

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-2156

TITLE SHAARE TEFILA CONGREGATION, ET AL., Petitioners V.
JOHN WILLIAM COBB, ET AL.

PLACE Washington, D. C.

DATE February 25, 1987

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1 **IN THE SUPREME COURT OF THE UNITED STATES**

2 -----x
3 **SHAARE TEFILA CONGREGATION, :**

4 **ET AL., :**

5 **Petitioner :**

6 **v. :** **No. 85-2156**

7 **JOHN WILLIAM COBB, ET AL. :**
8 -----x

9 **Washington, D.C.**

10 **Wednesday, February 25, 1987**

11 **The above entitled matter came on for oral**
12 **argument before the Supreme Court of the United States**
13 **at 10:10 a.m.**

14 **APPEARANCES:**

15 **PATRICIA A. BRANNAN, ESQ., Washington, D.C.; on behalf**
16 **of the Petitioners.**

17 **DEBORAH T. GARREN, ESQ., Baltimore, Maryland; on behalf**
18 **of the Respondents.**

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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument first this morning in Number 85-2156, Shaare Tefila Congregation versus John William Cobb.

Mr. Brannan, you may proceed when you are ready.

ORAL ARGUMENT OF PATRICIA A. BRANNAN, ESQ.

ON BEHALF OF THE PETITIONERS

MS. BRANNAN: Mr. Chief Justice, and may it please the Court;

This case presents the issue, whether a complaint that alleges racially motivated discrimination and harassment against Jews may state a claim under Title 42 of the United States Code, Section 1982.

The complaint alleged that respondents' desecration of the synagogue of Shaare Tefila Congregation was racially motivated and hence covered by the statute. The complaint further alleged that the facts that supported the allegation of racial motivation were principally the character, symbols and words that respondents themselves painted on the synagogue.

The complaint alleged that they painted the words, "Dead Jew, Death to the Jew." They painted swastikas, and on a door the words, "In, Take a Shower,

1 Jew." They painted the garbled German words, "Toten
2 Kamf Verband" next to a skull and crossbones.

3 The "Toten Kamf Verband" with the death head
4 units of concentration camp guards in Nazi Germany, and
5 the skull and crossbones was their symbol. These words
6 and symbols invoked Nazi ideology, and it was one of the
7 principal tenets of Nazi ideology, both in Nazi Germany
8 in the 1930s and '40s and among neo-Nazi groups in this
9 country today that Jews are racially non-white and
10 inferior to whites.

11 The complaint further alleged that respondents
12 painted the words, "Ku Klux Klan," and the burning
13 cross, the familiar symbol of the Klan. Klan groups,
14 like the Nazis, hold as one of their central tenets that
15 Jews are racially distinct from whites and inferior.

16 The Fourth Circuit Court of Appeals split on
17 the issue as to whether this conduct stated a Section
18 1982 claim. A majority affirmed the dismissal of the
19 complaint, holding that because Jews are not racially
20 distinct or non-white, this conduct does not state a
21 1982 claim. But in dissent, Judge Wilkinson recognized
22 that although Jews are not racially distinct from
23 whites, when they suffer racially motivated deprivation
24 of rights protected by the statute, they like any other
25 group should be covered.

1 We, of course, agree that Jews are not
2 racially distinct from whites. We respectfully ask this
3 Court to reverse the Fourth Circuit and to hold,
4 consistent with its prior cases --

5 QUESTION: May I ask you a question about your
6 last comment? Do you think at the time the statute was
7 passed that the people who voted for the statute thought
8 that Jews were racially distinct or not?

9 MS. BRANNAN: I believe that they did, under
10 the common understanding of the word "race" at that
11 time. That issue has been briefed in greater detail,
12 actually, in the St. Francis College case.

13 For our purposes, we don't believe that that
14 even would matter. That what really matters, if persons
15 who discriminate against Jews, Arabs or other minorities
16 now, who do that because they view them as racially
17 distinct, that that conduct should be covered.

18 After all --

19 QUESTION: Maybe it should. But you don't
20 contend that at the time the statute was passed, that
21 the authors of the statute might well have used the term
22 "race" in a way that would have treated the Jews as a
23 separate race?

24 MS. BRANNAN: We believe that they did use
25 that term at that --

1 QUESTION: But you don't rely on that fact?

2 MS. BRANNAN: We don't believe that that
3 really adds to the argument that we are making. I am
4 reminded, in answering your question, of Justice
5 Marshall's language in the McDonald case, that at the
6 time of the passage of the statute in 1866, Congress
7 probably didn't anticipate racial discrimination against
8 whites of the sort that this Court held in McDonald to
9 be covered.

10 But Congress had an open-ended concept of what
11 it was covering, that there would be new groups coming
12 to this country; new kinds of discrimination undoubtedly
13 would arise. And it was the discrimination itself that
14 Congress focused on, not particular groups and whether
15 they were covered.

16 That is also illustrated, we believe, in the
17 legislative history by the repeated references to
18 Germans and Swedes and other groups as a race who really
19 -- it just isn't thought any more that those groups are
20 racial --

21 QUESTION: Ms. Brannan, the word
22 "discrimination," of course, connotes treating some
23 people differently than others, and your idea is that
24 the statute covers any instance in which, say, a
25 Frenchman treats a German differently than he would

1 another Frenchman, if they are all in this country?

2 MS. BRANNAN: No, Justice Rehnquist. The
3 principle for which we argue is more narrow. That would
4 only be covered if it is racially motivated
5 discrimination.

6 QUESTION: Well, then how does one know
7 whether a decision by someone of French extraction to
8 treat someone of German extraction differently than he
9 would treat other people, is racially motivated?

10 MS. BRANNAN: We think that that is a question
11 for the finder of fact as it would be in any --

12 QUESTION: Well, what should the judge charge
13 the jury?

14 MS. BRANNAN: The judge should charge the jury
15 that the standard is racial motivation, and that that
16 can be evidenced by statements and admissions of the
17 defendants, by any, for instance, expert opinion as we
18 put in, in this case, that indeed this very conduct and
19 these very symbols --

20 QUESTION: And if someone of French extraction
21 then thought that the person of German extraction was of
22 a different race, that would be sufficient?

23 MS. BRANNAN: Yes, it would, if it can be
24 established -- and the plaintiff, of course, has the
25 burden of proof.

1 QUESTION: But only that this person thought
2 that, not that it is a fact?

3 MS. BRANNAN: That's exactly right. That's
4 exactly right. And the reason --

5 QUESTION: But if you had discrimination of
6 the same sort by a Frenchman against a German, just
7 because he doesn't like Germans, they have been engaged
8 in too many wars and that other Frenchman acknowledges
9 that they are not different races, then it wouldn't be
10 actionable?

11 MS. BRANNAN: Unless the plaintiff could
12 prove, of course, that that statement was false or that
13 acknowledgment was false. And the reason we think that
14 that is a principled and fair distinction, in fact
15 supported by this Court's cases, is the Court has held
16 that these statutes address discrimination that is
17 racial in character.

