

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-2057

TITLE ALAN J. KARCHER, SPEAKER, NEW JERSEY ASSEMBLY, ET AL
v. Appellants

GEORGE T. DAGGETT, ET AL.

PLACE Washington, D. C.

DATE March 2, 1983

PAGES 1 thru 39



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440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

ALAN J. KARCHER, SPEAKER, NEW
JERSEY ASSEMBLY, ET AL.,

Appellants

v.

GEORGE T. DAGGETT, ET AL.

No. 81-2057

Washington, D.C.

Wednesday, March 2, 1983

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

KENNETH J. GUIDO, JR., ESQ., Washington, D.C.; on behalf of
the Appellants.

BERNARD HELLRING, ESQ., Newark, New Jersey; on behalf of
the Appellees.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

KENNETH J. GUIDO, JR., ESQ.
on behalf of the Appellants

3

BERNARD HELLRING, ESQ.
on behalf of the Appellees

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KENNETH J. GUIDO, JR., ESQ.
on behalf of the Appellants -- rebuttal

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1 considered with deviations over one percent and that lesser
2 deviations would be sought.

3 Additional legislative criteria which was to be secondary
4 to population equality were to protect minority interests by not
5 unnecessarily diluting black votes particularly in the tenth or
6 the Newark district.

7 The others were to preserve the cores of existing
8 districts as much as possible for all members of the Legislature
9 and to preserve municipal boundaries, which, in New Jersey because
10 there are so many of them, are small enough to be building blocks
11 for reapportionment purposes.

12 Plaintiffs, including all of the incumbent Republican
13 members of Congress, on February 2nd and 9, 1982 brought suit
14 to declare this statute unconstitutional because they believed
15 other plans submitted to the Legislature would have reduced the
16 variation between districts to even lower levels than the 0.7 of
17 one percent in this case.

18 The cases were consolidated and submitted on depositions,
19 affidavits, and exhibits without trial upon the agreement of all
20 parties to this action. On March 3, 1982, the three-judge district
21 court by a divided vote declared the statute unconstitutional.

22 The Court read Kirkpatrick and White, the decisions of
23 this Court, as requiring any legislatively drafted congressional
24 redistricting plan to be held unconstitutional if there existed
25 the possibility that a plan with a smaller deviation of census

1 population might be developed.

2 The Court concluded that such a possibility existed in
3 this case and struck down the statute. In doing so, the Court
4 failed to consider the problems undisputed in the record with
5 each of the plans rejected by the Legislature.

6 The Court also gave little, if any, consideration to
7 other criteria such as preventing the dilution of minority voting
8 strength in certain districts. The Court concluded that preventing
9 racial dilution did not justify the deviations because the district
10 with the largest black vote, District 10, was not one of those
11 with the highest deviation.

12 And, finally, the District Court rejected the Appellants'
13 argument that the as nearly as practicable standard of Kirkpatrick
14 and White is satisfied when the population deviation is even less
15 than the statistical imprecision of the census.

16 QUESTION: Do we really know what the statistical
17 deviation is on variance from the census figures? Do we really
18 have anything to go by?

19 MR. GUIDO: What we have in this case is that we have
20 the statement of Dr. Trussell who is a demographer at Princeton --
21 an expert demographer -- and a noted authority on the census. In
22 fact, he participated in all of the studies that the census has.
23 He --

24 QUESTION: It was my understanding, though, that there was no
25 real consensus, if you will, on what the most recent census variation

1 might be and if there is such a variation people have spoken in
2 national terms which would not necessarily focus it on that --

3 MR. GUIDO: That is right. Dr. Trussell is the only
4 one who has focused that on districts as small as congressional
5 districts or at the state level.

6 If I may return to my argument -- The -- Circuit
7 Judge Gibbons dissented. He concluded that where the deviation
8 between the districts is less than the recognized margin of error
9 a good faith effort on the part of the Legislature to achieve
10 numerical equality has been shown as a matter of law. And, courts
11 in such situations should not substitute their judgment for that
12 of the legislature.

13 The Appellants on March 8 filed a notice of appeal and
14 applied for stay of the judgment pending appeal to this Court.
15 On March 15, Justice Brennan stayed the District Court's judgment.
16 As Justice Brennan recognized in granting Appellants' application
17 for a stay, the district of Newark presents the question whether
18 the proper interpretation of this -- what are the proper inter-
19 pretations of the standards laid out in Kirkpatrick v. Preisler.

20 Do they require absolute equality, or do they allow for
21 some latitude given the arguable statistical insignificant variances
22 argued in this case?

23 In this case, the essence of what we are arguing about
24 is whether a variance of less than 0.7 of one percent is not good
25 enough to satisfy the requirements of Kirkpatrick, Wesberry and

1 White.

2 QUESTION: Mr. Guido, what does that 0.7 of one percent
3 translate into in terms of people?

4 MR. GUIDO: In terms of people it translates into a
5 deviation of approximately, I think, 3,551 people between the
6 largest and the smallest. That is much different than in the
7 figures that were in Wesberry, for example. In Wesberry it was
8 140 percent deviation or 551,000 people.

9 In Kirkpatrick, the deviation was 5.97 percent, or
10 25,000 people. In White, it was 4.13, or 19,275 people.

11 The deviations in this case are less than the deviations
12 in 11 other plans adopted in other states and fall within the
13 range of, I think, approximately five other states.

