

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: BOLLEY JOHNSON, SPEAKER OF THE FLORIDA
HOUSE OF REPRESENTATIVES, ET AL., Appellants v.
MIGUEL De GRANDY, ET AL.; MIGUEL De GRANDY,
ET AL. v. BOLLEY JOHNSON, SPEAKER OF THE
FLORIDA HOUSE OF REPRESENTATIVES, ET AL.;
UNITED STATES, Appellant v. FLORIDA, ET AL.

CASE NO: 92-519, 92-593, and 92-767

PLACE: Washington, D.C.

DATE: Monday, October 4, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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BOLLEY JOHNSON, SPEAKER OF THE :
FLORIDA HOUSE OF REPRESENTATIVES, :
ET AL., :
Appellants :
v. : No. 92-519

MIGUEL De GRANDY, ET AL.; :
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MIGUEL De GRANDY, ET AL.; :
Appellants :
v. : No. 92-593

BOLLEY JOHNSON, SPEAKER OF THE :
FLORIDA HOUSE OF REPRESENTATIVES, :
ET AL.; :
- - - - -X
UNITED STATES, :
Appellant :
v. : No. 92-767

FLORIDA, ET AL. :
- - - - -X

Washington, D.C.
Monday, October 4, 1993

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at

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WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 1:00 p.m.

2 APPEARANCES:

3 JOEL KLEIN, ESQ., Washington, D.C.; on behalf of Florida,
4 et al.

5 JAMES A. FELDMAN, ESQ., Assistant to the Solicitor
6 General, Department of Justice, Washington, D.C.; on
7 behalf of the United States.

8 C. ALLEN FOSTER, ESQ., Greensboro, North Carolina; on
9 behalf of De Grandy, et al.

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

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in three consolidated cases. Number 92-519, Johnson
5 v. De Grandy; 92-593, De Grandy v. Johnson; 92-767, United
6 States v. Florida.

7 Mr. Klein.

8 ORAL ARGUMENT OF JOEL I. KLEIN

9 ON BEHALF OF FLORIDA, ET AL.

10 MR. KLEIN: Mr. Chief Justice, and may it please
11 the Court:

12 The district court incorrectly held that
13 Florida's legislative districting plan violates section 2
14 of the Voting Rights Act by diluting the votes of
15 Hispanics living in Dade County. The Florida plan
16 provides Dade County Hispanics with a proportional share
17 of majority districts, and we submit that such an
18 allocation necessarily gives them the same opportunity as
19 others to elect voters, to elect representatives of their
20 choice, which is all that section 2, by its terms,
21 requires.

22 The United States agrees with us that
23 proportionality is sufficient, but it argues that we must
24 show proportionality with respect to all Hispanics in
25 Florida, not just those living in Dade County. But the

1 problem with that argument is that it's flatly
2 inconsistent with this Court's decision in Gingles, which
3 held that any group claiming vote dilution must show that
4 it is sufficiently large and geographically compact to
5 constitute a majority in a single-member district.

6 In Florida, there's only one such group of
7 Hispanics who can meet that threshold requirement, and
8 those are the Hispanics living in Dade County, and they,
9 as I've said, already have proportional representation.
10 The remaining Hispanics in Florida are so geographically
11 diverse that it is impossible to construct anything
12 remotely resembling a compact district in which they could
13 be a majority.

14 Now, the United States' response is, well, you
15 can create more districts for Hispanics in Dade County.
16 But that simply misses the point of Gingles, which is, in
17 the absence of compactness, the State plan simply doesn't
18 dilute Hispanic votes, and therefore there's no violation
19 under section 2 and no remedial districts in any location
20 are required.

21 The United States' argument also has the other
22 problem of being incompatible with the text of section 2,
23 which protects a right to elect representatives, not a
24 right to have representatives elected by others of the
25 same race who may live hundreds of miles away in the

1 State. A concept that the United States calls, quote,
2 virtual representation, but which is nowhere mentioned in
3 the statute, legislative history, or numerous decisions of
4 this Court addressing section 2.

5 So, if I can, let me state the principle that we
6 think governs the appeal, and that is that a State plan
7 satisfies section 2 if it provides a proportional share of
8 majority districts to each geographically compact group of
9 minorities, something that the Florida plan indisputably
10 does.

11 If I might, now, let me return --

12 QUESTION: Mr. Klein, I assume that you are
13 asking us to reject this notion of the Statewide frame of
14 reference totally, for this case and for every case?

15 MR. KLEIN: I think you have to reject it in the
16 following sense. Unless you can show reasonable
17 geographic compactness throughout the State, which you
18 might be able to show in a case like Bandemer where there
19 were 59 percent Democrats or Republicans. Unless you can
20 show that, I think you have to reject it and I think
21 Gingles requires it. So I think that is my position.

22 And, indeed, I would suggest to the Court, if
23 one looks at the array of voting rights cases, from '65
24 forward, frankly, they are always brought locale by
25 locale. They may be a multidistrict situation, but

1 they're not brought in a Statewide basis for precisely
2 this reason.

3 QUESTION: Well, even -- I had thought perhaps a
4 Statewide basis was the proper focus. But if the proof at
5 trial of those complaining is limited to, as it was in
6 this case, Dade County, I'm not sure that we need to go
7 beyond that now.

8 MR. KLEIN: I agree with you, Justice O'Connor,
9 that the proof in this case was limited to Dade County.
10 And I think it's sufficient to dispose of this appeal.

11 QUESTION: And that's enough to dispose of the
12 case, is it not?

13 MR. KLEIN: It is. I do want to make the added
14 point -- it absolutely enough, but I do want to make the
15 added point that there would be no possible reason for a
16 remand. Because it's not just a failure of proof, it's
17 that you cannot prove geographical compactness, a fact
18 that the United States concedes by suggesting that you
19 basically concentrate additional districts in Dade County.

20 But I think you're exactly right, Justice
21 O'Connor, and that's why I'd like to start with the
22 district court's opinion, which, after all, is the case
23 that brought us up here on appeal. And make no mistake
24 about it --

25 QUESTION: And the proof, by everybody,

1 basically focused on Dade County.

2 MR. KLEIN: Absolutely. The United States
3 contests otherwise, but I think there's no support in the
4 record. First of all, the district court's opinion, of
5 course, talks only about Dade County. It made the Gingles
6 compactness, the Gingles cohesion, and the Gingles
7 white-bloc voting findings in Dade County. It found
8 vote dilution of voters in Dade County.

9 The United States went first. They had the
10 burden of proof. They put on evidence only about Dade
11 County. We moved for a directed verdict. They said they
12 proved Gingles in Dade County. It seems to me that on
13 that record the only issue is vote dilution in Dade
14 County.

15 Now, as to that, which the district court, in
16 fairness, did address. Where its error is is in its
17 notion that somehow proportionality isn't a defense. The
18 district court said, look, we applied Gingles two and
19 three, and we find that there's cohesion and white-bloc
20 voting. We can create more districts than the State did
21 in Dade County, and so we're going to impose 11 rather
22 than 9 districts.

23 That is, of course, a maximization principle,
24 and it would apply equally well to any municipality. If
25 you had a city council with five people on there and you

1 had a 40 percent minority in the city, if they lived
2 compactly you could create, just as a matter of math,
3 three out of five districts. It happens every time.

4 Now, our submission would be section 2 obviously
5 doesn't require that. Where the district court went wrong
6 is in thinking that you don't have to temper the Gingles
7 factors by a proportionality finding, something that the
8 Court in Gingles itself obviously did.

9 And the reason that is, is section 2 provides a
10 comparative standard. In other words, you have to have
11 the same opportunity as others. Well, when you create 11
12 out of 18 districts in Dade County that are majority
13 Hispanic, you are diminishing the opportunity of white
14 voters. That's exactly how you do this. And therefore,
15 what you've done is you've created a far greater
16 opportunity for Hispanic voters than you would for white
17 voters, and that's not what the statute requires.

18 So I think proportionality is an absolute
19 touchstone, it has to be. Now, the De Grandy people --

20 QUESTION: It's sort of curious in a statute
21 that absolutely forbids that. Do you find any irony in
22 that?

23 MR. KLEIN: I don't think the statute forbids
24 that, Justice Scalia. I think the statute says only that
25 it doesn't require it. And, indeed, our argument is fully

1 consistent with that.

2 QUESTION: You're saying it's the touchstone.

3 MR. KLEIN: I'm saying --

4 QUESTION: How can it be the touchstone if it
5 doesn't require it?

6 MR. KLEIN: It's the touchstone as a maximum.
7 That is to say in order to -- I think this Court in
8 Gingles said the following, and I think this is exactly
9 right, that Gingles stands for the proposition that a
10 large, cohesive, compact -- large, cohesive, compact
11 majority does have a right to proportional representation.
12 That's what Gingles says is the equal opportunity.