18 There is something especially invidious, in
19 the eyes of the 1866 Congress, about racial
20 discrimination, that if the discrimination were just for
21 some other reason, it isn't --

22 QUESTION: Why isn't it enough that he is
23 discriminating against Germans, and Germans are a race
24 under the statute?

25 MS. BRANNAN: Well --

1 QUESTION: He is discriminating against
2 Germans as Germans, not because he thinks Germans are a
3 different race but because he thinks Germans are
4 Germans, and under the statute as it was enacted at the
5 time, it was agreed that Germans were a distinct race.

6 MS. BRANNAN: That is --

7 QUESTION: Why wouldn't that come within the
8 statute?

9 MS. BRANNAN: That is another way of
10 approaching the issue that we think is very fair in
11 light of the legislative history, and indeed, would lead
12 to a reversal of this case and an affirmance in the St.
13 Francis College case as well.

14 QUESTION: It would make a lot more sense --
15 given two instances of discrimination against the
16 German, you would want us to find one actionable and the
17 other one not actionable simply because of the two
18 people is foolish enough to think that Germans are a
19 separate race and the other one isn't?

20 MS. BRANNAN: The only difficulty, as we have
21 argued in our briefs, is that at all costs we would want
22 the courts to avoid is the issue of defining race in
23 order to determine coverage.

24 We believe that was one of the key errors of
25 the Fourth Circuit majority, that they had a notion, a

1 correct notion that Jews are not racially distinct from
2 white, and they let their correct idea get in the way of
3 dealing with this discrimination on the terms of the
4 discriminators themselves, and that certainly we
5 wouldn't want the lower federal courts to be analyzing,
6 are Jews racially distinct, are Germans or Arabs or any
7 other group racially distinct.

8 QUESTION: Well, unless that's what Congress
9 intended to be determined in a case like this.

10 MS. BRANNAN: And we believe, Justice
11 Rehnquist, that the legislative history demonstrates
12 it's not at all what they intended, and that in fact
13 this Court's analysis of that history in the McDonald
14 case makes that very clear.

15 QUESTION: What if I take a dislike to people
16 with brown eyes, and I say that I'm just not going to
17 deal with people with brown eyes the same way I'm going
18 to deal with people with blue eyes. Now, if I deny
19 someone a right on that basis, is that actionable under
20 the statute?

21 MS. BRANNAN: Well, the answer is, of course,
22 unless it's racially motivated in our society.

23 QUESTION: Well, could that be racially
24 motivated?

25 MS. BRANNAN: It could be if there were facts

1 to show that historically, or in our society, and in the
2 eyes of the discriminators, was a racial distinction,
3 and the hypothetical --

4 QUESTION: How is the judge going to charge
5 the jury? What should they ask themselves, to decide
6 whether someone with blue eyes who treats differently
7 people with brown eyes is "discriminating"?

8 MS. BRANNAN: The charge should be whether it
9 is conduct that we understand as racial, as based on
10 that person and their heritage and background and what
11 they are in unchangeable ways, unlike, for instance
12 religion, and that that should be backed up in the
13 evidence and the plaintiff has the burden to show that
14 it ties in historically or culturally with an
15 understanding that is racial.

16 In the hypothetical you posed, that probably
17 would be an unlikely result, that a plaintiff could
18 prevail in a case like that.

19 QUESTION: But it has to have a historical
20 background. In other words, the discrimination would
21 have to be going on for a while before it would be
22 actionable under the statute?

23 MS. BRANNAN: Not necessarily. If there
24 developed now, for instance, a notion that French
25 Canadians are racially distinct and there were Klan-like

1 groups who were out to do the sorts of things that
2 happened at Shaare Tefila to French-Canadians, I don't
3 think we would have to wait for some period of time but
4 we would need to show that they view their conduct as
5 racially motivated against those groups.

6 QUESTION: Ms. Brannan, are you asking us, in
7 effect, to equate race with national origin
8 discrimination? Is that what it approaches?

9 MS. BRANNAN: We are not. We are looking to
10 the facts of this case and saying that, given the
11 historic and contemporary link in the eyes of people who
12 lash out at Jews, that they are a racial group; that we
13 really needn't broach that question in this case at all.

14 But to go back up --

15 QUESTION: So long as they are intelligent
16 enough to know that they are not a distinct racial
17 group, it would be okay; they could paint the same
18 things on the synagogue so long as they know that the
19 Jews are not a separate race?

20 MS. BRANNAN: In this case, Justice Scalia --

21 QUESTION: That is the position you are urging
22 us to take, though, isn't it?

23 MS. BRANNAN: No. I don't think it turns only
24 on admissions. In this case, if the Respondents denied
25 up and down that they had a racial belief about Jews, I

1 think --

2 QUESTION: They in fact didn't. I'm not
3 saying they just admit -- they in fact didn't. They in
4 fact know that Jews are not a separate race. But they
5 still set out to defame and cause injury to Jews.

6 Do you think that that would not be covered,
7 so long as the individual is not doing it because he
8 thinks Jews are a separate race?

9 MS. BRANNAN: Well, I have some difficulty, I
10 suppose, with the notion of, you know, "they don't
11 think," because given the content of the message that
12 they put up on the walls of Shaare Tefila, it really
13 evokes a racist history.

14 QUESTION: Don't change my hypothetical. I am
15 giving you a hypothetical in which the individual knows
16 Jews are not a separate race and paints the same things
17 as were painted here on the synagogue.

18 Now, under your theory if I understand it
19 correctly, that would not be actionable?

20 MS. BRANNAN: Under my theory, I guess I can't
21 reconcile them knowing that Jews are racially distinct
22 and still invoking the Holocaust.

23 QUESTION: Make believe, all right?

24 MS. BRANNAN: All right.

25 QUESTION: Accept my hypothetical. Under your

1 theory it would not be actionable; isn't that right?

2 MS. BRANNAN: If we could know completely what
3 was in their minds, it would not be actionable. But
4 perhaps to work a variation on your hypothetical --

5 QUESTION: Well, what in the legislative
6 history supports that very unusual approach to the
7 statute, and perhaps unworkable approach?

8 MS. BRANNAN: Well, we think in fact that the
9 approach is directly in line with this Court's cases,
10 particularly the McDonald and General Building --

11 QUESTION: I asked about the legislative
12 history.

13 MS. BRANNAN: And what is supportive in the
14 legislative history was the repeated references --

15 QUESTION: Well, there may be some support in
16 the legislative history for treating Jews as a separate
17 race or treating Germans as a separate race. But I
18 don't see anything in the legislative history that would
19 make it turn on the relative sophistication of the
20 person doing the discriminating, which you are urging.

21 The view of the discriminator -- I mean,
22 that's what gets you into a very peculiar approach
23 here. And is there anything in the legislative history
24 to support that?

25 MS. BRANNAN: Well, Justice O'Connor, we think

1 it isn't so much the sophistication as the intent of the
2 discriminator, and that is an issue that this Court
3 addressed in terms of the legislative history in General
4 Building Contractors, and held that intent is the
5 touchstone of coverage, that a plaintiff now has to show
6 racially discriminatory intent.

