE ROBERTS: Well, isn't it
18 correct, though, that a result is -- focus on results
19 is not sufficient if the challenge is an equal
20 protection one and not a section 2 one?

21 MR. SMITH: Right, but -- but our challenge
22 under the Equal Protection Clause --

23 CHIEF JUSTICE ROBERTS: I'm talking about
24 district 25.

25 MR. SMITH: It's a little hard to keep all

1 the different arguments straight, but yes. Our
2 argument is based on intent there, yes, Your Honor.
3 And -- and the argument is that the intent went too far
4 because they had to --

5 CHIEF JUSTICE ROBERTS: Well, that's why I
6 asked earlier that your -- your statement that all of
7 this was done with a political motive -- I wondered how
8 that satisfied the equal protection requirement, not
9 the section 2 requirement.

10 MR. SMITH: Well, I think there are
11 situations in which you have a political motive
12 overarching the entire map, and that -- but at the same
13 time, that pushes you to do some things which could
14 violate the Fourteenth Amendment in terms of racial
15 conduct. And that's what this -- that's what our
16 argument is --

17 JUSTICE KENNEDY: But you don't think that's
18 a defense. It seems to me the State creates the very
19 problem that it claims that it must use race to settle.

20 MR. SMITH: That's correct, Your Honor, yes.
21 We don't think it's a defense in this instance.

22 JUSTICE SOUTER: Now, with respect to section
23 2, what is -- what is your position on the relationship
24 between the predominant political motivation and the
25 existence and nonexistence of a section 2 violation?

1 MR. SMITH: Your Honor, if I understand the
2 question, I -- if the question is is it permissible to
3 have --

4 JUSTICE SOUTER: If -- let me put it another
5 way.

6 MR. SMITH: Okay.

7 JUSTICE SOUTER: If -- if you otherwise
8 demonstrate a section 2 violation, is the political
9 motivation a defense?

10 MR. SMITH: No, Your Honor.

11 JUSTICE SOUTER: No.

12 MR. SMITH: Certainly not.

13 Now, we have a -- an argument about that too,
14 which has to do with the district in the Dallas-Fort
15 Worth area, and I think the political defense there
16 doesn't have anything to do with it.

17 Now, if -- if I could, I think that the whole
18 map -- the decision to redraw the whole map violates
19 the Equal Protection Clause for a wholly different
20 reason, which was that it was wholly lacking in any
21 rational, legitimate public purpose. At the time,
22 there was a lawful map in place that had the right
23 number of districts, and the district court found as
24 fact that the only reason that this law was even
25 considered, let alone passed, was to help one political

1 party gain more seats in the Congress at the expense of
2 the other.

3 JUSTICE GINSBURG: What about having a --

4 JUSTICE SCALIA: Wow. That's a surprise.

5 (Laughter.)

6 JUSTICE GINSBURG: What about having a -- a
7 plan that was put in place by the legislature instead
8 of a temporary plan put in effect by a court?

9 MR. SMITH: The --

10 JUSTICE GINSBURG: Isn't there -- isn't it --
11 you -- you seem to treat this as a redone redistricting
12 instead of as the very first redistricting done by a
13 legislature.

14 MR. SMITH: It was the first one done by the
15 legislature because they violated the Constitution
16 intentionally when they had an obligation to -- to draw
17 a map 2 years earlier. Our submission is that the
18 existence of some power that the legislature may have
19 to -- to alter the remedial map -- and they may well
20 have that power. We don't -- we don't question that --
21 doesn't justify the map. They still have to, in
22 exercising that power, point to some constitutional
23 basis for which they're acting.

24 JUSTICE SCALIA: Which -- but it's a
25 perfectly constitutional basis to alter the map because

1 we don't think it allocates the seats in the fashion
2 that our political power enables us to -- to provide
3 for. Legislatures redraw the maps all the time for
4 political reasons. I mean, to say that this is, you
5 know, something horrible is ridiculous. You
6 acknowledge that political motivation is fine.

7 MR. SMITH: Your Honor, we --

8 JUSTICE SCALIA: Don't you?

9 MR. SMITH: -- we acknowledge that we
10 tolerate political motivation in the context of map-
11 drawing when there's other legitimate public purposes
12 being served, which is to say at the beginning of the
13 decade when they have to redraw the map anyway.

14 JUSTICE SCALIA: I see.

15 MR. SMITH: But our position is when it's
16 purely for partisan motivation, which is -- only occurs
17 in mid-decade --

18 JUSTICE SCALIA: Even -- even when the map is
19 so distorted -- you -- you acknowledge that the map that came
20 out, after this -- this realignment of districts, had
21 less of a divergence between the voting strength of the
22 Republican Party and the number of Republican seats
23 than had existed under the previous allocation by the
24 Democrats.

25 MR. SMITH: That -- that is not, we believe,

1 a justification for two reasons, Your Honor. This
2 notion that you can have compensatory gerrymandering
3 and that that can be your justification -- I think it's
4 wrong as a matter of law because all it amounts to is
5 another way of saying we like -- we don't like the
6 partisan composition of the delegation that the people
7 voted for and we're going to change it.

8 JUSTICE SCALIA: I'm saying less. Less.

9 It -- there's less of a divergence under the new map
10 than there was under the old one. The only difference
11 is this divergence is in favor of the majority.

12 MR. SMITH: Well, Your Honor, as the district
13 court found -- and this is on page 85 of our
14 jurisdictional statement appendix -- it wasn't that
15 there was bias in the map that the court drew. It was
16 that there were 20 of 32 districts that strongly
17 favored the Republicans in the court-drawn map. It
18 just so happened that the voters in those districts, in
19 six of those Republican-leaning districts, happened to
20 like voting for moderate to conservative Democrats who
21 they were comfortable with. Now, if you tell me -- I
22 -- I find difficulty -- I find it difficult to
23 understand how anyone could say the legislature can, as
24 a matter of -- use the machinery of government to
25 decide that those voters should not have that

1 opportunity to do that again, that that was a mistake.

2 CHIEF JUSTICE ROBERTS: Well, counsel, just
3 take it in -- in an abstract way. If you think that
4 the prior system has been gerrymandered by the party in
5 power, are you saying that when that shift in power in
6 the statewide offices changes, that the new party in
7 power cannot redress the gerrymandering of its
8 predecessor?

9 MR. SMITH: My -- my answers to that are
10 twofold. I think as a matter of law that the Court
11 should hold that -- if that's the only justification,
12 you ought to wait until you have other public purposes
13 for redrawing the lines.

14 But even if that were -- even if the Court is
15 going to allow that kind of justification for mid-decade
16 redistricting, it shouldn't allow it here because it
17 was just factually untrue, as the district court found.

18 JUSTICE KENNEDY: Well, but let's get back to
19 the -- to the principle without just talking about
20 these -- these factfindings. It -- it seems to me
21 very odd for you to be telling us that partisan
22 gerrymandering is -- is improper when that's the sole
23 or substantial, predominant motivation, but then saying
24 that we can't correct it when it's happened.

25 Let's assume that the 1990 legislative plan

1 was one that was done with -- without a wholly partisan
2 intent, but over the years, it -- it now freezes in the
3 Democrats or party X to having a much greater advantage
4 than the general registration would give it. And if it
5 leaves it in for a particularly partisan purpose, why
6 -- why can't it be redone?

7 MR. SMITH: Well, Your Honor, I think that if
8 the Court --

9 JUSTICE KENNEDY: I just don't understand
10 that argument.

11 MR. SMITH: I think it's a dangerous thing to
12 do, to say to the legislatures of the country you can't
13 redistrict for partisan gain, but if you can recouch it
14 as partisan compensation, that's okay.

15 CHIEF JUSTICE ROBERTS: Let me give you
16 another parallel. Let's suppose that districts have
17 been gerrymandered for racially discriminatory purposes
18 for years. Can you take race into account in drawing
19 new districts to remedy that racial discrimination?

20 MR. SMITH: I think if a map is illegal, Your
21 Honor, then -- then certainly it is within the power of
22 -- of the legislature to --

23 JUSTICE BREYER: Oh, well, that's -- but now,
24 in fairness, I think to the red brief argument --
25 you've read the red briefs.

1 MR. SMITH: I have, Your Honor.

2 JUSTICE BREYER: Yes. They are filled with
3 factual information that in their opinion shows that
4 previously the Democrats had gerrymandered this much
5 worse, and that what -- this was an effort to create a
6 balance. That's what their view is. Now, I want to
7 know really precisely what is your response to that
8 argument.

9 MR. SMITH: My response is -- is -- factual
10 response is that by the time we got to 2002, the
11 district court's drawn map had 20 of 32 districts,
12 which voted overwhelmingly Republican for every other
13 office, in the range of 60 to 70 percent, so that
14 whatever bias was introduced into the map in 1991, if
15 there was one, had been eradicated because all of these
16 Democrats in those districts had become more
17 Republican. And so the map was not biased. There was
18 nothing wrong with the lines.

19 JUSTICE BREYER: Now, what do I look to in
20 the record to verify what you just said?

21 MR. SMITH: You look to the court's finding
22 on page 85 which said that 20 of 32 districts favored
23 the Republicans. And you look at the expert reports
24 filed by both sides at the trial that preceded that
25 finding, and the experts for both sides said that the

1 court-drawn map was a pro-Republican map that favored
2 the Republicans or, at minimum, was fair, and that with
3 the kind of voting patterns that existed in Texas at
4 the time, one would expect the Republicans to carry 20
5 districts in most of the elections.

6 Now, they also said -- and -- and this is a
7 reason why the State didn't actually put their expert
8 on the stand -- that the map that the legislature had
9 drawn instead was wildly biased in favor of the
10 Republicans in that at 52 percent of the vote, they
11 would still get 22 districts, and at 50 percent of the
12 vote, they'd still get 20 districts.

13 JUSTICE SCALIA: Yes, but what percentage did
14 they have? I -- I thought that -- you say that they
15 should have gotten 20 districts, and how many districts
16 did the plan give them?

17 MR. SMITH: The plan gave them 20 districts
18 in which they had a strong Republican majority. Now,
19 what that means is that --

20 JUSTICE SCALIA: But you say that's what they
21 should have had, given -- given the voting in the
22 State.

23 MR. SMITH: I say they -- that given that
24 opportunity to have 20 districts elect Congressmen,
25 that's -- that's all that anybody could reasonably ask

1 for. That's the only kind of justification that I can
2 even imagine justifying purely partisan redistricting
3 in mid-decade.

4 The fact of the matter is the large majority
5 of the Members of Congress who went to Washington after
6 the 2002 election were elected by Republicans in
7 Republican districts. That's what the facts are. Now,
8 they say, well, vestiges of the past gerrymander are
9 still around, but what does that mean? The fact is the
10 districts are by now overwhelmingly Republican in the
11 large majority of cases.

12 JUSTICE SCALIA: Do you have any -- any
13 authority either in the text of the Constitution or in
14 a -- a case for the proposition that the only reason a
15 legislature can reapportion its districts is because
16 there's been a census?

17 MR. SMITH: Our -- our position is slightly
18 different.

19 JUSTICE SCALIA: Well, but that's your
20 position when you said mid-decade redistricting is bad
21 because your -- your position is the only reason is the
22 census is -- has -- has caused there to be less than --
23 than one man/one vote.

24 MR. SMITH: There may be cases where you
25 could do mid-decade redistricting for neutral,

1 legitimate public purposes. I submit they'll be quite
2 rare in -- in practice, but there certainly could be.

3 Our position is you can't redraw the lines
4 purely for partisan gain, and the case I would point to
5 that I think most strongly speaks to that is Cox v.
6 Larios. In that case, the district court found that
7 population deviations, sufficiently small that they
8 weren't even usually requiring justifications, didn't
9 pass the rational basis test because the only
10 explanation you could offer for those deviations was
11 that they were systematically attempting to help the
12 Democrats at the expense of the Republicans.

13 JUSTICE SOUTER: But -- but are you saying --

14 JUSTICE KENNEDY: Well, if you say that mid-
15 decennial districting is suspect or subject to some
16 special rules, then it seems to me that you're --
17 you're taking away a very important deterrent that
18 works on legislatures when they do decennial
19 districting. If you know as a legislature, when you do
20 a decennial districting, that your program is going to
21 be presumptively valid or not subject to partisan
22 gerrymandering, then -- then you're -- then you're
23 liable to overreach. And it -- it seems to me very
24 dangerous for this Court to take away that control
25 mechanism that exists so that legislatures know that

1 there's a possibility that if they overreach, they can
2 be corrected.

3 MR. SMITH: That -- that might be a concern,
4 Your Honor. I don't think the -- the historical
5 practice supports it because the fact is that while
6 there's been a fair amount of partisan redistricting,
7 whatever one wants to call it, in the last several
8 decades, there have been precious few, if any, examples
9 of anybody trying to convene the legislature before the
10 next census to try to fix it. It is extraordinarily
11 rare. And the reason for it is we -- there's a general
12 tradition we've established in this country that
13 whatever happens when those lines get drawn, even if
14 it's done by a court, you leave it alone until the next
15 time --

16 CHIEF JUSTICE ROBERTS: Well, there was no --

17 JUSTICE SCALIA: That -- that little -- even
18 if it's done by the court. I like the way you slipped
19 that in. I mean, even if you had a general rule that
20 you cannot redistrict except after a decennial census,
21 surely there ought to be an exception unless -- which
22 -- which would read, unless the districting you're
23 living under was never decreed by the legislature, but
24 was decreed by a court. And that was the situation
25 here. Surely, that's a good reason, even if you

1 adopted your general proposition.

2 MR. SMITH: The -- the reason I -- I slipped
3 it in is that in my description of what I think is the
4 current tradition, Your Honor, is we went and looked
5 and found how many court-drawn congressional district
6 maps have there been in this country in the last 40
7 years, and how many times were they redrawn by the
8 legislature. And the answer is that if you go back
9 between 1970 and 2000, there were 36 of them, and only
10 two of them were redrawn in very small, technical ways,
11 one in Hawaii where they only have two districts and
12 then the one in Texas, which was changed in Dallas.
13 It's not --

14 JUSTICE SCALIA: Well, I'd say that's a shame
15 for the democratic process. I -- I don't like the idea
16 that -- that there are a lot of districts out there
17 that have never been drawn by the people, which is what
18 the Constitution envisions.

