

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 85-2169

**TITLE** SAINT FRANCIS COLLEGE, ET AL., Petitioners V.  
MAJID GHAI DAN AL-KHAZRAJI, ETC.

**PLACE** Washington, D. C.

**DATE** February 25, 1987

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   SAINT FRANCIS COLLEGE, ET AL.,   ;

4                   Petitioners,                   ;

5                   v.                   ;       No. 85-2169

6   MAJID GHAIIDAN AL-KHAZRAJI, ETC.   ;

7   - - - - -x

8                   Washington, D.C.

9                   Wednesday, February 25, 1987

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

13   APPEARANCES:

14   NICK S. FISFIS, ESQ., Bethel Park, Pennsylvania; on  
15       behalf of the petitioner.

16   CAROLINE MITCHELL, ESQ., Pittsburgh Pennsylvania; on  
17   behalf of the respondent.

C O N T E N T S

ORAL ARGUMENT DE

PAGE

NICK S. FISFIS, ESQ.

On behalf of the petitioner

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CAROLINE MITCHELL, ESQ.

On behalf of the respondent

20

NICK S. FISFIS, ESQ.

On behalf of the petitioner - rebuttal

1 PROCEEDINGS

2 CHIEF JUSTICE REHNQUIST: We will hear  
3 argument now in No. 85-2039, Saint Francis College  
4 versus Mahid Ghaidan Al-Khazraji, etc.

5 Mr. Fisfis, you may begin whenever you are  
6 ready.

7 ORAL ARGUMENT OF NICK S. FISFIS, ESQ.

8 ON BEHALF OF THE PETITIONER

9 MR. FISFIS: Mr. Chief Justice, and may it  
10 please the Court, this case involves issues similar to  
11 that present in the prior discussion, and started by the  
12 filing of three complaints in the Western District of  
13 Pennsylvania by plaintiff Dr. Al-Khazraji charging  
14 various offenses under the civil rights laws of the  
15 United States. I go into the detail only because there  
16 is some question as to what the pleadings here actually  
17 raise, and therefore you have the question as to the  
18 kind of charges that were in fact made.

19 My brief sets forth the allegations in the  
20 various complaints here, and I would note that the  
21 operative complaint as viewed by the District Court did  
22 not charge any racial discrimination but charged  
23 discrimination on the basis of national origin and  
24 religion, and that therefore the question then becomes  
25 whether or not an Arab under the facts here would be



1 treated as falling within the scope of section 1981 of  
2 Title 42 in a situation when in fact there was not a  
3 racial allegation made.

4 Now, I should say in all fairness that  
5 District Judge Zigler who had handled the case before it  
6 was reassigned to Judge Menser had read the case or had  
7 read the various pleadings more broadly than Judge  
8 Menser did and more broadly apparently -- and as broadly  
9 apparently as the Third Circuit did in this particular  
10 situation. But the fact remains that the operative  
11 complaint as I think it was read by both Judge Zigler  
12 and Judge Menser was really the second complaint, the  
13 one filed by prior counsel for the plaintiff here, and  
14 that complaint basically restricted itself to a national  
15 origin and a religion complaint, not a racial one.

16 However, the issue here seems to be premised  
17 on the notion that in fact a racial complaint at least  
18 could arguably be read into the complaint. That seems  
19 to be the basis upon which the Court granted certiorari  
20 in this case, and therefore other than mentioning the  
21 limitations on the actual pleadings, which is a fact  
22 that the Court might take into consideration, I will  
23 then deal with the argument as to whether or not Arabs  
24 do fall within the scope of Section 1981 of the --

25 QUESTION: What did the Court of Appeals

1 hold?

2 MR. FISFIS: The Court of Appeals, Your Honor,  
3 held here that Arabs do fall within the scope of Section  
4 1981.

5 QUESTION: So the race issue was -- rather  
6 than national origin was before it.

7 MR. FISFIS: Oh, yes, indeed, it was. I mean,  
8 the least the way the Third Circuit interpreted the  
9 factual situation.

10 QUESTION: So we are reviewing a judgment of  
11 the Court of Appeals, so I am not sure the pleadings  
12 have got much to do --

13 MR. FISFIS: Well, Your Honor, the point about  
14 getting into the pleading history and what have you is  
15 that the various pleadings are some indication that from  
16 the beginning the plaintiff here has been viewing this  
17 as a national origin claim and that Arab at least  
18 initially and to some extent has been characterized as  
19 being in the national origin category.

20 QUESTION: The Court of Appeals said -- went  
21 on a racial ground, didn't it?

22 MR. FISFIS: Yes, but I am discussing this in  
23 terms of, to use the phrases that were used previously,  
24 the --

25 QUESTION: So you will discuss it on a racial

1 ground.

2 MR. FISFIS: Yes, I am -- yes, I will, Your  
3 Honor.

4 QUESTION: All right.

5 MR. FISFIS: My position is really a rather  
6 simple one in this case. The statute basically talks in  
7 terms of white citizens and it seems fairly well  
8 admitted by the plaintiff himself in the deposition that  
9 he gave that he qualifies as a Caucasian, i.e., that he  
10 is in fact racially white. The charges of  
11 discrimination are presumably that he was discriminated  
12 against in relation to other people who are racially  
13 white, and our position very simply is that in that kind  
14 of a factual situation a claim under Section 1981 is not  
15 made. And it really comes down to that. He has  
16 admitted in the deposition that he does qualify as a  
17 Caucasian, i.e., a person who is racially white. The  
18 statute has been construed by this Court to apply on a  
19 racial basis, not on a national origin basis, not on a  
20 religion basis, not on a sex basis, and therefore once  
21 the plaintiff in essence admits that he is a Caucasian,  
22 and when his purported complaint is that he was  
23 discriminated against in denial of tenure in relation to  
24 other Caucasians, that a claim is not made under the  
25 statute.

1 QUESTION: He doesn't have in his allegations  
2 or in his proof things that are in the prior case that  
3 was argued.

4 MR. FISFIS: Absolutely.

5 QUESTION: Namely, that he was discriminated  
6 on the grounds of race because that was the intent of  
7 the people who fired him.

8 MR. FISFIS: There is absolutely no evidence  
9 in the record to my knowledge, Your Honor, that there is  
10 any racial animus at all in terms of the decision that  
11 was made.

12 QUESTION: Or that the decision was made  
13 because they thought that he was of different race.

14 MR. FISFIS: That is correct, Your Honor. My  
15 recollection of the record is that there is absolutely  
16 no evidence in the record at all to indicate that. Now,  
17 I will say in all fairness that there was very limited  
18 discovery in the matter.

