

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

**THE SUPREME COURT  
OF THE  
UNITED STATES**

CAPTION: GEORGE VOINOVICH, GOVERNOR OF OHIO,  
ET AL., Appellants, v. BARNEY QUILTER,  
SPEAKER PRO TEMPORE OF OHIO HOUSE OF  
REPRESENTATIVES, ET AL.

CASE NO: 91-1618

PLACE: Washington, D.C.

DATE: Tuesday, December 8, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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GEORGE VOINOVICH, GOVERNOR OF :  
OHIO, ET AL., :  
Appellants :  
v. : No. 91-1618  
BARNEY QUILTER, SPEAKER PRO :  
TEMPORE OF OHIO HOUSE OF :  
REPRESENTATIVES, ET AL. :

- - - - - X  
Washington, D.C.  
Tuesday, December 8, 1992

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

APPEARANCES:  
N. VICTOR GOODMAN, ESQ., Columbus, Ohio; on behalf  
of the Appellants.  
THOMAS G. HUNGAR, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the United States, as amicus curiae  
supporting Appellants.  
ARMISTEAD W. GILLIAM, JR., ESQ., Dayton, Ohio; on behalf  
of the Appellees.

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

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in number 91-1618, George Voinovich v.  
5 Barney Quilter.

6 Mr. Goodman.

7 ORAL ARGUMENT OF N. VICTOR GOODMAN

8 ON BEHALF OF THE APPELLANTS

9 MR. GOODMAN: Your Honor, Mr. Chief Justice, and  
10 may it please the Court:

11 This Court has repeatedly recognized that state  
12 redistricting bodies are best situated to identify and  
13 then reconcile traditional State policies with Federal  
14 constitutional and statutory requirements. This Court has  
15 long held that redistricting and reapportioning  
16 legislative bodies is a legislative task which the Federal  
17 courts should make every effort not to preempt.

18 The district court in this case made every  
19 effort to preempt the legislative reapportionment adopted  
20 by the Ohio Apportionment Board on February 18 of this  
21 year, which we have referred to in these proceedings as  
22 amendment D.

23 During the course of my argument this morning, I  
24 plan to discuss each of the district court's intrusions  
25 upon Ohio's apportionment process.

1 First, the lower court preempted Ohio's  
2 redistricting efforts by improperly shifting the burden of  
3 proof to the apportioning persons to justify their  
4 apportionment plan under the Voting Rights Act.

5 Second, the district court found, in the face of  
6 unprecedented cooperation and consultation with the  
7 African American community in our State, that the  
8 Apportionment Board intentionally discriminated against  
9 minorities in violations of the Fifteenth Amendment.

10 And third, and only as an afterthought in the  
11 course of their March 19 opinion where the district court  
12 denied our application for a stay pending appeal to this  
13 Court, the district court found that the appellants had  
14 violated the one person-one vote rule of the Fourteenth  
15 Amendment by adhering to a provision of the Ohio  
16 constitution which permitted deviations from ideal  
17 population of plus or minus 10 percent in the pursuit of  
18 our Ohio constitution's policy of respecting county  
19 boundaries.

20 We would respectfully suggest to this Court that  
21 the record in this case is complete and clear and that  
22 none of the findings of violations made by the district  
23 court are supported in the record. Accordingly, we would  
24 respectfully request this Court to remand this case to the  
25 district court with instructions to enter judgment in

1 favor of the Appellants.

2 With respect to the Voting Rights Act, we  
3 believe that the findings and conclusions of the district  
4 court are both legally and factually incorrect. The  
5 district court held that the apportioning persons in our  
6 State were automatically forbidden to create majority-  
7 minority districts in the absence of what would amount to  
8 be a judicial finding of a violation of the Voting Rights  
9 Act.

10 The district court held that the apportioning  
11 board could not implement the State's policy of attempting  
12 to avoid the dilution of minority voting strength in their  
13 redistricting plan without first proving that the 1981  
14 plan of apportionment violated the Voting Rights Act or  
15 that the plan which they adopted on February 18 did not  
16 violate the Voting Rights Act.

17 QUESTION: Is dilution the only issue in the  
18 case under the Fifteenth Amendment, as you see it?

19 MR. GOODMAN: Your Honor, under the Fifteenth  
20 Amendment, no, because the district court in passing  
21 seemed to say that because there was some political  
22 gerrymandering, which they felt was racially based, that  
23 there was a violation of the Fifteenth Amendment.

24 QUESTION: Well, I take it you concede that race  
25 was an explicit factor in the redistricting?

1 MR. GOODMAN: Yes, Your Honor, it was, but not  
2 for an invidious purpose, and we believe this Court's  
3 opinion in Carey would support the use of race, which the  
4 apportioning persons did in this case.

5 QUESTION: Well, the --

6 MR. GOODMAN: It was not for an invidious  
7 purpose.

8 QUESTION: The usual rule is that disparate  
9 treatment requires the State in this case or the  
10 apportioning authorities to bear the burden of proof to  
11 show that there was a compelling interest, does it not?

12 MR. GOODMAN: Well, Your Honor, we believe that  
13 the record shows that the use of race was not invidious  
14 and was, first of all, necessary because of the housing  
15 patterns of the African American community in our State.

16 QUESTION: Well, first, let's just first of all  
17 talk about the burden of proof. If race is the explicit  
18 category that's being used, is it not the usual rule in  
19 other contexts that the burden of proof would be upon the  
20 entity using race to come forward and to show that it was  
21 lawful, legitimate, for necessary compelling State  
22 interests, et cetera?

23 MR. GOODMAN: Well, Your Honor, we believe that  
24 there is a difference in the argument we make between the  
25 placing of the burden of proof under the Voting Rights

1 Act, which was shifted to the appellants, and the burden  
2 which we believe we met with respect to the Fifteenth  
3 Amendment.

4 QUESTION: Well, would you agree that the burden  
5 should be placed on you in this respect?

6 MR. GOODMAN: We believe, Your Honor, that would  
7 be correct, that we do have an obligation to show -- and  
8 we believe the record clearly does show -- that the use of  
9 race was not for an invidious purpose. We believe, first  
10 of all, as this Court said in Mobile, that the plan was  
11 not adopted for the purpose of discriminating against the  
12 African American community.

13 In fact, the record is clear that the Ohio  
14 Chapter of the NAACP branches supported the plan before  
15 this Court as it affects the minority community in its  
16 entirety. And with respect to the four districts of five  
17 -- and there were only five minority -- majority-minority  
18 districts created, one more than there was in the 1981  
19 plan -- all the black community supported the creation of  
20 the four districts in Cleveland, Ohio, or Cuyahoga County,  
21 and the Ohio Conference of Branches of the NAACP supported  
22 our plan throughout the state as it affected the minority  
23 community.

24 QUESTION: Well, suppose that a State decided  
25 that it wanted better urban-rural balance, and it said we



1 need to put some rural voters into the -- some urban  
2 voters into the rural districts. Could it say, you know,  
3 most black people are members of urban communities, so  
4 we'll just move black voters in? Would that be  
5 constitutional?