19 MR. SMITH: Well, Your Honor, the other thing
20 I think about this -- this argument about that we have
21 this -- this need to have a legislative plan is you
22 invite an abuse of a different kind. If you -- if you
23 say to the legislature, you can sit on your hands at
24 the time when you have an undisputed constitutional
25 obligation to redraw the lines at the beginning of --

1 of the decade, as long -- and you'll know that what
2 that will do is it will give you the right to come
3 along anytime you feel like it when you get your
4 political ducks --

5 CHIEF JUSTICE ROBERTS: Is that the reason
6 these lines were not redrawn at the beginning of the
7 decade, because the majority party sat on its hands?

8 MR. SMITH: That's absolutely what happened
9 here, Your Honor. They didn't make any serious efforts
10 to redo it. The only person --

11 JUSTICE GINSBURG: I thought there was --

12 CHIEF JUSTICE ROBERTS: I thought --

13 JUSTICE GINSBURG: -- I thought there -- the
14 houses were divided. One party, one -- had one house;
15 the other, the other. And so they were at loggerheads
16 and they --

17 MR. SMITH: The reality is -- and the record
18 -- there was discussion of this at trial by Senator
19 Ratliffe -- there was not very serious effort to do
20 this at the time. The only person who can call a
21 special session -- and it does take special sessions in
22 Texas to get these lines drawn historically -- is the
23 Governor. He declined to call any special sessions
24 when they -- when they had a divided legislature. Of
25 course, 2 years later, when they had unilateral control

1 of the whole legislature, we were calling special
2 sessions like mad to get the job done. So --

3 JUSTICE GINSBURG: But the court -- even from
4 the court's perspective, was it the same three judges
5 that did the -- that did the plan, the court-ordered
6 plan? And I thought that the -- the judge who presided
7 told us in his latest opinion that they never
8 anticipated that as being a permanent plan, and indeed,
9 they tried to stay as close as they could to the then-
10 existing plan.

11 MR. SMITH: Well, Your Honor, there was some
12 language to that effect. If you go back, though, and
13 read the opinion that the -- the judges wrote in -- in
14 2001 when they actually were describing in meticulous
15 detail their process of drawing the map, he
16 specifically said then that they didn't follow the old
17 lines, that they used neutral criteria like compactness
18 and following political subdivisions, and that they --
19 this was not an effort to -- to come up with a map that
20 matched the old map.

21 The only thing that I think really fairly can
22 be said about the court-drawn map is it did give a
23 separate district to all of the incumbents, which is
24 what you'd expect a court to do. They're not going to
25 sit around and decide mutual incumbents ought to have

1 to run against each other. And so it did have that
2 effect, I think, of allowing some incumbency advantage
3 to continue on.

4 But it is -- it is not true that the -- that
5 the court tried to keep some pattern in the map beyond
6 that. The court specifically said otherwise in 2001
7 when it drew the map, and then it said in --

8 JUSTICE KENNEDY: Well, we're not -- we're
9 not trying the court for a bad intent. We're looking
10 at the effect of what it's done, and if the effect of
11 what it's done is to leave in place something that's
12 slanted based on -- on statewide registration in favor
13 of the Democrats, then -- then, it seems to me, there's
14 -- there's a ground for the new legislature to act.

15 And -- and one -- one reason legislatures may
16 not have redrawn plans often is because they always
17 protect incumbents.

18 MR. SMITH: But, Your Honor, the facts are
19 that it wasn't slanted. The facts are the experts both
20 testified from both sides at the trial that the map was
21 fair to both parties and that it contained 20
22 Republican districts. And that's what the court found
23 too in 2004. Then we have an appeal and we go back
24 down on remand, and suddenly we're starting to hear
25 about vestiges of gerrymanders. But the court didn't

1 withdraw its finding of fact that there were 20
2 Republican districts in its own map.

3 That's true. I mean, look at the way the
4 votes were cast in 2002. There were 20 Republican
5 districts in the map. The six districts that these
6 Democrats represented who they -- who they -- the
7 moderate Democrats that they were targeting -- the
8 average vote for statewide office in that district was
9 something like 65 percent -- 55 to 65 percent for the
10 Republican candidate.

11 I -- I looked, for example, yesterday at the
12 -- there was an election for the Attorney General in
13 Texas in 2002. It was an open seat, two -- two non-
14 incumbents running against each other, two people from
15 Austin. And the average vote for the Republican
16 Attorney General candidate, Mr. Cruz's boss, in that
17 election in those six districts was 62 percent for him
18 and 38 percent for the -- the Democrat. So these were
19 not Democratic districts. This was not a gerrymander
20 in any rational use of the word.

21 JUSTICE SOUTER: Mr. Smith, may -- may I ask
22 you to comment on -- on one problem that I have with
23 your position that has nothing whatever to do with the
24 -- with the fact that there was a -- a judicial
25 redrawing in the first place here?

1 If I understand your argument, you're saying
2 that a -- a districting that takes place prior to the
3 report of a new decennial census, which is done for
4 purely political reasons, maximizing political
5 advantage, is invalid for that reason, I guess under
6 the Equal Protection Clause.

7 MR. SMITH: Yes, Your Honor.

8 JUSTICE SOUTER: And yet, I take it it's also
9 your position that if the districting is done in
10 response to the new decennial figures so that there's a
11 need to do something to conform to one person/one vote,
12 that there is nothing illegitimate about political
13 motivation, at least up to some point --

14 MR. SMITH: Right.

15 JUSTICE SOUTER: -- in -- in drawing the
16 lines at that time.

17 How can we in principle say that the
18 motivation which is legitimate in 1991 is somehow
19 constitutionally illegitimate and dispositive in 1995?

20 MR. SMITH: It seems to me that one is not
21 saying that it's legitimate in 1991. One is saying
22 that in redistricting, which is a messy process, we
23 tolerate a lot of mixed motives. We tolerate some
24 consideration of race. We -- we ask for some
25 consideration of race. We tolerate some consideration

1 of politics. But that is dramatically different under
2 the rational basis test from a law that is passed
3 solely for political reasons because it doesn't have
4 the other kinds of interests that are being promoted
5 and protected in -- at the beginning of the decade.
6 And so there's a drastic difference, it seems to me,
7 under the rational basis analysis between a law which
8 serves a lot of purposes, some governmental and public,
9 some of them private, and -- and not legitimate bases
10 for governmental action.

11 JUSTICE KENNEDY: But you're making the
12 assumption that a mid-decennial districting is not
13 interested in compactness, it's not interested in
14 counties, it's not interested in keeping a university
15 within one -- within one district. That's -- that's
16 just simply not true.

17 MR. SMITH: Well, Your Honor, the -- the fact
18 here is that the only reason they decided to change was
19 for partisanship. That's what the district court found
20 as a matter of fact.

21 Now, the other legal requirements of -- of
22 the map that are -- give you the -- the legitimate
23 bases for redrawing the lines at the beginning of the
24 decade were already satisfied because such a map
25 already existed. And as this Court said in -- in

1 Grove, the -- the court-drawn map, in some sense,
2 changes the status quo. You have to say what are the
3 additional governmental interests that are -- that
4 exist and justify going through this process again and
5 changing that map, which already is fully lawful, has
6 been affirmed by this -- this Court as lawful.

7 JUSTICE SOUTER: But your answer, both to the
8 Justice Kennedy and -- and to me, ultimately comes
9 down, I guess, to saying that political partisanship
10 alone, undiluted, unadulterated by any other
11 motivations, is per se wrong.

12 MR. SMITH: It's -- it's not a basis that can
13 justify public conduct, State action. If -- if it was,
14 then it would be perfectly okay, I suppose, to have
15 government subsidies for some parties and not for
16 others, or to have -- let some people use public
17 facilities and not others.

18 JUSTICE SOUTER: All right. Let's -- let's
19 assume that the -- that the partisans who do the mid-
20 term redistricting candidly say, we are doing this for
21 partisan reasons, but we recognize limits on what we
22 can do. And the limits are the traditional ones,
23 compactness, et cetera. Let us assume that there is,
24 in fact, evidence of a good faith effort at least to
25 conform to those districting principles. Under those

1 circumstances, is the mid-term redistricting equally
2 illegitimate?

3 MR. SMITH: The question I think you need to
4 pose is what is the justification for doing anything,
5 not -- not for any particular line --

6 JUSTICE SOUTER: Well, that may be, but how
7 about the question that I posed?

8 (Laughter.)

9 MR. SMITH: Well, it seems to me, Your Honor,
10 that if -- if the -- I was trying to get to an answer.
11 I really was.

12 JUSTICE SOUTER: Okay.

13 MR. SMITH: It seems to me that if -- if you
14 can -- if they can legitimately and -- and plausibly
15 say, we are -- we -- we decided to redraw the old map
16 because it was so departed -- it's so departed from
17 these important principles and values like compactness
18 and respect for subdivision -- so if that's our reason
19 --

20 JUSTICE SOUTER: No. I'm -- in a way, I'm
21 making it easy for you. I'm saying, look, they're --
22 they're saying we think we can get a better deal for
23 our party, but we are respecting these districting
24 principles. Equally illegitimate?

25 MR. SMITH: I think so, Your Honor. If all

1 they're saying is we -- we didn't go as crazy as we
2 could have, but the only reason we did anything is
3 because we want more seats, but we could have done even
4 worse, that seems to me not a -- not a justification
5 for action, but merely a -- a decision not to -- to be
6 more political than purely political.

7 JUSTICE SOUTER: The difficulty I have with
8 that is that it is -- it is impossible -- I think you
9 would agree. It is impossible -- and may, indeed --
10 let's assume undesirable -- to take partisanship out of
11 a political process. And -- and if partisanship pure
12 and simple, even though subject to the discipline of
13 districting principles, is -- is illegitimate, then I
14 don't see why that does not imply the illegitimacy of
15 any districting at any time.

16 MR. SMITH: Well, Your Honor, our -- our
17 submission is it makes a difference when it's pure
18 rather than merely one of the many things that is going
19 on.

20 If I could take a few minutes just to talk
21 about our section 2 argument with respect to the
22 African American --

23 JUSTICE STEVENS: Before you do that, may I
24 just ask one short question?

25 MR. SMITH: Sure.

1 JUSTICE STEVENS: You've mainly attacked the
2 plan as a whole in your briefs. And I'm wondering. I
3 often look at particular districts, as you may know.
4 Are there residents of districts 23, district 24 that
5 are plaintiffs?

6 MR. SMITH: We have plaintiffs in every
7 district, I think, on the whole map, certainly any
8 district that would raise a concern under --

9 JUSTICE STEVENS: But they're not identified
10 easily --

11 MR. SMITH: Yes, Your Honor, but -- but I
12 think that there -- there was a -- in the complaint
13 there's allegations about where each of these people
14 live, and I think that -- that we were very careful to
15 make sure anything we were talking about specifically,
16 such as, for example, district 24 in Dallas, we had --
17 we had plaintiffs. The -- the list is quite long. So
18 there is standing, I think, for all of those arguments.

19 Now, on -- on district 24, our submission is
20 that under section 2, there ought to be protection for
21 districts where the minority group does not have an
22 absolute majority but where the evidence shows that it
23 can effectively elect a candidate of its choice in --
24 in concert with a -- a predictable group of Anglo or
25 sometimes Hispanic crossover voters, and that we think

1 on the facts of this case, this was such a district
2 because the African Americans in every case were a
3 large majority of the voters in the Democratic primary
4 and the Democratic nominee, in virtually every case, is
5 elected in this district regardless of what -- what
6 race that person may be.

7 CHIEF JUSTICE ROBERTS: What was the
8 percentage of the African American voters in the
9 district as a whole?

10 MR. SMITH: Citizen voting age population is
11 26 percent, Your Honor. The --

12 JUSTICE KENNEDY: But -- but if -- if your --
13 if your test is that section 2 ought to be opened up to
14 any racial group that could influence an -- an election,
15 I don't see the limits on your principle.

16 MR. SMITH: That's not our -- our test, Your
17 Honor. Our test is they -- they have to control the
18 election, and --

19 CHIEF JUSTICE ROBERTS: So that if you had a
20 situation where it's 40 percent one group, 40 percent
21 another group, and 20 percent where the 20 percent
22 controlled who was elected by siding with one group or
23 the other group, then you would say that that was an
24 influence district for that small -- the smallest group
25 in the district?

1 MR. SMITH: Your Honor, I don't think that
2 would work because I think the way we -- we view what
3 you have -- you -- the group has to be able to decide
4 who's going to be on the ballot, and then you want to
5 see whether there's enough crossover voting to --

6 JUSTICE KENNEDY: No. Suppose there's a
7 primary where it works that they can get on the ballot.
8 Suppose we're looking at the general election.

9 MR. SMITH: If -- if that group gets to
10 decide who gets on the ballot --

11 JUSTICE KENNEDY: Accept the hypothetical.

12 MR. SMITH: Yes. If that group has -- has
13 picked who gets on the ballot and their choice always
14 wins the general election, I think that's not an
15 influence district. That's -- that's --

16 JUSTICE BREYER: What is the answer? I mean,
17 you've read the briefs. The obvious reply to that is
18 there are many, many districts in the United States
19 where African American voters have a big influence on
20 the Democratic primary.

21 MR. SMITH: Yes.

22 JUSTICE BREYER: A lot. And there are a lot
23 where the Democrat wins. So if your principle is
24 accepted, says the other side, that means that any
25 district that's drawn here to favor the Democrats can't

1 be changed, but all the ones that favor the Republicans
2 can be changed. Now, if that argument is right, it's
3 hard for me to accept, but that's a neutral principle
4 of constitutional law. So I want to see what -- what
5 your response is to that.

6 MR. SMITH: I think there are a number of
7 limiting principles that apply here that -- that
8 suggest we're not just coming in here and asking for
9 the Voting Rights Act to become the -- the pro-
10 Democratic act --

11 JUSTICE BREYER: Obviously you're not.
12 That's why I would like --

13 MR. SMITH: And -- and --

14 JUSTICE BREYER: -- you to say what
15 specifically the answer to that argument is.

16 MR. SMITH: The -- the -- first of all, there
17 are not that many districts in which African Americans
18 control the Democratic primary and then have
19 predictable ability to see that person elected in -- in
20 the general election. Where that is the truth, they
21 then have representation of the kind that I think is
22 valuable under section 2 of the Voting Rights Act.