19 QUESTION: So his argument, you say, is that  
20 he claims to have been discriminated on the grounds of  
21 race but concedes he is not of a different race?

22 MR. FISFIS: That is correct. That is  
23 basically what we end up having here because the  
24 presumed discrimination was in relation --

25 QUESTION: How did the Court of Appeals come

1 to such a -- make such an error then?

2 MR. FISFIS: Your Honor, all I can do is read  
3 the way the Court of Appeals dealt with the racial issue  
4 and defined it as being membership in a group that is  
5 ethnically and physiognomically distinctive, and that  
6 presumably would ignore the admission of the plaintiff  
7 that he in fact was a Caucasian and was presumably  
8 discriminated against in relation to other Caucasians.

9 QUESTION: Well, ethnicity, that may be  
10 different from race, isn't it?

11 MR. FISFIS: I would submit it is, Your  
12 Honor. In going back to the discussion in the  
13 earlier --

14 QUESTION: You say the Court of Appeals  
15 applied the statute too broadly if it applied it just to  
16 ethnic groups.

17 MR. FISFIS: I would suggest that it did, Your  
18 Honor, yes, that the language used in the statute talks  
19 about white citizens. It does not talk about various  
20 ethnic groups, and therefore I would submit that ethnic  
21 group or national origin claims are not within the scope  
22 of Section 1981, and that essentially is what the  
23 plaintiff is arguing in this case.

24 QUESTION: You say ethnicity is different from  
25 race. It is nowadays, but it was not in 1866, was it?



1 MR. FISFIS: Your Honor, I have read the  
2 references to the Congressional Globe debates that are  
3 cited --

4 QUESTION: Never mind that. The dictionary  
5 definitions that are set forth extensively in the  
6 briefs.

7 MR. FISFIS: Your Honor, I would submit that  
8 that is irrelevant, that the critical thing is that the  
9 statute is in terms of white citizens, and the contrast  
10 therefore to have a discrimination claim under 1981 has  
11 to be in reference to white, which is a racial  
12 characterization, and that you cannot contrast that and  
13 treat Germans or English or Greeks or Italians as being  
14 people within the scope of the statute.

15 QUESTION: Even though they thought they were  
16 doing something about race in the sense that they  
17 understood race at that time.

18 MR. FISFIS: If the Court please, I do not  
19 think that the legislative history is anywhere near  
20 clear enough to indicate that that in fact is what the  
21 39th Congress had in mind whenever they were going  
22 through the debates on the Civil Rights Act of 1866. I  
23 mean, I do not dispute that there were a number of  
24 references in the legislative history where what we now  
25 call ethnic groups were characterized as races, but

1 there is no real indication as I read that history that  
2 in fact there was a clear intent that those people be  
3 included.

4 Actually, if you look at --

5 QUESTION: Well, I think it is clear that what  
6 they meant by race is something quite different from  
7 what we mean by race. I think that is absolutely  
8 clear. Not just from the legislative debates, but from  
9 the dictionary definitions at the time.

10 MR. FISFIS: Justice Scalia, even if that is  
11 so --

12 QUESTION: They meant a stock, a stock of  
13 people, whether it was ethnically distinct or not, but  
14 I --

15 MR. FISFIS: Justice -- I am sorry.

16 QUESTION: I think the other point you are  
17 making I think is worth pursuing, and that is, does  
18 white person imply only color, or does it mean race?

19 MR. FISFIS: Well, I --

20 QUESTION: You say it means just color.

21 MR. FISFIS: Color in the racial sense at  
22 least.

23 QUESTION: Color in the racial sense at  
24 least.

25 MR. FISFIS: Because otherwise we start

1 getting into the situation that we then start looking  
2 for 1981 purposes at the individual shades of the  
3 purported plaintiffs and then starting deciding what  
4 degree of darkness or lightness, depending on a  
5 particular situation, we are going to say is  
6 sufficiently distinctive so that we are going to get  
7 involved in saying that we are making out a Section 1981  
8 claim because the purported favored group is dark and  
9 the purported aggrieved group is light or vice versa.

10 And I would suggest that the characterization  
11 in the statute, because of the use of the term white  
12 does not include ethnic groups even though there were  
13 some discussions during the legislative history and even  
14 though the dictionary definitions indicate that the term  
15 race may have had some meaning beyond or was used in  
16 other than the racial sense in which we use it today.

17 The fact is that the statute was not written  
18 that way, and I would submit that if Congress had in  
19 mind the notion that all these various ethnic groups  
20 were to be covered, there would be some -- much broader  
21 language could have been used than was used in the  
22 actual statute.

23 I mean, actually, the interesting thing is, if  
24 you look at the legislative history, when they start  
25 talking about the different kind of ethnic groups and

1 they are described as race, it so often comes up in the  
2 question of they are really talking about the  
3 legislatures having power to discriminate by saying the  
4 Germans, for example, are not allowed to own property  
5 and things of that sort. In some ways we go back to the  
6 earlier discussions that the Court had as to whether the  
7 statute in fact covers private claims of action, and the  
8 decisions of the Court have determined, of course, that  
9 it does, so we have to operate on that premise.

10 And you also run into the generalized  
11 disagreement that the Court has had over the years  
12 whether the Civil Rights Act of 1866 and the reenactment  
13 in 1870 were in fact designed to deal solely with the  
14 freed slaves and the people in the south rather than the  
15 broadened scope that has since been given so that it now  
16 apparently covers discrimination against whites, at  
17 least vis-a-vis people of other races.

18 But those decisions have been reached. Unless  
19 the Court is prepared to find exceptions to those or  
20 overrule those earlier lines of cases, we have to face  
21 the fact that this Court has already decided that the  
22 scope of the statute goes beyond the mere protection of  
23 blacks which was one of the earlier positions that was  
24 taken.

25 But in light of the history, I would suggest

1 that it would be inappropriate for the Court to go  
2 beyond the broad categorizations and extend the reach of  
3 the statute to in essence start covering ethnic groups or  
4 nationality groups or nation origin groups, which is the  
5 suggestion that is being made here.

6 QUESTION: If this person was denied tenure to  
7 make room for an Asian, say, he could stake a good claim  
8 under McDonald.

