ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: RUTH O. SHAW, ET AL.,Appellants v. JANET RENO, ET AL.

CASE NO: 92-357

PLACE: Washington, D.C.

DATE: Tuesday, April 20, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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RUTH O. SHAW, ET AL., :

Appellants :

v. : No. 92-357

JANET RENO, ET AL. :

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Washington, D.C.

Tuesday, April 20, 1993

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

APPEARANCES:

ROBINSON O. EVERETT, ESQ., Durham, North Carolina; on behalf of the Appellants.

H. JEFFERSON POWELL, ESQ., Special Counsel to the Attorney General of North Carolina, Raleigh, North Carolina; on behalf of the State Appellee.

EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Federal Appellee.

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C O N T E N T S

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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 92-357, Ruth O. Shaw v. Janet Reno.

Mr. Everett.

ORAL ARGUMENT OF ROBINSON O. EVERETT

ON BEHALF OF THE APPELLANTS

MR. EVERETT: Mr. Chief Justice, and may it please the Court:

As our complaint seeks to make clear, this case poses the basic issue of how far a legislature may go in seeking to guarantee the election to Congress of persons of a particular race. Perhaps the best evidence is here in the form of the map, which is a reproduction in color of a map which was earlier lodged with the Court at page 133A of the jurisdictional statement in Pope v. Blue, and there are a number of copies of that which I believe are before the Court.

We proceed in a sense on the theory that while we are reluctant to use political pornography -- and this has been described as political pornography, but really the only way to understand what took place in North Carolina is to look at the evidence thereof.

And our complaint seeks briefly to set forth the history of the developments in our State. Basically the

Attorney General in the summer of 1991 and in the fall made clear that it was necessary to have two majority-minority districts.

QUESTION: Are you talking about the United States Attorney General?

MR. EVERETT: Yessiree. Yes, Your Honor. Indeed, it was Attorney General William Barr at that particular time.

QUESTION: Did he -- the federal statute?

MR. EVERETT: He was relying on the Voting Rights Act. This was apparently an interpretation of the Voting Rights Act which, as we understand some of the recent opinions of the Court, was erroneous. At least that's the way we interpret the Growe case and the Voinovich case.

But in any event, he set forth preconditions. Basically, as we allege in the complaint, the precondition for clearing -- for preclearing the North Carolina plan was that there be two seats which would be guaranteed for election of African Americans to the Congress of the United States so that here, in a sense, we oppose the issue of legal segregation of the congressional delegation of North Carolina.

Now, North Carolina is a State where the minority population is relatively dispersed. Indeed, we

have also lodged with the Court various data pertaining to the dispersion of the population throughout the 100 counties of the State. Most of the black population is concentrated in the east and in the Piedmont, that is to say, along the coast and in the center of the State.

Interestingly, there are only five counties in the State and those, with one exception -- and that's not a major exception -- are relatively small counties, only five counties in which there is a majority of black persons. And as a result, after the first plan was submitted to the Attorney General --

QUESTION: There are only five counties in which there's a majority of white persons?

MR. EVERETT: Of black persons.

QUESTION: Of black persons?

MR. EVERETT: Yes, Mr. Chief Justice. And interestingly, those are counties of relatively small population in the northeastern part of the State. There's one county which I would say is mid-sized.

So, as a result of that, the only way basically to achieve this objective of having two majority-minority districts -- and indeed, these are super majority-minority districts because it's not 51 percent. There's some margin for error, not 65 percent as in the U.J.O. case, but moving up into the mid-50's.

The only way to achieve that was to violate every one of the principles of redistricting and reapportionment which have heretofore been accepted by the Court, or at least as we understand it, which have been accepted by the Court. We harken back to Reynolds v. Sims where there was a reference to a pattern of crazy quilts which in and of itself would be sufficient to invalidate the constitutionality of the reapportionment.

We harken back to U.J.O. itself where in one of the opinions -- I believe it was the opinion of Justice White -- there is a reference --

QUESTION: Mr. Everett, could I interrupt you? You say that the district violates all the principles that have been established in the cases. Well, it doesn't violate the one person/one vote principle, does it?

MR. EVERETT: It violates every principle except the principle of giving a majority -- to preselecting --

QUESTION: How about the one person/one vote principle?

MR. EVERETT: It does not violate the one person/one vote. That's correct.

QUESTION: Tell me what principle does it violate.

MR. EVERETT: Well, it violates the principles of compactness.

QUESTION: But are they constitutional principles?

MR. EVERETT: We would submit that compactness and seeking a community of interest is a constitutional principle and that at least -- put it this way, Your Honor -- that it is not permissible to disregard everything else for the sole purpose of targeting that the seat will have a person of a particular race.

QUESTION: Is -- when you say everything else, do you include anything other than compactness in the concept of everything else?

MR. EVERETT: Well, I include contiguousness. I include --

QUESTION: Well, but this district is entirely contiguous, isn't it?

MR. EVERETT: Well, they're contiguous in a very marginal sense of the word. I think --

QUESTION: But it is entirely contiguous, is --

MR. EVERETT: Contiguous -- I think actually, Your Honor, one of the districts is cut in the middle by District 12, but we would view contiguousness as meaning more than a contact at a point so that we would suggest that if there's any significance to contiguousness other than, say, a point -- one point where there is an

infinitesimal contact, that it violates contiguousness.

Certainly compactness it violates no matter what the test is.

Community of interest it violates. Take the 12th district, which is the one that has received quite a bit of attention and which stretches from Durham, my hometown, to Gastonia. It snakes along Interstate I-85. It's described by Judge Vorhees in his dissent in the lower court. It snakes along. At some points it is no wider than I-85. In fact, at some points it's no wider than two lanes of I-85. You can go from one side of the highway to another, and you go from one district to another.

QUESTION: Well, Mr. Everett, I guess this Court summarily affirmed in a previous case that came before us raising just these points.

MR. EVERETT: Well, Your Honor, we think that we came at it from an entirely different viewpoint. That was a case in which the assertion was predicated on political gerrymandering. There was no assertion that this was done for the sole purpose of targeting two seats for persons of a particular race. That we think is the fatal flaw. We think that perhaps the issue of compactness could have been raised differently in that case and there might have been some constitutional issues before you.