23 Now, of course, there are going to be limits.

24 One of them is De Grandy. They -- they only have
25 rights up to a proportional level of their proportion

1 of the population. And by not respecting -- not
2 protecting this kind of district, what you do is, in
3 fact, condemn the people, the African Americans in
4 Texas, to less than proportional representation because
5 there is no other way to give them a district in which
6 they have any possibility of -- of participation in the
7 process and electing a candidate of their choice. This
8 is the only place in Texas where it can be done.
9 They're -- they are more than an eighth of the
10 population, citizen voting age population, and they're
11 only getting 3 districts out of 32 because the State of
12 Texas chose to eliminate this district.

13 JUSTICE SOUTER: This would be at -- least
14 your criterion, whether we accept it or not, would --
15 would be more administrable if we're dealing with the
16 elimination of a district than if we were dealing with
17 the question of creating one. Do you take the position
18 that the NAAC brief does that there really should be
19 distinct criteria, depending on whether you're asking
20 to create something new or preserve something which has
21 been in place?

22 MR. SMITH: I -- I perhaps have more faith in
23 the ability of courts to predict the future than -- than
24 that brief does, but -- but I certainly can imagine a
25 rule where the court says, we're going to require that

1 there be experience, not simply predictions by experts,
2 in order to create a district below the majority level.
3 That would be an administrable rule which would give
4 -- at least give some protection in situations of the
5 kind that we -- we face here.

6 If I could reserve the balance of my time,
7 Your Honor.

8 CHIEF JUSTICE ROBERTS: Thank you, Mr. Smith.
9 Ms. Perales.

10 ORAL ARGUMENT OF NINA PERALES
11 ON BEHALF OF APPELLANTS IN NO. 05-439

12 MS. PERALES: Mr. Chief Justice, and may it
13 please the Court:

14 I will begin by arguing that Texas violated
15 the Equal Protection Clause by making excessive use of
16 race in its changes to district 23. After removing
17 100,000 Latinos from district 23, the State used race
18 to craft a razor-thin Latino majority. Abandoning
19 political data, the State used census block
20 redistricting to achieve 50.9 percent Latino voting age
21 population.

22 JUSTICE KENNEDY: In 23.

23 MS. PERALES: In district 23, Your Honor.

24 Thus, the State used race, as we contend, not
25 only to protect an incumbent, but to give the false

1 impression of Latino support for that incumbent.

2 JUSTICE KENNEDY: Focus for a minute just on
3 the -- what we can call the removal, the drawing of the
4 lines to exclude some Latino voters. Just focus on
5 that, not the later justification. The district court
6 found that this was for political reasons, not racial
7 reasons, even though it was a largely racial group that
8 was removed. Do you attack that finding as clearly
9 erroneous?

10 MS. PERALES: Yes, Justice Kennedy, we do
11 attack that finding as clearly erroneous. This case is
12 really the flip side of Easley v. Cromartie because in
13 this case Latino voters supported Republican and
14 Democratic candidates. As the State asserts
15 vigorously, Latino voters voted significantly and
16 substantially --

17 JUSTICE STEVENS: May I interrupt you just
18 with one -- one question on district 23? Regardless of
19 what the intent of the parties was, I'm just wondering
20 why is the district court's finding on intent relevant
21 to the section 2 issue when the test under section 2 is
22 results?

23 MS. PERALES: Yes, Justice Stevens. The --
24 the test under section 2 is results, and that goes --

25 JUSTICE STEVENS: So that even if the intent

1 was primarily political, it would still violate section
2 2.

3 MS. PERALES: Yes, and we argue in our brief
4 exactly that. But we hope today to focus in oral
5 argument at least first on the Fourteenth Amendment
6 violation, which is the intentional use of race both as
7 intentional vote dilution, as well as the analytically
8 distinct claim under Shaw v. Miller.

9 With respect to the question whether Latino
10 voters voted with such a high correlation -- and that's
11 the phrase used from Easley v. Cromartie -- whether
12 there was such a high correlation between Latino voters
13 and Democratic voters, particularly in district 23, to
14 justify removing them because of their race and then
15 saying that they were Democrats, that nexus simply
16 doesn't exist under the facts of this case.

17 Besides the State's arguments and -- and the
18 many assertions that it makes with respect to Latino
19 voting support for Republican candidates and especially
20 Congressman Bonilla, we also have Latino voting for
21 Bonilla that rises and falls. If Latinos were close
22 adherents to the Democratic ticket, you wouldn't see
23 fluctuating support for Congressman Bonilla. You would
24 see low and steady support if Latinos were Democratic
25 voters. Instead, we see something very different,

1 which is Congressman Bonilla gaining support in the
2 Latino community within his district up until 1996
3 where the peak is 30 percent Latino support and then a
4 steady decline over a series of elections, ending in
5 2002 with only 8 percent, as the district court found,
6 Latino support for Congressman Bonilla. This is not --

7 CHIEF JUSTICE ROBERTS: Does that undermine
8 the assumption that there's -- they're voting as a
9 bloc? 30 percent of the group is voting for one
10 candidate. Is that sufficient to establish a voting
11 bloc?

12 MS. PERALES: Yes, Mr. Chief Justice. Under
13 section 2's question with respect to racially polarized
14 voting, we would contend that voting as a bloc 70
15 percent or subsequently higher than 70 percent to 90-92
16 percent is enough under section 2 to satisfy the test
17 whether Latinos are voting cohesively. Congressman
18 Bonilla has never been able to garner a majority of
19 Latino support, not more than 30 percent.

20 But with respect to a somewhat different
21 question, which is whether partisanship and race
22 correlate so highly in district 23, that you can remove
23 Latinos and in the hopes of being able to take the
24 Democratic index down, we say that that kind of voting
25 is not tight enough. In *Easley v. Cromartie*, of

1 course, the Court found that African American voters
2 voted 95 to 97 percent for Democratic candidates across
3 elections.

4 JUSTICE SCALIA: I don't understand. Does
5 this go to motive or result? I mean, what if I'm --
6 I'm stupid and I think there's the correlation and I
7 remove it for that reason? I'm not removing them for
8 racial reasons. I'm removing them because I want to
9 remove Democrats. And you're saying that if I have
10 made a mistake about how solidly they vote Democratic,
11 that turns my validly non-racial decision into a racial
12 decision?

13 MS. PERALES: This Court made clear in Bush
14 v. Vera that the State may not make exactly the kind of
15 assumption, Justice Scalia, that you described. The --
16 the Court held in Bush v. Vera that you cannot use race
17 as a proxy for partisanship. You cannot make that
18 assumption. So if the State --

19 JUSTICE KENNEDY: Well, but -- but that was
20 because it was deliberate in that case, and that's not
21 the hypothetical that Justice Scalia has posed.

22 MS. PERALES: In this case, we contend that
23 the State removed Latino voters from district 23
24 because they were Latino and that --

25 JUSTICE KENNEDY: But that's not the

1 hypothetical that was posed to you by the Justice.

2 MS. PERALES: That if the State --

3 JUSTICE SCALIA: I'm assuming --

4 JUSTICE KENNEDY: As I -- as I understood it.

5 JUSTICE SCALIA: -- they're removing them
6 because they're Democrats, but I'm wrong about that.

7 MS. PERALES: Then it is still wrong to take
8 out 100,000 Latinos using that assumption. I mean, the
9 -- the act that was done was to slice through the most
10 Latino county in the United States, 95 percent Latino.

11 The people were not removed anywhere else. Clearly,
12 the State removed Latinos from this district and then
13 said, well, we did it because we were aiming for
14 Democrats.

15 JUSTICE SOUTER: But is it -- is it wrong
16 under the Equal Protection Clause or is it wrong under
17 section 2?

18 MS. PERALES: It's wrong under both, we would
19 argue in our brief.

20 JUSTICE SOUTER: No. But on Justice --
21 Justice Scalia's hypothesis, there is no intention to
22 remove Latinos as Latinos. And maybe the answer to
23 that is if you're removing Latinos, it does not matter
24 whether your motivation is invidious or not. I don't
25 know whether that's your position. But it -- if that's

1 not your position, then I think there's got to be a
2 difference between the -- the Equal Protection Clause
3 analysis and the section 2 analysis.

4 MS. PERALES: We contend that in this case
5 the removal is invidious because it was Latinos that
6 were identified and taken out and then -- for
7 incumbency protection, similar to what --

8 JUSTICE SOUTER: Well, is that because there
9 were no other Democrats who could have been identified
10 and taken out?

11 MS. PERALES: There's no testimony that the
12 State considered ever taking out anybody else but the
13 people in Webb County.

14 JUSTICE SCALIA: I thought you said that the
15 county was 92 percent Latino or something like that.

16 MS. PERALES: Yes, Justice Scalia.

17 JUSTICE SCALIA: Well, how can you -- how can
18 you possibly take out any substantial number of
19 Democrats without taking out Latinos?

20 MS. PERALES: That's exactly our point, that
21 the State removed --

22 JUSTICE SCALIA: Well, that's my point too.

23 (Laughter.)

24 MS. PERALES: Moving to what I -- the point
25 --

1 CHIEF JUSTICE ROBERTS: Can I -- can I -- I
2 don't understand -- I think your argument is at cross
3 purposes. I mean, the one point -- and you're making
4 the point that the Democrats do not vote overwhelmingly
5 for the Democratic candidate. They voted as much as 30
6 percent for Bonilla. But the Voting Rights Act is
7 concerned with whether or not a group voting ethnically
8 as a bloc can vote for candidates of its choice. Well,
9 if they're 30/70, it's not -- it's hard to think of
10 them as having a clear candidate of choice. So what
11 does it matter whether they're in or out?

12 MS. PERALES: I agree, Mr. Chief Justice, but
13 under the facts of this case, what had happened by 2002
14 was something very, very different. After 1996, when
15 Mr. Bonilla garnered the high of 30 percent among
16 Latino voters, not -- not in his district but among
17 that group --

18 CHIEF JUSTICE ROBERTS: Yes, the percentage
19 goes up, the percentage goes down.

20 MS. PERALES: Yes.

21 CHIEF JUSTICE ROBERTS: It depends on who's
22 running against him. At the low point, there was a
23 popular Hispanic candidate running against him in some
24 of those elections.

25 But it seems to me that the predicate for

1 coverage under the Voting Rights Act that a particular
2 group is being denied the opportunity to elect a
3 candidate of its choice doesn't even come into play if
4 you're right that the -- the vote is split over time,
5 depending on the circumstances in a particular
6 election.

7 MS. PERALES: No, Mr. Chief Justice, because
8 this is bloc voting at rates of 70 percent or higher,
9 and after 1996, that 70 percent bloc went to 80 percent
10 and then it went to 90 percent. And as the voters
11 became increasingly disenchanted, I suppose, with the
12 incumbent, that decline was steady. It didn't
13 fluctuate up and down. It was going down and it went
14 down even farther. Mr. Bonilla was always opposed by a
15 Latino candidate in each of his general elections that
16 he's had since he's been elected. So that hasn't
17 really been a factor for the voters. But as they
18 became more cohesive and they reached 55 percent of the
19 -- the registration in the district, they were poised
20 to elect their candidate of choice.

21 CHIEF JUSTICE ROBERTS: Well, then -- well,
22 but then -- and this is why I say it's an argument at
23 cross purposes. If you're right about that, then the
24 assumption that the Hispanic voters are going to be
25 voting Democratic is not one that was unfounded, which

1 I thought was your -- your first point.

2 MS. PERALES: We would contend, Mr. Chief
3 Justice, that voting against Congressman Bonilla
4 doesn't make you a Democrat. And it, in fact,
5 highlights that the State was seeking voters, Latino
6 voters, who had withdrawn their support for Congressman
7 Bonilla as opposed to just seeking Democrats because you
8 can vote against Congressman Bonilla and still vote
9 Republican in other races, as Latinos did. And you
10 could have been a former supporter of Congressman
11 Bonilla. It doesn't make you a Democrat in that sense
12 that race and partisanship are completely
13 interchangeable so that the State can scoop in and grab
14 100,000 people of the same race and then say later,
15 well, we were taking out Democrats.

16 CHIEF JUSTICE ROBERTS: It's not just the
17 State that's saying it, though. You have a district
18 court finding that ethnicity was not the predominant
19 factor, that politics was the predominant factor.
20 Maybe -- as Justice Scalia suggests, maybe they were
21 right, maybe they were wrong, but the point was that it
22 was being done for political purposes not for ethnic
23 purposes.

24 MS. PERALES: We agree, Mr. Chief Justice,
25 that the end goal was political in the sense of

1 incumbency protection, but a State may not use race as
2 the means to the end of protecting an incumbent. What
3 happened here was that the only group of voters who had
4 shifted their support away from Congressman Bonilla
5 were Latino. Democrats had never voted for Congressman
6 Bonilla. The problem inside this district was not a
7 problem of Democratic voters. It was Latino voters who
8 had supported him and withdrawn.

9 JUSTICE KENNEDY: Well, can -- can the State
10 use race as the means to an end of electing a new
11 candidate that the race wants? And what should be the
12 difference?

13 MS. PERALES: It should turn on the candidate
14 of choice --

15 JUSTICE KENNEDY: I mean, it sounds like
16 you're going to say race cannot be used as this basis,
17 but how can race be used not to protect an incumbent
18 but to allow the group to choose the representative of
19 its choice and then reelect him every year?

20 MS. PERALES: Well, district 23 was created
21 by the Balderas court pursuant to a finding under
22 section 2. So it was a remedial district under section
23 2 when it was created in 2001. And in 2002, when it
24 was used as a remedial district, it -- it elected a
25 Latino-preferred candidate in 13 out of 15 elections,

1 according to the State's expert, and came very close to
2 unseating Congressman Bonilla. The State's response
3 was essentially to punish Latino voters for voting
4 against Congressman Bonilla by slicing them out of the
5 district. So the State used race to achieve its end of
6 -- of incumbency protection.