9 MR. FISFIS: I think that is correct, Your  
10 Honor.

11 QUESTION: Or to make room for a Negro.

12 MR. FISFIS: That, too, would be correct under  
13 McDonald.

14 QUESTION: Well, how do we know what the facts  
15 are here?

16 MR. FISFIS: Well, the only thing we have in  
17 the record at this point is that the only other person  
18 granted tenure --

19 QUESTION: Was a white person.

20 MR. FISFIS: -- was the plaintiff's wife, and  
21 she was granted tenure two years after he was turned  
22 down for tenure. I mean, the record other than that has  
23 no evidence in it as to what occurred as far as the  
24 granting of tenure is concerned.

25 QUESTION: But his claim is that he was



1 discriminated against because he was ethnically  
2 different.

3 MR. FISFIS: The way the Third Circuit  
4 apparently has --

5 QUESTION: Well, his claim must include  
6 discrimination based on ethnicity, on his different  
7 ethnic character, because he concedes he is not  
8 different racially.

9 MR. FISFIS: That is correct, Your Honor. His  
10 claim essentially is that he was discriminated against  
11 on the basis that he is an Arab who was born in Iraq.

12 QUESTION: Yes, but may I ask, he doesn't just  
13 limit it to ethnic differences, but at least the Court  
14 of Appeals ethnically and physiognomically distinctive.  
15 In other words, one of the two elements of their test,  
16 as I understand it, is some kind of inherited  
17 characteristic that is visible physically, that you can  
18 see. People are maybe eight feet tall or something, and  
19 also from a particular country.

20 MR. FISFIS: Justice Stevens, that is correct  
21 as far as the Third Circuit is concerned. That is not  
22 necessarily part of the complaint of the plaintiff.

23 QUESTION: No, but in order to prevail under  
24 the Third Circuit's theory, which we are reviewing, he  
25 would have to prove, as I understand it, that he was in

1 a separate ethnic group and a separate group that was  
2 physiognomically distinctive from the general  
3 population.

4 MR. FISFIS: I think that is correct, Your  
5 Honor.

6 QUESTION: So I mean there are two ingredients  
7 that are part of their test.

8 MR. FISFIS: Yes, if you treat that as a -- I  
9 always get confused -- as an "and" rather than as an  
10 "or" in terms of the requirement that both be present,  
11 that would --

12 QUESTION: And they would therefore fit into  
13 the point that Justice Scalia was suggesting earlier,  
14 that a given stock is subject to -- if you are of a  
15 particular national origin which also has particular  
16 physical characteristics that make you identifiable, and  
17 then that group as a whole is subjected to  
18 discrimination, you fit this test.

19 MR. FISFIS: If the reading that Justice  
20 Scalia is giving it is the appropriate, one, then I  
21 think what you say does follow. I don't see how the  
22 answer could be anything other than an affirmative.

23 QUESTION: But see, it wouldn't necessarily  
24 cover every national origin claim. You might have two  
25 countries in South American where the people are not

1 physiognomically distinctive, but yet they might be  
2 different from the population at large in the United  
3 States.

4 MR. FISFIS: I suppose that might be true,  
5 Your Honor. I am not totally sure. But if you read it  
6 as requiring that both -- that both be present, that it  
7 be genetically part of an ethnically and  
8 physiognomically distinctive subgrouping, then  
9 presumably you would need both to be able to make a  
10 claim out. Now, how you end up making it out and the  
11 kind of proofs that would be required and what you would  
12 end up charging a jury or the standard that the District  
13 Judge would use in terms of factfinding, I would not be  
14 presume to be able to tell you.

15 QUESTION: Well, the Third Circuit wouldn't  
16 protect Germans on that basis.

17 MR. FISFIS: It might.

18 QUESTION: Well --

19 MR. FISFIS: I suppose it might decide or a  
20 factfinder could decide that German is an ethnic group,  
21 and that there are some physical characteristics that  
22 are uniquely enough belonging to Germans that one could  
23 end up saying they have been discriminated against under  
24 this particular test.

25 QUESTION: Or Irish.

1 MR. FISFIS: Same thing with Irish. I mean,  
2 presumably every ethnic group in one way or another, at  
3 least one way or another someone could end up saying  
4 they have physiognomically distinctive characteristics  
5 that fit within the stereotype of a particular ethnic  
6 group.

7 QUESTION: The Swiss. They yodel.

8 MR. FISFIS: I mean essentially without  
9 rehashing what was said during the first argument, that  
10 essentially is our position, that there are really no  
11 precedents of the Court that would include the plaintiff  
12 here within Section 1981 that the statute itself should  
13 be read the way I have suggested that it should, that a  
14 claim here which is essentially a national origin claim  
15 does not fall within the scope of the statute.

16 If the Court has no other questions, I would  
17 be prepared to go on and discuss the retroactivity  
18 issue.

19 Again, the position on the retroactivity issue  
20 is really a rather simple one. This Court decided in  
21 *Wilson versus Garcia* that in Section 1983 cases the  
22 personal injury statute of the various states would be  
23 used to decide the scope of the statute of limitations  
24 for Section 1983 cases. The Third Circuit concluded in  
25 the *Goodman* case that the two-year statute would be

1 applied, and that it is being applied in Section 1981  
2 cases, which is what is present here.

3 The question before us is how we would apply  
4 the retroactivity standards of Chevron Oil versus  
5 Hughson. As I read the recent decision of this Court in  
6 the criminal retroactivity case that came down not too  
7 long ago there is specific language indicating that that  
8 case is limited to criminal cases and not to civil cases  
9 and that Chevron is still the standard to be applied in  
10 civil retroactivity cases, which is what we have here.

11 Again, I really have two simple arguments in  
12 regard to the retroactivity. One, that the proper scope  
13 is not necessarily the degree of certainty within a  
14 particular circuit, but that considering the wide  
15 ranging divergence of views as to statutes that were to  
16 be followed in the various circuits through the United  
17 States in the application of statute of limitations  
18 under the Federal Civil Rights Acts, that no person  
19 could reasonably have relied on any particular statute  
20 of limitations and that therefore the onus was on  
21 plaintiffs to in essence go for the shortest potential  
22 statute in a particular jurisdiction.

23 QUESTION: Well, do you think it is  
24 permissible, Mr. Flsfi, to go circuit by circuit on  
25 this retroactivity business?



1 MR. FISFIS: Your Honor, obviously if the  
2 Court concludes that it is permissible, then it can be.  
3 My suggestion is that it really should be done on a  
4 national basis. If you do it on a circuit by circuit  
5 basis, then I would suggest that as of the time of the  
6 accrual of the cause of action here for the reasons  
7 basically set forth in the brief when I discussed the  
8 Davis case and the way the Pennypacker case had been  
9 decided previously, that it was nowhere clear that a  
10 six-year statute of limitations rather than a shorter  
11 statute of limitations was going to be -- was going to  
12 be applied, that those cases if you read them carefully  
13 simply were not clearcut enough so that one could say  
14 that in all 1981 cases regardless of which of the  
15 particular subdivisions of 1981 was going to be applied  
16 and regardless of the type of case involved, that there  
17 was going to be a six-year statute applied rather than a  
18 two-year statute.