6 MR. GOODMAN: Well, Your Honor, it would depend  
7 again if it were such as this Court's decision in  
8 Gomillion where we fenced out or minimized the political  
9 effectiveness of the black community, it would be a  
10 violation of the Fifteenth Amendment. But in this case,  
11 all the parties --

12 QUESTION: But would there be a violation for  
13 using this kind of stereotype, this kind of shorthand?

14 MR. GOODMAN: I believe not, Your Honor. I  
15 believe that there must be a discriminatory intent and an  
16 injury, and unless there is shown to be by the plaintiffs,  
17 or the appellees in this case, a showing that the  
18 apportioning persons used race for an invidious purpose  
19 and that there was an injury, then these appellees could  
20 not approve and support their case, and --

21 QUESTION: Mr. Goodman, you seem to be adopting  
22 the proposition that the use of race is perfectly okay so  
23 long as it is benign, it's intended for a good purpose. I  
24 don't know that that accords with our law. We have not  
25 allowed, for example, racial set-asides in contracting --

1 MR. GOODMAN: Well, Your Honor --

2 QUESTION: -- even though that had a benign  
3 purpose. You're saying race -- racial judgments are okay  
4 so long as your intent is good. Is that right?

5 MR. GOODMAN: I'm not saying that, Your Honor.  
6 First of all, this is not a Croson type case. This is not  
7 a case brought on behalf of whites urging that there is  
8 reverse discrimination. This is a case that while it  
9 seems to me is for the benefit of white Democrats -- and  
10 that was the class sought to be served -- it is not a case  
11 of reverse discrimination, and I believe that a plurality  
12 in the Carey case --

13 QUESTION: Well, you think that they're the  
14 wrong plaintiffs here. Is that the only problem? You  
15 want this decided because they're the wrong plaintiffs.

16 MR. GOODMAN: No.

17 QUESTION: If, in fact, some white Democrats had  
18 brought the suit claiming that this was diluting their  
19 votes, then the suit might lie.

20 MR. GOODMAN: No, Your Honor. We believe that  
21 this case is like the Carey case, although Carey I  
22 recognize is a section 5 case. Members of the Court in  
23 the plurality in that case said that the purposeful use of  
24 race was not per se a violation of the Fourteenth and  
25 Fifteenth Amendment. And I am saying that this is not a

1 Croson type case of reverse discrimination. I'm saying  
2 that all the parties in this case used race. The  
3 apportioning persons used it for the purposes of making  
4 sure that in the plan that they drafted, there was no  
5 dilution --

6 QUESTION: They didn't violate the Voting Rights  
7 Act. Thereby -- I had assumed the purpose of the Voting  
8 Rights Act was to prevent racial determinations in voting,  
9 that drawing up districts on the basis of race, and what  
10 you're suggesting is that it has the ironic effect of  
11 inducing all the States to use race in drawing up their  
12 districts lest they be accused of a violation of the  
13 Voting Rights Act. What an ironic consequence.

14 MR. GOODMAN: I think, Justice Scalia, my  
15 response would be that since Thornburg and the section 2  
16 amendments focus on the results of a plan, that there is  
17 no way that the apportioning persons in this case could  
18 have drafted a plan with the housing and the location of  
19 the minority community in our States without taking  
20 cognizance of race. And as -- I would submit that the use  
21 for which race is taken is the issue.

22 And unless there can be shown -- unless there  
23 can be shown -- that there was an invidious use of it,  
24 that the plan was conceived or operated for the purpose of  
25 discrimination, and unless there can be demonstrated an

1 injury that the use in this case was, in fact, benign and  
2 to carry out the Federal mandate, I believe after all --  
3 and I think the --

4 QUESTION: plan -- you intentionally used race.  
5 You intentionally used race to favor the black -- for the  
6 minority community to give them a majority -- insure them  
7 control of these districts. Isn't that so far right?

8 MR. GOODMAN: Yes. Well, we --

9 QUESTION: Isn't that so far right?

10 MR. GOODMAN: That is correct.

11 QUESTION: Well, that is a discrimination.

12 MR. GOODMAN: I'm sorry, Your Honor?

13 QUESTION: That is a discrimination.

14 MR. GOODMAN: Yes, it is a discrimination, Your  
15 Honor, but not for an invidious purpose.

16 QUESTION: You seem to say that any time the  
17 black community agrees with you in creating a minority-  
18 majority district, that that's all you need for this  
19 purposeful discrimination.

20 MR. GOODMAN: Well, Your Honor, we think that is  
21 clearly a part of what we are arguing, that there could be  
22 no injury for the protected class.

23 QUESTION: Why do you think the commission  
24 should be able to use just the totality of the  
25 circumstances test instead of the Gingles test?

1 MR. GOODMAN: By the Gingles test, you mean,  
2 Your Honor, the finding of a majority of the political  
3 cohesiveness --

4 QUESTION: Yes, and racial block voting.

5 MR. GOODMAN: Yes, Your Honor. We believe and  
6 have agreed with the argument of the Solicitor that the  
7 Gingles preconditions do apply, but as we've said in our  
8 brief, we don't believe this Court needs to necessarily  
9 adopt that position in order to be able to reverse the  
10 district court.

11 QUESTION: I know you don't, but -- because you  
12 don't want to apply the Gingles test.

13 MR. GOODMAN: No. Your Honor, we would have --  
14 we believe that if this Court applied the Gingles test,  
15 that the district court was in error in finding a  
16 violation because, after all, the district court found --

17 QUESTION: Well --

18 MR. GOODMAN: -- that there was no --

19 QUESTION: But you don't want -- you want to  
20 reverse the district court on another ground.

21 MR. GOODMAN: Well --

22 QUESTION: You don't want to -- I mean, the  
23 argument you've been making would reverse the district  
24 court not on the mistake on the -- in applying the Gingles  
25 test --

1 MR. GOODMAN: We --

2 QUESTION: -- but just on this more general  
3 view --

4 MR. GOODMAN: Well, Justice White --

5 QUESTION: -- that you can discriminate as long  
6 as you think you're doing it for a good purpose.

7 MR. GOODMAN: No, Your Honor. We believe that  
8 on the voting rights issue, the district court shifted the  
9 burden to the apportioning persons to prove that their  
10 plan did not violate, but we argue that the burden was on  
11 the plaintiffs in this case to bear the burden of proof to  
12 show that the plan which we had adopted did, in fact,  
13 cause the minority voting strength to be diluted. And we  
14 believe, Your Honor, that in attempting to comply with the  
15 Federal mandate not to adopt the plan, which does, in  
16 fact, cause vote dilution, that we had to take race into  
17 account.

18 QUESTION: Do you accept the proposition that  
19 you have the burden to prove that your object was to  
20 comply with the Federal law? Do you have to go that far  
21 and then you draw the line and you say the burden is on  
22 the other side?

23 MR. GOODMAN: No, Your Honor. We believe that  
24 the burden was on these plaintiffs to show that the plan,  
25 which we adopted, the apportioning persons adopted, did

1 cause the dilution of minority voting strength, a burden  
2 which they did not bear nor does the facts -- do the facts  
3 of this case warrant such a conclusion by the district  
4 court.

5 QUESTION: Which is hard to show. Very often  
6 it's the party who has to bear the burden of showing  
7 dilution or of showing nondilution who's going to lose.  
8 So, what you're suggesting is that you have the right  
9 intentionally to use race in the drawing up of districts,  
10 and the other side is going to have to bear the burden of  
11 showing that that intentional use of race somehow caused a  
12 dilution.