13 Now, that means not mandated proportionality, as
14 the United States says. You've got to show large,
15 compact, and cohesive. In this case where there was
16 large, compact, and cohesive, we gave them
17 proportionality. Whether less than proportionality would
18 have sufficed under the statute is an issue not presented
19 by this case, because everyone concedes in Dade County
20 that there is proportionality. And our only point is that
21 in order to preserve the equal opportunity language, you
22 have to accept proportionality as an upper limit in terms
23 of what the statute requires, whether the State --

24 QUESTION: Well do you take -- excuse me, do you
25 take the position that it is -- necessarily, it is a

1 dispositive upper limitation, or do you say that it is a
2 relevant consideration in deciding what the upper limit
3 should be?

4 MR. KLEIN: No, I think -- I think it is under
5 section 2. I think it's dispositive.

6 QUESTION: You say it is dispositive.

7 MR. KLEIN: And I think that's true in a single
8 district case, in contrast --

9 QUESTION: Is it fair to say that in this case
10 we would not have to go that far to accept your position,
11 because I gather in this case, basically, we've got a
12 record in which there does not seem to be any other
13 explanation than a maximization principle. So we would
14 not have to hold that it was dispositive in every case in
15 order to reject the maximization theory.

16 MR. KLEIN: You wouldn't. But let me say why I
17 think that's -- why it would be hard not to accept the
18 principle as a general principle.

19 If you take a situation and you say to a --
20 let's say this is Dade County, and you say we have 9 out
21 of 18 districts that are majority Hispanic, that's the way
22 we design our plan. I find it hard to imagine -- assuming
23 that there's not some other glitch like people are
24 prevented from getting to the polls, how could that not
25 provide people in Dade County with an equal opportunity as

1 other members of the electorate. By hypothesis, if
2 Hispanics are cohesive, they will win 9 out of 18
3 districts. That is the most that a white majority could
4 do.

5 QUESTION: So you're -- in so many words you're
6 saying that this is strictly a results kind of test. I
7 mean equality --

8 MR. KLEIN: Well, I think that --

9 QUESTION: -- Is a bottom-line equality, and it
10 has nothing to do with discrimination that may have
11 occurred, I think, in Judge Easterbrook's phrase, along
12 the line.

13 MR. KLEIN: Well, I think --

14 QUESTION: In other words, if you get a result
15 which is consistent with proportionality, it doesn't
16 matter that that result may, in fact, have been arrived at
17 through various discriminations along the way which just
18 happen to work out numerically in a way which, on the face
19 of it, gives equality.

20 MR. KLEIN: It depends what you mean, Justice
21 Souter. And what I mean by that is in a single district
22 plan it's very difficult to see, when you have a compact
23 group and you allocate districts on a proportional basis,
24 what kind of steps in the process might be discriminatory.
25 If there are discriminatory steps, then I would concede

1 you raise a Fourteenth Amendment issue. But I think --

2 QUESTION: But not a section 2.

3 MR. KLEIN: Section 2, it's absolutely clear.

4 Indeed, the whole amendment in 1982 was that it is effects
5 that matter. And I would submit to the Court, if you have
6 effects without intent, you lose under section 2, there's
7 a violation. And if you have intent without effects,
8 there is no violation. I think that's absolutely clear
9 and that's what the words of the statute say.

10 QUESTION: You don't really disagree, as I
11 understand it, with the maximization argument made by the
12 Government. Your -- you concede maximization, don't you?
13 You just say the maximization only has to occur within
14 the -- within the district where there is a cohesive
15 racial group.

16 MR. KLEIN: No, I don't --

17 QUESTION: And then that district has to be
18 maximized. Isn't that correct?

19 MR. KLEIN: I don't concede that at all,
20 because --

21 QUESTION: Well, what do you mean by
22 proportional representation?

23 MR. KLEIN: Because what you had here was more
24 than proportional. Maximization is what the district
25 court here did.

1 QUESTION: Oh, maximization certainly doesn't
2 mean -- doesn't mean that they're going to win if they
3 have 1 vote against 100. It simply means that on a one
4 person, one vote basis, they will have the number of
5 representatives that is the same percentage of the
6 representatives as their votes are of the total votes.
7 That's all maximization is. It doesn't mean they have to
8 get all the representatives, certainly.

9 MR. KLEIN: If that's what you mean by
10 maximization, we're in complete agreement.

11 QUESTION: Well, what does anybody else mean by
12 it?

13 MR. KLEIN: Well, I think what people mean by
14 maximization, and the lower courts have used the term this
15 way, it is possible in Florida to create 11 majority House
16 districts. That is even though Hispanics have half the
17 people in Dade County, you can create 11 districts. That
18 is a simple numerical proposition. And so if you truly
19 wanted to maximize minority representation, you could give
20 them a disproportionate number of districts. Now, all
21 we're saying is that's not what section 2 requires.

22 QUESTION: Oh, I see, okay. But you agree that
23 it has to be maximized up to the point where they can
24 elect as many representatives as they are numerically of
25 the -- racially of the population of the State or of the

1 subunit that has a cohesive group.

2 MR. KLEIN: Where they're compact.

3 QUESTION: Yeah.

4 MR. KLEIN: Yes --

5 QUESTION: Allotted might be a better word than
6 maximized, it seems to me, in that situation.

7 MR. KLEIN: I think that -- I think that's a
8 fair word.

9 Now, let me then say, I think that -- that, I
10 think, does dispose of the issues in Dade County.

11 QUESTION: Just on the maximization point, if a
12 State chose voluntarily to maximize in this instance,
13 would there be a constitutional or a section 2 violation,
14 in your view?

15 MR. KLEIN: Well, I don't think there'd be a
16 section 2 violation, because I don't think majorities have
17 a cause of action under section 2. I do think it raises a
18 serious constitutional question under Shaw v. Reno, a
19 question that I don't think is --

20 QUESTION: Suppose the districts were compact?

21 MR. KLEIN: Even if they were compact, it seems
22 to me you get into a question of whether the creation of a
23 disproportionate number of minority districts is something
24 akin to affirmative action. If the Voting Rights Act
25 requires that and if, under Metromedia, Congress has that.

1 power, I guess the answer is yet -- yes. But,
2 fortunately, none of that is presented --

3 QUESTION: When you said you don't think the
4 majorities have a cause of action, you decide the majority
5 by looking Statewide or at Dade County?

6 MR. KLEIN: I think -- when I say the majority,
7 I mean white people. I think you have --

8 QUESTION: I know. But there's -- I don't think
9 the majority -- I don't think the white people are a
10 majority in Dade County.

11 MR. KLEIN: I don't think that matters under
12 section 2, Justice Stevens. Section 2--

13 QUESTION: Because section 2 looks at the entire
14 State, is that the reason?

15 MR. KLEIN: No. Section 2 covers protected
16 minorities. By that, it means blacks, Hispanic, Asians.
17 It does not apply to whites. It doesn't matter --

18 QUESTION: It wouldn't apply to whites even if
19 whites are a minority in the covered jurisdiction.

20 MR. KLEIN: Right.

21 QUESTION: You mean nationwide protected
22 minorities.

23 MR. KLEIN: Protected minorities is what
24 Congress had in mind. That is, it gave a cause of action
25 here to blacks, to Hispanics -- as the Court may remember,

1 they added what they called language minorities.

2 QUESTION: I understand.

3 MR. KLEIN: But there's never been a
4 suggestion -- and, of course, it's not presented by this
5 case, but there's never been a suggestion that white
6 voters would have a cause of action on section 2.

7 QUESTION: Is --

8 MR. KLEIN: Which was designed to implement --
9 originally, to implement the Fifteenth Amendment --

10 QUESTION: But under the plain language of the
11 statute I suppose there would --

12 MR. KLEIN: Well, I think --

13 QUESTION: If you discriminated on account of
14 race, or --

15 MR. KLEIN: Well, the plain language of the
16 statute talks about protected minorities.

17 QUESTION: Right.

18 MR. KLEIN: And what I'm submitting to you is
19 that the term protected minorities really does mean a
20 discreet group: that is blacks, Hispanics, and so forth.

21 QUESTION: Would it comply with the statute,
22 then, in -- say Dade County was electing just county
23 officers rather than the State legislature, if they
24 contrived a plan that denied whites a majority in any
25 district?

1 MR. KLEIN: I think it probably would, but I
2 think that would raise an equal protection question that
3 Justice Kennedy --

4 QUESTION: But you think it would comply with
5 the statute because whites are not a group that's defined
6 by color.

7 MR. KLEIN: That is, it's not a group that is
8 protected with the term protected minority under the
9 statute. That's my understanding of the legislative
10 history. And as I say, the genesis of section 2 --

11 QUESTION: But you have to go to the legislative
12 history to find -- to come to that conclusion.

13 MR. KLEIN: Well, there is -- the term in the
14 statute is protected minority.

15 QUESTION: Where is that term? It's not in --
16 it's not in section 2.

17 QUESTION: I mean, that's not in section 2, so.

18 QUESTION: Section 2 speaks of any citizen,
19 which is what one would have thought it said: "which
20 results in the denial or abridgment of the right of any
21 citizen of the United States to vote on account on account
22 of race or color."