19 Therefore without getting into the convenience  
20 factor and the notion that full retroactivity here gives  
21 a much greater degree of certainty than attempting to go  
22 through the procedure that has been happening since  
23 Wilson versus Garcia came down with this myriad of cases  
24 in the circuits trying to decide how much certainty was  
25 there and how much certainty was there not, that the

1 certainty aspect would in fact be enhanced by a  
2 determination that full retroactivity is appropriate.

3 But in any case, if you go through the  
4 Pennsylvania cases, that is the Third Circuit cases  
5 interpreting the status of its decisions on how the  
6 statute of limitations was to be applied in Section 1983  
7 cases, I suggest to you that there was no certainty upon  
8 which anyone could have relied, and that in any case the  
9 1978 amendments to the Pennsylvania statute of  
10 limitations statutory scheme completely reopened the  
11 door anyway, and that the Third Circuit in its own cases  
12 basically indicated that the 1978 amendments cast  
13 substantial doubt on the statute of limitations aspect  
14 of Davis.

15 Davis is specifically mentioned by the Third  
16 Circuit, and yet in our case the the Third Circuit  
17 relies on Davis as indicating certainty was present as  
18 far as the retroactivity is concerned.

19 I will reserve any further time I have, unless  
20 the Court has any questions.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
22 Fiske.

23 We will hear now from you, Ms. Mitchell.

24 ORAL ARGUMENT OF CAROLINE MITCHELL, ESQ.,

25 ON BEHALF OF THE RESPONDENTS

1 MS. MITCHELL: Mr. Chief Justice, and may it  
2 please this Court, we are asking this Court today to  
3 decide whether Section 1981 of the Civil Rights Act of  
4 1866 covers those of Arab ancestry. We premise our  
5 argument on two very important points. First, the  
6 meaning of the word "race" as we use it today in 1987 is  
7 not the same as those legislators used it in 1866.

8 QUESTION: (Inaudible.)

9 MS. MITCHELL: That is correct, Your Honor.

10 QUESTION: Okay, you tell me how you get the  
11 word "race" to be relevant to the meaning of "white  
12 person."

13 MS. MITCHELL: Your Honor, we look at the term  
14 "race" because one of the things that was happening  
15 about the time that the 1866 Act was passed was that in  
16 the 1830s there was an influx of Irish and German.  
17 These waves of immigrants created some severe problems  
18 for persons in states such as Ohio who believed as  
19 advocates of the American nativist movement that the  
20 Irish and the Germans were not fit to live with those of  
21 the Anglo-Saxon race.

22 A prominent Know-Nothing tract published in  
23 1854 indicated that Irish and Germans were not of the  
24 type of quality of persons that we would want dwelling  
25 with those of the Anglo-Saxon race, and openly advocated

1 discrimination against those people.

2 QUESTION: Right. Now, are you going to  
3 answer my question?

4 MS. MITCHELL: Yes, Your Honor.

5 QUESTION: I mean, I believe all of that, but  
6 the way to combat that would have been to use the word  
7 "race" in the statute. Now, they did not use the word  
8 "race" in the statute, did they?

9 MS. MITCHELL: That is correct, Your Honor.  
10 The legislation --

11 QUESTION: So the dictionary definitions you  
12 should have given us were the dictionary definitions of  
13 "white" instead of the dictionary definitions of  
14 "race."

15 MS. MITCHELL: Your Honor, Senator Trumble,  
16 who was the author of the 1866 legislation, spoke to the  
17 purposes of the 1866 legislation and in that legislative  
18 history indicated that one of his objectives was to make  
19 sure that persons of all races and colors and previous  
20 conditions of servitude had equal rights under the law.

21 QUESTION: And that is the only thing you are  
22 going to rely on to get us to believe that the word --

23 MS. MITCHELL: No, that is not all, Your  
24 Honor.

25 QUESTION: -- that the word "white person" in

1 the statute means "race?"

2 MS. MITCHELL: Your Honor, the concept of race  
3 was a generally understood term for the legislatures in  
4 those days to use in the sense that we now use the word  
5 "ancestry." To the legislators in 1866 "race" meant  
6 "ancestry." Senator Merrill in the case indicates --

7 QUESTION: Ms. Mitchell, I don't think you are  
8 understanding me. I believe all that. I believe all  
9 that. I am with you on that point. But the word "race"  
10 does not appear in the statute.

11 MS. MITCHELL: That is absolutely correct,  
12 Your Honor.

13 QUESTION: So of what relevance is it then?

14 MS. MITCHELL: It is relevant because this  
15 Court has indicated in several decisions that as a  
16 racial character of rights that 1981 was intended to  
17 protect. We look back at the 1866 Act to see what the  
18 meaning of "race" was in the minds of those legislators  
19 in 1866, and it was a far different definition. Those  
20 legislators believed that by covering various races they  
21 were covering the Swiss, the German, those of the  
22 Scandinavian race, those Moors and Turks, and some  
23 immigrants who were yet to come to the shores.

24 QUESTION: And the only evidence that "white  
25 person" in the statute means "race" was the one snippet



1 of legislative history you just quoted.

2 MS. MITCHELL: No, Your Honor. There are --

3 QUESTION: And you say later decisions of  
4 ours, which say it is --

5 MS. MITCHELL: That is correct. I believe  
6 that your later decisions looked at the 1866 Act to see  
7 what was meant by the term "race" which to this day has  
8 not --

9 QUESTION: The term "race" is not in the 1866  
10 Act.

11 MS. MITCHELL: That is --

12 QUESTION: How do you get around that?

13 MS. MITCHELL: Your Honor, we look at the  
14 decisions of this Court.

15 QUESTION: Well, how did this Court get around  
16 that?

17 (General laughter.)

18 MS. MITCHELL: Your Honor, this Court has  
19 never addressed the issue. This Court has never defined  
20 "race" for us.