7 QUESTION: But why isn't it enough if the
8 intent is to discriminate against a race, as race was
9 understood when the statute was enacted? You are not
10 just insisting that the intent be to discriminate
11 against a race, but you are insisting that the intent be
12 to discriminate against a race because it is a race, not
13 because we have been at war with Germans for 200 years,
14 but because Germans are a separate race.

15 Now, why do you have to add in that
16 qualification under the statute? Isn't enough that you
17 are discriminating against a race? Isn't that all the
18 statutory language would require?

19 MS. BRANNAN: Yes, but the difference, I
20 think, between the last part of what you said and what
21 we are arguing, Justice Scalia, is the motivation of the
22 actor must be racially discriminatory. That is the
23 thing that we are emphasizing.

24 QUESTION: Why? Where is that in the statute?

25 MS. BRANNAN: Well, basically because this

1 Court so held in General Building Contractors and
2 McDonald, but that has been the thing that the Court has
3 looked to, not who the group is, who is the victim, but
4 what the intent is as demonstrated by the acts and by
5 statements and by the usual evidence that fact finders
6 look at to measure intent.

7 QUESTION: Do you think McDonald would have
8 come out differently if a person just didn't like the
9 color of the white race's skin, or of the black race's
10 skin and was discriminating on that ground, although
11 still discriminating against a race?

12 MS. BRANNAN: Well, in our society skin color
13 is very wrapped up, of course, with issues of race and I
14 am not sure that those two things are separable in a
15 case such as McDonald.

16 QUESTION: That's what I was wondering about.
17 What would you say if they painted swastikas on the
18 synagogue on Lenox Avenue in the middle of Harlem?
19 There is a synagogue there.

20 MS. BRANNAN: Yes, Justice Marshall.

21 QUESTION: And there is not a white person
22 within ten blocks.

23 MS. BRANNAN: And we believe that the result
24 would be the same, that those congregants should be
25 covered, as we believe Shaare Tefila would be covered.

1 QUESTION: Well, you couldn't do it on race,
2 could you?

3 MS. BRANNAN: Well, again swastikas on a
4 synagogue again invoke that ideology of racial
5 distinctness of Jews, and we think if that is part of --

6 QUESTION: But there are no Jews in that
7 synagogue. There are no white Jews, I would say.

8 MS. BRANNAN: Well, we think it makes no
9 difference whether the Jews are black or white if the
10 racial animus is there to support the cause of action.
11 As in McDonald versus Jones, the Court hasn't weighed
12 the color of the skin or the race of the victim but has
13 looked to the intent of the discriminator and that the
14 result there should be the same even if the victims are
15 black.

16 QUESTION: If these people had just vandalized
17 the synagogue without painting anything, swastikas or
18 anything like that, they had just trashed the place,
19 would you be here?

20 MS. BRANNAN: It would be a much more
21 difficult case.

22 QUESTION: You would then have to have some
23 other evidence that they did it on a racial basis?

24 MS. BRANNAN: Exactly.

25 QUESTION: But if it turned out that they --

1 as Justice Scalia suggested, if it turned out that as a
2 matter of fact they knew that Jews were not a different
3 race, they claimed that they just didn't like Jews, you
4 wouldn't be here then?

5 MS. BRANNAN: Exactly, if there weren't some
6 evidence. Here the character of what was painted is the
7 strongest evidence.

8 QUESTION: And you would -- in that case you
9 wouldn't even be here if you determined or you wouldn't
10 even be here, even arguably under the statute, claiming
11 that at the time the statute was passed, that Jews were
12 considered to be enough different to be covered by the
13 statute?

14 MS. BRANNAN: We might, although I think we
15 would be advocating, as are the respondents in the St.
16 Francis College case --

17 QUESTION: You don't want to urge in this
18 Court, I take it, that Jews are a different race?

19 MS. BRANNAN: No, not at all, Justice White.
20 We want to urge that where the discrimination against
21 them is racial, even though --

22 QUESTION: And you don't want to -- you are
23 not urging that Congress thought Jews were a different
24 race at the time they passed the statute?

25 MS. BRANNAN: There is some evidence of that,

1 but we really don't think that is critical one way or
2 the other to the holding, that what Congress was after
3 and was concerned about was racial discrimination
4 against anyone.

5 QUESTION: Well, do you think it would be
6 error if we read the legislative history to say,
7 Congress thought that Jews were a different race and
8 therefore the statute covers it? Would we be in error?

9 MS. BRANNAN: No, I don't, although we would
10 certainly urge the Court to make clear that of course
11 Jews or any other group now bringing a claim would not
12 have to prove some racial distinctness. That was really
13 what was suggested by the Fourth Circuit majority, that
14 there is an extra burden beyond racial motivation on the
15 plaintiff to show that they are non-white or racially
16 distinct, although it is unclear, racially distinct from
17 whom.

18 That, we believe, was the crux of the error
19 and that particular aspect of that opinion, we believe
20 should be reversed and made clear by the Court, whether
21 or not the Court accepts the racial motivation theory
22 that we have put forward or the respondents' approach
23 that is more closely tied to the meaning of race in 1866.

24 QUESTION: And could, under your theory, these
25 respondents have been prosecuted criminally under the

1 criminal counterpart of these statutes?

2 MS. BRANNAN: We believe that they could. We
3 believe that they could. In fact, they were prosecuted
4 under state law only under the malicious destruction of
5 property types of statutes that don't in any way address
6 the racial motivation or the real -- the civil rights
7 violation that was the most hurtful part of the
8 conduct. It wasn't really getting the wall messed up
9 that is offensive to the congregation.

10 QUESTION: Ms. Brannan, you have a lot of
11 trouble with this Screws case which says, you must have
12 an intent to deprive somebody of a right, a specific
13 right. Remember that case?

14 MS. BRANNAN: Yes, I do, and we --

15 QUESTION: Well, in this you'd have it awful
16 hard to prove that criminally, beyond a reasonable doubt.

17 MS. BRANNAN: I think as a question of proof,
18 there will be more or less easy cases. We think that
19 the intent here is very clear, and that the right that
20 was violated is the right in Section 1982 to hold
21 property, one of the specifically enumerated rights.

22 QUESTION: It doesn't say that the result --
23 the man was killed. Screws says it was what was in the
24 man's mind.

25 You have to prove that he intended not only to

1 kill but to kill in order to deny him a constitutional
2 right. Well, that would be a lot of problem in this
3 case.

4 MS. BRANNAN: Yes, it would certainly be a
5 question of fact. But we believe at the threshold a
6 colorable prosecution could be brought.

7 QUESTION: If your interpretation is correct,
8 do you think that it will eliminate or sweep out of the
9 way some specific exceptions that were enacted in Title
10 VIII, the Housing Act where Congress specifically
11 exempted some forms of possible discrimination?