13 MR. GOODMAN: Well, Justice Scalia --

14 QUESTION: That would be an extraordinary  
15 principle for us to adopt it seems to me.

16 MR. GOODMAN: Well, I would think it would not  
17 be extraordinary based upon how these apportionment plans  
18 are drafted. We have a set of apportionment persons who  
19 say that if we draft a plan that does dilute minority  
20 voting strength, or arguably does, we're going to be in  
21 court. And we believe that you can't draft a plan to  
22 comply with the Federal mandate of section 2, which is to  
23 carry out the purposes of the Fifteenth Amendment, to make  
24 sure that you are not engaging in some invidious  
25 discrimination without taking race into account.

1 QUESTION: Administrative efficiency.

2 MR. GOODMAN: I'm sorry, Your Honor?

3 QUESTION: Administrative efficiency demands it.

4 MR. GOODMAN: Well, I think, Your Honor, we  
5 tried to follow this Court's Gingles opinion, and we tried  
6 to follow the Carey case which did, again as I say, note  
7 the fact that purposeful noting of race was taken into  
8 consideration.

9 Mr. Chief --

10 QUESTION: What do you do about the district  
11 court's finding that there was no racial block voting in  
12 Ohio?

13 MR. GOODMAN: Your Honor --

14 QUESTION: Do we -- to find for you, do we have  
15 to find that that was plain error or was what? What do we  
16 have to do --

17 MR. GOODMAN: No, Your Honor. We believe that,  
18 as the Solicitor would argue, that finding by the district  
19 court means that there was no meeting of the third Gingles  
20 precondition, and that alone -- that alone -- should cause  
21 the district court's opinion to be reversed in addition to  
22 the fact that what the district court would have us do is  
23 to look to each and every district, figure out how many  
24 minority voters it takes to elect an incumbent, that would  
25 be the amount. And if we put any more black population



1 into that county, we would violate the act. This again  
2 runs in the face of the first Gingles preconditions.

3 Mr. Chief Justice, may I reserve the balance of  
4 my time for rebuttal?

5 QUESTION: Yes, you may, Mr. Goodman.

6 MR. GOODMAN: Thank you.

7 QUESTION: Mr. Hungar, we'll hear from you.

8 ORAL ARGUMENT OF THOMAS G. HUNGAR

9 ON BEHALF OF THE UNITED STATES

10 AS AMICUS CURIAE SUPPORTING THE APPELLANTS

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

13 I'd like to begin by addressing the district  
14 court's interpretation of section 2.

15 The position of the United States is this. The  
16 district court's finding of a section 2 vote dilution  
17 violation should be reversed because the language and  
18 purpose of section 2, as amended in 1982, and the  
19 underlying logic of vote dilution claims call for a  
20 threshold focus on the three preconditions set forth by  
21 this Court in Gingles. Those preconditions are at least  
22 as applicable in the context of challenges to single-  
23 member districts as they are in cases challenging the  
24 inherently dilutive practice of multi-member districting.

25 QUESTION: Well, Mr. --

1 QUESTION: That may -- excuse me.

2 QUESTION: Mr. Hungar, would you mind addressing  
3 the questions that have been raised heretofore with Mr.  
4 Goodman about whether it is possible to take race into  
5 account in drawing these lines without invoking the strict  
6 scrutiny of cases under the Fourteenth and Fifteenth  
7 Amendments when you use race as the basis for doing this?

8 MR. HUNGAR: Justice O'Connor, in our view --

9 QUESTION: And who has the burden of proof?

10 MR. HUNGAR: In our view, that's a very  
11 difficult question. It is always troubling when States or  
12 government takes race into account in making decisions.  
13 The Court yesterday noted probable jurisdiction in a case  
14 that squarely presents that question, Shaw against Barr,  
15 under the Voting Rights Act in a closely related context.

16 We have not addressed that question in this  
17 case, nor have the parties in their briefs because it's  
18 not presented in this case. There is no claim in this  
19 case that white voters or any -- members of any other  
20 race, other than blacks, were discriminated against by  
21 virtue of the State's decision to take race into account.  
22 The only claim in this case is that blacks suffered  
23 intentional dilution of their voting power by virtue of  
24 the State's decision to take race into account.

25 In fact, all parties before the Court concede

1 that it is appropriate to take race into account. They  
2 just differ over the type -- the manner in which race is  
3 to be taken into account. At page 37 of their brief, for  
4 example, the appellees take the position that because  
5 there is substantial white crossover voting, the State was  
6 required to be very careful in order to avoid diluting  
7 black voting power. Obviously, the only way to do that is  
8 to take race into account.

9 So, this isn't a Croson type case. This case  
10 does not present the issue presented in Shaw against Barr.

11 QUESTION: Well, in this case there was an  
12 allegation in the complaint that influence of black voters  
13 was derogated. So, it's not just a dilution case, is it?  
14 The complaint certainly can't be read that way.

15 MR. HUNGAR: Well, Justice Kennedy, with respect  
16 I believe -- we interpret the complaint to raise a  
17 dilution claim, that is, a claim that black voters were  
18 intentionally discriminated against. Whether -- the claim  
19 certainly is that black voters were intentionally  
20 discriminated against and that the State attempted to, in  
21 some sense, minimize or reduce their voting power.  
22 Whether that is referred to as an influence claim or a  
23 dilution claim, that is the nature of the claim. And in  
24 our view, that is the only claim before the Court and the  
25 proper resolution of that claim is that it should be

1 rejected because the district court essentially committed  
2 two errors of law in accepting that claim.

3 QUESTION: Well, if there's an influence claim,  
4 are we remitted to the Gingles factors?

5 MR. HUNGAR: We don't believe so. For the -- if  
6 we're talking about intentional discrimination under the  
7 Constitution, we don't believe the Gingles factors are  
8 necessarily applicable because the functions served by the  
9 constitutional ban against intentional discrimination is  
10 different than the functions served by section 2. Section  
11 2 focuses on equal access to the process. The prohibition  
12 against intentional discrimination focuses on exactly  
13 that.

14 QUESTION: Well, suppose there's just a section  
15 2 claim that they -- which is an influence claim, rather  
16 than a dilution claim. You still don't need the Gingles  
17 factors, and the burden of proof certainly then should  
18 shift to the apportioning authorities, shouldn't it?

19 MR. HUNGAR: No, Your Honor. If I understand  
20 your question correctly, we believe the Gingles factors  
21 are applicable to so-called influence claims. If those  
22 are a subset of dilution claims or not, we believe that  
23 the three Gingles factors are fully applicable to all  
24 challenges, to vote dilution challenges or influence  
25 challenges, to redistricting decisions.

1           And the reason for that comes directly from the  
2 language of section 2. Section 2 requires that racial  
3 polarization, both minority cohesiveness and white block  
4 voting, be shown in vote dilution challenges. Section 2  
5 guarantees racial groups an equal opportunity to  
6 participate in the political process and elect  
7 representatives of their choice. There's no minority  
8 cohesiveness. By definition, the minority group has no  
9 representatives of its choice.

10           QUESTION: What is the justification for a State  
11 in reapportioning ever deliberately taking race into  
12 account in order to create a -- intentionally to create a  
13 single-member district that will be controlled by a  
14 minority? Does there have to be any precondition met?