21 QUESTION: (Inaudible.)

22 MS. MITCHELL: Well, Your Honor, if this Court  
23 has held that 1981 is intended to protect against  
24 racially motivated deprivals of the right to contract --

25 QUESTION: The 1866 Act (inaudible) all

1 citizens, all persons born here are declared to be  
2 citizens, and such citizens of every race and color --

3 MS. MITCHELL: Are intended to enjoy equal  
4 rights under the law. Yes, that is correct.

5 QUESTION: Well, the word "race" is in the  
6 statute.

7 MS. MITCHELL: That is correct, Your Honor,  
8 and if we go from that sentence --

9 QUESTION: But what did the statue mean by  
10 "white persons?" Who were white persons?

11 MS. MITCHELL: Your Honor, the word "white"  
12 was not a term of art in 1966. Anglo-Saxon was the term  
13 of preference. The legislators were unanimously  
14 Anglo-Saxon. They intended in their definitions in 1866  
15 to characterize the Anglo-Saxon race as the one to which  
16 all other races aspired.

17 QUESTION: So "white persons" meant white  
18 Anglo-Saxon protestants? What? What did it mean?

19 MS. MITCHELL: Your Honor, the term  
20 "Anglo-Saxon" was used as the ancestry which was most  
21 favored in the sense of the 1865 legislators, and it as  
22 this exact problem, the problem created by the  
23 Know-Nothing Party that certain legislators intended to  
24 correct under the 1866 Act. They said that if Ohio  
25 shall pass an Act which denies to a German citizen the

1 right to contract --

2 QUESTION: Yes, but stop for just a minute.  
3 Did "white person" mean Anglo-Saxon? Is that the short  
4 definition?

5 MS. MITCHELL: In 1866, I believe that it was,  
6 for the additional reason that in 1866 immigration into  
7 this country was very severely limited to only races  
8 such as the Germans and the Irish in the east and the  
9 Chinese in the west. One of the problems facing the  
10 legislators of 1866 was that there would be  
11 discrimination against Chinese, there was discrimination  
12 against Irish, there was discrimination against Germans,  
13 and the 1866 Act was intended to give to all men equal  
14 protection --

15 QUESTION: You are defending the Court of  
16 Appeals judgement here.

17 MS. MITCHELL: I am partially defending it in  
18 the sense that they indicate --

19 QUESTION: You mean you are not defending it  
20 totally? Is that it?

21 MS. MITCHELL: I am not defending their  
22 definition, Your Honor, for this reason. I believe that  
23 ancestry in the minds of the 1866 legislators meant  
24 race. I believe that the 1866 Act is intended to  
25 protect those of different ancestries. The Third

1 Circuit held that an Arab, an ethnic Arab of Arabian and  
2 Iraqi ancestry could pursue a claim under Section 1981.

3 We agree with their finding, but we believe  
4 that the test that the Third Circuit used has some very  
5 severe problems for this Court --

6 QUESTION: The test was what?

7 MS. MITCHELL: Their test is that one who is  
8 ethnically and physiognomically different may maintain a  
9 claim under 1981.

10 QUESTION: Yes, and you don't agree with that  
11 test?

12 MS. MITCHELL: We suggest that the proper test  
13 is that one who is of an ancestry viewed as different  
14 may maintain a claim under 1981. We believe that if you  
15 were to use the ethnical and physiognomical test you  
16 would get the Federal District Courts into looking at  
17 the physiognomical characteristics of people --

18 QUESTION: Viewed by whom? By the defendant?  
19 I mean, suppose I don't like the McCoys.

20 MS. MITCHELL: Pardon me?

21 QUESTION: I am a Hatfield, and I don't like  
22 the McCoys.

23 MS. MITCHELL: That's correct, Your Honor.

24 QUESTION: And I view all McCoys as bad. I  
25 don't care where they are. If they have the name McCoy,

1 they are bad. Now, is that --

2 MS. MITCHELL: No, Your Honor, because they  
3 are not of a distinct ancestral group. Our definition --

4 QUESTION: Who decides who is a distinct  
5 ancestral -- I think they are a distinct ancestral  
6 group. I think all McCoys are McCoys.

7 MS. MITCHELL: Your Honor, then you are into  
8 the subjective type of discrimination issue.

9 QUESTION: That is what I am trying to get  
10 at. Is it subjective? If it is not subjective --

11 MS. MITCHELL: No, Your Honor.

12 QUESTION: You have to know who the real McCoy  
13 is.

14 (General laughter.)

15 QUESTION: That is right. That is what I was  
16 leading up to.

17 (General laughter.)

18 MS. MITCHELL: Well, I am not, and you are  
19 probably not. The ancestral test, Your Honor, is an  
20 objective test. It looks at whether the ancestry of a  
21 certain people is one which has been viewed as  
22 distinct. For instance --

23 QUESTION: How --

24 MS. MITCHELL: -- the Jews have a certain  
25 ancestry.



1           QUESTION: How easy does that ancestry word  
2 make it much easier? You have referred to the  
3 Scandinavians as of one ancestry. Now, could a person  
4 of Norwegian extraction bring an action against someone  
5 of Swedish extraction for discrimination?

6           MS. MITCHELL: Absolutely, Your Honor. The  
7 point is that if you are discriminated against because  
8 your ancestry is Norwegian, you have a cause of action  
9 under Section 1981, regardless of whether the  
10 perpetrator is --

11          QUESTION: In spite of the fact that Norway  
12 and Sweden were one country up until 1905?

13          MS. MITCHELL: Your Honor, that makes no  
14 difference to us, and the reason is that country of  
15 origin is not a good test for that exact reason. If  
16 this --

17          QUESTION: How about someone of Bavarian  
18 extraction suing someone of some other German area?

19          MS. MITCHELL: Your Honor, if there is  
20 discrimination because of the ancestry of the person, if  
21 a college refuses to tenure Germans believing for  
22 whatever reason that they don't deserve to be tenured  
23 because of an ancestral --

24          QUESTION: What about discriminating against  
25 somebody because he is a son or because she is a

1 daughter of a felon?

2 MS. MITCHELL: Your Honor, that is not  
3 ancestral discrimination, in our opinion. Ancestral  
4 discrimination as defined by the ethnologists in the  
5 20th century relates to the culture from which your  
6 forebears came. There is in fact a Jewish culture, a  
7 Scandinavian culture, an Irish culture, a German  
8 culture.

9 QUESTION: What if I don't like people who  
10 were born in Rhode Island, or the Rhode Island culture?

11 MS. MITCHELL: Your Honor, I don't believe  
12 that ancestry takes into account your state as being one  
13 of the covered categories.

14 QUESTION: If it can take into account someone  
15 born in Bavaria, why can't it take into account someone  
16 born in Rhode Island?

17 MS. MITCHELL: Because the common perception  
18 is that Rhode Island people are not of different  
19 ancestry than Pennsylvanians.