14 At the outset, I think it is important to focus on the
15 appropriate standard of review in this case, because the Appellees
16 here and two members of the District Court below interpreted the
17 standards of Kirkpatrick and White to mean that a redistricting
18 plan adopted by a state legislature is automatically unconstitu-
19 tional no matter how low a deviation it contains as long as it is
20 possible to conceive of a plan with a lower deviation.

21 This is true, they argue, no matter what flaws there
22 might be in the other plans, and no matter what the statistical
23 imprecision of the underlying census data may be. In reaching
24 this incongruous result, the Appellee has ignored the admonition
25 of this Court in White that from the beginning we have recognized

1 that reapportionment is primarily a matter for legislative con-
2 sideration and determination. As this Court clearly stated,
3 legislatures have primary jurisdiction over legislative reappor-
4 tionment. And, districting inevitably has sharp political
5 impact, and inevitably political decisions must be made by those
6 charged with the task.

7 In balancing the commands of the one man-one vote rule
8 of this Court against the requirement of the primacy of the
9 legislature, this Court has evolved a pragmatic case-by-case
10 approach in litigating these issues.

11 In Wesberry, it said, "as nearly as is practicable,
12 one man's vote in a congressional district is worth as much as
13 another's." And, in elaborating on this standard this Court in
14 Kirkpatrick rejected the fixed percentage formula.

15 Consequently, as this Court concluded in White,
16 congressional districts pass constitutional muster if they are
17 as mathematically equal as is reasonably possible.

18 In reading through those cases, the Court has focused
19 on a number of factors in applying these standards. The first is
20 the magnitude of the deviation. The Court has spoken in Kirk-
21 patrick of markedly reduced deviations. In White, it talked
22 about grossly out of proportion. The Court has traditionally
23 looked at the accuracy of the data relied upon in drawing the
24 plan. In Kirkpatrick at page 529 the Court mentioned the fact
25 that the accuracy of the data can be a factor to be taken into

1 consideration. And, on page 22 of our brief, note 17, we point
2 out that the Court in Mahan and in Burns v. Richardson recognized
3 that there may even be situations in which the census data does
4 not have to be used because of problems of accuracy.

5 The third factor the Court has looked to in determining
6 whether a plan meets constitutional muster is the extent to which
7 the challenged variances fall within the range of what other
8 states have done. I have just pointed out to you where the
9 statute challenging this plan falls with regard to other states.

10 Additionally, the fourth factor has been the availability
11 of acceptable alternatives, which we will address in a minute, and
12 the extent to which there exists legitimate justifications for
13 the deviations.

14 In all of the cases that this Court has decided since
15 Baker v. Carr, it has never stricken a plan with a variance as
16 low as in this case. As I said, the variances in this case are
17 no where near those of Wesberry, Kirkpatrick and White.

18 QUESTION: But wasn't it the position of the Court that
19 there were other plans with a still smaller variation?

20 MR. GUIDO: That is correct, Your Honor, but what we will
21 address is the question of the inadequacies of those plans. If
22 you wish me to address that now --

23 QUESTION: I am patiently waiting.

24 MR. GUIDO: While reviewing court drawn plans this Court
25 holds to a higher one vote-one man standard than legislatively drawn

1 plans, this court has upheld plans with similar deviations to that
2 plan challenged in this action out of deference to the legislature,
3 although it holds court drawn plans to a higher one man-one vote
4 standard. Significantly, the plan approved after this Court's
5 decision striking the statute in Kirkpatrick contained a deviation
6 of 0.629 percent. In essence, the same deviation challenged in
7 that action.

8 That occurred in the case where the Court imposes a
9 higher standard under the one man-one vote principle on courts
10 when they draw the plans than on legislatures. However, it sus-
11 tained a plan with a similar deviation.

12 The other factor that the Court has considered is the
13 precision of the data that is to be relied upon. As we point out
14 in our brief, the record in this case reveals that the census count
15 was not perfect. It is not an entirely accurate enumeration of
16 the population. Its imprecision is due not only to the under-
17 counting of illegal aliens as the Appellees contend, but also to
18 the undercounting of other groups, people under 35, people over
19 65, immigration, outmigration and certain other groups.

20 QUESTION: Is there proof to that effect in the record?

21 MR. GUIDO: Pardon?

22 QUESTION: Is there proof to that effect in the record?

23 MR. GUIDO: In the record, yes. Dr. Trussell's state-
24 ment supports that and all of the attachments that are included
25 with that include all of the studies that have been done by the

1 Census Bureau on that issue. They are all exhibits as attachments
2 to his statement --

3 QUESTION: And, yet, you structure your own apportion-
4 ment on the census figures?

5 MR. GUIDO: On the census figures, that is correct,
6 Your Honor. Since those were the only figures that were available
7 and the Legislature of New Jersey attempted to get as close to
8 zero as possible, even in recognition that there was an error factor
9 in those figures, and in recognition of the fact that there was
10 no way, as a practical matter, to make corrections for those
11 deviations. So, what we are arguing here is even though that
12 cannot be done, this Court as a matter of constitutional law
13 should recognize that it should not require something to be done
14 by the Legislature that is essentially physically impossible.
15 They took the best available data that was available to them.
16 They used that data. That data has imprecision and is now being
17 attacked because they did not come close enough to zero when, in
18 fact, no one knows that if we drew a plan that had absolutely
19 zero census population deviation that it would not be in reality
20 a plan with a substantially higher deviation than the 0.7 of
21 one percent that is in this case.

22 QUESTION: Is there any finding by the District Court
23 that it did or did not credit Mr. Trussell -- Dr. Trussell's
24 testimony?