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But what we are saying is that even in search of diversity in the Congress, the legislature of North Carolina and the Attorney General can go only so far, but they cannot go as far as they went in this particular instance.

QUESTION: Well, that brings us back to the point Justice Stevens was beginning to discuss with you. Isn't a State free to reject the idea of compactness if it chooses?

MR. EVERETT: We would think there are some limitations even on how far the State can go in rejecting the principle of compactness. We certainly would say this in answer to your question, that perhaps they can reject compactness, but not do so in the context of seeking to assure the election of a person of a particular race, whatever that race may be.

QUESTION: Well, isn't that your basic point, Mr. Everett, that that sort of intent or motivation on the part of the legislature is subject to strict scrutiny?

MR. EVERETT: Exactly, exactly.

QUESTION: So that your argument really isn't --does not rest, I take it, at any point on the fact that any of these other principles have been mandated either by the authority of this Court or by any other authority that we would have to recognize. Your case really rests simply

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on the motivation by which this particular configuration supposedly was justified.

MR. EVERETT: That's the key to it, Justice Souter, that it rests on the motivation. In a sense the distortions are a reflection of the motivation, and the distortions show what happens once we start down the path to what might be termed segregating the electoral process because --

QUESTION: But none of them has independent constitutional significance.

MR. EVERETT: We would think that is -- that the motivation is the independent constitutional grounds for invalidating it. We would contend that regardless -- it goes beyond strict scrutiny, that anytime a motivation of this particular type is that which dominates the legislative purpose, anytime the legislature is thinking of choosing -- of drawing boundaries for the specific purpose of assuring that persons of a particular race will be elected, then under those circumstances, it's invalid.

Now --

QUESTION: Would you say -- let's just assume for the moment that the Voting Rights Act either authorizes exactly what was done here or required what was done here. You would say then the Voting Rights Act is unconstitutional.

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MR. EVERETT: If it required --

QUESTION: How about authorizes it?

MR. EVERETT: We would say that if it authorized the legislature to act with that intent and if, in fact, the legislature acted with that intent, that then it would be unconstitutional.

QUESTION: Well, how much of North Carolina is the kind of State that the Voting Rights Act applies to?

MR. EVERETT: 40 counties. There are 40 counties which require preclearance. The remaining counties would not. However --

QUESTION: So, you don't deny that you had to have preclearance for this redistricting.

MR. EVERETT: Preclearance was required, but as we understand it, preclearance does not change the basic rules. Preclearance does not mean that factors such as those in Gingles are totally ignored.

QUESTION: No, no. And you say the Attorney General was wrong in refusing to preclear your original plan.

MR. EVERETT: Well, we think he was wrong even at the outset --

QUESTION: Yes.

MR. EVERETT: -- that he was wrong at an earlier stage --

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QUESTION: Yes.

MR. EVERETT: -- in requiring that there be the majority-minority districts.

As we understood the opinion in Voinovich, there is nothing in the Voting Rights Act which requires that there be particular types of majority-minority districts. This is something that in a sense is the primary responsibility of the State so long as the State does not violate other principles in a manner that dilutes the vote. Now, there has been no dilution of the vote in this particular instance.

Indeed, it's interesting to look at statistics presented in the brief by the appellees.

QUESTION: But if the Attorney General -- don't we have to decide here whether the Attorney General was --construction of the Voting Rights Act was correct or not?

MR. EVERETT: In a sense, you do --

QUESTION: Well, in a sense. Well, it's either yes or no.

MR. EVERETT: I'll say yes. I'll say yes, you've got to say that --

QUESTION: We have to decide --

MR. EVERETT: -- because --

QUESTION: And to -- for you to win, we have to decide that he construed the act wrong.

MR. EVERETT: No, I don't think -- I would disagree with you on that.

QUESTION: Why?

MR. EVERETT: I think as a preliminary point --

QUESTION: How does that work?

MR. EVERETT: Well, to focus on the issue that the Court presented, the legislature, after the refusal of preclearance, then went ahead and with reckless abandon drew something that apparently was not in line with the suggestions of the Attorney General so that --

QUESTION: Well, the Attorney General suggested that the State needed to have another majority-minority district --

MR. EVERETT: They did.

QUESTION: -- and pointed out that it might -- one might be created in, what, the southeast corner?

MR. EVERETT: In the southeast, yes.

QUESTION: The southeast corner of the State? Then he didn't -- but anyway, he did -- before you could get preclearance, he thought you had to have another district.

MR. EVERETT: Before we could get preclearance --

QUESTION: Is that right?

MR. EVERETT: -- we had to have two districts. They had to be -- there was one that was there. There had to be another. There had to be two districts which would guarantee the election of a person of a particular race.

QUESTION: Mr. Everett, what's the effect of the Voting Rights Act by its terms where 40 out of 100 counties are covered?

MR. EVERETT: Well, we would contend that there is a requirement of preclearance admittedly, but that a plan which burdens the areas that are not subject to preclearance and unduly burdens them is unconstitutional.

QUESTION: Supposing you were to draw a district that was entirely in areas that were not subject to preclearance. Would the Voting Rights Act have anything to do with that?

MR. EVERETT: We would say it would not, that it should be separated -- that there would be no nexus between any violation and the purported corrective action.

QUESTION: But are all of the counties which are the subject of this district which you're complaining about -- are they all subject to preclearance?

MR. EVERETT: Relatively few of them are, as a matter of fact.

QUESTION: So, many of the counties in this district are not subject to preclearance?

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MR. EVERETT: A number of them that are in the 12th district, which is the one we are particularly focusing on, are not subject to preclearance. For example, Durham County is not subject, and indeed, Durham County is one which in the Thornburg case, in Thornburg v. Gingles, was accepted because the political process was not operating in a way that in any -- that diluted the minority vote. So, we have a situation where the precleared is -- the preclearance requirement is being used to affect adversely areas which have never been found guilty of any sort of --

QUESTION: Well, was this -- this was a three-judge court, wasn't it?

MR. EVERETT: It was a three-judge court.

QUESTION: Was this issue brought before it about whether or not that 12th district was subject to preclearance at all?

MR. EVERETT: Well, we brought up that -- and we've consistently taken the position that to manipulate the preclearance requirement for the 40 counties, primarily in the northeast, as a basis for covering the entire State with a plan which is racially discriminatory, at least as we interpret it, is beyond the purview of the Voting Rights. We took the position in our original complaint that what was done was not authorized by the

Voting Rights Act, but in addition and more fundamental we take the position that what was done is not authorized by the U.S. Constitution.