20 QUESTION: But that just answers the question  
21 by defining it.

22 QUESTION: How about somebody born in New  
23 England as compared with somebody born in the deep  
24 south?

25 MS. MITCHELL: Your Honor, I don't believe

1 that that is the type of ancestral discrimination that  
2 we want to cover under our test nor was it the type of  
3 ancestral discrimination that the 1866 Act --

4 QUESTION: It may make a lot more sense than,  
5 say, Swedes and Norwegians.

6 QUESTION: There is a lot of discrimination  
7 against Yankees in the south, and probably against  
8 southerners in the north. Why wouldn't that be  
9 covered?

10 MS. MITCHELL: Your Honor, the ancestral  
11 theory relates back to what was in the minds of the  
12 legislators in 1866. The legislators in 1866 clearly  
13 considered race as meaning ancestry. The fact that we  
14 use the term "race" today to mean the five divisions of  
15 mankind as proposed by modern ethnologists does not make  
16 any difference.

17 QUESTION: Ancestry means forebears, and all  
18 of these questions that have been put to you say what  
19 about this kind of forebears. And you speak as though  
20 you have in mind something much narrower than just  
21 forebears when you use the term "ancestry."

22 MS. MITCHELL: Your Honor, I am trying to  
23 avoid a country of origin definition because I think  
24 country of origin is a very difficult thing. I think  
25 that you can be traditionally viewed as Irish whether

1 your ancestors are the Irish Free State or whether they  
2 were born in Belfast. I think that this Court does not  
3 need to address that precise issue. The ancestral  
4 definition that we propose looks to whether your  
5 forebears are of a different subgroup or --

6 QUESTION: You didn't like McCoys either, and  
7 you know, that is why I picked McCoys, because they are  
8 all of the common ancestor. They all have the same  
9 name. They are all from the same --

10 MS. MITCHELL: But they are not of the type of  
11 people that the 1866 Act was intended to protect.

12 QUESTION: Oh, that is your second  
13 qualification.

14 MS. MITCHELL: That is the second --

15 QUESTION: It has to be an ancestral group  
16 that the Congress in 1866 would have identified as a  
17 race.

18 MS. MITCHELL: That is certainly one workable  
19 definition, Your Honor, but then we get to the --

20 QUESTION: Now, what does that mean? Is that  
21 what you are proposing, that it has to be, Number One,  
22 an ancestral group, and Number Two, a group that the  
23 1866 Congress would have said is a race?

24 MS. MITCHELL: We can look to the 1866  
25 Congress usage of the term "race" to see what they

1 meant.

2 QUESTION: I know we can. Are you going to  
3 answer my question? Is that the test you are proposing,  
4 Number One, ancestor, and Number Two, it is a group that  
5 the 1866 Congress would have considered to be a race?

6 MS. MITCHELL: That is the test that we are  
7 proposing.

8 QUESTION: That is the test you are proposing?

9 QUESTION: And then you have to prove that  
10 they thought about the Persians as a separate race.

11 MS. MITCHELL: Your Honor, I think that there  
12 is enough language in the 1866 Act to suggest that those  
13 legislatures did view as separate races those coming  
14 from those discrete geographic areas which are perhaps  
15 now known as countries and perhaps not.

16 QUESTION: Let me just get one thing clear in  
17 my mind. You are not defending the Court of Appeals'  
18 second element, physiognomically distinctive. You want  
19 us to change that definition, and you did not file a  
20 cross-petition for cert.

21 MS. MITCHELL: That is correct, Your Honor.

22 QUESTION: But you want us to in effect  
23 broaden the definition that they applied because I  
24 suspect maybe you have concern about whether your client  
25 can satisfy that element of the test.



1 MS. MITCHELL: No, that is not correct, Your  
2 Honor. Your Honor, my client and his physiognomy would  
3 be viewed by the Third Circuit as the type of  
4 physiognomy entitling him to maintain --

5 QUESTION: I am wondering if you want to win  
6 the case. You say the court of Appeals was just wrong  
7 in its test, although you won under that test. You say  
8 please don't adopt that test, use this one, so if we  
9 agree with you about the Court of Appeals but disagree  
10 with you on your test, your client is going to lose.

11 MS. MITCHELL: Well, Your Honor, I believe  
12 that this Court can refine this notion of physiognomy.

13 QUESTION: It isn't much of a refining. You  
14 just reject the Court of Appeals test.

15 MS. MITCHELL: Your Honor, I reject it in  
16 part. Insofar as the Court of Appeals test suggests  
17 that ancestry or ethnic origin is part of the foundation  
18 for proving your 1981 claim, that is certainly a  
19 workable and usable definition that these courts can  
20 utilize.

21 I am not in favor of a test which would  
22 require a Federal District Court to look at the  
23 physiognomy of a person who comes in and indicate that  
24 if you have slanted eyes then you are entitled to pursue  
25 your claim because you are probably oriental, but if

1 your eyes are not slanted enough then how can we  
2 conclude that you are entitled to sue? What would  
3 happen to Mr. Justice Marshall's father if we use a  
4 physiognomy test as part of the ethnic origin or  
5 ancestry test.

6 QUESTION: Don't worry about my father. What  
7 will you do for somebody from South Africa?

8 MS. MITCHELL: That is precisely the issue.

9 QUESTION: What would a resident of South  
10 Africa be classified as?

11 MS. MITCHELL: Your Honor, under the modern  
12 day classifications of race residents of South Africa  
13 are not classified at all. The modern day definition of  
14 race adopted by the EEOC --

15 QUESTION: You mean they don't exist?

16 MS. MITCHELL: That is correct, Your Honor.

17 (General laughter.)

18 MS. MITCHELL: There are vast groups of  
19 people who do not fall within --

20 QUESTION: What difference do you make between  
21 the people from Nigeria and the people from Sierra  
22 Leone?

23 MS. MITCHELL: Your Honor, the people from  
24 Nigeria are Caucasian, because there is a portion of  
25 Caucasians --

QUESTION: I have never seen one that looks

1 like a Caucasian to me.

2 (General laughter.)

3 MS. MITCHELL: That is precisely -- that is  
4 the point, Your Honor. The point is that if we use a  
5 dictionary definition of Caucasian we have Middle East  
6 Caucasians who are Arab --

7 QUESTION: Incidentally, I thought Caucasians  
8 were from the Caucasus.

9 MS. MITCHELL: Your Honor, the original  
10 definition in 1854 was that it was a resident of the  
11 Caucasus Mountains between the Black Sea and the Caspian  
12 Sea.