12 I guess those would just be swept away by the
13 potential for suit under this section?

14 MS BRANNAN: Well, as in the Court's prior
15 cases, considering the relationship of 1981 in Title VII
16 and 1982 in Title VIII, they are separate and
17 independent causes of action and the Court already has
18 held that in Title VII and Title VIII, Congress did not
19 intend to --

20 QUESTION: Well, certainly, your
21 interpretation would make useless the reservations
22 expressed in Title VIII for certain types of
23 discriminatory conduct.

24 MS. BRANNAN: Well, our view is that Title
25 VIII has its restrictions and its areas of coverage, and

1 that 1982 has its, and that they stand independently.
2 It may well be that there are cases covered under
3 Section 1982 that would not be covered under Title VIII.

4 In fact, this is such a case. We do not have
5 a Title VIII claim because the congregation building is
6 not a dwelling. So, the two, we believe, can be on
7 parallel tracks but each have their independent areas of
8 coverage and exemption.

9 QUESTION: Well, but it would open up for
10 suit, if you are correct, various things that were
11 reserved in Title VIII, for example the duplex housing
12 when the owner lives in part of the duplex, and that
13 sort of thing.

14 MS. BRANNAN: We think that is true now,
15 Justice O'Connor, under 1982. For example, if a black
16 family is now denied housing, rental housing in a
17 duplex, there is no reason why they cannot bring a
18 Section 1982 case if they can prove that discrimination,
19 you know, was against them on racial grounds.

20 It's really -- we're not going any farther in
21 that area than already the Court has established, that
22 there are areas of coverage under Section 1982 that
23 might be exempted.

24 QUESTION: Well, except that you would extend
25 it to every other possible source of national origin?

1 MS. BRANNAN: Well, we view it really not as
2 an exemption, but as reversing the Fourth Circuit's
3 attempt to restrict by defining groups the courts think
4 are not racially distinct from the coverage of the
5 statute, whereas under this Court's cases, particularly
6 General Building Contractors, the rule has been where
7 there is racially discriminatory intent to breach one of
8 the protected rights under the statute, there is
9 coverage.

10 QUESTION: Yes, but Justice O'Connor's point,
11 I think, is that Title VIII has some meaning. If you
12 assume that what Title VIII was doing was extending to
13 persons other than just blacks the guarantees of 1982.
14 But now, under your theory, Title VIII doesn't do
15 anything that 1982 doesn't already do.

16 MS. BRANNAN: Well, Title VIII, as I recall,
17 also covers religious discrimination. It also covers, I
18 believe, gender based discrimination which our theory
19 certainly would not reach.

20 Racial motivation, we believe, will cover
21 victims of racial motivation but in a straightforward
22 religious discrimination case, for example, our theory
23 would not cover plaintiffs, whereas Title VIII very well
24 might. So they do have, we believe, their independent
25 areas of coverage and exemption, even under the approach

1 we urge.

2 QUESTION: Could I just explore again what you
3 mean by racial motivation? Suppose a landlord doesn't
4 want a particular racial group, just because the
5 landlord thinks that that racial group is sloppy, just
6 has made the judgment that the group as a whole is
7 sloppy.

8 Now, would that be the racial motivation?

9 MS. BRANNAN: Yes, Justice Scalia, we think it
10 would be, and in fact it's those kinds of stereotyped
11 generalizations about racial groups that have created
12 the disabilities that Congress was trying to break in
13 the 1866 Act.

14 QUESTION: But the landlord has to believe
15 that it's -- if the landlord just believed that, let's
16 say, all Frenchmen are sloppy, but knew that Frenchmen
17 were not a separate racial group, that would be okay?

18 MS. BRANNAN: I don't --

19 QUESTION: Or let's say, all Puerto Ricans or
20 all Italians or whatever? So long as the landlord knows
21 that is not a racial group, that's perfectly okay?

22 MS. BRANNAN: If it isn't a racially based
23 distinction, we think that case would not be covered.

24 QUESTION: Very strange.

25 MS. BRANNAN: Again, harking back to the

1 legislative history a bit, what was at the heart of the
2 Reconstruction, Congress's concern of course in the
3 first instance was creating situations in which the
4 newly freed slaves could function in our society. But
5 they didn't limit that protection, of course, just to
6 blacks as the Court held in McDonald.

7 It was really a deep concern with racial
8 motivation as being something distinct and particularly
9 odious in our society that was at the heart of their
10 concern.

11 QUESTION: It seems to me you are only getting
12 at the ill-educated discriminator, right?

13 MS. BRANNAN: Well, perhaps, Justice Scalia,
14 it's a question of ignorance, not education. I think
15 that there are perhaps those in much more sophisticated
16 places with a string of degrees who may be surprised to
17 hear a congregation arguing before the Supreme Court
18 that Jews are not a race.

19 We believe that the error of the Fourth
20 Circuit simply was in not applying this Court's
21 precedents in McDonald and General Building Contractors,
22 but adding on that extra burden an extra test for the
23 plaintiffs.

24 One of the additional difficulties with that
25 test is that it simply is not practicable and sensible

1 for the district courts to be trying to figure out who
2 is racially distinct or non-white, which are the words
3 the Fourth Circuit used. It is unclear, first of all,
4 what the Court even meant by "racially distinct."

5 Racially distinct from whom?

6 In Sullivan and Tillman, this Court held that
7 even whites who are the victims of racial discrimination
8 by other whites, because those white plaintiffs have
9 advocated the rights of blacks, have a cause of action
10 under Sections 1981 and 1982. And we believe, again,
11 the principle that underlies that case is if the
12 motivation is racial, it's racial because those white
13 plaintiffs were advocating the rights of blacks, that
14 once again there should be a cause of action even if the
15 plaintiffs and defendants are of the same race,
16 indisputably.

17 In terms, of course, of its language about the
18 Jewish plaintiffs in Shaare Tefila being non-white, we
19 think perhaps it goes without saying that it would be
20 completely inappropriate exercise for the district
21 courts to undertake trying to figure out who is white
22 and non-white in some objective, anthropological or
23 scientific test, that that simply would not be an
24 appropriate approach for the courts to take.

25 For all of these reasons we respectfully ask

1 this Court to reverse and to hold that all victims of
2 racially motivated deprivations of the rights enumerated
3 in the Civil Rights Acts of 1866 may state a cause of
4 action under Sections 1981 and 1982.

5 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
6 Brannan.

7 We will hear now from you, Mrs. Garren.

8 ORAL ARGUMENT OF DEBORAH T. GARREN

9 ON BEHALF OF THE RESPONDENTS

10 MS. GARREN: Mr. Chief Justice, and may it
11 please the Court:

12 You have heard the petitioners argue that the
13 desecration of a synagogue, what is a place of worship
14 is covered by Section 1982, what everyone agrees is a
15 race discrimination statute, because these defendants
16 allegedly acted out of a completely erroneous and
17 irrational belief that Jewish people are racially
18 distinct.

19 I would argue that inclusion of such a
20 religious discrimination claim within the scope of this
21 race discrimination statute is entirely out of keeping
22 with the purpose of the statute as originally enacted
23 and its specific language as interpreted by this Court.