25 MR. GUIDO: The only -- In the District Court the

1 dissenting judge relied upon that information. What the District
2 Court said with regard -- The two other members of the District
3 Court said with regard to that is that essentially here this is
4 the argument that had been made in Kirkpatrick and earlier cases,
5 and, therefore, as a matter of law we are disregarding this
6 argument.

7 We did not make --

8 QUESTION: Counsel, have you finished answering that
9 question?

10 MR. GUIDO: Yes.

11 QUESTION: I wanted to ask you another one. Which of
12 those districts is contiguous only for yachtsmen as the dissenting
13 judge suggested?

14 MR. GUIDO: I think it is the second one. It seems to
15 be down into this area. It also turns --

16 QUESTION: I did not quite hear you --

17 MR. GUIDO: Because of the nature of that district, if
18 you look at it and if you look at this --
19 Even if you made that district square, you would still have to
20 get across that spit by being a yachtsman. It turns out that the
21 shape --

22 QUESTION: Are there two bodies of water that have to
23 be crossed?

24 MR. GUIDO: Pardon?

25 QUESTION: Are there two bodies of water or only one?

1 MR. GUIDO: It would have to be -- There is one body of
2 water there.

3 QUESTION: Just one body of water?

4 MR. GUIDO: Yes, that is my understanding.

5 QUESTION: What is the body of water?

6 MR. GUIDO: Pardon?

7 QUESTION: What is the body of water?

8 MR. GUIDO: Well, Your Honor, I am not certain of the
9 body of water.

10 QUESTION: I will ask Mr. Hellring.

11 (Laughter)

12 MR. GUIDO: The reality is that even if we drew the
13 district as square, you would still have to at certain times be
14 a yachtsman to cross it.

15 QUESTION: Does any district prior to 1980 have that
16 problem?

17 MR. GUIDO: At that time?

18 QUESTION: Prior to this redistricting.

19 MR. GUIDO: I do not know the answer to that, Your
20 Honor. I do not think that that was the case prior to 1980,
21 except for the spit that is referred to by the dissenting judge --

22 QUESTION: How many of those districts have any genuine
23 community of interest?

24 MR. GUIDO: In all of these districts?

25 QUESTION: How many of them have genuine community of

1 interest either economic, social or political?

2 MR. GUIDO: Well, Your Honor, it is my understanding
3 and Justice Brennan is probably much more familiar with it --
4 with the State of New Jersey than I am --

5 QUESTION: Well, I think, in Kirkpatrick --

6 MR. GUIDO: -- but the basic goals in this case were to
7 maintain essentially the core districts from the 1970 census
8 and that that essentially reflected the communities of interest
9 at that time in recognition of the fact that there needed to be
10 changes because there was a loss of a district. All of those
11 factors, Your Honor, I think, as I listed in the -- at the
12 beginning, maintaining the core districts meant that there was
13 an attempt to preserve the communities of interest that had been
14 reflected in the 1970 reapportionment as drawn by the District
15 Court previous to that time.

16 QUESTION: Mr. Guido, is that green district that is
17 by Asbury Park and Long Branch, is that all one district?

18 MR. GUIDO: This green district is all one district.

19 QUESTION: But the same district isn't extended up to
20 the light green north of the body of water?

21 MR. GUIDO: It is different than this --

22 QUESTION: There are numbers on that.

23 QUESTION: Yes, but I cannot see the numbers.

24 QUESTION: Number eight is the one.

25 MR. GUIDO: This here is all one district.

1 QUESTION: Thank you.

2 MR. GUIDO: And essentially one of the things I think
3 you have to understand is if you look back at the appendix, you
4 look at this map and you say, well you look at these districts
5 and they have these sort of puzzle kind of shapes. The reality
6 is that in New Jersey the building blocks that were used were
7 municipalities because of the community of interest concern and
8 in putting together those building blocks in such a way.

9 There were sufficient numbers of them so that you could
10 satisfy that population equality requirement and as a consequence
11 because you use those boundaries you end up with a map that looks
12 like this. At one time I went back and looked at all of the maps
13 that had been drawn over time in New Jersey and I can tell you
14 that if anyone thinks that this is a strange map, there have
15 always been strange maps in this regard in New Jersey, primarily
16 because municipalities were used as the building blocks; two, is
17 that you have a state with an irregular shape; and three, with a
18 very high population. So as a consequence, you end up with a
19 map that --

20 QUESTION: Did Kirkpatrick say that community of
21 interest was relevant at all in cases of this kind?

22 MR. GUIDO: In Kirkpatrick, no it did not, Your Honor.
23 In fact, we are not even arguing that communities of interest is
24 relevant. What we are arguing here is that essentially the
25 statistical imprecision of the census data was such that it

1 justifies holding that this plan was the functional equivalent
2 of zero, and we are arguing that if the minute deviation in this
3 case is not justified by an acceptance of the statistical imprecision,
4 that the concern for the minority interest is sufficient
5 to justify that deviation. We are arguing --

6 QUESTION: But Judge Gibbons said that minority interest
7 was pretextual in this case, didn't he?

8 MR. GUIDO: Your Honor, what the Court said in this
9 case about the minority interest was that essentially there was
10 no connection -- they could not find a linear connection between
11 the tenth district and the fourth district that concerns the
12 minority interest was affected and the deviations that were in
13 this case.

14 As a practical matter, when you look at this map, it
15 is impossible after the fact to construct the cause or connection
16 between minority interest and the interest here. The only thing
17 that you can do to make a judgment about whether the Legislature
18 appropriately took into consideration minority interest was
19 whether the plan that was adopted by the Legislature better met
20 the minority concerns than the other plans before the Legislature.