QUESTION: Well, Mr. Everett, do I understand your argument here to be that the problem is not race consciousness as such in drawing lines, it's the specificity of the race consciousness in saying, in effect, that there must be a quota of two districts?

MR. EVERETT: That is basically it.

QUESTION: Well, how then do -- how do you draw the line on your theory between what is a permissible use of race consciousness in this kind of districting or redistricting and what is impermissible? How is the -- what is the principle on which that line is drawn?

MR. EVERETT: The principle to some extent can be related to factors such as those in the Gingles case. Where there is a compactness of a minority group and it's broken aside -- broken apart, then we would submit that the Voting Rights Act could authorize race conscious corrective action, but what we're concerned --

QUESTION: Well, what about a case like this in which you're not so much breaking apart a district in which a violation has occurred, you've simply got to come up with another district and, as a consequence, essentially a whole new configuration? How do you --

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would one way to do it, on your theory, simply be to avoid a Gingles violation? Would that sort of be your -- or a violation of the Gingles principles. Would that be your objective to determine what is permissible and what isn't?

MR. EVERETT: We think that would at least be one dividing line and one that would not permit what has been done here.

But I suppose our basic concern is with the state of mind which begins with the proposition that you've got to come out with a certain result, that in a sense is demeaning the electoral process. It's --

QUESTION: What if the Attorney General had suggested in this case not that there should be a second district, minority-majority district, but that it would be permissible to have two, and he would like to know why two had not been proposed? Given the fact that you accept that some race consciousness is permissible, would that have been impermissible?

MR. EVERETT: We think even that goes too far.

QUESTION: I guess the trouble I'm having is you accept the principle that there can be some race consciousness, but I don't understand how you are willing to let that principle be applied in a concrete way at every point at which we or somebody might suggest, well, taking race into account, this might be a permissible way

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to do it or, a second step, this is probably the only permissible way to do it. At that point you draw the line. I don't understand how you can take race into account and draw the line as neatly as you're drawing it. That's where I'm having my trouble.

MR. EVERETT: Well, our line is in terms of whether there is something very specifically that was done contrary to the interests of the minority, breaking up a natural community of interest --

QUESTION: But there again we're getting back to, it seems to me, to criteria which you conceded a while ago did not themselves have any independent constitutional significance. And I think you're now coming back to the argument that race -- when race is taken into account, although that may be permissible per se, it cannot be taken into account, in effect, without serving a series of other principles like compactness, community identification, and so on. And yet, you've conceded that these don't have independent constitutional significance. So, how do we derive your rule?

MR. EVERETT: I think it may be a situation where you look at a number of factors and decide whether the paramount purpose was to achieve a particular result. If you --

QUESTION: Mr. Everett --

QUESTION: Mr. Everett, I thought part of your answer to Justice Souter's question was that race could be taken into consideration if race had previously been taken into consideration in an adverse way --

MR. EVERETT: That's --

QUESTION: -- that you could right that wrong. But I wonder if you're wise in conceding that race should be taken into -- could be taken into consideration in any further extent.

MR. EVERETT: Well, I perhaps misspoke myself earlier because I was thinking of the corrective situation where something has been done on racial grounds adverse to a minority group as, for example, breaking apart a community of minority persons into two districts and thereby basically diluting the vote. Then I think certainly some corrective action could be taken, and the corrective action would take race into account.

QUESTION: Well, Mr. Everett, I mean, you say community of -- communities of interest can be taken into account, but doesn't that necessarily mean that racial groups can be taken into account as well? I mean, if in fact there's a community that's a religious community, a racial community or whatever, why can't that be taken into account by intelligent legislators in districting? I thought you were making that concession before.

MR. EVERETT: I'm thinking of a community, a racial community, let's say, a neighborhood.

QUESTION: Right.

MR. EVERETT: But it's not predicated on the stereotype that one black --

QUESTION: Yes. I think what you're objecting to is using race as a stereotype --

MR. EVERETT: That's exactly it.

QUESTION: -- that assuming that all black people will vote for a black representative, and therefore drawing a district with a certain number of blacks in it on the assumption that since they're black, they will vote for a black representative. That's using race not for community, but for the stereotypical conclusion that if you are white, you will vote for a white, and if you're black, you'll vote for a black, which is not very good for our society I assume.

MR. EVERETT: Justice Souter, that's exactly it. The assumption here -- the stereotype underlying this is that a black in Durham has more in common with a black in Charlotte than that black does with a white living across the street.

QUESTION: Well, is that any different from an assumption that an Irish Catholic will vote like another Irish Catholic and they're more apt to vote Democratic

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than Republican, say?

MR. EVERETT: Well, it -- there may be --

QUESTION: And what is the difference between the two situations?

MR. EVERETT: There may be communities of interest, but I think that basically our Constitution has set its face against the racial stereotype.

QUESTION: Well, how about religious stereotypes? So you assume that all the Jewish people will vote in one particular way. Is that different from the same assumption about black people?

MR. EVERETT: If there were an assumption made of that sort, I think it would be equally --

QUESTION: Well, there was in the U.J.O. case I think.

MR. EVERETT: I'm sorry? I --

QUESTION: Remember the U.J.O. case, United Jewish Organization case?

MR. EVERETT: In the U.J.O. case, I don't think there was an assumption that the Hasidic Jews will all vote as a community. There was a community of interest in a geographic community which was set apart, but there was something more than any sort of stereotype that one Hasidic Jew was exactly like another or anything of that sort.

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QUESTION: Well, what about drawing lines based on registered Republicans as opposed to registered Democrats, making an assumption they'll vote with the party? Can you do that?

MR. EVERETT: Well, I think -- that's -- you can change parties. You can move people. Parties can change their position, but race is fixed.

QUESTION: No, but you make a stereotypical assumption that they won't change for the next election when you draw your lines. Is that really different from any other kind of group interest?

MR. EVERETT: Well, it would seem to us that the political gerrymandering has been treated by the Court different than the racially -- racial gerrymandering. We think that the party lines, the party affiliations, are much less fixed.