24 Likewise, and particularly importantly,
25 determination of the coverage of Section 1982 wholly by

1 reference to the illogical and erroneous misperceptions
2 of discriminators is a far cry from the purpose and the
3 language of Section 1982 as it has been interpreted by
4 this Court.

5 QUESTION: Ms. Garren, there is some evidence
6 in the legislative history, of course, that Congress had
7 in mind treating race to cover such things as Gypsies
8 and Chinese and Germans and so forth, is there not?

9 MS. GARREN: There are some general references
10 by some of the legislators and the --

11 QUESTION: President Johnson vetoed the
12 statute because he thought it was unwise to sweep in
13 Chinese and Gypsies, didn't he?

14 MS. GARREN: Yes, ma'am.

15 QUESTION: So, there is some legislative
16 history to support the approach that Congress, at least,
17 in enacting Section 1982, may have intended to cover
18 discrimination on the basis of a different version of
19 what constitutes race than we would have today?

20 MS. GARREN: I think there is no evidence in
21 the legislative history that Congress intended to define
22 the coverage of the statute wholly by reference to
23 intent. In other words, there is no evidence in the
24 legislative history that the coverage of the statute is
25 determined by whether or not a defendant arguably acted

1 out of an erroneous and illogical racial perception.

2 QUESTION: That may be true, but how about the
3 argument that apparently is going to be made in the
4 companion case, rather than here, that indeed the
5 statute does cover discrimination against Jews because
6 they are Jews?

7 MS. GARREN: I would say, Justice O'Connor,
8 that in this case the petitioners have always very
9 carefully not argued that Jewish people have any sort of
10 racial identity or even are commonly identified by
11 society as racially distinct. They haven't made that
12 argument in this case.

13 There may have been some general references in
14 the legislative history to Jewish people as members of a
15 different race. I think it would be inappropriate to
16 look to an individual legislator's comment regarding
17 that as determinative of the coverage of the statute.

18 There is certainly no indication that the
19 majority --

20 QUESTION: Well, it would be appropriate,
21 though, to look to the legislative history to determine
22 what it is that Congress had in mind in passing this
23 statute?

24 MS. GARREN: Yes, ma'am, and that is what you
25 all have done in determining that the statute is limited

1 to rights which are racial in character and addresses an
2 effort to achieve racial equality, with reference to
3 people who are members of specific groups, I think. And
4 whether or not there was a general recognition in
5 society at the time of the 39th Congress that Jews are
6 racially distinct, it is something that has never been
7 argued by petitioners in this case, and I think
8 something that is not evidenced in the legislative
9 history either.

10 And will be difficult to discern, if one
11 attempted to go back and develop racial definitions at
12 that time. I would argue that a more appropriate
13 approach would be to try to bring the statute into the
14 20th Century, and at most, in an effort to define what
15 groups are covered, to look at whether a group -- an
16 individual as a member of a group that is commonly
17 identified as non-white or is commonly identified as
18 white, that is reflective, I think, of the specific
19 language of the statute and also --

20 QUESTION: This Court has brought whites
21 within the protection of the Act in McDonald.

22 MS. GARREN: Yes, ma'am. I understand that.

23 QUESTION: It is unlawful to discriminate
24 against white people. So, how can you now exclude Jews?

25 MS. GARREN: Jewish people would have a cause

1 of action based on discrimination because they are
2 white, if that was their contention, but that is not
3 their contention in this case. They also do not contend
4 that they are racially distinct from whites in any way.

5 So, I would argue that they do not fall within
6 a group that is protected by the statute. There is no
7 evidence that they fall within such a group.

8 QUESTION: Mrs. Garren, the problem we have in
9 the United States -- when I say a problem, it's perhaps
10 a great asset of our country -- is that we have so many
11 different races that over a period of many years that
12 there have been a great many intermarriages. We have a
13 heterogeneous society.

14 How would your theory fit, for example, if a
15 white had married an Asian and their progeny, children,
16 grandchildren, would -- would they be a member of the
17 white race or an Oriental race?

18 MS. GARREN: I understand.

19 QUESTION: You can cite any number of examples
20 like that. We see them every day. We have friends like
21 that.

22 What do we do about that?

23 MS. GARREN: Your Honor, I am not attempting
24 to suggest that the Court define scientific categories
25 of race, as has been suggested by the petitioners. I

1 think what you would do with those sorts of cases is,
2 first of all, there are certain groups in our society
3 that are commonly identified as non-white.

4 Those groups would be entitled to protection,
5 and if an individual is subjected to discrimination
6 because he is perceived to be a member of such a group,
7 then he would be covered.

8 QUESTION: That is matter of perception?

9 MS. GARREN: It is a perception only of an
10 individual's membership in a group that is commonly
11 identified as non-white. And that is something that the
12 jury could determine, in other words, whether or not
13 that individual was acted against because he was
14 non-white.

15 QUESTION: Does that bring you close to the
16 position of your opposition here today?

17 MS. GARREN: No, I think it does not, because
18 the petitioner argues that the perceptions of the
19 discriminator, without reference to groups, are
20 determinative. In other words, under the petitioner's
21 argument, to take an extreme example, if a group of
22 anti-gay people decided that homosexuals were racially
23 different than others and discriminated against them on
24 that basis, I think carrying the petitioners' argument
25 to its logical conclusion, that claim would be covered

1 by the statute.

2 The same might be true for handicapped
3 individuals. Suppose some deviant organization in our
4 society decided that handicapped people were different
5 racially and acted against them on that basis, I believe
6 that claim also would be covered under the petitioners'
7 theory for coverage of this statute.

8 So, it is something different. It's an effort
9 to bring the statute into the 20th Century and to
10 recognize racial groups in a way with reference to
11 society's perceptions.

12 QUESTION: Where do you want to go to find
13 this, it read it, if you are part Scandinavian, part
14 Indian, part South African, part Japanese? What are
15 you? What book do you find --

16 MS. GARREN: Again, Your Honor, I am not
17 saying that anyone has to make that determination. I am
18 saying that there only has to be a decision by a jury
19 whether you are discriminated against because you are
20 identified as non-white.

21 QUESTION: White or non-white?

22 MS. GARREN: Pardon me.

23 QUESTION: You said you have to find out
24 whether you are white or non-white?

25 MS. GARREN: No, sir, I did not say that.

1 QUESTION: What did you say?

2 MS. GARREN: I said that an individual could
3 obtain the coverage of the statute if he was
4 discriminated against because he is identified as
5 non-white, or as a member of a group that is commonly
6 identified as non-white.

7 QUESTION: How did he become identified as a
8 non-white person?

9 MS. GARREN: Well, I think one obvious way in
10 which he would be identified as a non-white person would
11 be by reference to immutable physical characteristics
12 such as skin color, which we traditionally understand --

13 QUESTION: I would like to have seen you
14 identify my father. He was white with blond hair and
15 blue eyes.

16 MS. GARREN: In that case, sir, I don't think
17 he would have a cause of action for race discrimination.

18 QUESTION: Oh, but he did. He was a Negro.

19 I am trying to find where you -- what do you
20 do with Sammy Davis?

21 (Laughter.)