15           MR. HUNGAR: Justice White, again that's a very  
16 difficult question that raises sensitive constitutional  
17 issues in --

18           QUESTION: Yes. Well, what's your answer?

19           (Laughter.)

20           MR. HUNGAR: In United Jewish Organizations  
21 against Carey, a plurality of the Court suggested that  
22 that would be appropriate certainly in section 5 cases  
23 where the Department of Justice has objected. We think  
24 more generally that while this case doesn't raise the  
25 question, it is appropriate --

20

1 QUESTION: Why doesn't it raise the question?

2 MR. HUNGAR: Because there's no claim in this  
3 case that the State's failure to take race into -- or  
4 decision to take race into account in itself violated the  
5 Constitution. Appellees take the position that the State  
6 had to take race into account in order to maximize black  
7 voting power. We don't agree that that's a proper  
8 interpretation --

9 QUESTION: What if there has been a challenge to  
10 creation of any minority controlled districts in this  
11 case?

12 MR. HUNGAR: The United States --

13 QUESTION: What would have been your answer?

14 MR. HUNGAR: The position of the United States  
15 is that it is appropriate for States to take race into  
16 account in certain circumstances in order to avoid a  
17 violation of section 2. In enacting amended section 2 in  
18 1982, Congress commanded the States not merely to avoid  
19 intentionally discriminating against racial groups, but  
20 also to avoid practices --

21 QUESTION: In short, if the Gingles -- if the  
22 State can satisfy the Gingles factors, they may create  
23 these districts.

24 MR. HUNGAR: If -- we don't believe that the  
25 Gingles factors alone, Your Honor, are enough to establish

1 a section 2 violation, but if the State has a --

2 QUESTION: I didn't ask you that.

3 Constitutionally I would like to know what a State has to  
4 show ever to create a -- intentionally a minority  
5 controlled district.

6 MR. HUNGAR: If a State -- if the State has a  
7 reasonable basis for believing that it is necessary to  
8 create majority and minority districts in order to avoid a  
9 violation of section 2, it is permitted to do so. That is  
10 the necessary implication of what Congress said in  
11 enacting amended section 2 in 1982.

12 QUESTION: And that involves applying the  
13 Gingles factors?

14 MR. HUNGAR: Yes, that's part of the analysis in  
15 our view. Now, the -- now, it's not necessarily --  
16 certainly up until this point, it has not been clear  
17 whether the Gingles factors even apply in this context.  
18 We believe they do. The lower courts have taken different  
19 positions on that question, and we are asking the Court to  
20 hold against --

21 QUESTION: But then are you arguing that the  
22 proponent of the plan had the burden of showing there was  
23 no section 2 violation?

24 MR. HUNGAR: No, Your Honor, because again there  
25 is no -- this case does not involve the type of claim that

1 we've just been discussing. There's no claim in this case  
2 that the State violated the Constitution merely by taking  
3 race into account. The appellees contend that the State  
4 had to take race into account.

5 QUESTION: No, but in performing their duty to  
6 prepare a proper plan, you say have a duty to avoid a  
7 section 2 violation, that would seem to me, if you're  
8 saying that, that they have a duty to decide for  
9 themselves that this particular plan is necessary and,  
10 therefore, assume the burden. Maybe I don't understand  
11 you.

12 MR. HUNGAR: Well, certainly if a State chooses  
13 -- Congress, in enacting section 2, commanded the States  
14 to avoid violating section 2. If a State wants to be sure  
15 it's avoiding -- violating section 2, it makes sense.  
16 Depending on the circumstances in the particular State, it  
17 may be appropriate for the State to look at racial  
18 considerations and make sure it's not violating section 2.  
19 It depends --

20 QUESTION: Sure, and give it a wide berth. I  
21 assume they should act prophylactically if there's even a  
22 minor risk, right, of a Gingles violation.

23 MR. HUNGAR: Well, again, Your Honor --

24 QUESTION: So, it isn't just Gingles applied all  
25 the way. It's even a minor risk. Play it safe and use



1 racial districts all the time.

2 MR. HUNGAR: As you know --

3 QUESTION: Is that proper?

4 MR. HUNGAR: -- we have not addressed the  
5 precise nature of this type of claim in our brief and have  
6 not taken a formal position on that question because in  
7 our view it's not presented in this case. It is presented  
8 in Shaw against Barr.

9 QUESTION: Let me ask you this. Supposing there  
10 were two alternate plans, one with four majority-minority  
11 districts and one with five majority-minority -- however  
12 you phrase that, and they thought both of them would  
13 comply with the law, could they select a plan with the  
14 five districts on the ground they thought that would be  
15 good public policy?

16 MR. HUNGAR: I'm not sure, Your Honor. It  
17 depends -- it's unlikely. The reality of redistricting is  
18 that there are many factors and many considerations that  
19 go into the choice of a particular plan over a  
20 particular --

21 QUESTION: Your answer to my question is you  
22 don't know.

23 MR. HUNGAR: Yes. We believe the first Gingles  
24 precondition --

25 QUESTION: Neither does the Government I guess.

1 MR. HUNGAR: That's correct, Your Honor.

2 Thank you.

3 QUESTION: Thank you, Mr. Hungar.

4 We'll hear from you, Mr. Gilliam.

5 ORAL ARGUMENT OF ARMISTEAD W. GILLIAM, JR.

6 ON BEHALF OF THE APPELLEES

7 MR. GILLIAM: Mr. Chief Justice, and may it  
8 please the Court:

9 I would like to take up a little bit of the  
10 factual background for the decision that was made here and  
11 then to respond, I believe, to some of the issues that  
12 have been raised by the Court's questions.

13 The stage on which this was played out in Ohio  
14 in 1991 was that there were 11 black legislators who had  
15 been repeatedly elected. They had been repeatedly elected  
16 with very large majorities. They were -- seven of them  
17 were elected from districts where there were less than 50  
18 percent black population.

19 The court found that there was no racial block  
20 voting. The experts on both sides agreed with that  
21 proposition. The experts for the appellants found that in  
22 the period 1986 to 1990 the white crossover vote was in  
23 the magnitude of 60 percent or greater. Our expert found  
24 coalitional voting throughout the State of Ohio. That  
25 finding was supported by the fact that blacks had been

1 repeatedly elected with 35 percent of the population, and  
2 they had done that over a period of 20 years.

3 Now, into this particular breach, the appellants  
4 stepped and said we must create as many majority-minority  
5 districts as we possibly can. There was no investigation  
6 prior to that policy announcement of whether or not there  
7 was polarized voting.

8 QUESTION: May I ask at that point, Mr.  
9 Gilliam?

10 MR. GILLIAM: Yes, Your Honor.

11 QUESTION: Suppose instead of saying they think  
12 we must do it to comply with the statute, they had said we  
13 think it would be good policy to create as many as we  
14 could. Would that be illegal in your view?

15 MR. GILLIAM: On those facts alone, no. The  
16 question would be was their act vote dilutive. Did it  
17 have the effect of diluting the votes of black citizens  
18 under the Voting Rights Act?