We should note here, by the way, that what we are talking about is something that is being put in place for the rest of this decade, for the next 10 years, as a result of this stereotype, and the result of the stereotype is that it's being assumed that one black will vote always for another black and should always vote for another black. There's a targeting. There's a -- the legislature seems to be approving a normative principle.

QUESTION: And, in fact, we know they don't

always vote that way, just as we know that Republicans don't always vote for Republican candidates. What's the difference?

MR. EVERETT: They don't always vote that way, but this is an encouragement to do so. This is a legislative affirmation basically that they should do so.

QUESTION: Does the Voting Rights Act apply to Republicans?

MR. EVERETT: Not to the best of my knowledge.

QUESTION: It deals with racial --

QUESTION: Yes, but of course, we're dealing with the Equal Protection Clause.

QUESTION: Did we fight a civil war about Republicans?

Does the Thirteenth and Fourteenth Amendment apply to Republicans? I didn't think so.

QUESTION: You don't think the Fourteenth Amendment applies to Republicans? You think it's okay for the sovereign to discriminate against Republicans? It's very interesting.

(Laughter.)

MR. EVERETT: Well, I suppose they could delimit. Davis v. Bandemer teaches us that.

But as Justice Scalia points out, the intent certainly is entirely different, the intent of the Voting

Rights Act. And --

QUESTION: We've also said in some of our reapportionment cases, haven't we, that legislative lines drawn on the basis of party interests are not -- don't violate any constitutional --

MR. EVERETT: That has been my assumption from your opinions.

Also rural versus urban. You can have interests of that sort which can be taken into account within the parameters of the one person/one vote line of cases.

But the racial distinction, as I understand, is something that a war was fought to get rid of. There are a line of opinions of this Court which in one way or the other have inveighed against racial classifications. We take that very seriously. We take the color-blind Constitution to be more than an idle aspiration, particularly under present conditions.

And the Court seems to be moving away from Federal supervision in such matters as integration of the schools, the Freeman v. Pitts case, the recent decisions dealing with -- well, the Voinovich case and the Growe case seem to indicate a willingness to move things back to the local level.

Here we have a situation where a Federal official directed that the North Carolina redistricting be

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accomplished to achieve a particular objective for a purpose that was constitutionally invalid, and we submit that relief should be granted and the judgment of the lower court should be set aside.

QUESTION: Mr. Everett, just one last point to make sure I understand your principle. You're not resting on the principle of the color-blind Constitution, are you? I mean, you accept, for example, the Gingles analysis, and whatever that is, it isn't color-blind. I mean, you accept that.

MR. EVERETT: Well, I think we are still standing on the principle of the color-blind Constitution in terms of inveighing against --

QUESTION: Do you want us to -- do we overrule -- do we say that the possibility applying a Gingles analysis cannot be anticipated in redistricting?

MR. EVERETT: Well, the Gingles analysis, if it were applied in this particular instance, would not permit the sort of result that was achieved here.

QUESTION: But you -- but is it fair to say that you accept the principle that redistricting can be done on the basis of trying to anticipate the possibility of a Gingles violation and to avoid it by drawing lines in such a way as to avoid voter dilution? You accept that principle, don't you?

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MR. EVERETT: I believe we would accept that there can be an effort to avoid any future dilution so long as it is not done with a view to having a particular person elected of a particular race. That's --

QUESTION: But in any case, that's not a principle of a color-blind constitution, is it?

MR. EVERETT: Well, that may not be in one sense, but certainly, as we view it, some of the basic concept of ignoring racial stereotypes -- that we view as an essential to the color-blind Constitution, and that we think is the principle that has been violated here.

May I reserve my remaining time?

QUESTION: Thank you, Mr. Everett.

Mr. Powell, we'll hear from you.

ORAL ARGUMENT OF H. JEFFERSON POWELL

ON BEHALF OF THE STATE APPELLEE

MR. POWELL: Mr. Chief Justice, and may it please the Court:

This case is about the legal significance of two facts. First, the North Carolina General Assembly intentionally created two majority-minority congressional districts. Second, the General Assembly did so for the purpose of complying with section 5 of the Voting Rights Act and of securing preclearance of its congressional reapportionment plan from the Attorney General of the

United States.

In their arguments before the district court and in their briefs to this Court, the plaintiffs' legal contention has been that the first of these allegations, that the State acted intentionally, is an adequate basis on which to make out a constitutional claim. The fatal flaw in the plaintiffs' case is that they themselves have affirmatively described what the State's purpose was in so acting, and that purpose was the lawful one of complying with Federal voting rights legislation as interpreted and administered by the responsible Federal official.

QUESTION: Do you have a position, Mr. Powell, on the application of the Voting Rights Act when only 40 out of 100 counties are subject to it?

MR. POWELL: That question was not, in fact, presented to the district court.

QUESTION: Do you have a position on it?

MR. POWELL: We do, Mr. Chief Justice.

QUESTION: Well, what is it?

MR. POWELL: And that is that given the distribution of the counties, it was necessary to preclear the entire plan and that, in fact, the proper focus in this case with the statewide redistricting plan is statewide. When the State --

QUESTION: Well, why should that be when only 40

counties are subject to preclearance?

MR. POWELL: As the Attorney General administers the statute, he expects the entire plan to be submitted. That makes pragmatic sense because State legislatures, when they draw up a statewide congressional reapportionment plan, they do it on a statewide basis.

QUESTION: But what's the authority for that in the Voting Rights Act if only 40 counties are covered?

MR. POWELL: I think it's administrative authority, Your Honor. It's the way the act has been administered and interpreted.

QUESTION: So, there isn't any authority in the act itself for that? It's just an administrative authority?

MR. POWELL: I'm not aware of it, Mr. Chief Justice.

QUESTION: I -- oh, I'm sorry. You go ahead.

I had just assumed that as long as any one covered county was going to be affected by the plan, that that would be enough to trigger the right to review.

MR. POWELL: I think that's --

QUESTION: Is your explanation different from that?

MR. POWELL: No. No, Justice Souter, I don't mean it to be. We think that would -- you would have to

submit the statewide plan under those circumstances.

QUESTION: I'm not sure I understand your -- I guess your good faith defense. If the intent is a constitutionally invalid intent, can it be possible that simply because the Justice Department told you you could do it, it is rendered okay? I mean, suppose the Justice Department says it's okay to discriminate in appointments on the basis of race. That happens to be wrong, but if in good faith you follow that, that makes it okay?