22 MS. GARREN: Sammy Davis might certainly have
23 a cause of action for race discrimination. He would not
24 have a cause of action based on his religion.

25 QUESTION: The people that committed this act

1 knew exactly what they were doing and they knew exactly
2 who they were aiming at, didn't they?

3 MS. GARREN: Your Honor, I understand that
4 this was an egregious wrong.

5 QUESTION: And should be punished.

6 MS. GARREN: It's one that cries out for a
7 remedy. That is correct. And there was a remedy here
8 available to these petitioners.

9 QUESTION: What?

10 MS. GARREN: Mr. Rehmer was convicted of
11 malicious destruction of property and was sentenced to
12 three years, the maximum sentence for that offense.
13 Criminal restitution was available to the petitioners
14 under Maryland law.

15 In addition, they had many common-law actions
16 that they could have brought in the state courts.
17 Instead, they asserted them as pendent claims in the
18 federal court, and never really, seriously wanted to
19 pursue those state claims because they wanted to send a
20 message to these individuals under federal civil rights
21 law.

22 My point simply is that you can only send that
23 message if Congress has accorded federal jurisdiction to
24 do it, and that there is no indication that Congress
25 intended the statute's coverage to be determined by

1 reference to individual discriminators' illogical and
2 irrational perceptions of race. There has to be
3 something more.

4 QUESTION: Ms. Garren, there is such a thing
5 as an Ethiopian Jew, isn't there?

6 MS. GARREN: Yes, sir.

7 QUESTION: Suppose this synagogue had been one
8 for Ethiopian Jews?

9 MS. GARREN: That might be a different case,
10 Your Honor. I can imagine a circumstance where there
11 could be allegations that the synagogue was defaced
12 because its members were predominantly black, in which
13 case clearly they would be able to assert a claim under
14 Section 1982.

15 QUESTION: Black, not Jewish, then?

16 MS. GARREN: That's correct. That's correct,
17 because they have agreed that Jewish people are not
18 racially distinct.

19 QUESTION: Well, if they are black and Jewish?

20 MS. GARREN: I think they have a cause of
21 action because they are black..

22 QUESTION: But not because they are Jewish?

23 MS. GARREN: As indicated --

24 QUESTION: If they painted swastikas they
25 wouldn't have a cause of action because they are Jewish?

1 MS. GARREN: That's correct, Your Honor.

2 QUESTION: You have to take that position.

3 MS. GARREN: In order to take that position,
4 you would have to. Yes, sir, I do.

5 (Laughter.)

6 MS. GARREN: You would have to define the
7 scope of the coverage of this statute, something clearly
8 that Congress and now the courts must do, by reference
9 to those deviant organizations' decisions about Jewish
10 racial identity.

11 The petitioners herein do not claim a Jewish
12 racial identity, and have never claimed a Jewish racial
13 identity, nor did they contend that they are commonly
14 identified as racial or non-white in any sense. It's
15 simply a matter of what the statute was intended to
16 address.

17 It was not, I would argue, a statute to root
18 out all forms of invidious discrimination or bigotry in
19 our society. This Court has held that it does not
20 address sex discrimination, religious discrimination,
21 national origin discriminations standing alone, and all
22 of those categories would be pulled in, arguably, under
23 the petitioners' theory.

24 QUESTION: Are you taking the position,
25 however, that the statute is applicable only to blacks?

1 MS. GARREN: No, sir, I am not.

2 QUESTION: So, if it were the yellow -- they
3 were Chinese you would say the statute is applicable?

4 MS. GARREN: That is correct. That group
5 would be --

6 QUESTION: And yet, when the statute was
7 enacted, the concern was with the freed men, was it not?

8 MS. GARREN: Well, if one looks to the actual
9 concern of the legislators in passing this statute, I
10 think one would have to realize that it was passed in an
11 effort to protect and extend the rights of the newly
12 freed slaves.

13 And this Court has indicated, therefore, that
14 blacks are protected, and has subsequently indicated
15 that whites as well are protected. The additional step
16 that you must take, not in my case, I would argue,
17 because in this case Jewish petitioners have indicated
18 that they do not have a racial identity but in the case
19 that follows mine, there is a need to make an effort to
20 define race.

21 I would argue that the petitioners just throw
22 that out the window and say, we don't need to define it;
23 we don't need to determine what groups are protected by
24 this statute; we'll determine the statute's coverage by
25 reference to each individual's deviant ideas, without

1 any reference to protected groups in our society.

2 QUESTION: May I ask, Ms. Garren, over the --
3 years ago, and of course it's still prevalent in some
4 areas, there was prejudice against Jews. That was known
5 in our society. There was a lot of anti-Semitism.

6 How would you characterize that prejudice?

7 MS. GARREN: Your Honor, I would --

8 QUESTION: You wouldn't call it racial
9 prejudice?

10 MS. GARREN: Prejudice that is based on their
11 religion.

12 QUESTION: Do you think it was based entirely
13 on their religion?

14 MS. GARREN: That is the characteristic that
15 defines them. There is no racial characteristic that in
16 fact defines people of the Jewish faith. It is a
17 religion.

18 QUESTION: Do you think that would be the
19 proper characterization in Germany when it was so
20 virulent?

21 MS. GARREN: No, sir, but again that was the
22 deviant perception of a couple of organizations in the
23 society that had run rampant. It wasn't a common
24 perception in the society.

25 They weren't commonly identified.

1 QUESTION: Do you think the origin of the
2 prejudice in this country was entirely religious?

3 MS. GARREN: Of the prejudice against Jewish
4 people?

5 QUESTION: Yes.

6 MS. GARREN: I think I am not qualified to
7 comment on that, but I have every reason to believe that
8 religion in part motivated that prejudice because that
9 is what in fact defines the group.

10 QUESTION: It didn't extend to Jews who were
11 atheists, nonbelievers? Do you really think that was
12 the case?

13 MS. GARREN: I'm not sure I understand your
14 question, Justice Scalia.

15 QUESTION: I mean, do you think that the
16 prejudice that existed against Jews in this country was
17 only against believing Jews, and so long as the Jew
18 said, I really no longer believe in the religious tenets
19 of Judaism, the prejudice no longer existed and that
20 person would have been able to get into all sort of
21 country clubs and what not?

22 MS. GARREN: No, sir, but I do think that the
23 discriminators identify the group by their religious
24 beliefs. They may not know in each individual instance
25 whether that Jewish person follows his faith or not.

1 QUESTION: Why -- you want us to use modern
2 concepts of taxonomy in order to apply this statute?

3 MS. GARREN: No, I don't think I do, Your
4 Honor.

5 QUESTION: Why?

6 MS. GARREN: I don't think I do. I am not
7 suggesting that you attempt to define racial categories
8 in a taxonomical fashion, or any kind of scientific way,
9 because I do think there are incredible difficulties
10 with doing that.