7 JUSTICE ALITO: Well, if the -- if the
8 objective is just to get rid of voters who vote
9 against Congressman Bonilla, why is that an equal
10 protection violation? It's not done for -- for race or
11 ethnicity, but just to get rid of voters who vote against
12 him.

13 MS. PERALES: Because the group of voters who
14 had withdrawn their support were Latino voters. The
15 district court discusses the -- the interrelationship
16 of these phenomenon in its opinion at jurisdictional
17 statement appendix 128 when it says, the State acted to
18 shore up the incumbency of Congressman Bonilla, and the
19 next sentence is, his support among Latino voters had
20 dropped to 8 percent. It was, in fact, the -- the
21 voting behavior of Latinos as opposed to anybody else
22 who had caused the incumbency crisis, and it was
23 Latinos as Latinos who were removed from the district.

24 At the same time, however, the redistricters
25 sat down and figured out exactly how many Latinos they

1 wanted to leave inside this district to achieve a bare,
2 razor-thin Latino voting age majority population, and
3 that was done to give the impression of Latino support
4 for the incumbent. The chief redistricter --

5 CHIEF JUSTICE ROBERTS: Is that -- and what
6 relevance does that have? What provision of the
7 Constitution prevents you from leaving a majority of
8 one group in a district to create the impression that
9 the district supports a particular candidate?

10 MS. PERALES: The Fourteenth Amendment, Mr.
11 Chief Justice, race may --

12 CHIEF JUSTICE ROBERTS: That's what the
13 Fourteenth Amendment was passed for, to avoid creating
14 the impression that a particular group supports a
15 particular candidate?

16 MS. PERALES: This Court has held that race
17 may not be used for its own sake in redistricting, and
18 here race was used most gratuitously and cynically to
19 make sure that the State could say a majority of
20 Latinos in district 23 support Congressman Bonilla.
21 The chief redistricter in the House, Representative
22 Phil King, testified -- and this is expressed motivation
23 -- that they sought to maintain a 50 percent Latino
24 voting age majority in the district while making it
25 safer for Congressman Bonilla, which involved pulling

1 100,000 Latinos out.

2 Similarly --

3 CHIEF JUSTICE ROBERTS: And how many -- what
4 percentage would they have shifted from making it look
5 like a Hispanic opportunity district with about 51
6 percent to when it would actually be one? What
7 percentage does it shift from being looking like one to
8 being one, both above a majority?

9 MS. PERALES: Oh, yes, Mr. Chief Justice, but
10 -- but quite a distance. The -- as the Balderas court
11 --

12 CHIEF JUSTICE ROBERTS: But what's the
13 number?

14 MS. PERALES: The voting age population for
15 district 23, as created by the Balderas court, Your
16 Honor, was a great deal higher. It was 63 percent, and
17 that was what was able to give the 55 percent voter
18 registration --

19 CHIEF JUSTICE ROBERTS: Is that your number?
20 It has to -- anything short of 63, it's just looking
21 like it? I mean, really, you're asking us to draw a
22 very fine line between a -- in each case a majority
23 Hispanic voting age district, but in one case, it's a
24 constitutional violation and in the other case, it's --
25 it's required by the Voting Rights Act. So what is the

1 magic number between 51 and 63?

2 MS. PERALES: We would argue that race cannot
3 be used for its own sake, that if you're going to put
4 people together into a Latino majority district, it
5 should be to meet a purpose, for example, to create an
6 opportunity district under the Voting Rights Act.

7 CHIEF JUSTICE ROBERTS: What's the number?

8 MS. PERALES: That would be -- well,
9 depending on how many people it takes in that
10 particular district to elect a candidate of choice. In
11 this case it was 63 percent. It might be a different
12 number for a different district. But your --

13 CHIEF JUSTICE ROBERTS: So if this district
14 were drawn with 60 percent, you would say that's just
15 to make it look like a Hispanic district?

16 MS. PERALES: No, Your Honor.

17 CHIEF JUSTICE ROBERTS: No. So what's the
18 number? It's -- it's somewhat more than 51 percent
19 because you're saying that's a constitutional
20 violation, and I want to know how many more it takes
21 before it becomes what's required under the Voting
22 Rights Act.

23 MS. PERALES: Maybe I can answer the question
24 by going around to the court's finding, which was that
25 district 23 was created not as a Latino opportunity

1 district, that it would not operate to offer the
2 opportunity to elect the Latino preferred candidate.
3 And the -- and the district court found this on page
4 145-146 of our appendix to the jurisdictional statement.
5 And in that same paragraph, they said, but it has a
6 political nuance that Congressman Bonilla will be elected
7 from a Latino majority district.

8 CHIEF JUSTICE ROBERTS: I'm just trying to
9 get a number. If you're asking us to rule on a
10 constitutional violation, I'm asking to find out what
11 the number is that changes it from a political nuance
12 to a Hispanic opportunity.

13 MS. PERALES: That number would be the number
14 that shows Latinos have the opportunity to elect their
15 candidate of choice. It will be a different number for
16 each district, but it would always be in the evidence
17 of the case because the analysis is done on different
18 districts.

19 Here, all of the experts agreed that district
20 23 had been created so that it would not elect a Latino
21 candidate of choice, but that the State testified that
22 it wanted to keep it voting age majority, that they did
23 so because they wanted Henry Bonilla to run from a
24 Latino majority district. The State abandoned
25 traditional redistricting criteria to do so,

1 redistricting at the bloc level and splitting 6
2 election precincts out of 51 in Webb County, which is
3 wholly unnecessary even to equalize population in
4 either district. There is no reason for the State --

5 CHIEF JUSTICE ROBERTS: Would it have been
6 better --

7 MS. PERALES: -- to have done that.

8 CHIEF JUSTICE ROBERTS: -- would it have been
9 better in your view if they had excluded more Hispanics
10 so it didn't look like a Hispanic opportunity district?

11 MS. PERALES: Well, the State certainly could
12 have moved Webb County whole out of the district. It
13 depends on how they would have done the overall --

14 CHIEF JUSTICE ROBERTS: And -- and that would
15 have been preferable. It would have been preferable to
16 you if it was, say, 45 percent Hispanic rather than
17 50.8, or whatever it was.

18 MS. PERALES: Mr. Chief Justice, it -- it
19 just doesn't hang on a particular number. It -- it
20 turns on whether or not the district is an opportunity
21 district, and if it isn't an opportunity district, why
22 is the State sitting down and using race for its own
23 sake to be able to say we got 50.9 percent Latino
24 voting age population? We managed to zigzag that
25 boundary through the streets and -- and through the

1 neighborhoods of the City of Laredo so that we could
2 say it was a Latino majority district.

3 JUSTICE SOUTER: Well, isn't -- isn't one
4 answer that we were doing it, number one, because we
5 wanted to protect the incumbent and we also had to use
6 race to avoid a section 5 problem and a section 2
7 claim? You've got to use race for those purposes.

8 MS. PERALES: Well, under section 5, the
9 State went ahead and created district 25 as the offset
10 because it seemed fairly clear that district 23 had
11 been dismantled to such a degree it was no longer going
12 to be able to be used for section 5 purposes.

13 Similarly, under section 2, the State saw
14 that it was terribly vulnerable and so again tried to
15 make an offset district which caused its own problems.

16 So the use of race here to achieve the 50.9
17 percent voting age majority was not to satisfy the
18 Voting Rights Act, either section 5 or section 2.

19 JUSTICE SOUTER: So you could have used that
20 reasoning to create a district in the first place, but
21 you cannot use that reasoning to create an offset
22 district in the second place at the same time that
23 you're trying to protect an incumbent. I think that's
24 what you're saying.

25 MS. PERALES: To create a district with 50.9

1 percent voting age population here in this part of the
2 State, it would be obvious that you weren't going to
3 yield an opportunity district.

4 JUSTICE SOUTER: In other words, you're
5 saying that would be implausible as a section 2/section
6 5 justification, regardless of when you're doing it.
7 Is that --

8 MS. PERALES: Yes.

9 JUSTICE SOUTER: Yes.

10 MS. PERALES: Yes, most certainly.

11 This case represents an egregious use of race
12 in redistricting. Without the Equal Protection Clause
13 to protect minority voters, States will have free rein
14 to use race to manipulate not only electoral outcomes,
15 as it did here, but also the complexion of a district
16 in order to be able to express some kind of symbolic --

17 JUSTICE SCALIA: But, of course, you want
18 them to use race to manipulate outcomes. It's just
19 sometimes.

20 CHIEF JUSTICE ROBERTS: You may answer.

21 MS. PERALES: Thank you, Mr. Chief Justice.

22 To serve a compelling State interest, to
23 comply with the Voting Rights Act, yes, Justice Scalia,
24 it is appropriate. It was not appropriate here.

25 CHIEF JUSTICE ROBERTS: Thank you, Ms.

1 Perales.

2 Mr. Cruz.

3 ORAL ARGUMENT OF R. TED CRUZ

4 ON BEHALF OF APPELLEES

5 MR. CRUZ: Mr. Chief Justice, and may it
6 please the Court:

7 The central issue in resolving these various
8 challenges to mid-decade redistricting is determining
9 which institution is constitutionally vested with the
10 primary responsibility for redistricting. Elected
11 legislatures or Federal courts.

12 In Texas, for the first time in 12 years, the
13 legislature acted to adopt a congressional
14 redistricting map. That map, in turn, replaced one of
15 the most profoundly anti-majoritarian congressional
16 maps in the country with a map that reflects the
17 demonstrated preferences --

18 JUSTICE STEVENS: But may I ask, General
19 Cruz, are you talking about replacing the court-ordered
20 map or the preceding Democrat gerrymandered map?

21 MR. CRUZ: The legislature replaced the
22 court-ordered map, but the court found as a factual
23 matter that the court-ordered map, in the court's
24 words, quote, perpetuated the 1991 Democratic Party
25 gerrymander, and that was the court characterizing its

1 own map with the same judges.

2 JUSTICE STEVENS: Yes, but you don't think it
3 really perpetuated the same degree of gerrymandering
4 that was present in the earlier map, do you?

5 MR. CRUZ: Well, the court's map, under the
6 --

7 JUSTICE STEVENS: I'm asking you.

8 MR. CRUZ: Yes.

9 JUSTICE STEVENS: Do you think it did? Do
10 you think --

11 MR. CRUZ: Yes, we do.

12 JUSTICE STEVENS: -- the court-ordered map is
13 just as bad as the Democratic map?

14 MR. CRUZ: The district court found that it
15 had blunted some of the most egregious lines, but under
16 the district court's map, 28 of 28 incumbents were
17 reelected. So the identical outcome was yielded.

18 JUSTICE STEVENS: But is your opponent
19 correct in saying that in six of those districts, the
20 Democrat won even though the district was majority
21 Republican?

22 MR. CRUZ: That -- that is correct, and then
23 the district court --

24 JUSTICE STEVENS: Does that sound like a
25 gerrymander?

1 MR. CRUZ: It -- it depends. The districts
2 were drawn such that the Democrats who were running
3 were incumbency. And the reality of congressional
4 elections is that incumbency is a tremendous advantage,
5 and in the face of incumbency --

6 JUSTICE SCALIA: No. I was going to say I --
7 if I were gerrymandering, I would absolutely want to
8 leave majority other party districts in which the
9 people from the other party were voting for a candidate
10 from my party with some regularity. I'd want to do
11 that. That's exactly what I'd want a gerrymander to
12 do.

13 MR. CRUZ: And that's exactly right. These
14 districts were drawn to protect incumbents.

15 It is notable that if one looks on a national
16 level, the 2001 map drawn by the court led to the most
17 anti-majoritarian results of any of the 50 States in
18 the Union. There were only two other States with more
19 than five Members of Congress that saw a minority of
20 voters electing a majority of the delegation, and those
21 were Illinois and Tennessee. In each of those, 49
22 percent in Illinois elected one extra seat to Congress;
23 in Tennessee, 48 percent. In Texas, by contrast, 45
24 percent of the two-party vote and 41 percent of the
25 overall State vote elected not just a one-seat

1 majority, but a two-seat majority. And so on any
2 national level, the prior map was the most profoundly
3 anti-majoritarian.

4 Now, this Court resolved in -- in *Vieth* that
5 majoritarianism is not a constitutional mandate, but
6 that being said, as Mr. Smith characterized in *Vieth*,
7 he characterized the fundamental principle of democracy
8 -- and this is Mr. Smith's characterization -- is the
9 principle that a majority can elect a majority of the
10 delegation.

11 And as this Court concluded in *Gaffney v.*
12 *Cummings*, achieving political fairness, achieving a
13 rough sense of proportionality, such that a majority
14 can elect a majority of the delegation, is not only
15 legitimate, it is salutary. It is --

16 JUSTICE BREYER: All right. So I -- I wrote
17 an opinion, as you know, where I was agreeing with you
18 on that, and I wonder if -- if then the thing to do
19 would be to say, yes, indeed, a legislature can redraw
20 a map to prevent a minority of the voters electing a
21 majority of the congressional delegation. But when
22 they do that, there has to be some reasonable assurance
23 that it works the same way for both parties. I mean as
24 a standard. I thought my standard worked before. I
25 guess there wasn't that much agreement, but -- but --

1 (Laughter.)

2 JUSTICE BREYER: -- from the point of view of
3 -- of taking that standard, which you agree with, I'm
4 glad to say, apparently, and modifying it to be sure it
5 works out the same way for both.

6 MR. CRUZ: Justice Breyer, under the standard
7 articulated in your opinion in Vieth, in our judgment
8 the result would be a straightforward affirmance here
9 because the map that was adopted is precisely what was
10 advocated in Vieth of a majority of the population
11 electing a majority of the delegation.

12 That being said, the question here is not
13 whether that is required. Indeed, it is ironic. In
14 1992 the Republicans in Texas brought a political
15 gerrymandering challenge to the predecessor map here,
16 and that map was rejected -- that challenge was
17 rejected under Bandemer, and the district court in 1992
18 told the Republican plaintiffs -- said even though this
19 may be tilted against you, there is nothing to prevent
20 you, over the ensuing decade, from running candidates,
21 from building support, and from eventually taking
22 control by electing your candidates to the machinery of
23 government and adopting a map you deem fair.

24 That -- those words of the district court
25 prove prescient because that is precisely what happened

1 over the ensuing decade, and it is equally true today.