23 MR. KLEIN: Well then I misspoke myself, then.
24 Then it might well apply, Justice Stevens. I think the
25 legislative history would make it -- would make it clear

1 this was designed to implement the Fifteenth Amendment and
2 therefore had a specific purpose. But I guess it is
3 possible, then, under the literal language of the
4 statute it does talk about members of a class of citizens
5 protected by subsection (a), and I think the general
6 reading of that has been that those are minority citizens
7 in the United States.

8 QUESTION: Is it your view that the cohesiveness
9 of the groups -- there was some issue about that in this
10 case, that that's irrelevant to your analysis. The
11 question of -- is are we talking about a protected group,
12 are the Hispanics in Dade County and in other parts of the
13 State cohesive.

14 MR. KLEIN: We concede that Hispanics in Dade
15 County are cohesive within Dade County. We vigorously
16 dispute the proposition that Hispanics in Dade County are
17 cohesive with other Hispanics Statewide.

18 QUESTION: But on your -- the view you stated
19 earlier about it's not a compact group, then the lack of
20 cohesiveness, the lack of identity, of necessary identity
21 of interest is kind of surplusage. Is that --

22 MR. KLEIN: That's correct. That's correct.
23 That is, what our submission is is the failure of the
24 United States to prove cohesion Statewide under its terms,
25 means that it hasn't stated a Statewide claim. It says in

1 order to show a Statewide claim, you'd have to prove
2 cohesion Statewide and white-bloc voting State-wide.

3 We say it never proved either of those things,
4 and a result of that it cannot prove up the very claim
5 that it is seeking to advance in this litigation.
6 However, even if it could prove up both of those points,
7 it would still fail because it failed to prove the first
8 Gingles factor of compactness on a Statewide basis.

9 Instead, what it did was basically to run
10 directly to something the statute disavows, and that is
11 proportional representation. It said we don't care where
12 Hispanics live, their vote is diluted unless they get more
13 districts in Dade County because they're entitled to
14 Statewide proportionality. I think that is so flatly
15 inconsistent with Gingles.

16 The United States says, well Gingles is just a
17 question of remedy, can you fit these in. But that's not
18 what the opinion says. The opinion says that if you don't
19 show you're a compact group, you have no cause of action
20 under section 2. Indeed, a unanimous Court in *Grove v.*
21 *Emison* said failure to prove the first Gingles factor
22 means no violation. And if there's no violation there
23 cannot be a remedy, we submit. It's not a question of
24 whether you can fit those districts someplace else in the
25 State.

1 QUESTION: On this record, do you -- can you say
2 that Florida did have the obligation to structure
3 districts with proportional representation in Dade County
4 itself, or could they have had a luck-of-the-draw system?

5 MR. KLEIN: Well, let me say it depends what one
6 means by luck-of-the-draw system. I think what I would
7 say is the following, is that the Hispanics in Dade County
8 are reasonably compact, they are cohesive, and there's
9 white-bloc voting. Therefore it seems to me, in drawing
10 district lines you have to take into account these
11 communities of interest.

12 QUESTION: Are those premises an assumption that
13 the State has simply accepted in this case, or were they
14 proven?

15 MR. KLEIN: They were proven, we believe, in
16 this case. And we think that they are not -- they are
17 accurate. That is they were -- we've never disputed that
18 those criteria are met.

19 Now, I think a very different question would be
20 done if a State, for example, took a computer and simply,
21 truly drew circles on a map as a way of drawing lines and
22 in no way took into account race. But in practicality,
23 Justice Kennedy, States do take into account community
24 interests, including both white and black and religious
25 and otherwise, and as long as you are reasonably compact,

1 as Hispanics in Dade County are, we think that's what the
2 Voting Rights contemplates -- Act contemplates, and that's
3 reasonable.

4 So we are not unhappy with proportionality as a
5 solution here. We think it's a fair one. It's just when
6 the United States decides to say that there are another
7 few hundred thousand Hispanics who are dispersed over
8 another 12 million people in Florida and we have to give
9 them proportional representation. That, we think, can't
10 be countenanced.

11 And we think, finally, in that regard -- let me
12 just make two last points. One, it seems to me the proof
13 of the pudding here is in the bizarre result the United
14 States is forced to embrace. Understand, in order to get
15 to 11 House and 4 Senate seats in Dade County, they have
16 to bring in voters all over -- actually people all over
17 the State of Florida into their case.

18 And then what do they say? Not that those
19 voters get a chance to vote for anyone. Those voters
20 cannot vote in these minority districts, but people in
21 Dade County who already have a proportional group of
22 representatives, they're going to get extra people.

23 And the United States says, well, that's because
24 all these people of the same race have a common interest.
25 But that seems to me to be a concept so repudiated by this

1 Court's decisions and by the so-called proportionality
2 proviso in section 2 itself. So I think that is an
3 argument that really falls of its own weight.

4 The final point I would make --

5 QUESTION: I'm not sure -- but isn't that the
6 same principle that you're accepting within a district?

7 MR. KLEIN: I think it is within a district.

8 QUESTION: That is, the vote of no individual
9 black person or other minority person is increased at all,
10 but that person is benefitted only that the votes of
11 others, not necessarily himself, is augmented.

12 MR. KLEIN: I don't --

13 QUESTION: He may choose to vote for -- you
14 know, for not the black candidate but a white candidate.

15 MR. KLEIN: But the assumption is -- this is a
16 group right in the following sense.

17 QUESTION: It is a group right, exactly.

18 MR. KLEIN: And the group -- you've got to have
19 a group of people. If you are black or you're Hispanic,
20 you've got to have a group of people that you say are
21 politically cohesive. And if you can show me that you're
22 going to have 50 plus percent, basically -- that's what
23 Gingles says, then you are able to, quote, elect
24 representatives of your choice.

25 The particular individual in the district, the

1 black individual may vote completely contrary to. But
2 what cohesion says and what compactness says is that
3 you're going to be able, as a group, to elect it. Now,
4 looking at --

5 QUESTION: You're saying this is the wrong
6 group.

7 MR. KLEIN: They're a different group.

8 QUESTION: It's not an individual right, you're
9 saying. It's a different group that they belong to.

10 MR. KLEIN: They're a different group, entirely
11 different group. And their group gets a representative in
12 Dade County. Now the last --

13 QUESTION: And have we said in our cases that
14 the equal protection clause grants group rights? We've
15 never said that.

16 MR. KLEIN: I don't think you've ever said that
17 in equal protection cases.

18 QUESTION: I thought the whole underpinning, the
19 whole premise, the whole principle of the Fourteenth
20 Amendment was that people are treated as individuals.

21 MR. KLEIN: I think that's right, but I think
22 that is not the premise of the current Voting Rights Act.
23 I think the current Voting Rights Act does talk in terms
24 of the ability to elect people of your choice. And if it
25 says that, that seems to me that you have to have a group,

1 because one voter simply cannot elect people of his or her
2 choice. And so I think the necessarily consequence --
3 necessary consequence of the Voting Act is that it is a
4 group right.

5 QUESTION: Well you have -- it's a capacity to
6 form a group, isn't it? I mean isn't that perhaps the way
7 to reconcile it with traditional -- the traditional
8 Fourteenth Amendment jurisprudence.

9 MR. KLEIN: Well, I don't know that it has to be
10 reconciled in the following sense. I think that
11 Congress -- obviously this Court in the Bolden case had
12 reconciled it with the Fourteenth Amendment, and Congress
13 went beyond that when it amended the statute. And it
14 seems to me at least the decision --

15 QUESTION: Well, the further you get beyond it,
16 the riskier it is, though.

17 MR. KLEIN: I agree with that, and that's what I
18 think the principle of the Shaw decision was last term.
19 That is, I think there is a point where Congress' ability
20 to fashion group rights may run into an equal protection
21 problem. But I don't think any of that's presented here.

22 The last point, if I might, is even if we were
23 to assume the test of Statewide proportionality here,
24 there's absolutely no question that Florida's plan
25 provides Statewide proportionality to Hispanics on the

1 basis of citizenship. That is to say that there are --
2 approximately 7.15 percent of the State are citizens, are
3 Hispanics. That's not just in Dade, but Statewide. And
4 the number of seats in the House and Senate exceeds 7.15
5 percent.

6 And there's no question here what the Voting
7 Rights Act covers. It covers the rights of citizens, not
8 the rights of people, not the rights of people of a
9 certain age, but the rights of citizens.

10 QUESTION: I think the Government argues -- or
11 perhaps it's the Appellee who argues in response to that
12 that Florida has chosen to draw its districts in terms of
13 total population rather than people of voting age,
14 citizens, and so it can't complain if the Voting Rights
15 Act case is fought out along those lines.

16 MR. KLEIN: I don't -- I don't think that's a
17 correct -- I think that's what they argue, Mr. Chief
18 Justice. I don't think they're right about that.