19 QUESTION: Why wouldn't it violate the  
20 Constitution to deliberately use race in this manner?

21 MR. GILLIAM: Your Honor, I'm not arguing my  
22 opponent's case. What I'm saying is that if race is used,  
23 there are circumstances, for example, in section 5 cases  
24 where race is used to correct a racial discrimination, a  
25 racial vote dilution.

1 QUESTION: Exactly, exactly. All right.

2 MR. GILLIAM: And that's the only circumstances  
3 under which race can be used.

4 QUESTION: Well, the way you describe it, there  
5 would be no reason in Ohio to discriminate.

6 MR. GILLIAM: I misled you then, sir. I  
7 intended to indicate that --

8 QUESTION: Well, you said that there had been no  
9 discrimination against blacks in all -- anywhere in Ohio.

10 MR. GILLIAM: Well, there had been no --

11 QUESTION: And if prior discrimination is a  
12 predicate to satisfying the Constitution, it wasn't  
13 present in Ohio.

14 MR. GILLIAM: That's correct, exactly. In fact,  
15 the prior predicate, racial discrimination, wasn't shown  
16 even as a threshold matter in this case. The two Gingles  
17 factors which are critical, which is the polarized voting,  
18 was totally shown not to occur -- the Solicitor General  
19 bases his argument on that particular point.

20 Secondly, there was no inability of black  
21 candidates to be elected. They were repeatedly elected,  
22 and they elected -- black voters elected not only black  
23 candidates, but white candidates of choice repeatedly.

24 QUESTION: What -- Mr. Gilliam, what if the  
25 Apportionment Board had said we want to have a Republican

1 reapportionment, and so we're going to try to cut down  
2 Democratic voting strength wherever we can, consistent  
3 with the Ohio constitution, and so forth? And they end up  
4 creating an additional majority-minority block vote, but  
5 they treat white and black Democratic legislators equally.  
6 They discriminate against them all. Is there anything  
7 constitutionally wrong with that?

8 MR. GILLIAM: The way you've said it, no. Let  
9 me amplify, if I may, Your Honor.

10 In Ohio there's a constitution. There is no  
11 conflict shown between the constitutional provisions which  
12 deal with reapportionment and the Voting Rights Act.  
13 Acting under the constitution, they are free to engage in  
14 policy. If they created a majority-minority district  
15 which had the dilutive effect on black voters so that the  
16 voters in that district were packed and fragmented as, for  
17 example, happened in the Armour case, then they would have  
18 to respond as to why that was done. If --

19 QUESTION: Under the Voting Rights Act or under  
20 the Constitution?

21 MR. GILLIAM: They would have to respond under  
22 both because, as the Court has observed, strict scrutiny  
23 is required because of racial classifications. There's a  
24 long line of cases.

25 QUESTION: Well, but the argument on the other

1 side here would be, you know, this is a disparate impact  
2 perhaps, but it is not done with intent to discriminate  
3 against blacks.

4 MR. GILLIAM: The argument is made, Your Honor,  
5 that there's no difference between a partisan gerrymander  
6 which has racial effects and a racial gerrymander, and I  
7 suggest they are one and the same because --

8 QUESTION: Well, what do you do with a case like  
9 Whitcomb against Chavis then?

10 MR. GILLIAM: Your Honor, with respect to  
11 Whitcomb v. Chavis, intent was not a factor in that case.  
12 It was conceded not to be a factor in that case.

13 QUESTION: Right. Well, supposing you have here  
14 the intent is not to -- as I believe I have put in my  
15 question, the intent is not to discriminate against  
16 blacks, but to diminish Democratic voting strength.

17 MR. GILLIAM: Well, then we look to the effects  
18 under the Voting Rights Act and where you have a racial  
19 gerrymander, which is statewide, which packs and fragments  
20 black voters with dilutive effects.

21 QUESTION: Well, but you keep hypothesizing a  
22 racial gerrymander, intimating that it is with intent.  
23 But my question is it was not with intent to discriminate  
24 against blacks.

25 MR. GILLIAM: Your Honor, I say it was racial

1 because it's admitted that it was racial.

2 QUESTION: Well, but you're not answering my  
3 hypothetical question.

4 MR. GILLIAM: Oh, I beg your pardon. Absent  
5 race and there's a political gerrymander, my view of that  
6 is that whites and blacks may not be treated alike because  
7 section 2 forbids that.

8 QUESTION: But it's an important question. And  
9 race isn't absent in the Chief Justice's hypothetical  
10 because race is the basis for reassigning the voters. So,  
11 don't say race is not applicable. Race is the surrogate  
12 used in order to accomplish a political gerrymander. In  
13 that case, what result?

14 MR. GILLIAM: Violation of the Fourteenth, the  
15 Fifteenth Amendment, and the Voting Rights Act if dilutive  
16 effects are shown.

17 QUESTION: But not if dilutive effects are not  
18 shown?

19 MR. GILLIAM: I think there has --

20 QUESTION: So --

21 MR. GILLIAM: I think there have to be effects  
22 under both the Voting Rights Act and the Fourteenth and  
23 Fifteenth Amendments.

24 QUESTION: So, it's just a Gingles -- so, it's a  
25 Gingles case no matter?

1 MR. GILLIAM: No. I think that under your  
2 decisions, race is an impermissible use where there are  
3 unequal and disparate results. Here the -- there were  
4 unequal, disparate results, and in my view that is  
5 sufficient.

6 I also say that we have here a statewide packing  
7 of black citizens, and the theory is that this is  
8 necessary. If we look at the statute, Your Honor, it says  
9 that you're not entitled to proportional representation.  
10 There's a disclaimer in the statute. That's a clear  
11 prohibition upon creating a right to majority-minority  
12 districts, which is what is proclaimed here by guaranteed  
13 safe seats, which is their theory upon which they are  
14 operating.

15 Now, unless they remove that disclaimer, they  
16 have nothing but a naked, freestanding gerrymander with no  
17 justification. They say they don't have to justify.  
18 There is no burden of proof upon them to justify this.  
19 They make no excuse about how the disclaimer should be  
20 overcome.

21 In fact, what they say is we have a rational  
22 State policy. We don't know what that rational State  
23 policy is because they're not following the Ohio  
24 constitution. They claim federalism but abandon their own  
25 constitution in the name of the Voting Rights Act.



1 QUESTION: Well, Mr. --

2 QUESTION: Was there any finding in the court  
3 below that there was a violation of the Ohio constitution?

4 MR. GILLIAM: No, Your Honor. What the court  
5 below found was that the Ohio constitution was abandoned  
6 in that -- in favor of the Voting Rights Act. So, there  
7 was not a finding that the Ohio constitution was violated  
8 by the district court.

9 QUESTION: Mr. Gilliam, why do the appellants  
10 have to prove that the Voting Rights Act required their  
11 plan? Why isn't the question whether the plan violates  
12 the Voting Rights Act? I mean, could you explain that to  
13 us?

14 MR. GILLIAM: Yes. For this reason, they have  
15 admitted a racial classification. The strict scrutiny  
16 cases of this Court require that there be a permissible  
17 inquiry by the court as to why is that so. You have now  
18 made these majority-minority districts. Why did you do  
19 so? They have to show, at a minimum, that there is no  
20 vote dilution.