MR. POWELL: No, Justice Scalia. That's emphatically not our position.

QUESTION: All right.

MR. POWELL: Our position --

QUESTION: So, you agree that that defense is only a valid defense if the Justice Department was correct that you needed a second majority-minority district.

MR. POWELL: Our defense is applicable if our intent was proper, and if our intent would not be proper if the Attorney General instructed the State or attempted to coerce the State into doing something unconstitutional. In this case, the Attorney General's implicit interpretation of the act embodied in his objection letter was well within the case law.

QUESTION: It may well be, but is it your position that even if it was wrong, so long as you were

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relying upon that, you are immunized?

MR. POWELL: So long as the State's reliance is reasonable. The State could not rely, and then invoke as a defense that reliance, on patently unconstitutional requests or demands from the Attorney General. The difference -- what makes this case different from the hypothetical you're thinking about --

QUESTION: The reliance here you say would be a reasonable reliance, whereas in my hypothetical it wouldn't be.

MR. POWELL: Yes, Your Honor.

QUESTION: You say that the Attorney General rested squarely on the Voting Rights Act, and you think that his interpretation was proper of the Voting Rights Act.

MR. POWELL: Yes, Your Honor. Yes, sir.

QUESTION: And you deny that later decisions such as Voinovich renders his interpretation invalid.

MR. POWELL: We do indeed. Of course, Voinovich was a section 2 decision, and Voinovich made two holdings of tangential relevance to this case. Voinovich applied the traditional invidious intent requirement and overturned a finding of invidious intent, and the Voinovich case held that the Voting -- that section 2 of the Voting Rights Act neither compels nor forbids the

creation of majority-minority districts.

QUESTION: But -- so, the Attorney General said that the Voting Rights Act required a second district.

MR. POWELL: No, Justice White. That's not what the Attorney General said.

QUESTION: What did he say?

MR. POWELL: The Attorney General objected to the State's first plan --

QUESTION: Yes.

MR. POWELL: -- saying that I am not convinced that the State has carried its burden of persuading me that the State's first plan did not have some kind of discriminatory purpose. And the Attorney General in explaining why he reached that conclusion that the State had failed to carry its burden explained, among other things, that I believe it will be possible to create a second majority-minority district and I'm concerned that that may be evidence --

QUESTION: And unless you do, you've violated the Voting Rights Act?

MR. POWELL: That's not the legal meaning of the Attorney General's objection letter.

QUESTION: Well, I thought you said that it was at least implicit in it.

MR. POWELL: It certainly is. Implicit in the

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Attorney General's letter is -- certainly is a suggestion that a second majority-minority district will go a long way towards meeting my concern because my concern is based in part on the fact you didn't create one.

QUESTION: Of course, you didn't have to accept his concern. You don't have to -- I mean, the Civil Rights Division of the Justice Department isn't the last word on this thing, is it?

MR. POWELL: Absolutely not, Justice Scalia.

QUESTION: You could have gone to the district court in the District of Columbia to say this is wrong.

MR. POWELL: Yes, Your Honor.

QUESTION: But you chose not to.

MR. POWELL: We certainly -- we did --

QUESTION: Then I don't think you should rely on the Justice Department. You chose to do it. You took the easy way out I suppose you could say, but I'm not sure that that gives you a good faith defense.

MR. POWELL: Congress has created a statutory scheme under which it is up to the State to decide which route to take in seeking preclearance. The State here chose the Attorney General's administrative preclearance route. The Attorney General objected.

QUESTION: He said no, and you were entitled to go somewhere else. You chose not to.

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MR. POWELL: And we submit that we were entitled, in fact, to go back to the Attorney General and to attempt to meet his objections.

QUESTION: Well, yes, but don't you -- suppose you had turned -- decided that you didn't want a second district and the legislature -- well, I'll put it this way. What does a plaintiff have to prove to show that the State has violated the Voting Rights Act in redistricting? Do they have to prove a discriminatory intent?

MR. POWELL: Under section 5, Justice White?

QUESTION: Yes.

MR. POWELL: I'm not sure.

Under section 2, you'd go through the Gingles preclearance.

QUESTION: Yes, yes.

MR. POWELL: Under section 5, I'm not sure a private right of action exists. A constitutional claim in this context would have to include a claim of invidious intent as this Court has traditionally used that concept. That's one of the things that's lacking in this case. The plaintiffs have not alleged -- indeed, the district court below said they could not plausibly allege -- that the General Assembly chose this plan because it would impose an adverse impact on white voters or, indeed, any other racial group.

QUESTION: Well, but certainly some of our cases have simply said that an intent to classify on the basis of race -- the Croson case, for example -- is subject to strict scrutiny, not that it's automatically out, but that it's subject to strict scrutiny.

MR. POWELL: Yes, Mr. Chief Justice. But the Croson line of decisions is distinct from this Court's own vote dilution, race-based vote dilution, cases, White against Regester, Rogers against Lodge, and so on. Those cases, which set out the test to be applied in this context, instruct the trier of fact to look for invidious intent.

QUESTION: Those were decided before Croson, weren't they?

MR. POWELL: That's correct, Your Honor. We believe that they continue to be valid. As recently as 1986 in Davis against Bandemer, the political gerrymandering case, seven Justices of this Court expressly reaffirmed the validity of the effects prong and the invidious intent prong --

QUESTION: Well, didn't you say earlier in your remarks that your defense is the Voting Rights Act?

MR. POWELL: Our defense is that the State's purpose here was compliance with the Voting Rights Act, that what the State -- what the Attorney General --

QUESTION: What did the Voting Rights Act require that led you to think that you should have a second minority district?

MR. POWELL: The Voting Rights Act --

QUESTION: Don't talk about the Attorney General. Just talk about the Voting Rights Act.

MR. POWELL: The Voting Rights Act requires the State to demonstrate an absence of invidious intent and an absence of retrogressive effect. That's a procedural requirement. The burden lies on the State. This Court has approved in a series of cases, going back 20 years, the use of majority-minority districts --

QUESTION: And did the Voting Rights Act, therefore, sort of incorporate the constitutional test?

MR. POWELL: Certainly. You violate section 5 if you had the invidious intent necessary to violate the Constitution.

QUESTION: So, if this were a State that were not covered by the Voting Act -- Voting Rights Act, would a State legislature be free, as a matter of policy, to draw a district such as this one?