2 There is nothing in Texas to prevent the Democratic
3 Party from doing the exact same thing over the ensuing
4 decade if they can command a majority of votes at the
5 polls.

6 JUSTICE STEVENS: May I ask you this
7 question? Assume you're correct that as a whole the
8 plan is well-justified and makes gains and so forth.
9 Does that necessarily mean that every district within
10 the -- the plan is immune from constitutional attack?

11 MR. CRUZ: Of course, it does not, and there
12 are a variety of district-specific attacks. The
13 plaintiffs have framed their partisan gerrymandering
14 attack as one that focuses on the map as a whole. And
15 -- and the --

16 JUSTICE STEVENS: I understand.

17 MR. CRUZ: -- and the reason for that is that
18 in the Vieth decision, Justice Kennedy's concurrence
19 was the controlling concurrence, and it set out a
20 standard for subsequent partisan gerrymandering cases
21 that litigants should find a, quote, substantive
22 definition of fairness in districting that commands
23 general assent.

24 Rather than attempt to meet that challenge,
25 the plaintiffs have refused to discuss effects at all,

1 and that's not by accident because any assessment of
2 effects would yield that the current plan is more fair
3 than the predecessor.

4 JUSTICE STEVENS: And the -- the next
5 question I wanted to ask you is that if it is possible
6 there can be a single-district challenge, what is the
7 justification for the -- the cracking of district 24,
8 which was a majority Democratic district before, into
9 five different districts, none of which would elect a
10 Democrat.

11 MR. CRUZ: The legislature made a policy
12 judgment, and under the decision --

13 JUSTICE STEVENS: But is it -- is it defended
14 by anything other than political motivation?

15 MR. CRUZ: There were a host of --

16 JUSTICE STEVENS: I mean in district 24.

17 MR. CRUZ: There were a host of judgments
18 about the multiple districts that district 24 was
19 broken into, and the district court found, for example,
20 that Representative Grusendorf wanted the City of
21 Arlington contained in one single district. There were
22 a whole host of specific motivations about the
23 surrounding districts that were drawn.

24 Indeed, the district court said on remand
25 that appellants' argument ignores, as it must, the

1 reality that the lines are infused with the myriad
2 mixtures of local politics and accommodations, often
3 inconsistent with overall objectives of partisan gains.

4 That was the district court's finding on remand, that
5 there are a host of decisions here that have nothing to
6 do with partisan gain, that have to do with drawing a
7 map that are the constitutional responsibility of a
8 legislature in drawing a redistricting map.

9 Appellants frame their basic challenge on
10 partisan gerrymandering because they cannot look at
11 effects, because any examination of substantive effects
12 yields the conclusion that the current map is much more
13 fair than the prior. They disavow any examination of
14 effects. Instead, they frame it as solely partisan
15 intent, which has never been the standard under this
16 Court's precedents. But even under that standard, they
17 base it on a simple syllogism that is found nowhere in
18 the Court's precedents, a syllogism that says because
19 there was an extant legal map in place, the
20 redistricting was unnecessary. And so anytime there is
21 a court map, it is unnecessary redistricting.

22 The problem is appellants raise a false
23 dichotomy because every legislative redistricting is
24 voluntary. Whether it is Texas in 2003 or Pennsylvania
25 in 2001, the legislatures face a binary choice. They

1 can act and adopt their legislative policy preferences,
2 or they can not act, in which case they know with an
3 absolute certainty that a court-drawn map will govern
4 the election that follows. In Pennsylvania, to be
5 sure, it was a map that would be drawn subsequently,
6 but the decision is the same. Does the legislature act
7 to embody its preferences or does it allow a court-
8 drawn map to govern the elections in the States?

9 And I would note the consequence of the rule
10 that appellants are urging is that it would create an
11 enormous incentive for the minority party in every
12 State to attempt to deadlock the system, to shut down
13 at the beginning of the decade any effort to adopt a
14 map because if they're able to deadlock the system, if
15 they are able, as happened in Texas, to flee the State
16 and no map passes, the consequence of that -- they
17 would know for certain under appellants' rule -- is a
18 court will draw the map. And under the Upham standard,
19 the court map will reflect the preexisting policy
20 judgments of the predecessor legislature. So any
21 minority party has an incentive. If they can stop it
22 from happening at the beginning of the decade, they
23 have an incentive to seek a better map.

24 JUSTICE SCALIA: A -- a minority who was a
25 majority.

1 MR. CRUZ: Indeed, yes. That -- that is
2 predicated upon a preference for a decade ago rather
3 than what would be adopted now.

4 The Framers chose political checks for the
5 problem of partisan gerrymandering. They assigned
6 principal responsibility to elected State legislatures
7 whom they certainly knew would care a great deal about
8 politics, and they assigned supervisory authority to
9 another elected legislature, Congress.

10 The appellants point to a host of perceived
11 policy problems about the specter of seriatim
12 redistricting of legislatures coming back every 2 years
13 and tweaking the line here and tweaking the line there.

14 To the extent that is a problem, Congress is the
15 institution constitutionally authorized to address it,
16 and there is no indication that there is a looming
17 threat of seriatim redistricting. It didn't happen
18 here. It was the first time in 12 years the
19 legislature had acted.

20 JUSTICE STEVENS: General Cruz, could I ask
21 you another district-specific question? Because I want
22 to get it on the table and let you explain it to me.
23 Focusing on district 23 for a moment, assuming for the
24 moment -- and I -- I know you probably disagree with
25 this but -- that the results of the redrawing of

1 district 23 violated section 2, would you say that it
2 would be a defense to that violation that the
3 motivation was actually non-racial but purely
4 political?

5 MR. CRUZ: As the hypothetical is -- is
6 asked, the answer would be no. But -- but the
7 difficulty is if the motivation -- if there's a
8 violation of section 2, a political motivation does not
9 excuse it.

10 JUSTICE STEVENS: Not a defense.

11 And the second question for me is that if
12 there were a violation in district 23 of section 2,
13 could it be cured by creating a district -- the
14 district farther to the east. I forget the number. 25
15 I guess it was. Would that be a cure in your -- in
16 your judgment?

17 MR. CRUZ: The Court has concluded before --

18 JUSTICE STEVENS: Given what the Court said
19 in Shaw II.

20 MR. CRUZ: Right, right, that -- that a -- a
21 section 2 violation in one area cannot be corrected
22 with a discrete change in a different area.

23 JUSTICE STEVENS: Right.

24 MR. CRUZ: However, in De Grandy, the Court
25 also said that the assessment is the totality of

1 circumstances in the region under assessment. And in
2 the totality of circumstances, the district court made
3 factual findings against the plaintiffs that they
4 cannot demonstrate were clearly erroneous. Indeed,
5 that -- that is the problem with all of the district-
6 specific claims that all of the sets of plaintiffs have
7 brought is that this was tried in a full trial. The
8 district court took testimony, made credibility
9 determinations --

10 JUSTICE STEVENS: Except for the fact the
11 district court really didn't find a violation in
12 section 2. They didn't quite, as I'm suggesting, say,
13 well, given a violation on section 2, can we cure it
14 and have a defense by what we do in -- in district 25.

15 And I don't think De Grandy is an answer to that, and
16 I'm not quite sure whether you said yes or no on my
17 question.

18 MR. CRUZ: If they are wholly different areas
19 --

20 JUSTICE STEVENS: Yes.

21 MR. CRUZ: -- the Court has concluded no.

22 JUSTICE STEVENS: Yes.

23 MR. CRUZ: If they are --

24 JUSTICE STEVENS: So the argument -- the
25 question then would be whether district 25 is a wholly

1 different area from district 23.

2 MR. CRUZ: That's correct.

3 CHIEF JUSTICE ROBERTS: And what do we look
4 at to determine that? I know what we said in De
5 Grandy, but I mean how -- I mean, you talk about the
6 south and west Texas. I mean, on the other hand, 23
7 and 25 are actually not that close together. So how do
8 we know that we should be looking at all the way from
9 El Paso to the Gulf, as opposed to a narrower area?

10 MR. CRUZ: They are not that relatively close
11 together, but -- but that is because this region of
12 Texas is -- is vast and -- and relatively lightly
13 populated. And so district 23, for example, runs 800
14 miles in length because you've got miles and miles of
15 -- of desert land and open ranch land with very low
16 population.

17 The way the Court did it in De Grandy, which
18 is also the way the Court should do so here, is to look
19 at what the parties agreed to and how they litigated
20 the case.

21 In this case, everyone litigated the district
22 23 section 2 claim with a focus on south and west
23 Texas. Indeed, what speaks volumes is that if one
24 examines the demonstration map that the GI Forum
25 appellants introduced, which is at their -- their

1 appendix to their jurisdictional statement, page 241,
2 that map only covered south and west Texas. They
3 proposed no districts for the rest of the State. They
4 were focused --

5 CHIEF JUSTICE ROBERTS: But I didn't
6 understand Ms. Perales' argument to concern section --
7 district 25 at all.

8 MR. CRUZ: It did not, and -- and, indeed,
9 she has never joined in the racial gerrymandering claim
10 that has been brought by the -- by the Jackson
11 plaintiffs. Her claim has focused on -- as -- as it
12 concerns racial gerrymandering, not that the
13 legislature did too much of it, but -- but in a sense
14 that it should have done more. It should have been
15 more aggressive in seeking to create majority minority
16 districts. And -- and the district court has factual
17 findings that rule against those claims.

18 JUSTICE BREYER: Would a -- I'd like you to
19 elaborate a little because, as I understood your claim,
20 particularly in response to Justice Stevens, you agree
21 that if 23 violated section 2, they can't make up for
22 it somewhere else. You agree they can't make up for it
23 particularly when their only way is for political
24 reasons. But your argument is they never violated --
25 that 23 as redrawn didn't violate section 2.

1 MR. CRUZ: That's correct.

2 JUSTICE BREYER: And the reason that it
3 didn't violate section 2, I want to know, is what?
4 Because you have the three preconditions which seem to
5 be met, and then you have some kind of -- it doesn't
6 violate section 2 from De Grandy if, despite the
7 preconditions, there is some kind of overall
8 proportionality. But all that is rather unclear in my
9 mind, and I want to know what your view of it is.

10 MR. CRUZ: There are multiple reasons,
11 Justice Breyer. As an initial matter, the district
12 court found on page 131a of the Jackson appendix to
13 their jurisdictional statement that CD 23 was not an
14 effective minority opportunity district. So that's a
15 direct finding that the -- that the old CD 23 was not
16 an effective minority opportunity district.

17 CHIEF JUSTICE ROBERTS: And why was that?

18 MR. CRUZ: Because the -- the data
19 demonstrated that a majority of Hispanic voters were
20 not able to elect their candidate of choice. Although
21 Congressman Bonilla consistently commanded a
22 significant percentage of Hispanic votes, he did not
23 command a majority, and the candidate for whom a
24 majority voted did not prevail in the congressional
25 election.

1 JUSTICE STEVENS: But isn't that somewhat
2 inconsistent with the decision to reshape the district?
3 Why did they do it then?

4 MR. CRUZ: What the legislature did -- the
5 legislature's express intention was to shore up
6 Congressman Bonilla's electoral chances, and -- and it
7 was explicitly because Congressman Bonilla is a valued
8 member of the delegation and the legislature made a
9 judgment that they wanted to increase his margin of
10 victory. If one --

11 JUSTICE KENNEDY: And -- and in your view,
12 that justification allows the creation of district 25,
13 which has, as far as Latino population, people of quite
14 different economic backgrounds and so forth, you know,
15 the -- the two-ended -- the district on the two ends.

16 MR. CRUZ: We did not --

17 JUSTICE KENNEDY: That -- that to me was --
18 was not discussed much in your brief, but it's a
19 serious Shaw violation. And -- and the two are really
20 linked, 23 and 25, in this respect because it was by
21 virtue of what it did in 23, that the State claims a
22 right to do what it did in 25.

23 MR. CRUZ: We did not place our principal
24 emphasis, with respect to 25, on the Voting Rights
25 Act's concerns potentially raised by the alterations in

1 23. That was a motivation, but it's not our principal
2 motivation. Our principal argument on 25 is that there
3 are a series of factual findings the district court
4 made that are not clearly erroneous and, indeed, we
5 would submit, are -- are completely supported by the
6 record to --

7 CHIEF JUSTICE ROBERTS: Do you have a -- a
8 section 5 argument with respect to district 25 as
9 opposed to a section 2 argument involving district 23?

10 MR. CRUZ: The legislature was certainly
11 concerned about section 5, and with respect to the
12 adjustment in -- in district 23, it was possible that
13 the Department of Justice might deem the alteration of
14 district 23 to be something that would be retrogressive
15 and, accordingly, having a district that was -- a
16 performing Hispanic opportunity district would increase
17 the chances of preclearance. So -- so that was a
18 factor in the consideration, was a desire to comply
19 with section 5 and also to comply with section 2,
20 although section 5 was the -- the principal focus of
21 the legislative discussion.

22 CHIEF JUSTICE ROBERTS: Is it permissible for
23 a legislature concerned with section 5 to take race and
24 ethnicity in account -- into account in drawing a
25 district?

1 MR. CRUZ: This Court has never squarely
2 resolved that. This Court has assumed in the racial
3 gerrymandering cases, assumed without deciding, that
4 compliance with the Voting Rights Act is a compelling
5 interest. And the -- the districts that have been
6 struck down have been struck down as not being narrowly
7 tailored. Although we advance that argument, we don't
8 have to prevail on that argument for district 25 to
9 survive the racial gerrymandering claim.

10 JUSTICE KENNEDY: And as to 23, do you want
11 this Court to say that it's constitutionally
12 permissible to take away a number of minority voters
13 from the district, but leave just enough so that it
14 looks like a minority? Is that a permissible use of
15 race? It -- it seems to me that's an affront and an
16 insult.

17 MR. CRUZ: Except the district court found as
18 a factual matter that what happened in district 23 was
19 wholly political. It was not racial, so that the
20 voters were not removed because of race. They were
21 removed because of politics.

22 JUSTICE KENNEDY: Well, but -- but the
23 additional finding is that 50 percent were kept to make
24 it -- to make it look good.