21 If we look at the issues of voting rights, we  
22 should look at the totality of circumstances standards.  
23 There are nine of them set forth in the statute. They say  
24 that we don't have to even look at these standards. We  
25 can simply apply these -- the voting rights without

1 reference to its own standards, without reference to the  
2 history of Ohio, which shows no polarized voting, a key  
3 fact, without reference to the fact that there's  
4 coalitional voting. We just do it.

5 And that was the excuse that was used in  
6 Gomillion. The Alabama legislature said we simply rely on  
7 State power. It's perfectly all right for us to  
8 gerrymander blacks out of Tuskegee, and my opponents say  
9 it's perfectly all right to gerrymander blacks out of the  
10 white suburbs into the inner cities simply because we have  
11 the power to do so. We need not justify use of race by  
12 going through the standards of the Voting Rights Act.

13 With respect to --

14 QUESTION: Are you saying, Mr. Gilliam, that  
15 it's perfectly okay so long as it doesn't dilute? That's  
16 the only claim you're making here, that this is bad  
17 because it dilutes, and if we find that that is not a  
18 valid reason to object, then you're content to have  
19 judgment go against you.

20 MR. GILLIAM: No. Let me put it this way, Your  
21 Honor.

22 QUESTION: You're making some other claim  
23 besides the dilution?

24 MR. GILLIAM: Yes. I think that there -- that  
25 the State has to justify its use of race I think in and of

1     itself.

2                   We asked for a declaratory judgment, and the  
3     declaratory judgment request that we made was that the  
4     trial court remove from the appellants the sword of the  
5     Voting Rights Act and require them to comply with the Ohio  
6     Constitution. That is the central claim of our case:  
7     their misuse of the Voting Rights Act and the way they  
8     have done it without justifying.

9                   The answer to your question would be yes. That  
10    would be sufficient for a declaratory judgment in this  
11    case.

12                   QUESTION: Let's assume that you had a very  
13    different political complexion in Ohio and the -- at the  
14    time it was clear that they had to reapportion. The board  
15    unanimously agreed that everything basically seemed to be  
16    going fine. The only thing they had to worry about was  
17    one person-one vote so that they said we will redraw the  
18    districts in a way that will preserve the same racial mix  
19    that we have now, since it seems to work to everybody's  
20    satisfaction. Would that be a use of race which would  
21    place a burden upon them?

22                   MR. GILLIAM: No.

23                   QUESTION: Why not? That's using race and it's  
24    consciously using race.

25                   MR. GILLIAM: I understand that. There is in

1 your hypothetical no use of race which has a conceivable  
2 dilutive effect, and you have explained the justification  
3 for it without any explanation which adds dilution to it.  
4 In those circumstances, I do not quarrel with that.

5 QUESTION: But doesn't your answer to me also  
6 imply that you have got to -- that you would have the  
7 burden to prove in the first instance that there was, in  
8 fact, a dilutive effect? And isn't that what they are  
9 claiming you should do here?

10 MR. GILLIAM: Your question suggests that in  
11 those circumstances, I would have the burden of proof.  
12 Let me answer the answer would be yes, and let me tell you  
13 why, if I may.

14 Any apportionment will create a certain number  
15 of majority-minority districts. It is inevitable because  
16 of the situation that we live in in the cities and  
17 countryside.

18 That is not what we complain about. We are not  
19 complaining about an apportionment that creates majority-  
20 minority districts that simply emerge from the process.  
21 We are not complaining about a situation, for example,  
22 where a cohesive minority group were simply held together.  
23 We're not talking about a situation where section 5  
24 applies.

25 What we're talking about here is a deliberate

1 use of race to gerrymander statewide done because -- not  
2 because of State policy, but because it is mandated by the  
3 Voting Rights Act.

4 QUESTION: Well, would the facts in this case be  
5 different if your opponents had not taken the position  
6 that they had drawn the lines, as they did, for purposes  
7 of avoiding a section 2 violation? If they had just kept  
8 mum, would you then have had on your own theory the entire  
9 burden of proof to prove that this was a section 2  
10 violation?

11 MR. GILLIAM: Your Honor, given the widespread  
12 implications of what they did, it would have been obvious  
13 what they did.

14 QUESTION: Well, that is simply to say that you  
15 might have had an easy job under your theory.

16 MR. GILLIAM: I might have had an easier job,  
17 yes, but the answer to your question --

18 QUESTION: But you -- would you still have had  
19 the burden in the first instance?

20 MR. GILLIAM: Yes, I would in that -- in your  
21 example, yes.

22 QUESTION: Okay.

23 QUESTION: What if their purpose was overtly to  
24 pack Democrats into districts, and as a byproduct of that,  
25 they packed certain racial groups in the districts? Would

1 that violate either the statute or the Constitution?

2 MR. GILLIAM: Yes, Your Honor. It would violate  
3 both.

4 QUESTION: Would it violate if you had a  
5 racially homogeneous State and you're deliberately packing  
6 districts for the purpose of getting as many majority  
7 Republican districts as you could?

8 MR. GILLIAM: The racially homogeneous State is  
9 a much more difficult question, and I --

10 QUESTION: Well, it certainly wouldn't -- it  
11 couldn't violate section 2.

12 MR. GILLIAM: -- answer -- I would probably  
13 answer it no. I'd probably answer your question no  
14 because it would be almost impossible to pack blacks in a  
15 racially homogeneous State as you have suggested.

16 QUESTION: No, but you could pack Democrats.

17 MR. GILLIAM: You could pack Democrats. The  
18 decisions of this Court has allowed the packing of  
19 Democrats from time to time.

20 QUESTION: But here you would say it's the same  
21 violation -- maybe I'm asking the same question the Chief  
22 Justice did. If their intent was to pack Democrats and  
23 incidentally, in order to do that, they inevitably had to  
24 pack some blacks --

25 MR. GILLIAM: Yes.

1 QUESTION: -- that would violate section 2.

2 MR. GILLIAM: That would violate section 2.

3 QUESTION: On the grounds that it diluted the  
4 black vote?

5 MR. GILLIAM: On the grounds that it diluted the  
6 black vote.

7 QUESTION: Why do you have to say dilution?  
8 Can't you just say that it's a degradation to the black  
9 race to use them in this manner?

10 MR. GILLIAM: It is, Your Honor.

11 QUESTION: Well, why do you have to talk about  
12 vote dilution then?

13 MR. GILLIAM: Well, let me put it this way. The  
14 cases, as I have read them, have required both -- and the  
15 Fifteenth Amendment both intent and effect. The Voting  
16 Rights Act cases are effect cases. You can have both in a  
17 Voting Rights Act case. I don't shrink from the burden of  
18 showing effect in this case, but that is my reading of the  
19 cases of this Court.

20 QUESTION: Does -- can your complaint be  
21 construed -- did you allege, as one of the theories of  
22 your complaint, that influence of blacks was diminished in  
23 some districts?

24 MR. GILLIAM: Yes, and that's an effect.

25 QUESTION: And this would be different than

1 dilution, wouldn't it?

2 MR. GILLIAM: Well, it is different. It is an  
3 effect also, however.

4 Where blacks are gerrymandered or anybody is  
5 gerrymandered, the entire purpose of the gerrymander is to  
6 move a group out of a district where they're expressing a  
7 voting preference, where they're engaged in some sort of  
8 influence. If they didn't have influence, there wouldn't  
9 be a reason to gerrymander them, and that is what occurred  
10 in this case.