MR. POWELL: We'd have a very different case. The answer would depend on the application of section 2. In appropriate circumstances, section 2, in order to avoid vote dilution as in the Gingles situation, might require

majority-minority districting.

QUESTION: No, but take Justice Kennedy's question just one step further. Supposing just as a matter of policy, forgetting the Voting Rights Act -- assume no Voting Rights Act -- could the State constitutionally decide that when -- if 20 percent of the population is of a particular race, that it would be good policy to have two districts in which that race represented the majority of the voters in the district?

MR. POWELL: No, Justice Stevens. However, something very close to that --

QUESTION: Why?

QUESTION: Why would -- what would make it unconstitutional?

MR. POWELL: There would not be an appropriate basis on which to make use of the racial classification. This Court in a number of -- well, members of this Court in a number of opinions have suggested that where the State confronted a problem with racially polarized voting, that the State might be able to use race conscious redistricting to address that, but that's not this case.

The determining factor in this case is that North Carolina is subject to section 5 preclearance. It met those affirmative obligations in ways that have been recognized repeatedly.

QUESTION: Well, just sticking for a moment with the hypothetical of the State where the Voting Rights Act is inapplicable, section 5, the only justification for a district of this kind then is that there was racially polarized voting?

MR. POWELL: Section 2 might require a State to use majority-minority districts, Justice Kennedy, in order to avoid vote dilution of minority voters.

QUESTION: So that a State that has racially polarized voting under the Voting Rights Act, as you are interpreting it, is required to employ methods which will continue racially polarized voting.

MR. POWELL: One hopes not, Your Honor.

QUESTION: But I thought that's the logical conclusion from your answer.

MR. POWELL: Only if the consequences of drawing majority-minority districts is to perpetuate racially polarized voting. That's a question which we believe Congress has considered and addressed by amending section 2 to incorporate the results test.

QUESTION: So, if a district would either perpetuate or increase the possibilities of racially polarized voting, then the district cannot be drawn consistently with the Constitution based on race?

MR. POWELL: The State doesn't act free -- if I

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understand the question correctly, the State doesn't act free of Federal voting rights legislation, and so that even if section 5 were not applicable, the State would -- a conscientious State legislature would have to meet the requirements of section 2. Section 2 may, depending on the particular demographics and the situation of the State, require majority-minority districting, but once again, that's not this case.

QUESTION: Mr. Powell, can -- this District 12 is a highly irregular shape. I guess you agree with that.

MR. POWELL: Yes, Your Honor.

QUESTION: In places only as wide as a highway and stretching virtually the length of the State.

Do you think that a district such as that could be in and of itself some evidence of an invidious intent?

MR. POWELL: Yes, Your Honor, it could be. In a case where plaintiffs were alleging that there was a variance between the State's purported purpose and its real purpose, which actually was the case in Voinovich I believe, that might be probative of the existence of this covert intent.

There's no dispute here over what the State's purpose is. There's a dispute over how to characterize it legally, but we're not in disagreement over what the State legislature was trying to do.

QUESTION: You think the Constitution forbids a State as a matter of policy to have proportional representations between the various races?

MR. POWELL: No, Your Honor. I may have misspoken myself.

QUESTION: You think the State is permitted to do that?

MR. POWELL: The State would have to have a proper basis. I'm not sure that the --

QUESTION: Well, the proper basis is we think there ought to be proportional representation. What's the name of the case that I think I wrote the opinion in?

MR. POWELL: Gaffney against Cummings.

(Laughter.)

QUESTION: I think I wrote the opinion in the Connecticut case.

MR. POWELL: Gaffney against Cummings.

QUESTION: Yes.

MR. POWELL: In Gaffney, the Court suggested in --

QUESTION: Well, we held that it was all right to give proportional representation to Democrats and Republicans.

MR. POWELL: You certainly did, Your Honor, and the Court suggested that the same thing -- that this Court

has no warrant to overturn State attempts to ensure some kind of rough correspondence between numbers of voters and representation. But that's not the primary basis on which we rely.

QUESTION: And you're asserting that the -- that a State can do that for race too and could say, you know, we have 60 percent one race, 30 percent another, 10 percent another. We're going to draw our districts to make sure that everybody gets his proper proportion of the action. That is constitutional you think.

MR. POWELL: We think nothing in our position requires us to hold beyond --

QUESTION: I'm sure it doesn't, but you seem to be taking that position.

MR. POWELL: Yes.

QUESTION: Well, you've taken two different positions really.

QUESTION: Well, it doesn't -- the Constitution doesn't require you to do it, but does it permit you to do it?

QUESTION: That's what I'm asking. Does it permit you to do it?

MR. POWELL: Gaffney against Cummings and other cases suggest it does.

QUESTION: Did that deal with race?

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MR. POWELL: Gaffney dealt with race in dicta.

QUESTION: Pardon?

MR. POWELL: Gaffney dealt with race in dicta.

QUESTION: It didn't deal with race in other words.

MR. POWELL: The holding was not about race. It was politics.

QUESTION: But your position is that proportional representation could be -- by race could be adopted by a State as a matter of policy quite consistently with the commands of the Constitution?

MR. POWELL: Consistently with this Court's cases interpreting it, yes, Your Honor. That's not this case.

The State's purpose here -- the State did not have an independent policy of racial proportionality. The State's policy here was to meet the one person/one vote requirement, to satisfy the exigent requirements of the Federal Voting Rights Act, and otherwise to satisfy other State concerns. The State here was not pursuing an independent policy of racial balancing or anything of the sort. And we think in the end, that's what the case is about.

For 20 years, this Court --

QUESTION: And you think in the end that that's

permissible.

MR. POWELL: What the State did here, yes, Your Honor.

For 20 years, this Court has approved majority-minority districting as an appropriate response to a State's obligations under section 5. We believe the cases that --

QUESTION: You know, I'm still not entirely clear what your position would be if you did everything exactly the same and there were no Voting Rights Act. Would it be constitutional or unconstitutional?

MR. POWELL: It would be -- it would not -- the plaintiffs would not have stated a claim. They do not allege that the State acted in order to harm a racial group. This State -- this Court's --

QUESTION: Your answer is it would be constitutional --

MR. POWELL: It would be constitutional.