19 I think this Court has said for one person, one
20 vote allocations you can use population, and Florida did
21 that and I don't think there's any problem. Now, the
22 question in this case is do Hispanic citizens in
23 Florida -- because they're now making a Statewide claim,
24 they're no longer making a district claim -- do they have
25 less opportunity than other members of the electorate to

1 elect representatives of their choice?

2 Now, what I submit is if you have 7 plus percent
3 of the electorate, of the citizens, and you've got 7 plus
4 percent of the seats, then you have exactly the same
5 opportunity. And that has nothing to do with how you
6 district, because we're now making a Statewide claim. And
7 so under any view of the facts, we submit that this case
8 should render a finding of no liability with respect to
9 either the Senate or the House plan, and that the judgment
10 with respect to the Senate plan of no violation was
11 correct, and with respect to the House plan should be
12 reversed.

13 I'd like to reserve the balance, Mr. Chief
14 Justice.

15 QUESTION: Very well, Mr. Klein.

16 Mr. Feldman, we'll hear from you.

17 ORAL ARGUMENT OF JAMES A. FELDMAN

18 ON BEHALF OF THE UNITED STATES

19 MR. FELDMAN: Mr. Chief Justice, and may it
20 please the Court:

21 This case is not about the Dade County Council,
22 but about the Florida Legislature. It will always be the
23 case that when you're measuring whether a group is under
24 or over represented within a larger jurisdiction, there
25 will be some parts of the jurisdiction where the minority

1 group is under represented and other parts of the
2 jurisdiction where it's over represented.

3 The whole point of looking at this to determine
4 whether the minority group has an equal opportunity to
5 participate and elect, is to determine when you look at
6 those electoral opportunities divided up over the
7 jurisdiction as a whole, of whether it's equal.

8 QUESTION: How do you square that with the
9 compact and cohesiveness requirement of Gingles?

10 MR. FELDMAN: I actually don't think there's any
11 problem in squaring that with those requirements. The
12 compactness requirement in Gingles, the Court was quite
13 explicit in stating why that requirement was necessary,
14 and that was to show that there is some area of the
15 jurisdiction where the minority group is sufficiently
16 compact that it could form a district if the State wanted
17 to do that.

18 QUESTION: See, but once you have some compact
19 group that can sort of carry the banner for the minority
20 Statewide, you can give that compact group as many votes
21 as is necessary to represent the minority Statewide is
22 your argument.

23 MR. FELDMAN: No, that -- I wouldn't put it that
24 way. Within Gingles itself there was no evidence at
25 all -- or in any of the cases that have come up since

1 Gingles -- concerning how minorities were distributed
2 throughout whatever jurisdiction it was. There may have
3 been a minority in one of the districts in Gingles who was
4 all the way over on the other side of the jurisdiction at
5 issue there, but that fact really had no bearing.

6 The point of the first Gingles requirement is
7 could you draw a district or are the problems that are
8 caused -- vote dilution here, are they caused by just the
9 residential dispersion. Could I -- I would like to --

10 QUESTION: So you are providing a remedy to
11 persons who have not been wronged.

12 MR. FELDMAN: No, I don't think -- I don't think
13 that's correct. Let me give you an example that may
14 illustrate it. If you look at South Florida there are 20
15 districts in the House that border -- that touch on Dade
16 County and that together comprise all of Dade County and a
17 few surrounding areas.

18 If you just move up the Florida coast one more
19 county to Broward County, or even -- the effect is
20 stronger if you move up two counties to Palm Beach County.
21 In that case you have all of South Florida, and if you
22 were to look at that area, for instance, the minority
23 Hispanics would be substantially under represented, in
24 fact more so than we -- than the two seats that we're
25 talking about here.

1 There's no way to arbitrarily divide -- to
2 draw -- there's no reason to take a single line of those
3 18 districts which themselves don't respect -- I'm sorry
4 20 districts which themselves don't respect county lines
5 in the first place. There's no reason to take that line
6 and say well we can only look at the vote dilution that
7 has occurred within that area:

8 QUESTION: But, Mr. Feldman, isn't that the line
9 you drew in your complaint? Didn't the United States'
10 complaint speak in terms of the 20 district Dade County
11 area?

12 MR. FELDMAN: Yes. You do have to look at that
13 area for purposes -- and particularly you have to look at
14 particular parts of that area to see that the way that the
15 State drew the lines there to fragment and impact the
16 Hispanic population, to -- which had the effect of giving
17 them less seats than they would have gotten. That is the
18 area -- just as in any Gingles case there will be one area
19 where you can draw the lines where the minority -- that
20 would give the minority -- that you can show the minority
21 group could have been given that district.

22 QUESTION: Where was this State frame of
23 reference stated in the complaint?

24 MR. FELDMAN: The -- I think the ultimate
25 allegation was that Hispanics in the State of Florida are

1 denied equal opportunity to participate and elect
2 candidates of their choice. The complaint also said that
3 Hispanics in the State of Florida are cohesive. It said
4 that Hispanics in the State of Florida have suffered --

5 QUESTION: What was the proof of that other
6 than -- you state in your brief, for example, English
7 language initiatives, language-based employment
8 discrimination. If one were to make a list of
9 cohesiveness or lack of cohesiveness, one would have a
10 pretty fair number of entries on the other side as well,
11 would not that be so in this case?

12 MR. FELDMAN: I think you have to look at the
13 record of this case as it comes to this Court. There
14 really -- there were -- this was not all that happened in
15 the case was in 8 days of, or 5 days or whatever it was of
16 trial here. There had previously been a congressional
17 phase of the case. The same district court sat on the
18 congressional phase of the case and made detailed findings
19 about the State of Florida in an opinion that's in the
20 joint -- the Jurisdictional Statement Appendix here.

21 QUESTION: Well, other -- what other than the
22 two examples that you put in your brief?

23 MR. FELDMAN: Well, in every -- I guess what I'm
24 trying to say is that in the Congress -- it was already
25 decided before the trial started here. The court had

1 already decided that there was racially polarized voting,
2 one segment of which is that the Hispanics were cohesive.
3 There were extensive studies of elections throughout the
4 State of Florida that was the primary basis for that
5 conclusion.

6 I mean, I could give you some examples. First of
7 all, there was the Court's opinion, which we cite in our
8 brief. There was a special master who was appointed to
9 take evidence in that case at Joint Appendix 61. He comes
10 to the same conclusion. There was an independent expert
11 who was appointed to develop a plan in that case. At 101
12 to 103 of the Joint Appendix he says: "It is beyond
13 dispute that there's racially polarized voting whereby
14 African-Americans or Hispanics vote one way and whites or
15 Anglos vote another." And he's talking about the State of
16 Florida. There were --

17 QUESTION: Was there evidence that there is a
18 greater identity between the Hispanics in other parts
19 outside Dade County and African-Americans than with
20 Hispanics in Dade County, that the identity of those two
21 groups -- so if you were going to pick a group to bracket
22 the Hispanics outside Dade County, it would not be the
23 Hispanics inside Dade County, but you would find more
24 cohesiveness with African-Americans inside Dade County?

25 MR. FELDMAN: I think there was some anecdotal

1 evidence that there were various segments of the Hispanic
2 community, that it does not vote cohesively with the
3 community as a whole. It is -- the statute does protect
4 Hispanics -- I think persons of Spanish descent is the way
5 the statute --

6 QUESTION: But didn't the district court make a
7 finding to that effect?

8 MR. FELDMAN: The district court finding was
9 that there is racially polarized voting in the State of
10 Florida.

11 QUESTION: But didn't it also -- didn't it also
12 point out just what Justice Ginsburg said, that the Cuban
13 Hispanics in Dade County tend to vote quite different from
14 non-Cuban Hispanics?

15 MR. FELDMAN: I don't believe the district court
16 did make that finding. It did refer at one point -- it
17 referred to the testimony of, actually, one of the
18 plaintiffs' experts, that Hispanics in Dade County have
19 somewhat different voting patterns in terms of party
20 affiliation than Hispanics in the rest of the country. I
21 don't take that to read the rest of Florida, especially in
22 light of the consistent findings that Hispanics vote
23 cohesively in the State of Florida.

24 In addition, the court looked at all of these
25 various subgroups of Hispanics.

1 QUESTION: What does it mean to vote cohesively?
2 Does it mean, for example, to vote for one party rather
3 than the other?

4 MR. FELDMAN: I mean I think that might be a
5 factor. But the way it's commonly proven is you look at
6 studies of how people -- of how groups vote. And what was
7 found in Florida is that very consistently Hispanics want
8 to elect Hispanics as candidates, throughout the State,
9 and they do, and the only time when they have the
10 opportunity to do that is when they're in the majority
11 district. In addition, there are Statewide elections, and
12 you can look and see how the Hispanics in the State as a
13 whole vote on those elections.

14 QUESTION: They must want to elect Hispanics.

15 MR. FELDMAN: They don't --

16 QUESTION: It isn't enough if all -- say all
17 Hispanics vote Republican or, you know, all of some
18 minority -- some other minority votes Democratic all the
19 time?