11 I want to --

12 QUESTION: Mr. Gilliam, in the response that you  
13 gave to, I guess it was, Justice Stevens' question where  
14 you -- your object is to pack Democrats, but an easy way  
15 to do it is that since you believe that the -- that blacks  
16 are largely voting Democratic, you've packed blacks as a  
17 means of packing Democrats, you said that would be bad.

18 MR. GILLIAM: Yes.

19 QUESTION: That would only be bad I think you  
20 would say if you can establish block voting. Even if you  
21 couldn't establish block voting, would it be bad?

22 MR. GILLIAM: Yes, Your Honor.

23 QUESTION: Well, how would it be violating --  
24 how would there be any dilution? Why would section 2 be  
25 violated?



1           MR. GILLIAM: Well, because a racial gerrymander  
2 may be a new dilution. Section 2 of the act deals with  
3 vote dilution in general. The argument of the Solicitor  
4 General in this case is essentially that in the absence of  
5 racially polarized voting, there can't be any vote  
6 dilution. By that theory, one could pack and fragment  
7 blacks to one's heart's content, create 100 percent black  
8 districts.

9           QUESTION: Right, right, so long as they don't  
10 vote as a block.

11          MR. GILLIAM: Well, no, no.

12          QUESTION: That's wrong.

13          MR. GILLIAM: Voting as a block is different  
14 from polarized voting. Voting as a block in this case,  
15 may -- if I may address the facts of this case, it was  
16 very clear. Both sides concede that blacks voted  
17 cohesively. It happened to be 85 to 95 percent  
18 Democratic. But that's quite different from polarized  
19 voting.

20           If polarized voting doesn't exist -- if, for  
21 example, the patient is well and it wasn't Ohio, it is the  
22 view then of the appellants, we could send the patient to  
23 the hospital, do a racial gerrymander, remove vital  
24 organs, to carry the metaphor further, and don't do this  
25 without a diagnosis, no medical checkup.

1           Now, the Voting Rights Act prevents new  
2     discriminations, as well as old discriminations. It  
3     doesn't say that we only have these factors to look at.  
4     It's not a mechanical application, as the Solicitor  
5     General would suggest.

6           He also suggests that unless you have 50 percent  
7     blacks in the district, there is no potential for dilution  
8     of their vote. If you had a 49 percent district, for  
9     example, which was regularly electing a black candidate,  
10    you could split it in half and that's perfectly okay.

11          Now, the Voting Rights Act reaches that kind of  
12    behavior, and we say that you cannot split blacks for  
13    racial or partisan purposes. You can't fragment them for  
14    racial or partisan purposes --

15          QUESTION: Even if it does not produce any  
16    dilution. I mean, apart from the constitutionality of it,  
17    just whether it violates section 2.

18          MR. GILLIAM: If it does not produce  
19    dilution --

20          QUESTION: It still violates section 2.

21          MR. GILLIAM: -- then you've got -- then I have  
22    to fall back on my argument which I made to you earlier,  
23    which is that there's a misuse of the Voting Rights Act.  
24    To create this, you cannot use a Federal statute for this  
25    purpose. You must stick with your State statute. If it

1 does not create dilution and there is no prohibition in  
2 State law, then I haven't proven a violation of the Voting  
3 Rights Act unless I prove effect.

4 QUESTION: What is the forbidden effect that  
5 you're trying to prove -- that you have to prove? Can you  
6 give us the standard --

7 MR. GILLIAM: Yes, Your Honor.

8 QUESTION: -- to tell us when there's a section  
9 2 Voting Rights --

10 MR. GILLIAM: The forbidden effect --

11 QUESTION: -- violation?

12 MR. GILLIAM: -- of a gerrymander is multiple.  
13 First of all, if blacks are packed, where it's very clear  
14 that for years and years and years they've been electing a  
15 black candidate with a very large majority -- for example,  
16 a majority here was in the area of 75 percent. Because of  
17 the packing, the results of the last election were that  
18 the majority went up to 85 percent. That's clearly  
19 packing under any definition in terms of the results of  
20 what occurred. So, you've got wasted votes in the packed  
21 districts.

22 QUESTION: May I ask you just one question? I'm  
23 sorry to interrupt you, but would that be true if there  
24 -- if the percentages in the other districts were so high  
25 that there was no significant dilution in the other

1 districts by virtue of packing in the one?

2 MR. GILLIAM: But your -- the answer would be  
3 no, if I understand you correct -- your answer correctly.

4 QUESTION: But if that's your answer, then  
5 really you should focus on the other districts to see if  
6 they're diluted --

7 MR. GILLIAM: That's the issue, Your Honor.

8 QUESTION: -- because the packing itself is not  
9 enough, as I understand your theory.

10 MR. GILLIAM: Well, I think packing is dilutive.

11 QUESTION: Well, it's evidence of dilution in  
12 other districts.

13 MR. GILLIAM: It's evidence of dilution, and it  
14 is dilution under my theory, Your Honor, if I may.

15 QUESTION: Well, then you seem to be giving a  
16 different answer than you gave to Justice Souter.

17 MR. GILLIAM: Well, in that case, I'm mistaken.  
18 Somehow or other I'm confused. Let me see if I can  
19 straighten it out.

20 QUESTION: But dilution of what, Mr. Gilliam?  
21 Of the black vote or of the Democratic vote? I thought  
22 the Voting Rights Act was intended to protect blacks, not  
23 Democrats --

24 MR. GILLIAM: It is dilution --

25 QUESTION: -- or Republicans for that matter.

1 MR. GILLIAM: It's dilution of the black vote  
2 that we are talking about. Black votes are diluted if  
3 they are wasted, Your Honor, because they don't have as  
4 much value as the value of white votes that haven't been  
5 packed.

6 Now, black votes also when they're packed  
7 create, as Your Honor has quite accurately pointed out, a  
8 side effect which is the removal of the blacks from the  
9 area where they were the problem.

10 QUESTION: But that's the only harm because if  
11 you go from 85 to 95 in district 1, and you go from 15 to  
12 10 in district 2, and 15 to 10 in district 3, your harm is  
13 strictly in districts 2 and 3, isn't it?

14 MR. GILLIAM: Well, the harm is felt throughout  
15 the State because the number of legislators who have to  
16 respond to black interests is diluted. The ability of the  
17 blacks to build the coalition that they built, for  
18 example, in Ohio is affected. Their ability to  
19 participate in the political process, which is what we  
20 have been talking about, is affected.

21 QUESTION: Because there's 40 percent Democrats  
22 instead of 30 -- 40 white Democrats instead of 35 percent.

23 QUESTION: Well, if all of those concerns are  
24 valid, if those are valid concerns, of the Voting Rights  
25 Act, then our Gingles test must be wrong because all of

1 the evils that you describe do not flow from block voting,  
2 and we shouldn't have all those block voting criteria in  
3 Gingles if, indeed, these evils are direct -- are, you  
4 know -- are the object the object of the voting rights.

5 MR. GILLIAM: Well, unless I misunderstand your  
6 question, Gingles itself says in footnote 11, page 46,  
7 that racial gerrymanders are bad. They exempt that from  
8 the major discussion of the case.