QUESTION: -- even if there were no Voting Rights Act.

MR. POWELL: Yes, Your Honor.

QUESTION: But I thought you answered Justice Kennedy's question to the same effect exactly the opposite.

MR. POWELL: I'm sorry, Mr. Chief Justice. I

may have misspoken.

QUESTION: Well, which -- on which case did you misspeak?

(Laughter.)

MR. POWELL: Justice Stevens' hypothetical is one in which the plaintiffs would have failed to state a claim and the State's action would be constitutional.

The -- this case in the end is about the State's compliance with the Voting Rights Act. The case is -- this is not a case in which the State invokes a defense or an immunity to protect itself.

QUESTION: Our cases have held that you could do this to remedy a violation of the act. You haven't established that there was a violation of the act which could only be remedied by this. All you've established is that the State, rather than going to the D.C. court, accepted the Attorney General's determination that the easy way to get this thing done would be to draw up a second district. I don't know how that has any remote resemblance to our cases that say where you've been in violation, you can do this to eliminate the violation.

MR. POWELL: With respect, Justice Scalia, we don't read the cases to hold that. We think that in a variety of cases, including City of Port Arthur, this Court has insisted on or permitted States to use or make

changes in their electoral laws, including majority-minority districting, in order to carry their burden of demonstrating compliance with section 5.

QUESTION: Well, section 5 I think -- I thought we agreed the test under section 5 is really equivalent to the constitutional test.

MR. POWELL: Well, there are two tests. There's the intent test --

QUESTION: Yes.

MR. POWELL: -- which is constitutional. Section 5 also forbids retrogressive effect.

In the end this case is about the Voting Rights Act. At least up to this point, the plaintiffs' argument has been a pure argument that race consciousness is invidious and unconstitutional. Section 5 and section 2, as amended, both authorize and in appropriate circumstances require race consciousness in governmental decision making. Unless those provisions of the statute are unconstitutional, the plaintiffs' claim is incorrect. We believe this Court's decisions upholding the act -- the act's constitutionality are correct, and that the district court below should be affirmed.

Mr. Chief Justice, if there are no further questions.

QUESTION: Thank you, Mr. Powell.

Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE FEDERAL APPELLEE

MR. KNEEDLER: Thank you, Mr. Chief Justice, and may it please the Court:

It is the position of the United States in this case that the State of North Carolina was permitted to take race into account in order to ensure that its redistricting plan complied with the Voting Rights Act. Several features of the Voting Rights Act will effectively require a State to do so in certain circumstances.

For example, the effects test under section 5, which this Court sustained in the City of Rome, requires a State to ensure that a districting plan not have a retrogressive effect on minorities, which will require a State, in order to ensure that its plan will comply, to look at the racial composition of the district.

The same is true under the results test in Gingles in which a court, in order to -- in which a State, in order to guard against or to create assurance against vote dilution, will have to evaluate the racial composition of its districts.

QUESTION: -- cases involved the constitutionality of the Voting Rights Act itself, did it?

MR. KNEEDLER: No, but in this Court's decision

in United Jewish Organizations, the Court faced essentially the same situation we have here. The facts were slightly different, but the essential thrust of that decision we think controls here, and that is that where a State is acting in an effort to comply, in a good faith effort to comply, with the Voting Rights Act, that in doing so, the State does not, at the same time, violate the very amendments that the Voting Rights Act is designed to enforce and constitutionally designed to enforce under this Court's decisions.

QUESTION: But U.J.O. didn't -- there was no challenge to the constitutionality of the Voting Rights Act there, was there?

MR. KNEEDLER: The Court treated the challenge --

QUESTION: Well, was there or wasn't there?

MR. KNEEDLER: There was. Well, not in so many words, but the -- Justice White's opinion for various Justices treated the challenge to the State's efforts to comply with section 5 of the Voting Rights Act as a challenge to the Voting Rights Act itself because if the State's efforts to comply were unconstitutional and those efforts were required by statute, then the act of Congress was necessarily unconstitutional.

Now, in this case, the basis for --

QUESTION: That was just a plurality opinion, wasn't it?

MR. KNEEDLER: Well, that's true, although there were two concurring Justices who would have taken --

QUESTION: Agreeing with what you just said?

MR. KNEEDLER: Taking an even broader position that any efforts to comply with the Voting Rights Act, even if the Attorney General's interpretation was not authorized, would negate invidious intent.

In this case to the extent --

QUESTION: Is it the policy, Mr. Kneedler, of the Justice Department and of the United States to encourage racial block voting?

MR. KNEEDLER: It is not, but as this Court has said --

QUESTION: Is it a policy to discourage it?

MR. KNEEDLER: Yes, although the Voting Rights Act is premised on the unfortunate fact that racial block voting occurs. And where racial block voting occurs, the result can be, as this Court has recognized, the dilution of minority votes and, to that extent, the abridgement of the right to vote that was supposed to be secured by the Fifteenth Amendment. We did, indeed, fight a civil war over these issues, but 100 years after the Civil War, Congress determined in 1965 that the business of the Civil

War was not done and that various efforts were used, either intentionally or not, to discourage blacks from registering and then to dilute their vote.

QUESTION: In this case, is it a plausible assumption that racial block voting is, A, encouraged and, B is the explicit premise for the design of this district?

MR. KNEEDLER: Well, I -- as to the latter, I think it's pretty clear that it's the premise. In fact, I think it's the premise of appellants' challenge in this case because their claim of injury as white voters must be premised on the fact that voters will vote -- that there will be racially polarized voting, or otherwise the injury of which they complain wouldn't occur. Beyond that, this Court's decision in Gingles affirmed district court findings of what were referred to there as severe racial block voting. So, in North Carolina, that was indeed the case, and in fact, in this case, the submission to the Attorney General indicated that there was still a substantial basis for that concern.

Now, as to the -- I'm sorry. The first part of your question I think went to the -- whether that was the purpose or to encourage it. I don't think there's any indication that it was the -- was intended to encourage. But where a government, be it Federal or State --

QUESTION: Well, the whole thing wouldn't

succeed unless they -- unless the block voting occurred.

MR. KNEEDLER: Right, but if it doesn't succeed, then the harm that appellants are most concerned about is really not present.