11 I am saying that --

12 QUESTION: Modern perceptions is what you want
13 us to use?

14 MS. GARREN: Common identification of a group
15 as non-white in our society, and that's an approach that
16 the lower courts have taken without fail in attempting
17 to grapple with these cases. And none of those lower
18 courts have included Jewish people within the rubric of--

19 QUESTION: Why just non-white? I mean, wasn't
20 non-white -- do you contest that non-white was used in
21 the statute to mean non-Anglo-Saxon? I mean, isn't
22 there a lot in the legislative history that would
23 suggest that Germans would have been considered
24 non-white for purposes of this statute?

25 MS. GARREN: There may be statements by

1 individual legislators with reference to a German race.
2 Now, whether that individual legislator considered
3 Germans to be non-white, I don't know.

4 I have no reason to think that the Legislature
5 intended to address the rights of Germans when it passed
6 the race discrimination statute.

7 QUESTION: Wasn't there a lot in the
8 legislative history that showed that the statute was a
9 reaction, not just to slavery but also to the
10 know-nothingism that had grown up in this country, and
11 that it was intended to protect Irish and Germans in
12 particular?

13 MS. GARREN: The respondents in the case that
14 follows us have discussed some of those references. I
15 do not think there is a lot in the legislative history
16 to that effect, nor do I think that that would represent
17 the majority opinion of the legislators.

18 I think the primary emphasis was on protecting
19 the rights of newly freed slaves and blacks in the South
20 when that statute was passed. It was a Reconstruction
21 era statute. And the courts have now extended it -- you
22 all have now extended it to encompass whites.

23 The question is, how one defines additional
24 categories that it would cover, and I think it is with
25 reference to those two categories that one defines the

1 definition.

2 QUESTION: Ms. Garren, do you want us to amend
3 McDonald and say, when we said "white people" we didn't
4 mean Jews?

5 MS. GARREN: No, sir. I think, again, that
6 Jewish people have a cause of action based on their
7 whiteness. If they are discriminated against because
8 they are white they can sue.

9 If a Jewish person is discriminated against
10 because he is black, he can sue. Jewish people don't
11 have a racial identity, as the petitioners have
12 recognized, as the lower courts have recognized, as we
13 recognize.

14 They have a cause of action if --

15 QUESTION: Just because certain Jews are white
16 in complexion doesn't take away the rights of them as
17 Jews.

18 MS. GARREN: Those are rights against
19 religious discrimination. There's no --

20 QUESTION: Well, isn't it religious --

21 MS. GARREN: (inaudible) Jewish people are
22 racially distinct.

23 QUESTION: Well, this is not religious
24 discrimination, then.

25 MS. GARREN: I would say this is religious

1 discrimination, and is not encompassed within this race
2 discrimination statute.

3 QUESTION: That's the only thing the swastika
4 means.

5 MS. GARREN: A synagogue was desecrated.

6 QUESTION: "Death to the Jews." That's what
7 the swastika means.

8 MS. GARREN: I appreciate what Nazis believed
9 and I also think that that is not a belief that is
10 common to society.

11 QUESTION: I didn't say Nazis. I said anybody
12 that uses the swastika means, "Death to the Jews."
13 German, American, or whoever he is, you don't use the
14 swastika.

15 MS. GARREN: Well, I think even the
16 petitioners in this case would agree that a claim would
17 not be covered if the swastika wasn't used to indicate
18 that Jews are racially inferior. That's what results
19 from their standard.

20 QUESTION: It means that you should die.

21 MS. GARREN: Pardon?

22 QUESTION: It means that you should die.

23 MS. GARREN: These are horrible views. The
24 question is whether or not we should determine that --

25 QUESTION: The word is Holocaust. The word is

1 Holocaust. That's what the swastika means.

2 MS. GARREN: I understand that Jewish people
3 have been subjected to historical discrimination, that
4 it's an awful circumstance. But whereas here these
5 petitioners were not without a remedy to make them
6 whole, there isn't any need to extend a federal statute
7 to cover any situation where a defendant acted out of a
8 misperception.

9 QUESTION: How could they protest the swastika
10 being placed on their building?

11 MS. GARREN: Well, I think first of all that
12 they could have pursued these fellows in state courts.

13 QUESTION: Well, if they say that, if you just
14 painted a stroke you're desecrating the building.

15 MS. GARREN: That's true, Your Honor.

16 QUESTION: Well, this was more than that.
17 This was a swastika.

18 MS. GARREN: I understand that, Your Honor,
19 and I think that the state courts likewise would have
20 addressed that circumstance.

21 QUESTION: Well, what statute does a state
22 have saying you shall not use swastikas?

23 MS. GARREN: The state doesn't have such a
24 statute, Your Honor. However, I think the egregious
25 nature of the conduct in this case would have been

1 addressed by reference to punitive damages, for
2 instance, in common-law actions; by reference to
3 criminal restitution, by reference to sentencing. And I
4 think it was.

5 With respect to criminal sentencing, at least
6 with respect to the individual whom I represent, he
7 received the maximum sentence and that is an uncommon
8 thing for malicious destruction of property in the State
9 of Maryland. That reflects an effort by the State to
10 address the seriousness of the act.

11 Your Honor, I don't know the circumstances
12 surrounding the others. It's not part of the record and
13 I have no way of knowing whether there's even sufficient
14 proof to tie them in with this incident.

15 QUESTION: Ms. Garren, you rely on the fact
16 that it was a synagogue to show that it was racial --
17 religious rather than racial. But actually, they just
18 went across the street to the synagogue after they had
19 initially spray painted a Drug Fair, which is not
20 notably religious.

21 (Laughter.)

22 MS. GARREN: That's correct.

23 QUESTION: And they sprayed the Drug Fair with
24 the words, "White Power" and "Aryan Brotherhood." And
25 then after that they happened to see a synagogue and

1 they go over and do what they did to the synagogue.

2 MS. GARREN: That's correct.

3 QUESTION: That doesn't strike me as
4 predominantly religious, the whole episode.

5 MS. GARREN: No one has denied, at least for
6 purposes of this appeal, that these defendants acted out
7 of a belief that Jews are racially inferior and that the
8 symbols they painted suggested that.

9 QUESTION: Well, then I don't understand why
10 the -- why you raise the fact that it was a synagogue
11 and saying that that proves something about the case. I
12 don't see that it does.

13 MS. GARREN: What happens when -- if the Court
14 applies this misperception standard, to use a shortened
15 term, then in essence all religious discrimination
16 claims, national origin discrimination claims, even some
17 sex discrimination claims might come within this race
18 discrimination statute.

19 That is the point I am trying to make when I
20 say, this is really religious discrimination and it's an
21 effort to use a standard that will result in an
22 unmanageable approach to this statute, I think, in the
23 lower courts and one that is not consonant with the
24 purpose of the statute as originally enacted, and with
25 its language.

1 The problem is with the standard that the
2 petitioners urge and the results that could accrue if
3 that standard is applied, and I don't think in this case
4 -- it really isn't necessary that you engage in this
5 racial definition that we have been hassling with
6 because the petitioners indicate that they are not
7 racially distinct, and Jewish people are not racially
8 distinct.