9 They also say they're not talking about single-  
10 member districts. They're talking about multi-member  
11 districts where blacks have submerged. In single-member  
12 districts, blacks are fragmented, fractured, and  
13 segregated, moved out of the suburbs, as it were, in this  
14 case into the inner cities.

15 Gingles -- a mechanical application of Gingles,  
16 as is suggested here, would basically give a green light  
17 to racial gerrymandering of the most extreme sort in a  
18 State where there had been no racial block voting, as Ohio  
19 was.

20 QUESTION: May I ask you what you mean by the  
21 term racial gerrymander?

22 MR. GILLIAM: All right, sir, yes. Racial,  
23 meaning that blacks were the target of the gerrymander.  
24 Gerrymander --

25 QUESTION: I'm asking you what you mean by

1 gerrymander.

2 MR. GILLIAM: Yes, I think. Gerrymander because  
3 they were moved for partisan purposes, and to a --

4 QUESTION: And is every redistricting that's  
5 motivated in part by partisan purposes a partisan  
6 gerrymander?

7 MR. GILLIAM: No.

8 QUESTION: Well, when is it and when it is not?

9 MR. GILLIAM: When you use race for partisan  
10 purposes, you are engaging in an invidious use of race  
11 because a racial gerrymander and a partisan gerrymander  
12 using race, as I have said, is one and the same thing.  
13 It's the deliberate use of race to achieve an object.

14 QUESTION: It's not the same thing under  
15 Whitcomb against Chavis, Mr. Gilliam, if there was no  
16 intent -- if the intent is only to discriminate against  
17 Democrats so far as the Constitution is concerned, unless  
18 you're just talking about the Voting Rights Act.

19 MR. GILLIAM: I am talking about the Voting  
20 Rights Act, and I am also talking about the Constitution,  
21 Your Honor. I understand the rule of Whitcomb v. Chavis  
22 and that we have the burden of showing intent under the  
23 Fifteenth Amendment.

24 QUESTION: So that just disparate treatment of  
25 Democrats and Republicans, even though it also involved

1 black Democrats, as well as white Democrats, would not  
2 automatically rule something out under the Constitution at  
3 any rate.

4 MR. GILLIAM: That would be my understanding of  
5 the law, Your Honor.

6 With respect to the matter of proportional  
7 representation, I simply want to address that briefly, if  
8 I may.

9 We have said here that there were guaranteed  
10 safe seats, and this was the remedy that was being  
11 applied. They have said, well, they were doing this for  
12 benevolent purposes for a rational State purpose. If we  
13 look at the actual districts that were involved, for  
14 example, Mr. Mallory who is here in the audience. Mr.  
15 Mallory is 60 years old. We're going to increase his  
16 district because he may not make it into the next 10  
17 years. We look at a couple of others, Mr. Beatty, Mr.  
18 Miller. They may run for other offices. If we look at  
19 Mr. Jones, Mr. Sykes, they're living in Toledo and they're  
20 living in Akron. We're going to increase theirs because  
21 there may be some racial migration. Blacks may actually  
22 move to the suburbs, and we've got to protect that seat.

23 And these are the explanations I've set forth on  
24 pages 10 and 11 in my brief, and I submit that that's not  
25 rational. That's not a State policy. That's not



1 correction of prior dilution or vote discrimination or  
2 curing anything that happened under the Voting Rights.

3 And those are the purposes they said at the  
4 beginning of this case to this trial court that they were  
5 pursuing. They were eliminating discrimination. They say  
6 that in their answer. They argue that in the trial courts  
7 -- to the trial court which resulted in the trial court  
8 saying show us. Tell us how you're doing that.

9 Thank you.

10 QUESTION: Thank you, Mr. Gilliam.

11 Mr. Goodman, you have 3 minutes remaining.

12 REBUTTAL ARGUMENT OF N. VICTOR GOODMAN

13 ON BEHALF OF THE APPELLANTS

14 MR. GOODMAN: Thank you, Mr. Chief Justice.

15 If I might, I would like to clear up the record  
16 because, as I listened to Mr. Gilliam, I wasn't sure I was  
17 hearing the same case that we're before this Court on.

18 In the first place, in answer to your question,  
19 Mr. Chief Justice, the district court abstained. The Ohio  
20 Supreme Court found that the plan did comport with the  
21 Ohio Constitution, and there is no other decision of any  
22 court to conflict with that.

23 Secondly, with respect to the questions of  
24 political gerrymandering, the district court did not find,  
25 even though it was raised in the course of their amended

1 complaint, that there was a political gerrymandering. And  
2 I believe yesterday this Court affirmed the decision of  
3 the district court in Wepron.

4 And I believe that the reason that the district  
5 court did not make a political gerrymandering finding  
6 under the Fourteenth Amendment is because after the  
7 election, November the 3rd, the Democrats maintained  
8 control of the House of Representatives, they picked up  
9 one additional African American seat, and the Republicans  
10 lost the seat in the Senate. And therefore, there is no  
11 degradation of anyone's political influence on the process  
12 as a whole.

13 And when the Court has, as I'm sure it has  
14 already, had an opportunity to look at the charts, which  
15 appear on pages 177 and 260 of the appendix, the Court  
16 will find that the Democrat plan that was submitted  
17 contained six majority-minority districts. The plan that  
18 is before this Court has five majority-minority districts.

19 And the chart that we appended to our reply  
20 brief, chart 1a, will show that the complaint that was  
21 made that we decrease the number of 10 percent districts  
22 -- in fact, the apportioning persons created 21 districts  
23 of 10 percent or more; the Democrat plan, only 20.

24 So, I think when the Court reviews the facts of  
25 this case -- and it is not, by the way, a strict scrutiny

1 case. There's not even a citation of Croson. But in any  
2 event, we believe that the facts of this case show that  
3 they did not meet the burden of proof. They did not show  
4 that the plan which was adopted and before this Court,  
5 known as amendment D, in any way diluted the voting  
6 strength of the black community in our State.

7 They did not show that there was any invidious  
8 discrimination under the Fifteenth Amendment. This  
9 Court's opinion, as I said earlier, in Carey supports us  
10 in that. Yes, we did use race, but we had to because of  
11 the residence of a black community in the urban areas.  
12 There was no way that we could not have taken race into  
13 account.

14 And with respect to the Fourteenth Amendment  
15 claim, Your Honor, it is clearly and simply a one person-  
16 one vote claim. It was made in passing in their March 19  
17 opinion. It was sort of like pin the tail on the donkey,  
18 or it may have been pin the tail on the Republicans. But  
19 we have shown that there was a rational State basis,  
20 namely, our constitution. There is no other plan that was  
21 available that could have met the one man-one vote  
22 requirements of our Constitution, and there was no built-  
23 in bias because we created --

24 QUESTION: Mr. Goodman --

25 MR. GOODMAN: Yes, Your Honor.

1 QUESTION: -- do you acknowledge that the reason  
2 race was used in particular was in order to assure  
3 compliance with the Voting Rights Act?

4 MR. GOODMAN: Yes.

5 QUESTION: All right.

6 MR. GOODMAN: That is correct.

7 Thank you, Your Honor.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
9 Goodman.

10 The case is submitted.

11 (Whereupon, at 11:02 a.m., the case in the  
12 above-entitled matter was submitted.)

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## CERTIFICATION

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

George Seinoich ✓ Barney Quilter

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

BY Lona M. May

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