21 As we have argued in our brief, we have demonstrated
22 that the plans that were relied upon by the District Court, two
23 of which did not even exist at the time that the statute challenged
24 in this case was adopted, did not meet the interest of minority
25 interest and that Mayor Gibson who was the major minority leader

1 in the state was actively lobbying for the statute passed in this
2 case and actively lobbying with the legislators against this
3 plan, and, in fact, no plan would have been adopted without the
4 vote of minority members of the Legislature, and it was this plan
5 that they felt best represented their interests.

6 QUESTION: Mr. Guido, I want to be sure about one
7 thing -- I believe Justice Powell referred to it -- all three
8 members of the panel below agreed on the pretextural aspect of
9 the preservation of minority --

10 MR. GUIDO: All three members on the panel below rejected
11 the argument.

12 QUESTION: All three agreed it was pretextural?

13 MR. GUIDO: I remember one of them using the word
14 pretextural, Your Honor, but I would concede that point for
15 purposes of the argument, and that the basis that they did say
16 was is that they said no one could develop a linear connection
17 between the deviations and the concern for minority voting
18 strength in this case. Yes, Your Honor, that -- And, that we
19 believe that that conclusion that there was a requirement that
20 in a reapportionment case especially with the deviation of 0.7
21 of one percent is a requirement that leaves no deference to the
22 Legislature as required by this Court in Upham and in White.

23 And, if there is to be any deference to the Legislature
24 the test should be, take a look at the plans that were before
25 the Legislature and compare those to the plan that is before

1 that is being challenged to decide whether or not that interest
2 was adequately --

3 QUESTION: May I ask one question about the lack of
4 compactness of the districts that Justice Powell aluded to with
5 District 3, I guess it is. It is kind of irregularly shaped.
6 As I remember the Rutgers professor's submission, he included
7 compactness as one of the tests of whether the plan was a satis-
8 factory one. Did the Legislature in this drafting this plan give
9 any attention at all to the desirability of compact districts?

10 MR. GUIDO: No, what the concern was here was, as I
11 pointed out at the outset --

12 QUESTION: Well, I understand there were other concerns.
13 Did they include --

14 MR. GUIDO: Did they include compactness --

15 QUESTION: -- that as of any value at all to that?

16 MR. GUIDO: In my discussions with them, there were
17 some concerns, but that concern was down the line. There were
18 some people who did mention the question of compactness, but as
19 I said, what it was was concern about the preservation of
20 municipal boundaries, core constituencies, fairness to minorities,
21 and population equality.

22 QUESTION: Well, also I suppose, preserving the majority
23 control of the Legislature?

24 MR. GUIDO: I would like to save a few minutes for
25 rebuttal, if I might.

1 QUESTION: May I ask if that was admittedly one of
2 the concerns?

3 MR. GUIDO: What, compactness?

4 QUESTION: No, preserving majority control of the
5 maximum number of districts possible?

6 MR. GUIDO: Oh, democratic majority control?

7 QUESTION: Yes.

8 MR. GUIDO: There was some concern by some members
9 that there be fairness to all of the incumbents, and, in fact,
10 there were discussions with one of the republicans who was very
11 concerned about his vulnerability. But, there also was some
12 concern in drafting the plan about preserving some of the
13 seniority of democratic members of the Legislature.

14 CHIEF JUSTICE BURGER: Mr. Hellring.

15 ORAL ARGUMENT OF BERNARD HELLRING, ESQ.

16 ON BEHALF OF THE APPELLEES

17 MR. HELLRING: Mr. Chief Justice, and may it please the
18 Court:

19 In striking down the statute which is represented by
20 this exhibit which was received in evidence by the District
21 Court, the Court below said that since there were a number of
22 other plans available to the Legislature including several which
23 had been introduced as bills which had smaller population
24 deviations, and since this redistricting statute was not the
25 unavoidable result of a good faith effort to arrive at the

1 smallest deviations in population, and since the record contained
2 no justification for the population deviation contained in this
3 statute, that it must be declared unconstitutional under the
4 principles enunciated by this Court in Wesberry and its progeny
5 Kirkpatrick and White.

6 The record contains no suggestion of any good faith
7 effort or indeed any effort to consider other plans with smaller
8 population deviations. There was a justification argued which
9 was made up later after the suit was started in which it was
10 suggested by the Appellants that they had some minority adjustment
11 problems with respect particularly to one of the districts, and
12 the three judges on the panel below found as a fact that this was
13 a phony, that it was a pretext, that it was an attempt to use a
14 minority argument in order to justify something which had nothing
15 to do with a minority issue and to use improperly and in an
16 insulting manner the problem of minorities in order to justify
17 a statute which was the result of bad faith.

18 Looking at this picture of the redistricting suggests
19 the word gerrymander. Gerrymander has become a term of obloquy.
20 Since I was in my earliest days in school, I remember being
21 taught about gerrymander. Why do we not like gerrymandering?
22 Why did the dissenting judge below, Judge Gibbons, say that as
23 a citizen of New Jersey, he was disturbed by looking at this
24 exhibit. Because gerrymandering suggests the use of base motives.
25 It suggests that a citizen who votes is wasting his time because

1 his vote has been snicked around in such a way that it will count
2 for very little.