20 MR. FELDMAN: No. I --

21 QUESTION: That's not enough. They have to vote
22 for a member of their race, that's required.

23 MR. FELDMAN: No, I don't think that's required,
24 but I think that that may be proven in a given case.

25 QUESTION: But it's not required.

1 MR. FELDMAN: No.

2 QUESTION: It would be enough if they always
3 vote for one party.

4 MR. FELDMAN: I think, yeah. I don't know if --
5 I don't know if just showing a party affiliation would
6 necessarily prove anything. It may be that people in
7 different --

8 QUESTION: Well, then what is it? If that's not
9 enough, they have to vote -- want to vote for a person of
10 their race, is that it?

11 MR. FELDMAN: No, I don't think that that's it.
12 I think, as this Court -- this Court in Gingles said that
13 it was the candidate -- it was the race of the elector,
14 not the race of the candidate that's what you look at
15 here. I think it -- looks and sees whether they tend to
16 vote for the same people. If they tend to vote for the
17 same people, you say that they vote cohesively. If not,
18 then not.

19 QUESTION: You said a minute ago that Hispanics
20 were not protected. But what was the group that is
21 protected?

22 MR. FELDMAN: I think -- I believe the statutory
23 language says persons of Spanish descent.

24 QUESTION: Where is that? Where does that
25 statute say which people are entitled to equal voting

1 opportunity?

2 MR. FELDMAN: I think --

3 QUESTION: As opposed to everybody, just certain
4 groups, where it that?

5 MR. FELDMAN: No, everybody's entitled to equal
6 voting opportunity, but there are particular -- the
7 statute protects against unequal voting opportunities on
8 account of race, for example, and that would affect
9 everybody.

10 QUESTION: Right.

11 MR. FELDMAN: It also specifically uses the term
12 persons protected by -- let me just see, it says by -- "in
13 contravention of the guarantees set forth in" -- this is
14 in section 2(a) -- it says "of the guarantees set forth in
15 section 1973b(f)(2) of this title." And that provision
16 has to do with language minorities, and I believe --

17 QUESTION: Oh, okay.

18 MR. FELDMAN: -- For purposes of this section
19 the term language minorities means a number of different
20 groups including --

21 QUESTION: Right.

22 MR. FELDMAN: -- Or persons of Spanish heritage.

23 QUESTION: May I ask just as -- out of
24 curiosity, what is the defining characteristic of the
25 Hispanic group we're talking about? Is it the language in

1 1973, or is it the race or the color?

2 MR. FELDMAN: It's the -- it's the fact -- I
3 mean, technically, it is that they are of Spanish
4 heritage, that's the statutory term.

5 QUESTION: The statute refers to Spanish
6 heritage.

7 MR. FELDMAN: Yes. But that -- it is clear that
8 what Congress had -- that term is used in the context of a
9 provision -- a different provision of the statute that
10 talks about the rights of language minorities and the
11 problems that have been caused by discrimination against
12 people on the basis of the fact that they speak a
13 different language.

14 QUESTION: Well, what provision of the statute
15 is it that refers to people of Spanish heritage?

16 MR. FELDMAN: It's --

17 QUESTION: Something in 1973?

18 MR. FELDMAN: It's -- 42 U.S.C.1973 aa-1a(e).
19 I'm sorry it's such a complex -- and, actually, the term
20 is also, for instance, in the 1973 l(c)(3), and I think
21 it's probably in a couple of other provisions as well.

22 QUESTION: And how does that become relevant to
23 the race or color criterion of section 2?

24 MR. FELDMAN: Because section 2 protects not
25 only for discrimination or unequal electoral opportunities

1 on the base of race or color, but also in this
2 provision -- where it adds.

3 QUESTION: Oh, just the 1973(b), I see.

4 MR. FELDMAN: Right. And that, in essence, as
5 language of minorities. But in any event, the evidence
6 at -- the evidence at the congressional hearing, and, in
7 fact, some of the evidence from the State's own expert at
8 the legislative -- at this, at the hearing that was held
9 immediately before the judgment in this case, clearly
10 showed -- I mean everyone agreed that Hispanics vote
11 cohesively in the State of Florida, given all of this
12 voluminous data.

13 QUESTION: Well, Mr. Feldman, I assume we are
14 looking at this case and this judgment, right?

15 MR. FELDMAN: That's right.

16 QUESTION: And did the district court in this
17 case that we're reviewing make any vote dilution findings
18 outside of Dade County?

19 MR. FELDMAN: The district court -- I think what
20 the district court, having made the number of findings --
21 it did in this very case. I mean the record in the
22 congressional case is in this court. It was from the same
23 complaints and it is the same case and the same parties.
24 In that case, I think they made all -- they made -- they
25 had made a wide variety of findings about elections and

1 voters in the State of Florida.

2 When they started the hearing in the legislative
3 case, as a matter of fact Judge Hatchett said: "This
4 court has made findings regarding elections in the State
5 of Florida." This is volume 1 of the transcript, page 82.
6 "Now we talk about whether we're talking about a different
7 State and different voters, but the voters we're talking
8 about are the same ones and we made very detailed findings
9 regarding those voters in elections."

10 Having done that, what the Court concentrated
11 on, I think, in this case was the question of whether you
12 really -- they had made most of the necessary findings --
13 of whether there was any reason to alter those findings.
14 Or, in particular, whether the plaintiffs could show that
15 you really could draw additional districts in Dade County,
16 as they had alleged in their complaint.

17 That there was a lot -- most of -- I think it's
18 fair to say that most of the evidence at trial centered
19 around the issue of whether those additional districts
20 would be compact, whether Hispanics in Dade County were
21 cohesive. Because if they weren't cohesive, the Hispanic
22 districts wouldn't -- they wouldn't be able, if they
23 formed their own districts, to elect the candidates of
24 their choice. And whether they would -- those districts
25 would have Hispanic majorities, that was what most of the

1 trial was about.

2 QUESTION: Mr. Feldman, on page 40a of the
3 Appendix to the Jurisdictional Statement where you get to
4 part B of the court's opinion, that first sentence is the
5 plaintiffs -- that the Dade County's -- "the Dade County's
6 Hispanic population is sufficiently large and
7 geographically compact to constitute a majority in 4
8 Senate and 11 House districts."

9 That sounds to me as if they were thinking in
10 terms of Dade County and not of the State at large.

11 MR. FELDMAN: I think -- I think it may be
12 inartfully drawn.

13 QUESTION: But it's very difficult to contend
14 otherwise, at least with respect to that particular
15 sentence.

16 MR. FELDMAN: I think what they meant in that
17 sentence was that the vote dilution that had occurred -- I
18 mean, what you had was a practice where Hispanics could
19 only elect other Hispanics -- or could only elect
20 candidates of their choice where they were the majority --
21 where they were in the majority in a district. And that
22 the State had deliberately drawn lines to fragment
23 Hispanic populations in Miami -- or the State had drawn
24 lines that had the effect of fragmenting Hispanics in the
25 State of Miami -- I'm sorry, excuse me, in Dade County.

1 And what the court was saying was that was where
2 the dilution -- you could kind of -- you could point to it
3 there. And it was focusing on all of the evidence that it
4 heard at trial about whether those districts were viable
5 and whether -- and whether that fragmentation of the
6 Hispanic populations had occurred.

7 QUESTION: Well, we're told by the Appellants
8 that the case was tried, basically, on the basis of Dade
9 County. You're telling us no, it wasn't, it was State
10 wide. We weren't there. We have to look at places like
11 this to try to make a judgment between the two of you.
12 And it seems to me a statement like this in the opinion
13 does cut against your point of view.

14 MR. FELDMAN: I would agree with you that it
15 cuts against my -- our point of view. What I would say is
16 that if you -- you can't look at this case and make sense
17 of what happened in terms of 8 days, or however many it
18 was, at the end of June in 1992. You have to look at the
19 whole case. And there had already been another opinion
20 issued in the case that had extensive findings, and you
21 have to look at the findings that were made here in light
22 of that and in light of all of the evidence. If the
23 Court -- I think if you look at all of that, you see that
24 it was a Statewide claim from the very beginning.

25 QUESTION: Mr. Feldman, could you -- there's an

1 awful lot of pages here to look through, as we understand.
2 Could you pinpoint what you think is the strongest
3 statement in any of the three opinions saying that they're
4 cohesive Statewide and compact Statewide?

5 MR. FELDMAN: But that -- first of all, I don't
6 think -- well, as to compactness, I don't know what it
7 would mean to say that they're compact Statewide. Counsel
8 talked about Davis and Bandemer. There was no showing in
9 Davis and Bandemer that the Democrats were throughout the
10 State in some proportion, or only in one part of the
11 State, or several parts of the State.

12 QUESTION: No, but I think a lot of the people
13 assume that within the Hispanic community there are Cuban
14 Americans who tend to vote very regular -- very
15 conservative Republicans, and there are a lot of
16 agricultural workers and the rest, who have a different
17 Hispanic origin, who tend to vote Democratic. I assume
18 that's true in Florida. It's probably true nationwide.