13 QUESTION: Well what Caucus are you from?

14 (General laughter.)

15 MS. MITCHELL: Your Honor, not from any right  
16 now.

17 QUESTION: But you are Caucasian.

18 MS. MITCHELL: Beg pardon, Your Honor?

19 QUESTION: But you are a Caucasian.

20 MS. MITCHELL: I am what the EEOC has called  
21 the white European subdivision of the Caucasian race.  
22 We also have North African persons who are usually  
23 black, residents of Libya who may in fact be Jews. We  
24 also have the Hispanic Caucasians who are Mexican. If  
25 you believe the petitioner's argument here Hispanic

1 Caucasians cannot sue because they are Caucasian.

2 Arabs who are Middle East Caucasian cannot sue  
3 because they are also Caucasian. They may have a  
4 different skin color. They may be ethnically and  
5 physiognomically different under the Third Circuit's  
6 test. They are certainly ancestrally different under  
7 our test which we propose to this Court today.

8 But the fact that they are Caucasian under  
9 some modern ethnological theory thus means that they are  
10 not entitled to sue under Section 1981. We cannot  
11 believe that this Court should use that as a  
12 definition. We cannot believe that the Federal District  
13 Courts here should look at one of 50 dictionaries to see  
14 whether a Syrian is a Caucasian or is --

15 QUESTION: Well, you wouldn't mind us saying  
16 that, I suppose, as far as the Third Circuit went it was  
17 right.

18 MS. MITCHELL: If you choose to affirm the  
19 Third Circuit, Your Honor, my client would be very  
20 happy, but that is not our theory of this case.

21 QUESTION: Well, I know, but you certainly  
22 don't argue that if a person is ethnically identifiable  
23 and has these physical characteristics, that you  
24 shouldn't discriminate against him.

25 MS. MITCHELL: Absolutely, Your Honor. That

1 is exactly true.

2 QUESTION: Well, you just want to argue some  
3 other case. That is all. You just object to the fact  
4 that the Third Circuit seems to have limited the  
5 coverage to those characteristics.

6 MS. MITCHELL: My particular concern with the  
7 Third Circuit --

8 QUESTION: Well, isn't that right, or not?

9 MS. MITCHELL: Yes, that is correct, Your  
10 Honor.

11 QUESTION: Well, you want to argue somebody  
12 else's case.

13 MS. MITCHELL: Well, Your Honor, what I am  
14 attempting to do is to --

15 QUESTION: So you would be very happy, I  
16 suppose, if you said we just don't reach the question of  
17 whether the statute is any broader than that. We know  
18 we were urged to do so by counsel, but we just don't  
19 reach it. We don't have to.

20 MS. MITCHELL: You do not have to reach that.

21 QUESTION: We just leave it open, just leave  
22 it open.

23 MS. MITCHELL: That is correct, Your Honor.

24 QUESTION: You ought to be happy with that.

25 MS. MITCHELL: Well, the issue, Your Honor, I



1 think --

2 QUESTION: Well, maybe you think the Third  
3 Circuit's test is so implausible that we are so unlikely  
4 to adopt it that you are trying to suggest one that  
5 would win for your client that is plausible.

6 MS. MITCHELL: Your Honor, I believe --

7 QUESTION: Maybe that is what you are trying  
8 to do.

9 MS. MITCHELL: I believe that the theory that  
10 we have suggested to this Court, the ancestry theory is  
11 one which is much more workable in the Federal District  
12 Courts as a threshold question for persons advancing a  
13 1981 claim.

14 QUESTION: Ms. Mitchell, I --

15 QUESTION: I think the Third Circuit's test is  
16 subsumed in yours.

17 MS. MITCHELL: Part of it is, Your Honor.  
18 That is correct.

19 QUESTION: Part of it?

20 QUESTION: Ms. Mitchell, aren't you really  
21 suggesting a sort of national origin test?

22 MS. MITCHELL: Your Honor, the national origin  
23 question is a very difficult one that we need not  
24 address, first of all.

25 QUESTION: Well, isn't that what at the bottom

1 of it all your test amounts to?

2 MS. MITCHELL: Your Honor, I believe not. And  
3 I believe that if a person, for instance, who is  
4 Armenian of ancestry is denied a right to contract  
5 because they believe he might be a terrorist, that if we  
6 use a national origin test he loses because Armenia is  
7 not a country. If we use an ancestral test --

8 QUESTION: Well, how can discrimination  
9 against Arabs because they are Arabs rather than  
10 Caucasians be anything but a national origin sort of a  
11 test?

12 MS. MITCHELL: Your Honor, we believe that it  
13 is a test that most properly focuses on the fact that  
14 those of Arab ancestry are, for instance, traditionally  
15 disadvantaged, viewed as different, of a different  
16 culture --

17 QUESTION: Well, if it looks like a national  
18 origin test and sounds like a national origin test, is  
19 that what it is?

20 MS. MITCHELL: It may be a national origin  
21 test. The problem --

22 QUESTION: And then what do we do with Jones,  
23 which says that doesn't get covered under the statute?

24 MS. MITCHELL: That is correct, Your Honor,  
25 but I believe that it would be --

1 QUESTION: So that is why you want to avoid  
2 calling it a national origin test.

3 MS. MITCHELL: That is correct. That is  
4 precisely our point.

5 QUESTION: Even though it looks like a  
6 national origin test. Okay.

7 MS. MITCHELL: In part it looks like national  
8 origin. But our position is that if the Court looks to  
9 the ancestry of the person as the 1866 Act suggested,  
10 that in fact not only is our client an Arab able to  
11 maintain suit under 1981, the Jewish members of Shaare  
12 Tefila Synagogue will win their case because ancestrally  
13 they were perceived to be a different group.

14 Whether or not they believed themselves to be  
15 a different group is not at issue. The issue is that  
16 ancestrally Jews were discriminated against because of  
17 their culture and because of their ethnicity, not  
18 because they were or were not advocates of a certain  
19 religious tenet.

20 QUESTION: When you say were perceived to be,  
21 you don't mean by the people who committed the acts.

22 MS. MITCHELL: That is correct, Your Honor.

23 QUESTION: You mean by society.

24 MS. MITCHELL: By society at large. Not a  
25 majority definition and not a minority definition, but

1 by members of the society at large.

2 QUESTION: You wouldn't have us look to modern  
3 dictionaries to figure out what is a race. You would  
4 have us look to old dictionaries.

5 MS. MITCHELL: Your Honor, I suggest that  
6 looking to any dictionary is going to give you 50  
7 different answers to the same question.