3 QUESTION: Mr. Hellring, how would you define gerry-
4 mandering as you pronounce it?

5 MR. HELLRING: I would suggest looking at this map and
6 saying that twisting district number seven in such a way that it
7 has come to be known as the fishhook district is gerrymandering.
8 That having another fishhook in reverse form on the other side --

9 QUESTION: Well, you might call number four a running
10 back district, too, I guess.

11 (Laughter)

12 QUESTION: But, what does that amount to for purposes
13 of our cases. Our cases do not say flatly that you cannot have
14 a district shaped like a fishhook or like a running back.

15 MR. HELLRING: In answer to Your Honor's question, I
16 think this is what it means under the cases decided by this Court.
17 This Court has thus far said, we will avoid the question of
18 whether gerrymandering in any form and to any extent is by itself
19 unconstitutional. Wells said it on the same day as Kirkpatrick
20 was decided. Justice Brennan said, we are not taking a position
21 one way or the other. There have been other instances in which
22 that issue has been avoided. It need not be dealt with in this
23 case in order to sustain the decision below on a constitutional
24 basis, but it fits in any way in the following manner. Kirk-
25 patrick says that a population deviation is no good if it is the

1 unavoidable -- is no good unless it is the unavoidable result of
2 a good faith effort to arrive at the lowest possible population
3 deviation.

4 This shows lack of good faith because the gerrymandering
5 is so extreme, so tortured that it is one piece of evidence, not
6 necessarily absolutely conclusive, but surely evidence of bad
7 faith.

8 QUESTION: Does gerrymandering mean that the district
9 has been drawn for ulterior political motives?

10 MR. HELLRING: Yes, it does. We respect straight lines.
11 Crooked lines we do not like. The people who do the voting find
12 that crooked lines, which are tortured in such a way to embarrass
13 two congressmen into running against each other, to put the homes
14 of two congressmen in the same district by lording a giggum.

15 QUESTION: Is that factual?

16 MR. HELLRING: It is, and it is in the record.

17 This represents a degree of gerrymandering which is so
18 extreme and so far different from anything that has happened
19 before in New Jersey that itself is evidence of bad faith.

20 Now, I have to talk about bad faith --

21 QUESTION: You don't have any cases in this Court that
22 invalidated gerrymandering of the kind you have just described?

23 MR. HELLRING: We have none. This Court has avoided
24 the question. I am not suggesting --

25 QUESTION: We have not avoided -- We have not always

1 avoided the question of a gerrymander. We have sustained a
2 political gerrymander in Gaffney against Cummings.

3 MR. HELLRING: Well, but in that case you were dealing
4 with not a congressional redistricting --

5 QUESTION: I know, but the way you talk it would make
6 no difference whether it is state or federal. Gerrymander is bad.
7 We like straight lines not crooked lines and drawing districts
8 for political purposes is a base purpose.

9 MR. HELLRING: Justice White --

10 QUESTION: Yet, Gaffney against Cummings held quite to
11 the contrary.

12 MR. HELLRING: Not in a congressional redistricting
13 case, and this Court has expressed repeatedly the importance of
14 maintaining --

15 QUESTION: So, you do not think that the political
16 gerrymandering -- You concede the political gerrymander in
17 Gaffney against Cummings did not violate the Equal Protection
18 Clause?

19 MR. HELLRING: Your Honor, please, I am not arguing
20 that case. This is a congressional redistricting case --

21 QUESTION: Are you making a constitutional argument?

22 MR. HELLRING: No. I am making an argument under
23 Kirkpatrick.

24 QUESTION: Well, are you making a constitutional
25 argument or a statutory argument?

1 MR. HELLRING: I am making an argument --

2 QUESTION: Well, is it constitutional, or not?

3 MR. HELLRING: It is not a constitutional argument.

4 QUESTION: What is it?

5 MR. HELLRING: It is an argument that under Kirkpatrick --

6 QUESTION: What is Kirkpatrick?

7 MR. HELLRING: Kirkpatrick is a statement by this Court
8 on the meaning of Article I, Section 2 of the United States
9 Constitution when it says that the members of the House of
10 Representatives shall be elected by the people. Senators --

11 QUESTION: Well, you are making a constitutional
12 argument.

13 MR. HELLRING: Well --

14 QUESTION: But not an equal protection argument?

15 MR. HELLRING: Well, if Your Honor, please, I am not
16 making an equal protection argument, and my argument about
17 gerrymandering is a constitutional argument only in the sense that
18 it relates to the issue of good faith as that is given to us by
19 the United States Supreme Court in testing -- for the purpose
20 of testing whether a given population deviation in a given
21 statute is or is not the unavoidable result of a good faith effort
22 to arrive at the smallest possible population deviation. And, I
23 would suggest, Justice White, that if this Court is ready to
24 deal with gerrymandering all by itself as a constitutional issue
25 and sees the necessity of doing so in this case, that it is a

1 perfect case for you to do it in.

2 QUESTION: What if you achieved absolute equality --
3 you took the very lowest plan there was and you still had fishhook
4 and running back districts and they still were in that form for
5 political purposes --

6 MR. HELLRING: But, you would not have. Mr. Reock
7 suggested a plan more than six months before this one was adopted
8 in which there was not any such gerrymandering, and it was based
9 solely on the problems of population deviation without doing any
10 harm to compactness or state interest or anything else. And, it
11 did not put congressmen running against each other or anything
12 else.

13 But, if Your Honor please, I am not suggesting that it
14 is necessary for this Court to find gerrymandering as a concept
15 to be an unconstitutional thing. That may come in a later case.
16 If you want to do it in this case, it is a good case to do it in,
17 but you do not need to. This case can be well determined and
18 upheld and affirmed solely on the basis that the population
19 deviation here was not the unavoidable result of a good faith
20 effort to arrive at the smallest population deviation.