25 MR. CRUZ: The -- the legislature was aware

1 of -- as this Court has said, the legislature will
2 always be aware of the racial composition of a
3 district. But the legislature specifically -- for
4 example, unlike *Bush v. Vera*, there are no bloc-level
5 cuts based on race. Indeed, in district 23, what the
6 legislature did, by and large, is go straight down
7 Interstate 35 which cuts right in the middle of Webb
8 County. Now, if one considers Webb County, there --
9 there are two halves of it. There is the half that
10 moved into new district 28. Now, those voters
11 presumably cannot complain about being disenfranchised
12 in that. At least the Hispanic voters there are now in
13 a unquestionably performing Hispanic opportunity
14 district that elects an Hispanic Democrat to Congress.

15 The remaining voters in Webb County -- in 2004,
16 Congressman Bonilla carried a majority of Webb County,
17 and so it is difficult to see who is being
18 disenfranchised, given that both halves of Webb County
19 are electing a Congressman for whom a majority of their
20 voters are voting.

21 JUSTICE SOUTER: Why -- in -- in --

22 CHIEF JUSTICE ROBERTS: Go ahead. I'm sorry.

23 JUSTICE SOUTER: In -- in contrast to that,
24 however, you could not make that argument or -- or that
25 response with respect to -- to district 24, the

1 district in which the -- the Black vote was -- was
2 cracked. And in response to earlier questions from
3 Justice Stevens, you -- you mentioned there were a
4 number of motivations for dividing it up the way it
5 did, and -- and yet, as you also acknowledge, those
6 differing motivations don't answer a -- a section 2
7 argument. What is your answer to the section 2 claim?

8 MR. CRUZ: Well, as you know, Justice Souter,
9 purpose under the '82 amendment is irrelevant to
10 section 2. It is an effects-only test, and -- and the
11 district court had a series of factual findings, most
12 of which appellants did not even challenge until their
13 reply brief, each of which is independently sufficient
14 to defeat their claim. The -- the district court found
15 against them on all three prongs of Gingles, and those
16 findings were fully supported by the record.

17 As an initial matter, the appellants
18 attempted to frame this as debating the legal question
19 over whether 50 percent is an absolute barrier. The
20 district court concluded that it needn't resolve that
21 question because the facts here presented no
22 opportunity to determine if there might be some
23 tolerable deviation below 50 percent. In this case,
24 African American voters in old district 24 comprise
25 less than 22 percent of the voting age population.

1 JUSTICE SOUTER: But -- but following Georgia
2 and Ashcroft, isn't -- isn't that a possibility that we
3 should consider as a satisfaction of what has come to
4 be known as the -- you know, the first of -- of the
5 Gingles factors?

6 MR. CRUZ: In our judgment, Georgia against
7 Ashcroft expanded the flexibility for States to
8 determine how to comply with the Voting Rights Act.
9 Georgia against Ashcroft obviously was a section 5
10 case, and it determined that in considering
11 retrogression, that opportunity districts and influence
12 districts should both be considered. It surely did not
13 mean that there was a cause of action now for any
14 plaintiff to argue that any conceivable influence
15 district must be drawn. That goes entirely against the
16 central theme of Georgia against Ashcroft, which is
17 that States have flexibility in choosing a
18 representational model for voters in that State.

19 JUSTICE SOUTER: But it -- it is not
20 inconsistent with Georgia and Ashcroft to say that for
21 -- for much the same reason, States have less
22 flexibility in cracking influence districts once they
23 have been established.

24 MR. CRUZ: That might perhaps be true if the
25 plaintiffs could demonstrate the other Gingles prongs,

1 but on the second and third prong, the district court
2 found that African American voter cohesion was far from
3 clear and there was absolutely no cohesion between
4 African Americans and Hispanics in district 24.
5 Indeed, they voted in an almost completely polar manner
6 in Democratic primaries.

7 And third, the district court found that
8 there was not Anglo bloc voting.

9 And so all three of the prongs -- what the
10 district court found as a factual matter is that
11 district 24 functioned as an Anglo Democratic district.

12 And indeed, this case is unusual in that there were
13 some extraordinary direct testimony that the way
14 district 24 operates is not accidental, that in 1991,
15 it was explicitly drawn by Anglo Democrats for the
16 specific purpose of electing Anglo Democrats and only
17 Anglo Democrats. And that was testimony not from a
18 State witness but from Congresswoman Eddie Bernice
19 Johnson, a Democratic African American incumbent from
20 the adjoining district who was in the State legislature
21 in 1991, and she said the African American population
22 there was deliberately split up to create a district
23 that would be -- elect white Democrats. That direct
24 testimony is extraordinary and it shows that what the
25 data demonstrate, which is that white Democrats control

1 the district -- and that's what the district court
2 found as a factual matter -- is not an accident. It
3 was precisely the intended effect of the map-drawers.

4 Indeed, if one looks to the three races that
5 the appellants' experts examined that were African
6 American versus Anglo in the primaries, of those three
7 races, an African American candidate of choice who was
8 Black prevailed in only one.

9 Of the 20 races appellants' experts examined,
10 of those 20, only one Black candidate prevailed, and
11 that case, the district court found, was aberrational
12 because that candidate was Ron Kirk. He was a former
13 mayor of the City of Dallas. He was a very popular,
14 local politician with a strong friends and neighbors
15 effect.

16 If you take that aberrational case out, the
17 two other cases appellants' experts looked to both
18 showed that the African American candidate, one of whom
19 was supported by 76 percent of African American voters,
20 lost. And indeed, what happened was the Anglos and the
21 Hispanics voted in virtual unison against the African
22 American candidate.

23 That data -- if one looks to the endogenous
24 races, there had never been an African American
25 opponent to Martin Frost, or the exogenous races, those

1 three we talked about -- the data demonstrate quite
2 persuasively that African Americans were drawn into a
3 district where they did not have an equal opportunity
4 to elect their candidate of choice because they lacked
5 the ability to elect a Black candidate. Now, they
6 could choose to do otherwise, but in this district,
7 they could not choose to elect a Black candidate. And
8 that was the district court's finding and that's what
9 the data demonstrated.

10 CHIEF JUSTICE ROBERTS: Counsel, can I move
11 you south and west again, back to district 23? How do
12 we tell -- as redrawn, it had what? 50.8 percent. And
13 I gather that that's not considered a Hispanic
14 opportunity district because of lower voting turnout,
15 registration, participation? How do we tell when
16 something is being done to make it look like a Hispanic
17 district and, instead, when it's being done for the
18 opportunity of providing a Hispanic opportunity
19 district if voter turnout and registration are
20 increased?

21 MR. CRUZ: The district court made a finding
22 that the reason district 23 was altered was to increase
23 the chances of Congressman Bonilla prevailing. And in
24 particular, if one looks to Webb County, which is the
25 county that was split, Webb County centers on the City

1 of Laredo. And in 2002 -- the race that the GI Forum
2 appellants focus on principally -- the candidate that
3 ran against Congressman Bonilla was Henry Cuellar, a
4 popular, local politician from Laredo, and he had a
5 very strong following in Laredo. And as a consequence,
6 Mr. Cuellar did very well in that election, came within
7 slightly under 4 points of beating Mr. Bonilla and Mr.
8 Bonilla's percentage of the -- of the Latino vote
9 dropped to its lowest historic point.

10 That, as the district court found, was also
11 aberrational because of Mr. Cuellar's very strong local
12 support, and the clearest evidence of that is under the
13 new map, when half of Webb County was placed in the
14 adjoining district, district 28, Mr. Cuellar ran
15 against the incumbent Democratic Congressman, Ciro
16 Rodriguez, and beat him in the primary, which
17 demonstrates that his success was because the -- the
18 voters in Laredo are supporters of Mr. Cuellar and,
19 accordingly, voted for him against either opponent,
20 Henry Bonilla or Mr. Rodriguez.

21 And so, when the legislature was determining
22 which section of voters to remove for political
23 reasons, the region that voted heavily against Mr.
24 Bonilla in the preceding election, Laredo, Webb County,
25 was a natural place to move voters who had in the last

1 election demonstrated they would vote for his opponent.

2 Under any assessment of 23, the prior map had
3 five districts that were indisputably Hispanic
4 opportunity districts, plus district 23 that elected
5 Congressman Bonilla, an Hispanic Republican. The
6 current map has six districts that are indisputably
7 Hispanic opportunity districts, plus district 23 which
8 elects Henry Bonilla. So the result is the same in
9 district 23, and there is an additional Hispanic
10 opportunity district in district 25.

11 If I may turn to district 25 and return to
12 Justice Kennedy's questions earlier about racial
13 gerrymandering with respect to that district.

14 The first indicium this Court has looked to
15 in racial gerrymandering case -- cases is unusual or
16 bizarre shape, and on that indicium, this district does
17 not fall anywhere near the districts this Court has
18 struck down as racial gerrymanders.

19 JUSTICE KENNEDY: Well, of course, the reason
20 the lines are straight is nobody is there.

21 (Laughter.)

22 MR. CRUZ: But those counties have to be
23 placed in some district. And -- and so the appellants
24 call a series of seven whole contiguous counties a land
25 bridge, but those are very sparsely populated counties.

1 In whatever district they're in, they're going to have
2 to connect with a population zone. And what the
3 district court found as a factual matter is that the
4 elongated nature -- the relatively elongated nature of
5 district 25 was a function of the geography and the
6 fact that you have population along the border and then
7 you have a large space of relatively low population,
8 and then you have to get back up to population. So
9 Texas historically has run north-south districts to get
10 enough population to form a congressional district
11 under this Court's one person/one vote precedents.

12 District 25, if one examines -- the district
13 court expressly found that the plaintiffs failed to
14 prove purposeful discrimination. The State defendants
15 introduced at trial a Cromartie analysis that was
16 precisely drawn from this Court's first Cromartie
17 decision, *Hunt v. Cromartie*, and it's found on pages
18 331 and 332 of the joint appendix. And what that
19 analysis did is precisely what this Court found in
20 *Cromartie I* was sufficient on summary judgment to
21 defeat a claim of racial gerrymandering.

22 It assessed the lines in Travis County, the
23 northern part of district 25, and it asked are the cuts
24 the legislature made driven by politics or driven by
25 race. And so what the State's expert did is drew a map

1 that would be based on race that would maximize the
2 Hispanics in district 25 on the northern end of Travis
3 County. He then compared that map to the map that the
4 legislature had drawn and said what are the differences
5 between what it would look like if the legislature was
6 attempting to maximize race as compared to what it
7 would look like if it was attempting to maximize party.

8 And what the State's expert found is there was on the
9 order of a 1 percent differential which is you're
10 talking between 24 and 25 percent. So it was about 4
11 percent differential of fewer Hispanics in the State's
12 map and more Democrats in the State's map. And so what
13 the State's expert found is precisely along the lines
14 as the evidence in Cromartie I that the legislature had
15 drawn the map looking for Democrats rather than looking
16 for Hispanics.

17 In addition, if one examines the two
18 numerical measures of compactness, smallest circle and
19 perimeter to area, smallest circle this map measured
20 8.5, which is smaller than North Carolina's
21 reconfigured district 12 upheld in Cromartie, which was
22 8.6 Its perimeter-to-area score, 9.5, is terribly low.

23 As a -- as a means of comparison, districts 18, 29,
24 and 30 that this Court struck down in Vera had
25 perimeter-to-area scores of 106, 144, and 69, as

1 compared to district 25's score of 9.5.

2 JUSTICE STEVENS: General Cruz, if you've
3 finished your answer -- I didn't want to interrupt you,
4 but that makes -- reminds me of a question I wanted to
5 answer you because -- ask you, rather, because you make
6 a very persuasive argument in your brief, which I found
7 very helpful, that the -- a State should be able to
8 correct a prior gerrymander by -- for -- with political
9 motivations.

10 I would like you to comment on this
11 suggestion. Supposing we said they have an absolute
12 right to do that with one caveat, that any new district
13 has to be more compact -- no more -- no less compact
14 than its predecessor, wouldn't that avoid all sorts of
15 problems?

16 MR. CRUZ: That could be a salutary policy
17 goal, and -- and Congress could certainly enact that.
18 But I -- I see no -- no source in the Constitution
19 placing that requirement upon States particularly --

20 JUSTICE STEVENS: We have -- we have quite a
21 history, as you just identified in your response to
22 Justice Kennedy, of being concerned about particularly
23 grotesque shapes, and that's why they developed these
24 tests of compactness for use in this very litigation.
25 And the fact that the lawyers have come up with this

1 approach to it makes me think maybe it does have some
2 relevance to the whole problem we're trying to
3 confront.

4 MR. CRUZ: At an extreme level, lack of
5 compactness can indicate something was going on. If
6 one looks at the districts this Court has struck down,
7 if you look at Bush v. Vera -- and we have in the joint
8 appendix the silhouettes of those districts that were
9 -- you know, had fingers going out in every direction.
10 There's plainly something questionable going on.
11 These districts are nothing like that.

12 JUSTICE STEVENS: When I -- when I was
13 thinking about this problem, I looked at district 24.
14 The thing that was interesting to me is that most of
15 the neutral justifications that you describe -- and
16 they're certainly in the -- in the five new districts
17 that replaced it, but in the key part of the population
18 that was moved, it becomes much less compact than it
19 was before.

20 MR. CRUZ: The -- the new map --

21 JUSTICE STEVENS: Which it seems to me quite
22 significant.

23 MR. CRUZ: The -- the new map was somewhat
24 less compact than the prior map, but it does --

25 JUSTICE STEVENS: And its particularly --

1 particular reference to the targeted group that was
2 moved out of the district.

3 MR. CRUZ: But lack of compactness does not
4 -- no one has brought a racial gerrymandering claim
5 with respect to districts other than 25 and, to some
6 extent, 23, although the 23 challenge is not a typical
7 racial gerrymandering claim.

8 JUSTICE STEVENS: I'm suggesting the
9 challenge to 24 should be a political gerrymandering
10 challenge.

11 MR. CRUZ: I understand that, although a
12 majority of the Court in Vieth concluded that in order
13 for a political gerrymandering claim to succeed, that
14 there must be a substantive standard for fairness to
15 measure the map against some baseline.