But the Voting Rights Act specifically addresses the problem not of individual discrimination against -- not only of individual discrimination against individual blacks, but the fear that a State either intentionally or through setting up districts that in concert with private behavior will have the effect of diluting the black vote. And where you have racially polarized voting and a minority is submerged in a majority white district, that will be the effect.

And Congress determined that full effectuation of the voting rights protected by the Fifteenth Amendment required that that be addressed as well, and this Court in Gingles and in Beer and other cases has sustained -- has applied the Voting Rights Act on that premise. And we do not believe that the principle of the color-blind Constitution requires a State to be blind to the fact that its citizens regrettably may vote along racial lines and to take account of the fact that its own redistricting plans --

QUESTION: Mr. Kneedler, what is your position that what if the State of North Carolina motivated by

precisely the same considerations you've just described adopted this program on its own without there being a Voting Rights Act?

MR. KNEEDLER: We have not taken a position.

QUESTION: What is your position?

MR. KNEEDLER: There would be much to be said for the State's ability to do that if there was --

QUESTION: Just the same facts that you have that motivated the United States.

MR. KNEEDLER: No. I think there would have to be -- for a State to do it without the Voting Rights Act, there would have to be a basis in racial block voting for that because the State would have to be addressing -- and this was the premise of a portion of the opinion in U.J.O. There would have to be a premise of some discriminatory conduct going on that the State would address. So, to that extent, it would be something of the same motivation that Congress had for enacting the Voting Rights Act.

I wanted to address one point here.

QUESTION: And you say it would or would not be permissible constitutionally?

MR. KNEEDLER: I think it would be permissible constitutionally if the State were addressing racial block voting, which it would be, in that respect, addressing private discriminatory conduct.

The Attorney General in this case did not require two districts. What the Attorney General said is that the State had failed to carry its burden of proving the absence of discriminatory purpose because the State's proffered reasons for rejecting a second majority-minority district appeared to be pretextual.

This Court has upheld in Katzenbach v. South Carolina, the shifting of the burden of proof to the State to demonstrate that its plans are free of racially discriminatory purpose or effect.

QUESTION: As I understand your argument, though, Mr. Kneedler, you're not relying on the fact that the Attorney General turned this plan down. You'd be making the same argument if the State had done this on its own before submitting it to the Attorney General.

MR. KNEEDLER: That's correct. States should be encouraged -- far from being a suspect, States should be encouraged to conduct their districting in a way that comes into compliance with the Voting Rights Act, section 2 and section 5, although in this case, the Attorney General's objection letter furnished the State with a pretty firm basis for doubt as to whether it could carry its burden if it chose, for example, the alternative to go to court. The State could legitimately believe it would have trouble carrying its burden of proving an absence of

discriminatory purpose.

So, clearly the basis for the Attorney General's objection or the State's concern in this case, a fear that the burden could not be carried, was an authorized interpretation by the Attorney General. The Attorney General is required to object where the State cannot carry its burden in that respect.

So, it is permissible for a State to take into account that it can't carry the shifted burden that this Court sustained in Katzenbach v. South Carolina, and therefore to devise another plan that will meet the Attorney General's concerns or the concern in section 5 of the Voting Rights Act as such that plans be free of racial discrimination.

We think it is the existence of the Voting Rights Act in this case and Congress' thorough examination of the need for the Voting Rights Act periodically that distinguishes this setting from the cases in which the Court has required strict scrutiny. This Court has recognized that the Voting Rights Act was a drastic remedy in the section 5 preclearance setting, for example, to address the pernicious evil of voting discrimination, and rather than require case-by-case adjudication, Congress determined, and this Court held validly determined, that it was necessary to adopt broader measures to prevent, to

hedge against purposeful discrimination. And it's on that basis --

QUESTION: Thank you, Mr. Kneedler.

Mr. Everett, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF ROBINSON O. EVERETT

ON BEHALF OF THE APPELLANTS

MR. EVERETT: Let me respond first to the last remark by Mr. Kneedler, Mr. Chief Justice. The position seems to be that if the Voting Rights Act authorizes something, then it is automatically valid. And that might be the case in some situations, but we would submit not in the situation that is involved here.

Moreover, it's our contention that the Voting Rights Act did not cause this conduct, that it was done by misinterpretation, and it was done by a misinterpretation on all sides, that the Voting Rights Act leaves the parties free to choose districts other than majority-minority districts, but there's no compulsion, no authorization to have a majority-minority district.

And our complaint very basically sets forth in its -- in the jurisdictional statement that we're complaining of a quota system of a proportional representation which was, in fact, being forced upon the congressional delegation. And therefore, the questions that were asked of Mr. Powell are particularly appropriate

because that's exactly what it was, to have a quota of a certain number of Members of Congress of a particular race. We find no authorization for that in any of the jurisprudence of the Court, and the result of doing that is to --

QUESTION: Indeed, it's prohibited in the Voting Rights Act itself.

MR. EVERETT: Section 2 has a specific proviso. So, we maintain that it's not authorized by the Congress, that it is not authorized by the Constitution, that the result is to produce the type of distortion that was reflected in the map, and to produce a process that is inimicable to all the ideals of the Fourteenth and Fifteenth Amendment and, indeed, of article I, section 2. And accordingly, we submit that the --

QUESTION: May I ask you just one question, if you do have a moment?

What if, say, a city like Chicago decided to create a certain number of wards where the Polish vote would control? Would your standard be different?

MR. EVERETT: I would think it would be. I don't think race is in the same category.

QUESTION: So, in a city they could have one rule for the Polish Americans and a different rule for the African Americans.

MR. EVERETT: Well, I would say that race is a stereotype which is so much frowned upon --

QUESTION: Treating Polish Americans is not a stereotype.

MR. EVERETT: Also, actually in the Chicago situation, they're living in neighborhoods. It would probably be a situation of an actual community of interest. I don't think anybody has ever said --

QUESTION: Well, the blacks tend to live together. Polish Americans tend to live together in Chicago.

MR. EVERETT: If I may finish simply the answer to this. I don't think anyone has ever said that one Polish American necessarily does like another Polish American. It's not the stereotype, which is what we're complaining of, the stereotype that one black thinks exactly like another and should be represented by another.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Everett.

The case is submitted.

(Whereupon, at 11:10 a.m., the case in the above-entitled matter was submitted.)

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:

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Case No: 92-357

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BY Dona M. Mays

(REPORTER)