21 And, if Your Honor, Justice White, means to suggest
22 that the smallest population deviation is not necessarily the
23 most desirable, then I think the Court would have to be ready to
24 change its ideas about one man-one vote.

25 QUESTION: Change its ideas if Kirkpatrick and White

1 against Weiser is supposed to be read that way, they ought to
2 cut into those two cases.

3 MR. HELLRING: Well, may I then suggest, Your Honor, that
4 if there is any addition to be made by this Court in this case by
5 way of further explanation of the meaning of Article I, Section 2
6 by way of further discussion as to what Kirkpatrick may not have
7 said enough times and what Your Honor, Justice White, said in
8 White against Weiser was not said enough times, then it seems
9 to me that this Court should take the occasion to reemphasize
10 the doctrine of one man-one vote. The cry of happiness and joy
11 and respect that rose up from all parts of this nation at the
12 time of Baker against Carr and Wesberry is one of the most
13 stunning juridical acts in this century when the idea of one man-
14 one vote was established. This is surely not the time to go
15 backwards on that --

16 QUESTION: You are not saying that that was unanimous,
17 are you?

18 MR. HELLRING: Pardon me, sir?

19 QUESTION: You are not saying that that was unanimous
20 all over the country, are you?

21 (Laughter)

22 MR. HELLRING: Your Honor has me there. As a matter of
23 fact, I know it was not even unanimous on this Court. A great
24 Justice, Mr. Justice Harlan did not agree with it. Another great
25 Justice, your teacher, Mr. Justice Brennan and mine, Mr. Justice

1 Frankfurter, thought it was a silly thing to get involved in the
2 political thicket of it. I am well aware that great principles
3 are not necessarily brought to light on a unanimous basis. And, I
4 do hope that that great principle will not be injured by this
5 Court now.

6 Three thousand six hundred seventy-four people care
7 whether it is one man-one vote particularly in the fourth district
8 where they have 2,261 too many and in the sixth district where
9 they have 1,500 or so too few, totalling a difference between them
10 of 3,674 -- that is people -- and, in a State of New Jersey where
11 in the last gubernatorial election the present governor sits
12 because he had a plurality of 1,700 votes.

13 QUESTION: May I ask you --

14 MR. HELLRING: And that is in the whole state.

15 QUESTION: May I ask you two questions about your
16 gerrymandering argument and the base motive that you described to
17 the dominant party in trying to have as many districts of the
18 same political flavor. Supposing you had two plans with equal
19 population disparity, equally satisfied the one person-one vote
20 rule, and equally compact, but you could demonstrate by evidence
21 that the majority selected one because they thought they would
22 elect more of their fellow Republicans or Democrats by that plan
23 rather than the other, and they were frank about it. They said
24 we are in control we might as well take advantage of our control.

25 Would you say that was unconstitutional?

1 MR. HELLRING: I would not. That would be a constitu-
2 tional act, and it should not be struck down under Kirkpatrick or
3 White or Wesberry.

4 QUESTION: Let me give you a second case, then. Supposing
5 you had this plan here and the Court holds it unconstitutional, so
6 you go back to the drawing board. And the Legislature goes back
7 and is able to achieve population equality to the very last digit
8 by doing some more gerrymandering, and that then comes back with
9 no numerical problem but the kind of distortion or even more
10 severe distortion we see here.

11 Would you say that was constitutional?

12 MR. HELLRING: Well, first of all --

13 QUESTION: In the second you say the reason is the same
14 as in my other case?

15 MR. HELLRING: Yes. That would be a second effort by
16 the Legislature, not by the Court?

17 QUESTION: That is right.

18 MR. HELLRING: Well, in such a case where the population
19 deviation was zero, then it should be held constitutional and not
20 struck down unless this Court is ready to say that we will con-
21 sider whether gerrymandering alone in its most extreme form is
22 unconstitutional.

23 QUESTION: I want your answer. I do not want you to
24 rephrase my question.

25 MR. HELLRING: But under the law that exists --

1 QUESTION: You keep rephrasing my question.

2 MR. HELLRING: Under the law that exists today, it is
3 a constitutional act.

4 QUESTION: You say it would be?

5 MR. HELLRING: Yes.

6 QUESTION: And, you think that is what Gaffney decides?

7 MR. HELLRING: Well, as to reapportionment it is certain -

8 QUESTION: There there was an attempt to achieve rough
9 parity between the parties, not have one exploit its dominance,

10 MR. HELLRING: Yes, and I think that is, while the
11 facts are different that is generally the concept of Gaffney,
12 which Justice White mentioned.

13 QUESTION: And, would you describe Gaffney as a gerry-
14 mander. I notice he does, but would you have? Because you were
15 the one who brought the term up during your argument.

16 MR. HELLRING: Yes. I do not remember the exact
17 torturing that was done in that -- the exact amount of gerry-
18 mandering that was done there, but I would not, based upon my
19 recollection of that case and the description of what --

20 QUESTION: The objective there was to achieve rough
21 parity between the parties.

22 MR. HELLRING: Yes. No, I would not consider that
23 gerrymandering.

24 QUESTION: But the lines were drawn with political
25 motivations, isn't that right?

1 MR. HELLRING: Well, if Your Honor, please, political
2 motivations --

3 QUESTION: Weren't they?

4 MR. HELLRING: Yes, and political motivations are nothing
5 that I --

6 QUESTION: Well, we are not arguing about what a gerry-
7 mander is.

8 MR. HELLRING: Well, I did not say that a gerrymander
9 was something which was describable purely because it was something
10 done for political motivations. We have political motivations all
11 day long --

12 QUESTION: If it is done deliberately to make sure that
13 a republican rather than a democrat is elected in this district,
14 would you call that a gerrymander or not?