8 QUESTION: How do we find out whether society  
9 at large considered -- I mean I think Jews is probably  
10 an easy question, but I don't know. Swedes. How do I  
11 figure out whether society at large considered them a  
12 separate race in your sense?

13 MS. MITCHELL: In 1866 the answer is very  
14 clear. In 1987 the answer may not be so clear. But if  
15 one uses the ancestral theory of discrimination Swedes  
16 are of a separate ancestry. If they are discriminated  
17 against because of that ancestry then they have a right  
18 under 1981 to redress.

19 QUESTION: Now, your question regarding  
20 Justice Marshall's father leads me to believe you were  
21 here during the earlier argument.

22 MS. MITCHELL: That is correct, I was.

23 QUESTION: What would your answer have been to  
24 the questions I was asking about whether the intent to  
25 discriminate has to be specifically directed to a

1 dislike of the race as opposed to a dislike of some  
2 characteristic which one thinks people that race or of  
3 that whatever you want to call the group happen to  
4 share?

5 MS. MITCHELL: Your Honor, my answer to that  
6 question is that if a group such as Jews is  
7 discriminated against because of their ancestral  
8 characteristics and beliefs, they have a right under  
9 1982. It is not founded on their religious beliefs. It  
10 is not a measure of whether subjectively the Neonazis  
11 believe that the Jews because of their religion deserve  
12 to be discriminated against.

13 Our test --

14 QUESTION: What about the question I asked  
15 whether if I think Italians or French or you pick the  
16 racial group, I think they are sloppy and therefore I  
17 don't want to -- I will not rent an apartment.

18 MS. MITCHELL: Then I will sue you under  
19 Section 1982 and under Section 1981.

20 QUESTION: It is not that I hate the French.  
21 I have nothing against the race. I just don't think  
22 they make good tenants.

23 MS. MITCHELL: I believe that --

24 QUESTION: That is enough.

25 MS. MITCHELL: -- you have discriminated, and



1 it is covered under Section 1981.

2 QUESTION: But you would give a remedy to some  
3 person who discriminated against someone because he was  
4 from Sweden but the person says, well, I know the Swedes  
5 are not of a different race at all. I haven't any  
6 racial animus against them. I just don't like Swedes.

7 MS. MITCHELL: Your Honor, whether the belief  
8 is mistaken is not at issue. Whether they were right or  
9 wrong in believing a certain ancestry to be --

10 QUESTION: You would go back and say, well,  
11 just -- you would say that, well, if that plaintiff was  
12 well advised he would know that he really is  
13 discriminating on a racial basis within the meaning of  
14 the statute.

15 MS. MITCHELL: That is correct. That is  
16 correct. We cannot use the subjective intent of the  
17 parties as our touchstone of whether there has been  
18 discrimination. If we have a smart Neonazi Party they  
19 say, oh, we don't view Jews as a separate race and we  
20 are discriminating against them because of their  
21 religion and therefore we are not going to suffer an  
22 award in the Federal District Court of attorney fees and  
23 punitive damages. We are going to have our state  
24 remedy.

25 QUESTION: Of course, it could be that there

1 is racial retaliation or religious, violent religious  
2 conflict. That could be, but that wouldn't be covered  
3 by 1982.

4 MS. MITCHELL: Well, it would be covered by  
5 1981 or 1982 if the belief was an ancestral belief that  
6 Arabs are terrorists or that Jews are inferior. It is  
7 not directed at them because of their Moslem faith or  
8 their Jewish faith. It is directed at them because of  
9 what society perceives to be a difference between their  
10 culture and the cultures of other people.

11 I would like to address one question that  
12 Justice Stevens raised in the Shaare Tefila argument.  
13 You asked, did the people who passed 1982 think Jews  
14 were a separate race. Our answer to the question is  
15 yes, they did believe that Jews and Swedes and Irish and  
16 Germans were a separate race, and we advocate here today  
17 that the 1866 Act was intended to cover that perception,  
18 that ancestral use of the term.

19 With the Court's permission, I would like to  
20 move to the Chevron aspect of my argument. My argument  
21 there is, first of all, that the Third Circuit was  
22 correct in holding that under Chevron considerations,  
23 the claim under 1981 was timely filed. I will call to  
24 the Court's attention one fact. The author of the  
25 decision in the Third Circuit, Judge Stapleton, was also

1 the author of a 1977 case, Davis, which was the case  
2 relied upon by litigants to believe that there was a  
3 six-year statute in the Third Circuit.

4 We believe that Judge Stapleton correctly  
5 interprets the law of the circuit in that regard.  
6 Should, however, this Court find that it would be  
7 appropriate to apply a two-year statute of limitations  
8 to 1981 under Wilson, we ask that this Court remand our  
9 case to the district for consideration of the equitable  
10 estoppel arguments.

11 These arguments were raised both before the  
12 District Court and before the circuit, but need not have  
13 been reached by either of those courts in reaching their  
14 determination.

15 Thank you.

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

18 Mr. Fisfis, you have six minutes remaining.

19 ORAL ARGUMENT OF NICK S. FISFIS, ESQ.,

20 ON BEHALF OF THE PETITIONERS - REBUTTAL

21 MR. FISFIS: If the Court please, I am just  
22 going to take about 30 seconds only to reply to the last  
23 matter on the remand, and may I suggest that if the  
24 court looks at the chronology of events the discharge of  
25 the plaintiff was in May of 1979, well before the

1 statute of limitations -- the two-year Pennsylvania  
2 statute of limitations would have run if that one is the  
3 -- if the Court treats it as retroactive, and therefore  
4 anything that anybody may have said to the plaintiff  
5 about not doing anything and going through internal  
6 processes would not really have made any difference,  
7 because he still had plenty of time to file within the  
8 two-year period, so there is no basis for equitable  
9 estoppel in this situation, even if you believe the  
10 allegations in his affidavit that certain statements  
11 were made.

12 Thank you.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
14 Fisfis. The case is submitted. We will resume at 1:00  
15 o'clock.

16 (Whereupon, at 12:02 p.m., the case in the  
17 above-entitled matter was submitted.)  
18  
19  
20  
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23  
24  
25

CERTIFICATION

erson Reporting Company, Inc., hereby certifies that the  
attached pages represents an accurate transcription of  
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Supreme Court of The United States in the Matter of:

85-2169 - SAINT FRANCIS COLLEGE, ET AL., Petitioners V.

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MAJID GHAIIDAN AL-KHAZRAJI, ETC.

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that these attached pages constitutes the original  
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BY Paul A. Richardson

(REPORTER)