9 Recognizing that, they have attempted to argue
10 that the perceptions of the individual defendants,
11 erroneous and irrational perceptions are what determine
12 the coverage of a federal civil rights statute. That
13 just can't be right. There is no evidence that that is
14 what determines the coverage of this statute in the
15 legislative history.

16 QUESTION: What if I just disagree with them
17 as to whether they are racially distinct within the
18 meaning that the framers of the statute had, framers who
19 thought the Gypsies were a race, framers who thought the
20 Germans were a race, who meant by "race" a stock?

21 MS. GARREN: I understand. It would be my
22 position that the petitioners have essentially
23 stipulated that away here. They have never contended
24 that Jews are racially distinct or commonly identified
25 as such, nor do they want that characterization.

1 QUESTION: Do you think it wouldn't be within
2 our power, given the status of the case, to decide it on
3 that basis?

4 MS. GARREN: Clearly it would be within your
5 power. I think that it would be --

6 QUESTION: Well, I mean --

7 (Laughter.)

8 MS. GARREN: Inappropriate. I think that it
9 would be an inappropriate interpretation of the
10 statute. It would result in you having to reach back to
11 the 1860's and determine what groups society then
12 regarded as racially distinct, and I don't think that is
13 a practical approach to interpreting the statute.

14 A more appropriate approach, I think, is to
15 look to our society now and determine what groups are
16 commonly identified as non-white, with reference to what
17 we all recognize as racial characteristics.

18 QUESTION: Why not non-white? What groups are
19 identified as races? What if we concluded that the
20 theory of these people was scientifically foolish but
21 not necessarily socially foolish? There are a lot of
22 people who might use the term "Jewish" to refer to what
23 they think is a racial group, a stock.

24 MS. GARREN: I think that the petitioners
25 would disagree that there is any kind of common

1 perception. I understand, Your Honor --

2 QUESTION: Has that been conceded away too,
3 that there's no common perception? I don't recall any
4 -- I do recall their forcefully arguing that they are
5 not scientifically -- Jews are not scientifically a
6 race, but I don't recall their arguing that there is no
7 general social perception that to be a Jew is only a
8 religious thing.

9 MS. GARREN: I think that they have never
10 indicated that there is a common perception in our
11 society today that Jews are racially distinct either.

12 QUESTION: May I ask, is it critical to your
13 case that there be some well-defined categories of
14 races? I imagine at one time, perhaps scientists might
15 have thought there were five or six races, or ten or
16 twenty. Now, they seem to say there are three, is it,
17 three races.

18 What if 20 years from now they really study
19 this thing and determine there is only one race, that
20 really, the differences among the races are not
21 scientifically significant?

22 MS. GARREN: Yes, sir.

23 QUESTION: Then, I suppose the statute would
24 just have -- no longer have any significance.

25 MS. GARREN: That is why I would take the

1 position that it isn't appropriate to define races by
2 reference to any kind of scientific terminology. In
3 fact, an appropriate approach is --

4 QUESTION: Well, how do you define race,
5 then? If you don't do it by reference to scientific
6 standards, what are the standards for defining whether
7 two people are in different races or not?

8 MS. GARREN: The approach that, in fact,
9 anthropologists take in many instances is by reference
10 to culture and by reference to common perceptions in
11 society.

12 QUESTION: Well, if you look at culture, I
13 suppose a pretty strong argument could be made that the
14 Jewish have a very special culture of their own.

15 MS. GARREN: I do not believe a strong
16 argument could be made that the Jewish people are
17 commonly identified as racially different. That's what
18 I am referring to when I say that cultural --

19 QUESTION: What I am trying to get at is, how
20 does one decide whether two people are in the same or
21 different races?

22 MS. GARREN: One evaluates whether those
23 individuals -- you look at the individual, first of all,
24 and you evaluate whether that individual is identified
25 as white or is identified as non-white in our society,

1 in some sense.

2 QUESTION: So, now we've got two races, white
3 and non-white? We're down to two, is that it?

4 MS. GARREN: There are various groups that
5 would fall in the non-white category. This isn't an
6 effort to get at defining what race means.

7 QUESTION: In your view, would Hispanics --
8 how about Hispanics and Arabs. Would they fit in your
9 category?

10 MS. GARREN: I think it's quite conceivable
11 that Hispanics would be a group that is commonly
12 identified as non-white in our society. Several of the
13 lower circuit courts have held that and have approached
14 the statute in precisely the way that I am suggesting
15 that you approach it.

16 QUESTION: And how about Moslems or Arabs?

17 MS. GARREN: "Moslems" is a religious term, I
18 believe. Again, it would require the courts to evaluate
19 whether there is a common identification of that group
20 as racially distinct, or non-white in our society.

21 For my individual reaction --

22 QUESTION: Yes.

23 MS. GARREN: I think that those groups would
24 be included within the categories that are protected
25 because in many instances individuals that are in those

1 groups have dark skin, for example. And there can be no
2 doubt that if an individual is discriminated against
3 because he is black and has dark skin, or a large number
4 of members of that group are black and have dark skin,
5 they would have a cause of action under this statute.

6 In conclusion, I would like to say that where,
7 as here, there are adequate state remedies available to
8 the petitioners, it is not necessary to stretch Section
9 1982 to cover every defendant's -- every defendant who
10 is motivated by an irrational and erroneous racial
11 perception, and therefore I would ask the lower courts
12 to uphold -- this Court to uphold the lower courts'
13 dismissal of this claim for the desecration of a
14 synagogue under Section 1982.

15 If there are no further questions, thank you.

16 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
17 Garren.

18 Ms. Brannan, you have one minute remaining.

19 ORAL ARGUMENT OF PATRICIA A. BRANNAN, ESQ.

20 ON BEHALF OF PETITIONERS - REBUTTAL

21 MS. BRANNAN: May it please the Court, if I
22 could just briefly address the issue that arose during
23 Mrs. Garren's argument about commonness of the
24 perception of Jews and whether this is a deviant belief,
25 first of all, as Judge Wilkinson pointed out in dissent

1 below, there was no record on the commonness of the
2 belief because we were cut off on a Motion to Dismiss in
3 which the district court didn't even consider the extra
4 pleading material that we put in the record.

5 But secondly, that I think that some Gallup
6 poll or test of the prevalence of the view really
7 doesn't solve the problem. The facts of this case show
8 that this kind of conduct occurs. It is not unique to
9 Shaare Tefila, and where it occurs, regardless of the
10 prevalence or whether we characterize it as deviant,
11 which I hope we all would, that the harm is the same.

12 It is a harm based on racially motivated
13 conduct and it should be redressed under Section 1982.

14 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
15 Brannan. The case is submitted.

16 (Whereupon, at 11:09 o'clock a.m., the case in
17 the above entitled matter was submitted.)
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CERTIFICATION

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

5-2156 - SHAARE TEFILA CONGREGATION, ET AL., Petitioners V. _____

JOHN WILLIAM COBB, ET AL. _____

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

BY Paul A. Richardson

(REPORTER)