15 MR. HELLRING: You see --

16 QUESTION: Well, would you call it a gerrymander or not?

17 MR. HELLRING: It depends upon what it did to the people.
18 You see, it is not --

19 QUESTION: It made sure that democrats in the particular
20 district were going to lose every time.

21 MR. HELLRING: But, you see, if it twists and turns and
22 squeaks and makes peculiar lines bad enough in order to prevent
23 people in a certain section from having a chance to vote in the
24 place where they have normally been voting solely to change the
25 results and that is the purpose and that is the result, that is

1 a sign of bad faith. I do not say that it is enough for uncon-
2 stitutionality.

3 QUESTION: Your kind of gerrymander has to have the element o
4 bad faith in it?

5 MR. HELLRING: No, it has to have the element of
6 destroying what is normal for purposes which are bad.

7 QUESTION: Well, Mr. Hellring, it sounds to me like your
8 argument concedes that every party in power when drawing district
9 lines can and will try to benefit its own party members in
10 drawing those lines. But, your concern is with the compactness
11 or neatness of the lines that are drawn forming resulting districts
12 that are more compact, is that right?

13 MR. HELLRING: Well, I would like to say it is all
14 right --

15 QUESTION: And, to what extent do we have to require
16 compact districts?

17 MR. HELLRING: I would like to say that I agree with
18 everything Your Honor put in Your Honor's question, and I agree
19 with almost all of it except the word "neatness". I am not
20 looking for neatness. This is so --

21 QUESTION: Are you looking for compactness?

22 MR. HELLRING: Reasonable compactness -- reasonable. I
23 am looking for something which is not so unreasonable --

24 QUESTION: Is that a constitutional requirement in
25 these redistricting -- compactness?

1 MR. HELLRING: Not yet. This Court has never said that
2 it is. And, all I am arguing with respect to gerrymandering in
3 this case before this Court today is that it demonstrates that
4 there was no good faith effort by this Legislature to arrive at
5 the lowest population deviation and that this was not the result --
6 the unavoidable result --

7 QUESTION: Well, let me ask you another question.
8 Suppose the Legislature had before it two plans with very minor
9 population differences, one slightly higher than the other. What
10 possible justifications do you agree the Constitution would per-
11 mit to be considered for the Legislature to adopt the plan with
12 the slightly higher deviation and still be acceptable?

13 Our Court has suggested, for example, anticipated
14 population shifts would justify it.

15 MR. HELLRING: That was in Kirkpatrick.

16 QUESTION: Our Court has suggested protecting incumbents
17 as a possible justification.

18 Is there any other justification in your view?

19 MR. HELLRING: Well, I think there could be others.

20 None that have ever been suggested so far as I know have as yet
21 been acceptable to this Court.

22 QUESTION: Would you propose that any others should be?

23 MR. HELLRING: Compactness in the sense of avoiding
24 extremes in gerrymandering, would be one.

25 QUESTION: So, that it would be your view that if the

1 higher deviation were more compact on the map that that would be
2 a justification for the higher deviation?

3 MR. HELLRING: Based on degree. If the degree of
4 gerrymandering were very, very different, then I would say that
5 would be an acceptable reason and an important reason.

6 Gerrymandering, of course, partakes of some of these
7 other things that Your Honor referred to, such as avoiding contests
8 between two incumbent representatives and things of that sort.
9 It is part of the seamless web of all of the reasons that go into
10 the determinations made by a legislature. I --

11 QUESTION: Is it your view that protection of municipal
12 or district boundaries is a consideration that should permit a
13 higher deviation.

14 MR. HELLRING: It is, but I know that this Court has
15 so far not accepted that as a valid ground. I would urge it
16 upon this Court, it is not necessary to argue that in order to
17 win this case and have it affirmed by this Court. But, the
18 answer to Your Honor's question is yes, I would consider that to
19 be a very important and valid consideration for a Court to take
20 into consideration.

21 Now, Appellants have enjoyed in this case at all levels
22 including this Court to talk about population deviations which
23 are within the limits of the statistical imprecisions of the
24 census which makes them equal to zero. If that has any meaning
25 at all, and I suggest it does not, then it can only mean that any

1 population deviation which already is created by the Legislature
2 in adopting a particular redistricting plan has got to be a much
3 greater population deviation if you superimpose upon it and add
4 to it the statistical imprecision of any census no matter what
5 that statistical imprecision may be.

6 Now, if the statistical imprecision somewhere up on
7 high in the omnipresent sky, which we do not know what it is, is
8 less than 0.7 of a percent as the population deviation here is,
9 then their argument falls for that reason. But, if it is more,
10 let's say if it is one percent, or one and one-half or as was
11 largely studied eight or nine years after the 1970 census a
12 statistical imprecision of two and one-half to 2.6 percent --
13 2.6 percent supposedly -- If it is that high then you have to
14 add about 12,000 to 15,000 people to the 3,674 people by which
15 you already have a population deviation.

16 So, that this argument about population deviation within
17 the confines of statistical imprecisions of the census is backwards
18 because if you strive for zero population deviation it may very
19 well be that because of the statistical imprecisions of any
20 census in the nature of things, there would any way be some kind
21 of a deviation. But, why strive for anything different from zero?
22 If you strive for a one percent de minimus under the argument of
23 statistical imprecision, then the cases before you will then say
24 why not 1.3? Why not 1.4? Why one percent? Why not one percent,
25 two percent, three percent, four percent, six percent? Where do

1 we stop?