16 JUSTICE KENNEDY: Well, Justice Stevens --

17 JUSTICE STEVENS: And that's the standard I'm
18 suggesting. Right. That's exactly the point.

19 MR. CRUZ: But --

20 JUSTICE KENNEDY: The compactness standard.

21 JUSTICE STEVENS: Yes.

22 MR. CRUZ: But the Court had before it --
23 appellants urged in Vieth compactness, principles of
24 cracking, principles of packing. One of the dissenting
25 Justices advocated that standard, and yet, a majority

1 of the Court -- the plurality explicitly rejected it.
2 And Justice Kennedy's concurrence explicitly rejected
3 the standards discussed in the dissents, including a
4 standard looking to compactness.

5 JUSTICE SCALIA: I'm not sure that Justice
6 Stevens is suggesting that as a standard. He's
7 suggesting it as a disqualifier. If it's not as
8 compact, it's no good, but if it is as compact, he's --
9 I -- I don't think he's suggesting it's okay. So we
10 still don't have a standard.

11 JUSTICE STEVENS: No. I was suggesting that
12 would be a safe harbor, and -- and it would just --

13 JUSTICE SCALIA: A safe harbor from an
14 unknown standard.

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: Jump in whenever you
17 want.

18 (Laughter.)

19 MR. CRUZ: Under any standard that looks to
20 the substantive lines on the map, anything that -- and
21 we have spent hours racking our brains trying to think
22 of a standard for litigation purposes that would yield
23 the old map being more fair than the new one. We're
24 not aware of any coherent standard that looks to
25 substance.

1 JUSTICE KENNEDY: Let -- let me ask you this.
2 Suppose you have a court that's required to
3 redistrict, and the court has two experts. Expert
4 number one says, here is a plan. It's totally partisan
5 in its orientation, but it balances the Democratic and
6 the Republican registration. It gives them exactly
7 proportional representation. Plan number two gives
8 minimal consideration to this, but it's compact. It
9 takes into account geography, communities of interest,
10 and so forth. Would the district court be in error if
11 it adopted the first plan?

12 MR. CRUZ: Well, that -- that question
13 actually was litigated in this case, the first time in
14 2001, as part of the litigation over how to draw the
15 new map. One of the arguments that was presented to
16 the district court was that the old map was no longer
17 consistent with how Texas voters were voting. And the
18 district court concluded that under the Upham case, it
19 lacked the authority to take that into account and to
20 change the demonstrated policy preferences of the last
21 legislative map. And that's why, on remand in this
22 case, the district court found although it didn't
23 intend to work partisan bias, that that was the effect
24 of its map.

25 JUSTICE KENNEDY: Well, but my hypothetical

1 is designed to suggest that partisanship, political
2 lines should be certainly a secondary consideration to
3 a valid principled scheme and that perhaps in the
4 hypothetical case, you could reverse a district court
5 for abuse of discretion in -- in overemphasizing
6 political considerations. And then if that's true, it
7 means that there is some standard lurking out there
8 indicating that political considerations should be of
9 at least secondary importance.

10 MR. CRUZ: In this case, the district court
11 was presented with maps that would be more fair on --
12 on pretty much any measure of partisanship, and what
13 the district court concluded is it didn't have the
14 ability -- that making that judgment was a political
15 judgment, and it was the legislature's job to do it.
16 And so it drew in the districts it was required to draw
17 because Texas had two new districts. It drew in what
18 it believed the Voting Rights Act required, and beyond
19 that, it made as few changes as possible.

20 And so the district court recognized that the
21 consequence of that map-drawing technique is whatever
22 partisan bias was there before is reflected in its own
23 map that just neutrally carries over the preexisting
24 bias. And that's why the district court found it was
25 perpetuating the prior bias, not because it intended to

1 do so, but because it was consciously restraining
2 itself from doing anything to alter the partisan
3 composition other than to carry over what was already
4 there.

5 JUSTICE BREYER: What -- district 24. I take
6 it -- it's a long walking stick is what it looks like.

7 And the -- I take it you're saying when I go back to
8 the record here, I'll discover a finding that the
9 district court made. They said this was not an effort
10 to use race to district. Is that right?

11 And one of the reasons that you think that is
12 because, although it's not a circle, it's not
13 absolutely terrible. That -- that is a supporter of
14 the ultimate conclusion they did not use race. Is that
15 right?

16 MR. CRUZ: Justice Breyer, that's -- that's
17 exactly correct --

18 JUSTICE BREYER: Then -- then if I -- if I --
19 so I have to go back, look at the record, and see what
20 it says.

21 Now, suppose I came to a different
22 conclusion. Then you might still win on this point if
23 the rationale for using race to district was because we
24 want to avoid a section 2 violation. And there, you
25 would lose, however, because you can't use that

1 rationale unless, according to Bush v. Vera, the
2 district that you draw is, in their words, reasonably
3 compact. So, again, you'd have to say that this
4 district that looks like a walking stick is reasonably
5 compact for that other purpose. Is that right?

6 MR. CRUZ: Well, although we would submit
7 this district is reasonably compact.

8 JUSTICE BREYER: Yes, so I understand that.
9 But -- but if -- if I -- you have two bites at this
10 apple with your reasonably compactness. One, you want
11 to say it wasn't -- you think this proves it wasn't to
12 use race in the first place, but if I'm wrong on that,
13 it's still a legitimate use of race because it's a
14 reasonably compact effort to conform with section 2.

15 MR. CRUZ: Justice Breyer, you're correct
16 that if the Court concludes this district is not
17 reasonably compact, then under its precedents, it
18 wouldn't be a narrowly tailored way to satisfy a voting
19 rights violation, but --

20 JUSTICE BREYER: And is there anything I can
21 look to to decide what reasonably compact means in that
22 second --

23 MR. CRUZ: Well, the district court's finding
24 was that Texas geography and population dispersion
25 limit the availability of district compactness in

1 southern and western regions of the State, and that was
2 at the Jackson jurisdictional statement, page 154a. So
3 that's -- there's -- there's a challenge in Texas
4 because you've got these --

5 CHIEF JUSTICE ROBERTS: You're talking about
6 district 25. Right?

7 MR. CRUZ: 25, yes. Yes, we're talking about
8 25.

9 JUSTICE BREYER: Yes, 25.

10 MR. CRUZ: 25 has seven whole counties and
11 only two county splits, which is unusual. Most of the
12 cases that this Court has struck down what it's
13 perceived to be racial gerrymanders have been a number
14 of county splits. In this case, the county splits --
15 those were mandated to -- because we have achieve
16 perfect equipopulosity, so we had to get exactly,
17 within one person, precise lines. But within -- in
18 between the two, they are whole contiguous counties
19 that are longstanding geographic units.

20 The testimony is clear that the -- the
21 legislature made no effort to avoid Anglo voters. It's
22 not like they snaked around. And even the lean of it
23 is a simple fact that the Gulf of Mexico leans like
24 this, and it follows the geographic boundaries of the
25 State, so that if one examines this district next to

1 the other districts, it follows historic lines that
2 have been used in Texas.

3 JUSTICE STEVENS: General Cruz, why wouldn't
4 it be a -- at least a helpful guide to what is
5 reasonably compact to compare with the preceding
6 district? Now, that fits 24 but not necessarily 25 I
7 understand. Wouldn't that make -- make sense if the
8 reasonable compactness is -- is one of the tests?

9 MR. CRUZ: One could certainly compare the
10 preceding district, and with respect to the preceding
11 district, the differential is -- is not great. It is
12 somewhat more compact.

13 But there were other policy agendas the
14 district court --

15 JUSTICE SCALIA: When you're carved out of a
16 couple of preceding districts, which is the preceding
17 district? I mean, isn't -- isn't that a problem with
18 that test?

19 MR. CRUZ: That -- that is a certainly a
20 challenge.

21 JUSTICE STEVENS: I suppose if you have a
22 plaintiff suing, it would be the one he lives in.

23 MR. CRUZ: You know, if you compare, for
24 example, district 25's perimeter-to-area score is 9.6.

25 You know, if -- if one looks at, for example, the plan

1 1385 submitted by GI Forum, that has one plan, district
2 -- one district, district 28, with a higher perimeter-
3 to-area score of -- of 10.0. And indeed, the district
4 court found as a factual matter that the demonstration
5 plan submitted by the GI Forum appellants was -- was
6 less compact and critically would not perform.

7 Going back to the section 2 question about
8 district 23, the district court found that one district
9 in the demonstration plan, district 28, had only a bare
10 majority of citizen voting population, 50.3 percent,
11 and there was undisputed testimony that for a district
12 to perform in this region, it had to have --

13 CHIEF JUSTICE ROBERTS: Why did they have --
14 why did have just 50.3 percent?

15 MR. CRUZ: Because the Hispanic population is
16 dispersed enough that one can't -- one can't draw --

17 CHIEF JUSTICE ROBERTS: They're doing that to
18 make it look like whoever was elected had Hispanic
19 support in that district? Is that --

20 MR. CRUZ: We did not ascribe motives to
21 them. They -- they drew it to demonstrate that -- that
22 you could draw a district with a bare majority of
23 citizen voting population, although their experts also
24 testified that a bare majority will not elect in this
25 region because of lower voter -- voter turnout.

1 JUSTICE BREYER: On the -- either it is
2 reasonably compact or it isn't. If it is reasonably
3 compact, we never get into Bush v. Vera, whatever, the
4 Vera case in the first place. And if it isn't, you
5 can't get out of it by saying it's an effort to cure a
6 section 2 violation.

7 MR. CRUZ: Correct, but with respect to the
8 question of racial gerrymandering, this Court's
9 question is, is race the predominant motivation?
10 There's a direct factual finding by the district court
11 that it was not. Indeed, the district court said that
12 the -- that the measures of compactness, examined in
13 relationship to the geography and population, reflect
14 the sheer size and population distribution of this
15 area, rather than a calculated stretch to find voters
16 of a particular ethnic makeup.

17 JUSTICE KENNEDY: You mean 25 -- the -- the
18 Latino makeup of 25 is accidental?

19 MR. CRUZ: It is a function of the population
20 in south and west Texas.

21 JUSTICE KENNEDY: It's accidental.

22 MR. CRUZ: The -- it is not accidental in the
23 sense that the legislature was unaware of it, and as this
24 Court has said, whenever a legislature is districting,
25 it is aware of the -- the racial distribution. But it

1 was drawing an additional district there, and the
2 district court found that in drawing those lines, it
3 did not reach out to segregate voters on either side
4 based on race, that that was not its intent and that
5 was not the effect of what it in fact drew.

6 JUSTICE SOUTER: What -- what do you say to
7 Ms. Perales' argument that the -- the numbers are just
8 too precise to have been reflective of anything but a
9 racial motivation, and that, therefore, the -- the
10 district court's finding was clearly erroneous?

11 MR. CRUZ: Well, that -- that concerns
12 district 23, and -- and --

13 JUSTICE SOUTER: Aren't they equally precise
14 here?

15 MR. CRUZ: No. District 25 is -- has a -- a
16 large majority on Hispanic voting age population and
17 also citizen voting age population.

18 JUSTICE SOUTER: I -- I misspoke. Okay.

19 MR. CRUZ: With respect to district 23,
20 there's an unusual aspect to the GI Forum appellants'
21 argument in that it's unlike a typical racial
22 gerrymandering claim where they say you're -- you're
23 seeking to draw lines based on race. She's arguing
24 they should have been more aggressive drawing lines on
25 -- based on race, which is -- which is not an argument

1 that sounds in the Shaw line of cases. What the
2 district court found is that it was purely a political
3 motivation that drew that decision, and if one is
4 looking to the Voting Rights Act, under any assessment,
5 the district is performing identically as it did
6 before.

7 And on the totality of circumstances, either
8 based on the region, in which case their argument --
9 argument is one for maximization -- they have six of
10 seven districts. They're arguing they're entitled to
11 seven of seven districts -- or on a statewide basis,
12 the district court found totality of the circumstances
13 was met.

14 With respect to district 24, the findings --
15 the -- two of the three findings, with respect to Anglo
16 bloc voting and cohesion, the appellants have made no
17 attempt to get around other than in their reply brief,
18 they have -- have briefly challenged them. But it was
19 their own expert who provided the information that the
20 district court found credible, that there was no
21 cohesion, that African Americans couldn't elect their
22 candidate of choice. And it is undisputed that in new
23 district 9, African Americans can elect their candidate
24 of choice. And so from a statewide -- from a totality
25 of circumstances perspective, the ability to elect a

1 candidate of choice for African Americans in the State
2 is higher under this map than it was in the preceding
3 map.

4 In sum, the basic question here is whether
5 courts or legislatures are the principal decision-
6 makers. If appellants' proffered rule is adopted, it
7 removes the safety valve that the Constitution
8 provided. It is rarely employed because it is rare
9 that one finds a plan so out of step with the
10 demonstrated preferences of voters for a decade. We
11 are aware of no other plan that allowed a minority of
12 voters who never crossed the 44 percent threshold to
13 control the majority of the delegation. We're aware of
14 no other map in the country.

15 And so if there is a standard that this is
16 impermissible, that consequence would either elevate
17 courts above legislatures, contrary to the
18 constitutional text and to 4 decades of this Court's
19 precedents, or if it looks to substance, it would call
20 into question the districts in a host of other
21 districts because on any objective measure, the
22 districts in Texas are fair as a partisan matter,
23 compared to the other States, compared to the
24 predecessor map, compared to any metric that one
25 applies. Indeed, the social scientists say, based on

1 the seats/votes curve, that given that Republican
2 voters are currently voting at roughly 60 percent for
3 Republican candidates, one would expect a higher
4 percentage of Republican candidates elected than --
5 than what this map is yielding. And so on any coherent
6 measure of a substantive measure of fairness, this map
7 should survive.

8 If there are no further questions.

9 CHIEF JUSTICE ROBERTS: Thank you, Mr. Cruz.
10 Mr. Garre.

11 ORAL ARGUMENT OF GREGORY G. GARRE

12 ON BEHALF OF THE UNITED STATES,

13 AS AMICUS CURIAE, SUPPORTING APPELLEES

14 MR. GARRE: Thank you, Mr. Chief Justice, and
15 may it please the Court:

16 The United States' participation in this case
17 is addressed to the Voting Rights Act issues, and our
18 position is that the district court properly concluded
19 that the 2003 plan does not unlawfully dilute minority
20 voting strength in either the Dallas/Fort Worth area or
21 the south and west region of the State. The district
22 court based that conclusion on factual findings that
23 are entitled to great respect on appeal and that
24 preclude appellants' section 2 claims under this
25 Court's decisions.