19 Does there -- is there anything in the record to
20 tell us? For example, do the Hispanics in the Tampa area
21 vote the same way as the Cuban Americans in Miami, or
22 anything -- any light on that at all?

23 MR. FELDMAN: Well, I can cite you the
24 voluminous exhibits showing the runs of election after
25 election. I mean there -- it is -- the Hispanics in

1 Florida are not uniform, nor does any minority group vote
2 uniform anywhere. And there are local variations and
3 there's also -- it just -- and even in any given locality,
4 the minority group is not going to vote 100 percent
5 cohesively.

6 QUESTION: Well, apart from looking at reams and
7 reams of exhibits.

8 MR. FELDMAN: Right.

9 QUESTION: Is there any statement anywhere that
10 is as succinct as the one the Chief Justice pointed you
11 to, but pointing in the opposite direction?

12 MR. FELDMAN: Well, if you look at the -- the
13 JSF in that, I think '92, 5/19, if you look at page 79a,
14 they -- the court says at the bottom of that page, and
15 carrying over to the next one: "The parties agree" --
16 "The parties agree that racially polarized voting exists
17 throughout Florida to varying degrees. The results of
18 Florida's legislative elections over the past 10 years
19 established the presence of racially polarized voting."

20 Racially polarized voting, as this Court knows
21 and as was made clear in Gingles, has two components:
22 that the minority group votes cohesively and that the
23 majority votes usually as a bloc to defeat minority
24 candidates. There are also -- that same finding in
25 different terms, and sometimes in stronger terms, I think

1 as I was saying before, was made by the special master --
2 some of these other things are in the Joint Appendix and
3 not in the JSF. And the independent expert --

4 QUESTION: Yes, but your statement that racially
5 polarized voting exists throughout Florida to varying
6 degrees could mean that in Dade County there's racially
7 polarized voting among blacks that is contra to the way
8 the Cuban Americans vote, and that there's racially
9 polarized voting in Tampa that's contra to either of those
10 two groups. I mean, it really doesn't -- that certainly
11 doesn't tell us that all Hispanics vote -- tend to vote in
12 the same way.

13 QUESTION: Indeed, the rest of that paragraph
14 doesn't even speak about Hispanics. It speaks about
15 African-Americans.

16 MR. FELDMAN: Right. But this opinion clearly
17 addresses -- they then go on to give some specific facts
18 about African-Americans, but the opinion addresses the
19 voting rights situation with respect to both Hispanics and
20 African-Americans. The whole litigation was concerned
21 about both groups and in the congressional phase they were
22 extremely concerned with both groups as to whether they
23 were going to -- whether they were required to draw
24 districts for that.

25 QUESTION: But the paragraph you refer to -- us

1 to, starting on page 79a does appear, at least, at the end
2 of the paragraph, to refer just to African-Americans.

3 MR. FELDMAN: Yes, well I can --

4 QUESTION: Where do you extract from this
5 opinion an indication that it's proper on your Statewide
6 frame to bracket the Hispanics outside Dade County with
7 the Hispanics inside, rather than with African-Americans.

8 MR. FELDMAN: Well, I think -- that's how I read
9 the finding that there's racially polarized voting in
10 Florida. I think the natural -- that the natural meaning
11 of those words is that, especially in the context of a
12 case where this was the type of issue that was
13 litigated throughout.

14 QUESTION: It's certainly a Delphic way of
15 putting it, isn't it?

16 MR. FELDMAN: I beg your pardon?

17 QUESTION: It's Delphic, isn't it, to get all
18 that out of racially polarized voting, which could mean
19 Hispanics and African-Americans versus whites?

20 MR. FELDMAN: Your Honor, the -- if you --
21 the -- if you go beyond the three-judge court, it adopted
22 findings that a special master had made. As I recall, the
23 special master's findings were in similar terms. But both
24 the court and the special master adopted other findings
25 that were made by an independent expert.

1 And it's not that any of these findings
2 disagreed with each other in any way, but the independent
3 expert, for instance, on the Joint -- in the Joint
4 Appendix on page 103, said it is -- he lists a bunch of
5 things that he thinks are beyond dispute. And he says
6 there is, quote: "racially polarized voting, whereby
7 African-Americans or Hispanics vote one way, and whites or
8 Anglos vote another."

9 QUESTION: Yes, but that doesn't --

10 MR. FELDMAN: That doesn't?

11 QUESTION: -- Deal with the question that I
12 asked you. Because in one part of this case, the Senate
13 part, wasn't there a question if there's only room for one
14 more, who should get it?

15 MR. FELDMAN: Yes. That was an issue, yes. We
16 don't agree that that was -- we think that that really
17 didn't need to be an issue in the case, and that the
18 problem was that we didn't have the opportunity to show
19 that there could be a remedy for both groups.

20 QUESTION: But if you're talking about creating
21 two more districts and if the cohesiveness is closer
22 between African-Americans and Hispanics outside Dade
23 County, then why should those two districts go to
24 Hispanics in Dade County?

25 MR. FELDMAN: Well, I think -- well I think I

1 can only make -- perhaps answer that by repeating, I
2 think, what I said before, which is the question is
3 whether Hispanics in the State of Florida vote cohesively.
4 It has been shown in this case that there -- well, it has
5 been shown in this case that no Hispanic, for example, was
6 elected to the Florida State Senate until 1988, never,
7 that no Hispanic was elected to Congress until 1989. That
8 Hispanics -- there were findings that Hispanics do not win
9 elections in Florida unless they're in the majority of a
10 district.

11 Maybe that supplies the -- what's -- what you --
12 clarifies what these findings are. But all of these
13 findings point in the same direction, that where Hispanics
14 are in the majority in a district, they get the
15 opportunity to elect the candidates of their choice, and
16 where they're not, they don't.

17 And I think that there were experts who
18 testified to support the independent expert's and special
19 master's findings, and so on. But, in any event, that --
20 I think they all mutually support each other, which is
21 that in the State -- in the State, as a whole, Hispanics
22 vote cohesively.

23 QUESTION: Well, we may -- we may have
24 difficulty in figuring out what the findings are, but do
25 you agree that if we do not read those findings as

1 establishing dilution outside of Dade County, that the
2 Hispanic population outside of Dade County cannot
3 legitimately be taken into consideration for purposes of
4 the maximization that went on here?

5 MR. FELDMAN: Yes, I do. And I think if there's
6 some doubt about what -- if you look at the Joint Appendix
7 at 61, at 103, there's expert testimony, 81, 209, 38, 266,
8 if you look at all those and you still don't think that
9 it's made out on a Statewide basis, I think the
10 appropriate thing to do would be to remand the case and
11 let the district court make the finding that you would
12 find would not have been made.

13 QUESTION: Is it enough if -- I mean are we
14 supposed to go through the testimony to see if it was made
15 out? Doesn't Gingles require that there be a finding?

16 MR. FELDMAN: Well, the only reason I refer --
17 this is -- the only reason I refer to the testimony is
18 because there are, in addition to the opinion that was --
19 that the court issued on July 17th, there was the previous
20 congressional opinion and the special master's and
21 independent expert's opinions, which were specifically
22 adopted by the court. And all of those make findings
23 about racially polarized voting in the State of Florida.
24 I only raised --

25 QUESTION: So you're talking about findings, not

1 just testimony.

2 MR. FELDMAN: Yes. I only raised the testimony
3 because that was what the finding was based on. And, in
4 turn, the testimony was attached to quite voluminous
5 exhibits showing the election runs in Florida and how
6 people vote.

7 QUESTION: Let me ask you a question of your
8 interpretive criterion. When you speak of findings, do
9 you -- do you account it as a finding by the court when
10 the court simply recites - or strike the word simply, when
11 the court recites a summary of testimony by expert
12 witnesses?

13 For example, I think twice in your brief you
14 refer to findings on the court. on page 43a of the
15 petition appendix, of fragmentation of the Hispanic
16 population within Dade County. And I looked at that
17 twice, and I don't see any findings there. What I do see
18 is a repetition by the court of summaries of what
19 witnesses said. This one testified this, that one
20 testified that. Are you counting those recitations as
21 findings by the court?

22 MR. FELDMAN: I think the district court's
23 opinion, with due respect to the court, was written
24 hastily. And I think you have to look at the context in
25 each case. I think the court tended at times --

1 QUESTION: Then the answer to my question, then,
2 is yes, you are --

3 MR. FELDMAN: No, the answer is sometimes yes
4 and sometimes no.

5 (Laughter.)

6 MR. FELDMAN: And they have to look at the --
7 you have to look at the context of it.

8 Again, I would emphasize that the questions that
9 we've been -- the things I've been talking about really go
10 to whether -- to the nature of the findings that were made
11 by the district court in this case. And if the Court
12 ultimately doesn't agree with us that those findings were
13 made by the court, the appropriate thing to do would be to
14 remand and --

15 QUESTION: Well, why should that be? It seems
16 to me the plaintiffs have an opportunity to prove their
17 case at trial and if they fail, if there was insufficient
18 evidence to support the decree that they wanted, you don't
19 send it back and say, well, let them try again. You say
20 they had their chance, the judgment is reversed, and
21 judgment is entered for the defendants.