2 The right answer is one man-one vote. Three thousand
3 six hundred seventy-four is too many unless it is the result,
4 the unavoidable result, of a good faith effort -- a good faith
5 effort, not this -- on the part of a legislature in adopting a
6 redistricting plan.

7 In this case there has been no showing of good faith.
8 The Court below annexed to its opinion what it called a remarkable
9 document which was a letter from the Speaker of the Assembly to
10 Dr. Reock of Rutgers University in response a few days after
11 Dr. Reock sent his proposed lowest population deviation plan to
12 all the members of the Legislature, he got a letter from Speaker
13 Jackman which they recall -- which they call a remarkable docu-
14 ment, and which says, you are silly if you think that we are going
15 to pay attention to population deviation as the main event. We
16 are realistic legislators and we know we have got the power now
17 because we have got a democratic house and a democratic senate and
18 a democratic governor, and we are going to get it before he leaves
19 office, and on the day that the democratic governor left office,
20 minutes before he left office, he signed this bill for the purpose
21 of accomplishing the objectives which are described in Speaker
22 Jackman's letter which is annexed to the decision of the Court
23 below and which is before Your Honors.

24 This was coupled by the testimony of the majority leader
25 of the Assembly who says, well, its population deviation is small.

1 That is an aspiration somewhere. That is not the real thing we
2 have got to consider.

3 A letter by another assemblyman to his constituents
4 and to other important leaders in the state in his party saying,
5 now this new statute that has been adopted, there is talk about
6 changing it. Let's get behind it because you know what it does
7 for us. Nevermind the population deviation question being at its
8 lowest.

9 These are clear pieces of evidence in this record
10 alongside of this map to show that instead of a good faith effort,
11 there was a bad faith effort.

12 Thank you.

13 CHIEF JUSTICE BURGER: Do you have anything further,
14 Mr. Guido?

15 MR. GUIDO: Yes, I do, Your Honor.

16 CHIEF JUSTICE BURGER: You have three minutes remaining.

17 ORAL ARGUMENT OF KENNETH J. GUIDO, JR.

18 ON BEHALF OF THE APPELLANT -- REBUTTAL

19 MR. GUIDO: After listening to the Appellees' argument,
20 I am a bit curious whether or not this case is about population
21 equality or whether it is about gerrymandering or some sort of
22 set of statutory standards about compactness or what.

23 There have been references to straight lines and
24 crooked lines in the arguments of the Appellees that I would
25 like to just address the Court to page 17 of the Joint Appendix

1 to take a look at the lines that Mr. Reock's map, which was
2 stressed so heavily, has -- Those lines may not be schematic
3 as these lines, but I think that if you look at all of the maps
4 in the Joint Appendix you will see crooked lines and not what are
5 traditionally compactness that you may find in other states
6 because of the nature of the population and its distribution.

7 I would also like to address the question of partisan-
8 ship that has been maintained here. It is uncomparable within
9 the record -- I think it is at the appendix on page 83, paragraph
10 8 of Mr. Karcher's statement -- which he says they were concerned
11 with the preservation of cores of preexisting districts where
12 practicable, and the discussions in a November, 1981 meeting
13 included discussions of various interests of incumbent congress-
14 men both Republican and Democrat.

15 There is no finding in the District Court below that
16 there was partisan gerrymandering in this case. And, the record
17 does not support any such claim. There is no allegation in the
18 complaint to that effect.

19 In fact, the election results belie any suggestion. All
20 incumbents but one were reelected in his district. And, as the
21 record shows, people were aware that the one seat that was lost
22 could be attributed to Millicent Fenwick running for the Senate
23 so that none of the incumbents would be hurt.

24 Everyone knew that some members of Congress would move
25 because the district lines had to be changed because they wanted

1 to be closer to their core constituencies.

2 That is what the record shows about partisan gerry-
3 mandering, which is allegedly the claim of bad faith in this case.

4 In addition, I think that the Court should recognize
5 that this case is not a case about good faith. It is about a
6 good faith effort to achieve population equality. The Appellees
7 in this case have nowhere shown that even if partisan factors
8 were at play here that they had any connection to the population
9 variations that exist in this case.

10 And, as this Court has repeatedly stressed, most
11 recently in Rogers v. Lodge and Mobile v. Boulden is that you can
12 make some allegations about -- you can make allegations about
13 certain things, but you sure to better show the connection between
14 that and the harm claimed. And, the harm in this case --

15 CHIEF JUSTICE BURGER: Your time is --

16 QUESTION: Just one very brief question on the compact-
17 ness problem and the study, the Rutgers study that you called our
18 attention to. The professor has a table which he talks about the
19 degree of compactness for each of his districts, is there anything
20 in the record that tells us the degree of compactness of your
21 districts?

22 MR. GUIDO: No, Your Honor. And, the other thing is
23 there are probably 15 definitions of compactness if you read the
24 literature on reapportionment.

25 Thank you.

1 CHIEF JUSTICE BURGER: Thank you, gentlemen.

2 The case is submitted.

3 (Whereupon, at 11:07 a.m., the case in the above-
4 entitled matter was submitted.)
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CERTIFICATION

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

ALAN J. KARCHER, SPEAKER, NEW JERSEY ASSEMBLY, ET AL., Petitioner
v. GEORGE T. DAGGETT, ET AL. #81-2057

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

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Pine Hunsaid

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