1 JUSTICE STEVENS: May I ask you if you agree
2 with General Cruz, that if the results of the 20 --
3 section -- district 23 violated section 2, it would not
4 be a defense that was politically motivated?

5 MR. GARRE: I -- I think that's right,
6 Justice Stevens, insofar as --

7 JUSTICE STEVENS: And would you also agree
8 with the second question I asked as to whether if it
9 were a violation -- I understand you don't think it was
10 -- it would not be a defense that they were able to
11 create a district -- a Hispanic district in another
12 part of the State.

13 MR. GARRE: Well, that's true in the context
14 that the Court said it in the Shaw II case, but we
15 don't think that the principle of Shaw II would apply
16 to the section 2 claim in the south and west part of
17 Texas in this case. And that's because in Shaw II, the
18 Court found a violation in the southern part of the
19 State and considered the question as to whether a
20 creation of a district in a completely different part
21 of the State, the middle of the State with no
22 connection, would remedy the section 2 violation, and
23 the Court said no.

24 This case deals with a section 2 claim which
25 is addressed to a particular region of the State, a

1 region that's marked by its high concentration of
2 Hispanic citizen voting age population, as well as
3 common geography and other factors. And we know that
4 the claim is addressed to that particular region of the
5 State because that -- that region is the focus of the
6 plaintiffs' demonstration plan. Mr. Cruz referred to
7 it. It's at page 241 of the GI Forum jurisdictional
8 statement. That's the plan that they claim they're
9 entitled to under section 2 of the Voting Rights Act,
10 and it's addressed to the entire part of the State.

11 So in that situation where you've got a claim
12 where you have a -- a Voting Rights Act section 2 claim
13 addressed to a particular region of the State, we don't
14 think that the Shaw II principle would come into a play.

15 Here, we don't think there's any section 2 violation
16 with respect to the elimination of --

17 JUSTICE STEVENS: Is that based on the
18 premise that section -- that district 25 and district
19 23 are in the same part of the State?

20 MR. GARRE: Yes, not just the same part of
21 the State, but a part of the State that falls within
22 the section 2 -- within the focus of the plaintiffs'
23 section 2 claim, and a part of the State that's marked
24 by its high concentration of minority citizen voting
25 age population.

1 In -- in the De Grandy case, this Court
2 confronted a very similar problem where you had one
3 part of the State, the Miami-Dade area of Florida,
4 which had a high concentration of Hispanic citizen
5 voting age population, and the State was drawing
6 various districts in that part of the State. And the
7 Court looked to those districts and considered whether
8 there was a proportional representation of the minority
9 group in that area and -- and found that, under the
10 totality of the circumstances, there was, and
11 therefore, there was no violation of section 2.

12 Here, you have a situation where the district
13 court found that the citizen voting age population in
14 the south and west part of the State was 58 percent,
15 and that under the State's plan, Hispanics enjoyed 85
16 percent majority minority districts in that area, which
17 is to say, six of the seven districts under the State's
18 plans were districts in which Hispanics enjoyed a
19 majority of citizen voting age population.

20 The decision within that area of where to
21 draw district lines is a decision that section 2 and
22 this Court's precedents leaves up to the States. And,
23 in fact, in the De Grandy case, this Court in -- in
24 particular considered the situation where a district
25 line ran through a minority neighborhood and split up

1 that neighborhood. The Court discussed it on page 1015
2 of its decision. And it said that the fact that the
3 district line went through that neighborhood and had an
4 effect on minority voters, in terms of which district
5 they went into, didn't in itself establish a section 2
6 violation.

7 And we think the same principle would apply
8 here, where the fact that the district lines separating
9 district 23 and 28 in the southern part of the State
10 near Laredo splits a Hispanic neighborhood, which is,
11 after all, not -- not surprising given that the large
12 percentage of the population in that part of the State
13 is Hispanic, doesn't in itself establish a section 2
14 violation.

15 The plaintiffs' section 2 claim in that part
16 of the State really sounds very much in a section 5
17 retrogression or dismantling claim, and this Court made
18 clear in the Holder v. Hall case that retrogression
19 principles of section 5 are not applicable in section 2
20 cases. And we certainly think that that principle
21 holds here and that --

22 JUSTICE KENNEDY: Are there cases that --
23 that we've issued from this Court that address what
24 happens in a case like this where the economic
25 circumstances and many other circumstances of the two

1 Latino populations are very different? The border
2 Hispanics and the Hispanics in Austin have very -- very
3 little in common other than -- than the Latino
4 background. Are there -- are there cases that address
5 whether or not these populations can be combined in --
6 in order to satisfy the -- the Voting Rights Act
7 requirements?

8 MR. GARRE: Well, I don't know of a --

9 JUSTICE KENNEDY: Have we talked about that?

10 MR. GARRE: -- specific case that has
11 addressed that concern. I suppose it would go perhaps
12 to the cohesiveness analysis under the Gingles factors.

13 I mean, what -- what is clear under this
14 Court's cases and the text of section 2(b) is that the
15 Court has to take into account the totality of the
16 circumstances in the area, not just the rough
17 proportion -- the existence of proportionality between
18 the Hispanic population and the number of districts in
19 which they enjoy a majority, but all the circumstances
20 that could bear on the region.

21 And the district court in this case conducted
22 that analysis and it found, under the totality of the
23 circumstances, that there was an -- that there was not
24 a section 2 violation in the south and west region of
25 the State. And we certainly think that that finding is

1 entitled to respect under the clearly erroneous
2 standard that this Court applies in reviewing findings of
3 -- ultimate findings of vote dilution. The Court has
4 -- has said repeatedly that it will not disturb such a
5 factual finding unless it is left with the definite and
6 firm conviction that a mistake has been made, and we
7 don't think the record in this case would support such
8 a conclusion with respect to either the section 2 claim
9 in the south and west or the section 2 claim in the
10 Dallas/Fort Worth area.

11 As we have explained in our brief, that claim
12 -- and I'm now turning to the Dallas/Fort Worth claim
13 -- fails because of the district court's finding that
14 African American voters in old congressional district
15 24 lacked the ability to elect candidates of choice in
16 that district in the sense that they would be unable,
17 in a contested election, to put their candidate, the
18 African American candidate, into office. That finding
19 too is supported by ample record evidence and we think
20 could not be set aside under the standard that this
21 Court applies.

22 JUSTICE BREYER: Is it possible it violates
23 section 2, the following? We look at the map as it's
24 drawn. We ask the question, is there a way to redraw
25 this map so that, say, the minority group has a more

1 significant influence for their bloc voting, et cetera,
2 et cetera? Gingles. Answer: Of course, there is.
3 It's the old way. And you say, well, why didn't you do
4 it the old way? Well, the only reason you didn't do it
5 the old way was pure politics and that that isn't a
6 sufficient justification.

7 MR. GARRE: Well, I don't think that would
8 bear on the typical section 2 analysis this Court
9 would apply. The -- the plaintiffs bear the burden of
10 coming in in a section 2 case, which is, after all, a
11 claim that the State is forced to draw a district in a
12 particular way, to show the demonstration district in
13 which the three Gingles factors can be met. And this
14 case is a little bit unusual in that instead of coming
15 up with a -- a new district, they've just pointed to
16 the old district, which in itself is -- is similar to
17 more of a section 5 claim.

18 But with respect to that district, the
19 district court failed -- failed to -- the district
20 court found that plaintiffs failed to meet the first
21 Gingles precondition, which is that they could not show
22 in that district that they had the ability to elect the
23 candidate of their choice because African Americans
24 were 22 percent of the population in that district, the
25 third largest racial group, and because other evidence,

1 including the past elections in that district and
2 direct testimony of politicians with intimate
3 familiarity of that district, supported the logical
4 conclusion that a group that comprises only 22 percent
5 of the electorate --

6 JUSTICE BREYER: I was thinking of district
7 23.

8 MR. GARRE: Oh, I'm sorry. With respect to
9 district 23, again I -- I think the -- the framework
10 for the plaintiffs' challenge to section 23 is the
11 south and west region of the State in a claim that they
12 were entitled to a seventh -- a seventh effective
13 majority district in that part of the State. The
14 State's plan, 2003 plan, gives them six majority
15 minority districts. The plaintiffs, GI Forum --

16 CHIEF JUSTICE ROBERTS: That's not -- not
17 including 23.

18 MR. GARRE: Not including 23. That's right,
19 Mr. Chief Justice.

20 They claim that they're entitled to a seventh
21 majority minority district. The district court
22 rejected that claim because it found that they had
23 failed to show that the seventh district that they drew
24 would be an effective district because it only had 50.3
25 percent citizen voting age population --

1 CHIEF JUSTICE ROBERTS: When you say they
2 drew, you mean the GI Forum proposal?

3 MR. GARRE: The GI Forum drew. That's right.
4 And again, that's at page 241 of the GI Forum
5 jurisdictional statement.

6 It found that that district was not effective
7 because it only had a 50.3 percent citizen voting age
8 population, and the district court found, based on the
9 testimony that showed that Hispanics have a
10 comparatively low turnout rate in elections, that a
11 50.3 percentage wouldn't do the trick to give them the
12 potential to elect.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr. Garre.

14 MR. GARRE: Thank you.

15 CHIEF JUSTICE ROBERTS: Mr. Smith, you have 4
16 minutes remaining.

17 REBUTTAL ARGUMENT OF PAUL M. SMITH

18 ON BEHALF OF APPELLANTS IN NO. 05-276

19 MR. SMITH: Thank you, Mr. Chief Justice.

20 As I understand the State's argument, it is
21 that the rational, legitimate governmental purpose that
22 was served in passing a new map in 2003 was to
23 eliminate an anti-majoritarian map drawn by the Federal
24 district court in 2001. I submit to you that's an odd
25 use of the word in a couple of different senses.

1 First of all, as the experts for both sides
2 found and as the court itself found, that -- the court-
3 drawn map was not unfair or biased in any way. It did
4 not in any way maldistribute voters in a way that --
5 that hurt -- hurt Republicans' chances to elect Members
6 of Congress. So when Mr. Cruz says that the problem
7 with the old map was that a minority of voters were
8 controlling the delegation, that is factually untrue.

9 What happened was that Republican districts
10 chose to elect moderate to conservative Members of
11 Congress who happened to be affiliated with the
12 Democratic Party rather than the Republican Party, but
13 that does not mean that Democrats were controlling the
14 delegation.

15 The anti-majoritarian name is odd in another
16 way because the map that replaced it, of course, is
17 terribly anti-majoritarian, as the experts for both
18 sides agreed. It totally flunks any -- any kind of
19 standard analysis about bias in a map to the point
20 where it locks in 22 to 10 regardless, essentially, of
21 how anybody votes in the State of Texas, and it's going
22 to produce majorities that are going to average about
23 -- margins of victory that are about 40 percent in --
24 for the rest of the decade, even if the Democrats gain
25 votes over time.

1 Now, it's a dangerous road we're going down,
2 I submit to you, if we start authorizing this kind of
3 partisan festival every couple of years adjusting the
4 lines. Now, we've had three States redo their
5 congressional districts already in this decade, and if
6 this Court were to uphold this one, I think we'll start
7 seeing lots and lots of other ones tit for tat around
8 the country.

9 There's another particular aspect of this
10 that I think is potentially dangerous, which is as you
11 get further into the decade, the census numbers get
12 older and older and more and more out-of-date. And
13 what the line-drawers then do is they've got the census
14 numbers over here, they know where the real people are
15 over here, and they can exploit that differential using
16 the old census numbers. So it seems to me that even if
17 you're going to say there's a legitimate public purpose
18 for redrawing the lines through the decade, we ought to
19 require the States to come up with fresh numbers. The
20 population -- one person/one vote requirements are so
21 incredibly strict in the congressional area. Simply to
22 sort of assume that these people can use the old
23 numbers when they're redrawing the lines 5 years after
24 the census seems -- seems mistaken to me and it does
25 invite terrible abuse. There -- and there are

1 mechanisms for getting new census numbers if the States
2 really feel it's important to do so.

3 Let me then turn, if I might, quickly to
4 respond, I think, to Justice Stevens' question about
5 what the record shows about the intent for taking the
6 -- the African American community in Fort Worth and
7 sending it up to Oklahoma, so to speak. That intent is
8 set forth in pages 87 to 88 of the jurisdictional
9 statement appendix where the map-drawer himself -- his
10 testimony is quoted, and he explained that we had to
11 find a Republican district in the -- in the
12 neighborhood that we could -- we could tack them onto
13 that could sort -- that could, quote, handle that
14 particular component of the current county population,
15 which is to say a district sufficiently Republican that
16 they would be completely disempowered for the rest of
17 the decade.

18 Now, there was -- there was a comment from
19 Mr. Cruz about how the district 24 was created for a
20 Anglo -- Anglo Democrat to win. The district that --
21 that was talked about in the testimony was the district
22 drawn in 1991. What Mr. Cruz didn't point out was that
23 in 1996, that district was completely changed by a
24 Federal district court in *Bush v. Vera*. The old
25 district went way down into the southeast into the

1 countryside. The new district, which is the one you
2 see in the maps before you, was drawn by the Federal
3 district court. It wasn't drawn by anybody seeking to
4 uphold any Anglo Democrats' opportunities.

5 CHIEF JUSTICE ROBERTS: Who was the -- who
6 was the -- the candidate in that district after the
7 district court plan?

8 MR. SMITH: Mr. Frost continued to run in
9 that district, Your Honor.

10 CHIEF JUSTICE ROBERTS: Well, didn't the
11 district court say one of its criteria was preserving
12 incumbency?

13 MR. SMITH: That's a different Federal
14 district court. I was talking about the -- the Bush v.
15 Vera court was the one that redrew it, Your Honor, not
16 the -- not the one that's in 2001.

17 Thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Thank you, Mr. Smith.

19 (Whereupon, at 3:00 p.m., the case in the
20 above-entitled matter was submitted.)

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