22 MR. FELDMAN: Yes. I don't think there's any
23 basis to -- I mean, I don't think there's any question
24 that there was sufficient evidence. But the district
25 court simply -- they entered judgment for us and they

1 didn't -- they didn't -- if the Court finds that the
2 court, the district court didn't specify, for instance,
3 whether Hispanics in the State of Florida, as a whole, are
4 or are not cohesive, then that's a finding that simply has
5 to be made one way or the other.

6 They -- certainly the district court never said
7 that Hispanics were not cohesive in the State of Florida.
8 If the court had said that, then I think it would be --
9 the appropriate thing to do probably would be to reverse.
10 There might still be additional issues remaining in the
11 case on other points.

12 QUESTION: So you're saying there was -- at
13 worse, from your point of view, there was a failure of the
14 district court to find on a crucial issue.

15 MR. FELDMAN: That's -- that would be what I
16 would say, yes.

17 But in any event, all of these things go -- none
18 of these go to our central premise, which is that -- the
19 question -- you have to look Statewide to determine -- the
20 appropriate measure for whether a State's districting plan
21 fragments or dilutes the votes of the black community, you
22 have to look Statewide.

23 QUESTION: Is there any support in the case law
24 for this Statewide frame of reference as opposed to the
25 geographical districts?

1 MR. FELDMAN: Actually, yes, I think there is.
2 I think Davis against Bandemer looked at the whole State
3 when it was looking at a very similar type of claim. I
4 also think that the four Justices in Shaw against Reno who
5 dissented, who analyzed the case quite different from the
6 majority -- the way the majority did. But the majority
7 didn't suggest that vote dilution claims of the sort that
8 the dissent didn't -- wouldn't have existed. That those
9 four Justices had looked at the State of North Carolina in
10 concluding that whites in North Carolina were not
11 disproportionately represented.

12 I also think I might have misspoke. What we're
13 really talking about here is -- in a relatively minor way.
14 But what we're talking about here is the -- is
15 proportional representation in the State of Florida.
16 That's only one factor that has to be considered in the
17 totality of the circumstances' analysis. And I don't want
18 to suggest -- it is -- although I think it bears very
19 heavy weight, I don't think that that is conclusive. And
20 I think Mr. Klein characterized our position that way, but
21 I think it's possible claims could be --

22 QUESTION: Mr. Feldman, assume there were no
23 Gingles preconditions show, could a State, on its own
24 initiative, maximize the voting strength of racial
25 minorities within its jurisdiction?

1 MR. FELDMAN: I'm not -- I guess I would have
2 one -- initially, I'm not sure what maximizing would mean
3 there? Does that mean --

4 QUESTION: Maximizing as you use it here.

5 MR. FELDMAN: Well, we've never --

6 QUESTION: Taking a State -- taking a State-wide
7 sample of all the minorities and giving them the maximum
8 possible number of seats in, say, the State legislature.

9 MR. FELDMAN: I think a State can reasonably
10 act, for instance, to preclude a section 2 claim. And if
11 that requires drawing as many districts in an area, or in
12 the State or wherever it is, in which the minority group
13 would be the majority, then I think that that would be the
14 proper thing to do.

15 QUESTION: Well, but I'm assuming that
16 Gingles -- that the Gingles conditions, preconditions
17 cannot be found. What then?

18 MR. FELDMAN: If they cannot be found?

19 QUESTION: There's no bloc voting.

20 MR. FELDMAN: I -- you know, I would hesitate to
21 hazard an answer to that. I think that would raise
22 questions -- I guess the question would be whether that
23 would be unconstitutional for a State to do that.

24 QUESTION: It raises at least at least a
25 delicate constitutional question.

1 MR. FELDMAN: A delicate -- the question would
2 be whether it would be unconstitutional for a State to do
3 that.

4 QUESTION: Doesn't that mean it's all the more
5 important for us to be quite confident that the district
6 court's judgment was no more than necessary to remedy the
7 violations that were shown?

8 MR. FELDMAN: I would certainly agree that the
9 district court is obligated simply to remedy the section 2
10 violations. But it found section 2 violations, and I
11 think the record supported those findings. And I do think
12 that if you -- if you arbitrarily limit the proportional
13 representation part of the analysis to Dade County, you're
14 going to lead to very odd results in different sorts of
15 cases where people are trying to draw smaller or larger
16 circles.

17 In fact, even in Dade County there are --

18 QUESTION: Well it seems to me an odd result to
19 give a remedy to someone who has not suffered a wrong.

20 MR. FELDMAN: Well, I think the answer -- I
21 think that's -- that's one way -- that's slightly
22 mischaracterizing what's happening. What is happening
23 here is that you have -- the whole premise of the statute
24 is based on an idea of a group's rights and a group's
25 fair, equal opportunities to participate and elect. And

1 you're necessarily abstracting from individuals when you
2 do that.

3 That's going to be true, though, even if you
4 look at Dade County. There are individual Hispanics in
5 Dade County who don't live in Hispanic-majority districts
6 and who don't -- wouldn't live in Hispanic-majority
7 districts under any conceivable plan. Now, under Mr.
8 Klein's analysis are we supposed to exclude those from the
9 proportional representation analysis? Are we just
10 supposed to look at where you can draw the majority
11 Hispanic districts under the State's plan, just the people
12 who live there, or under our plan or what alternative?

13 Thank you.

14 QUESTION: Thank you, Mr. Feldman.

15 Mr. Foster, we'll hear now from you.

16 ORAL ARGUMENT OF C. ALLEN FOSTER

17 ON BEHALF OF DE GRANDY, ET AL.

18 MR. FOSTER: Mr. Chief Justice, and may it
19 please the Court:

20 In contrast to what I believe has been the tenor
21 of the argument so far, this is not a maximization case.
22 In this case the plaintiffs have not only proved the
23 Gingles preconditions factors, they proved all of the
24 totality of the circumstances factors, and in addition,
25 over and above all of that, they proved disparate

1 treatment.

2 What the plaintiffs are saying in this case is
3 they want to be treated -- when districts are drawn in
4 neighborhoods where they live, they want to be treated the
5 same way that Anglos are treated when districts are drawn
6 in Anglo neighborhoods. That's what the plaintiffs are
7 saying, and that is the reason why I have asked the clerk
8 to give you these maps that you have in front of you,
9 because I'd like to direct your attention to the first
10 map.

11 This is Plaintiffs' Exhibit 5 and this is the
12 State plan which was challenged in this case. And I would
13 like for you to look up where you can see the 91 in this
14 yellow district. That's Fort Lauderdale. And I would
15 like to draw your attention to the blue district, that
16 rather oddly shaped blue district that splatters its way
17 across Broward County there. And I believe that you will
18 agree, after your experience in Show v. Reno, that you
19 would suspect that this is a minority district that was
20 created for minorities. It is not. It is an Anglo
21 district.

22 QUESTION: Are you talking about the kind of
23 purplish blue or the cobalt blue?

24 (Laughter.)

25 QUESTION: There are two different --

1 MR. FOSTER: Actually, Mr. Chief Justice, you
2 can take your pick, both of them are Anglo districts. But
3 I'm talking about the cobalt blue just to the left of
4 where it says Fort Lauderdale. Actually, Fort Lauderdale
5 is written across part of that district.

6 This is an Anglo district, as is district 90,
7 and if you looked at district 99, that's an Anglo
8 district, as is district 101, which is right on the border
9 of Broward and Dade County and actually dips down into
10 Dade County to submerge some Spanish voters -- or Hispanic
11 voters that are in Dade County.

12 And if you look down in Dade County at district
13 119, which is the gray district toward the bottom, that is
14 an Anglo district. And all the Hispanic voters in this
15 case have asked the court below to do is to have districts
16 drawn where they live that are just -- that utilize the
17 same districting criteria that the State legislature used
18 to draw districts in Anglo neighborhoods.

19 That's all they're asking, but that's not what
20 they got. Because if you use the same districting
21 criteria that were used to draw the districts in the Anglo
22 neighborhoods, you will get 11 Hispanic seats in the Dade
23 County area -- not Dade County, and I'll turn to that in
24 just a minute, because that's another misconception that
25 we're --

1 QUESTION: Suppose that you used those same
2 factors and you got 15, would you be entitled to that
3 remedy?

4 MR. FOSTER: In this particular case I think we
5 might well be entitled to it, Justice Kennedy. Because if
6 you take the statistics of Hispanic population in the Dade
7 County area and if you truly maximize -- this is not a
8 maximization case. We never asked for the maximum number
9 of districts. We asked for the number of districts that
10 could be drawn if you used the same criteria that was used
11 for Anglo districts.

12 There's nothing in the record as to what the
13 maximum number of districts is. There's nothing there.

14 QUESTION: Counsel, what are the criteria used
15 in drawing Anglo districts that you say should have been
16 used, to draw funny looking shapes like this?

17 MR. FOSTER: No, sir. They -- although they
18 certainly are funny looking, they were drawn -- they
19 respect Anglo neighborhoods, they respect Anglo
20 incumbents. Of course, the number of Hispanics that could
21 be elected was coming up and so there weren't as many
22 incumbents to respect.

23 But if you respect Hispanic neighborhoods in the
24 Dade County area, if you just respect and don't split,
25 don't pack their neighborhoods, if you treat them the same

1 way that Anglo neighborhoods were treated in this -- in
2 both Broward and Dade Counties, you will get 11 Hispanic
3 districts and you will 4 Hispanic Senate districts. If
4 you just treat them equally --

5 QUESTION: Does that involve any disrespect to
6 the lines that existed before for other groups?

7 MR. FOSTER: No, ma'am.

8 QUESTION: In other words if you said -- respect
9 everyone equally and Hispanic groups were not respected
10 equally, do the new lines disrespect any other groups?

11 MR. FOSTER: No, ma'am. There's no allegation
12 in this case that any other group, other than -- the
13 groups that were considered were the African-Americans,
14 the Hispanics, and the Anglos. The Anglos were going down
15 in numbers of seats, and -- yes, sir.

16 QUESTION: I don't understand. I had thought
17 that the whole name of the game in trying to maximize the
18 racial vote is not to keep neighborhoods together, but to
19 keep only so many of them together as will give you 51
20 percent of the vote.

21 MR. FOSTER: And if you try --

22 QUESTION: And then put another 51 -- or, you
23 know, to make it safe, 60 percent. You don't want a 100
24 percent Hispanic district. That will not maximize the
25 Hispanic vote. So I don't know how these criteria you've

1 been talking about has anything to do with this.

2 MR. FOSTER: That will pack.

3 QUESTION: You have to intentionally go about
4 packing districts on the basis not of neighborhood lines.
5 You have to be very careful to include a fair number of
6 Anglos in the district.

7 MR. FOSTER: In fairness -- in fairness, Your
8 Honor, to what the plaintiffs tried to do in this case and
9 what the district court adopted, the plaintiffs' plan did
10 respect communities. It respected Anglo communities, it
11 respected Hispanic communities, and it respected
12 African-American communities.

13 And that's the reason why -- the district court
14 was faced with two plans, one put forward by the State
15 which demonstrably did not respect Hispanic communities.
16 It demonstrably split and packed Hispanic communities. On
17 the other hand, it was faced with another plan put forward
18 by the plaintiffs which didn't do that, which treated
19 Hispanics and African-Americans the same way that it
20 treated Anglo voters.

21 And the court -- and we think this is exactly
22 what section 2 commands, the court chose the one that
23 treated everyone alike. And that's what -- section 2
24 commands that everyone have the equal opportunity. And it
25 is the plaintiffs' plan and only the plaintiffs' plan that

1 offers --

2 QUESTION: Mr. Foster.

3 MR. FOSTER: Yes, sir.

4 QUESTION: Wherein was the violation of the
5 Voting Rights Act in the law passed by the Florida
6 legislature?

7 MR. FOSTER: It both -- it -- number one, we
8 proved all three of the Gingles preconditions. Number
9 two, the court carefully considered the Zimmer factors and
10 found that they supported. And number three, the court --
11 while there may be some question as to whether there are
12 findings or not, as Justice Souter says, the court goes
13 through the testimony and it certainly, I think, fairly
14 appears to me that the court is citing with approval the
15 testimony that finds disparate treatment.

16 QUESTION: Well -- and you say nine districts
17 was not enough. In Dade County or Statewide?

18 MR. FOSTER: Well, sir, I'm glad you brought up
19 that point. Would you turn to map number 3.

20 QUESTION: Well, would you answer my question?

21 MR. FOSTER: Yes, sir. No one's talking about
22 Dade County in this case, Mr. Chief Justice, and I'd like
23 to demonstrate that to you. What you've heard previously
24 simply is not the fact. Please look at map number 3, and
25 I'd like to demonstrate to you what I'm talking about.

1 Map number 3 shows -- you can see District
2 number 102, it's the light-blue district that stretches
3 all the way from Miami and goes over to Naples. It's over
4 100 miles long. That is a district which the State must
5 count in order to make out their case for proportionality.

6 Now, they have come in here and they have told
7 you that we're only talking about Dade County, right.
8 That district has three times as much land in Collier
9 County in it as it does in Dade County.

10 QUESTION: Well, I think what they said, as I
11 understood it, was that they were talking about districts
12 which included some part of Dade County. I don't think
13 they insisted that it was limited to Dade County.

14 MR. FOSTER: Yes, sir. And if you'll look at --

15 QUESTION: Before you leave that district, is
16 that an Anglo district?

17 MR. FOSTER: It's an Hispanic district, sir, and
18 they have to count it in order to get proportionality.
19 They cannot get their so-called proportionality unless
20 they count District 102. And it is no more Dade County
21 than a man in the moon.

22 Also, if you will look --

23 QUESTION: Are you saying it doesn't include any
24 part of Dade County.

25 MR. FOSTER: Just a wee bit. And it doesn't --

1 you can look and see where it goes over into Dade County.
2 It's more than a wee bit, it's about 25 percent Dade
3 County and about 75 percent Collier County. It most
4 certainly doesn't --

5 QUESTION: Are you talking areawise or
6 population?

7 MR. FOSTER: Areawise and I don't remember the
8 precise figures, but I think that's pretty close to
9 populationwise as well.

10 Also, if you will look on your first map,
11 District 101 that I pointed out to you which is at the
12 border of Broward County and Dade County, the only aspect
13 of Dade County that is included in District 101 is that
14 infinitesimal little yellow blip that comes down into the
15 light blue. That's what -- that is where they are trying
16 to say that we limited our proof to Dade County and for
17 that reason, somehow or another, you can't take into
18 account anything else. They're taking into account
19 District 101 which is 99 percent, in population and area,
20 in Broward County.

21 QUESTION: Is that a Hispanic district?

22 MR. FOSTER: That happens to be a white
23 district, an Anglo district.

24 QUESTION: Well then you gained by having them
25 do that.

1 MR. FOSTER: That's true. But the point is that
2 their -- that their analysis makes no sense. Their
3 analysis does not tell us anything --

4 QUESTION: But if you left out both 101 and 102,
5 the proportion of Hispanic representation would be even
6 higher.

7 MR. FOSTER: Barely, by the fact that you're
8 dropping one number from the numerator and one from the
9 denominator. But the point is that their analysis -- if
10 you focus down on any one single district -- if you focus
11 on District 114, for example, which is this one to the
12 left of the pink district here in Dade County, and if you
13 focus on that and you say let's just look at that
14 district, then Hispanics are 84 percent of the population
15 there and they have 100 percent of the seats, so they're
16 underrepresented.

17 And then, as a matter of logic, as the circle
18 grows wider you will reach a point where there is
19 proportional representation. And then as the circle gets
20 bigger than that, there will be underrepresentation. That
21 is true any time you have a concentrated minority. It
22 will always be true.

23 If you think about it in terms of a target with
24 a bull's-eye and a lot of concentric circles around the
25 bull's-eye. As you go from the bull's-eye -- which is the

1 concentration of minorities where you may well have over
2 representation because the minorities may have all the
3 seats, but as you pointed out, Mr. Chief Justice, less
4 than 100 percent of population. And as you go out from
5 that circle into Anglo areas, the successive dilutive
6 effect of the increased Anglo areas is going to change the
7 numbers.

8 What this is saying is that any analysis that
9 does not go to the whole jurisdiction, the State, simply
10 hasn't told you anything. It's not probative because you
11 can pick and choose, you can cherry-pick the area that you
12 want to pick and you can prove anything with the numbers.

13 QUESTION: Well, who were these exhibits
14 introduced by? Were these your exhibits?

15 MR. FOSTER: These are plaintiffs' exhibits.
16 This is the State's plan.

17 QUESTION: Yes, and you have one dealing with
18 the Miami area, one dealing with what you call South
19 Florida, another dealing with what you call South Florida.
20 I take it your exhibits didn't go beyond at least South
21 Florida.

22 MR. FOSTER: That is true. Our case was focused
23 on South Florida, because that is where the minority --
24 the Hispanic population is primarily concentrated. But I
25 agree with the Solicitor General's view that certainly

1 there are findings in this record having to do with all of
2 the factors which pertain to Hispanics in the entire State
3 of Florida. And I simply think an analysis that focuses
4 on anything less than the total jurisdiction hasn't told
5 us anything.

6 I would only like to make one other point, and
7 that has to do with the Senate. If you will look at map
8 number 2 -- because this, again, tells you how much
9 further the plaintiffs in this case have gone than just is
10 required by the plurality opinion in Gingles. In fact, I
11 think we've satisfied all of the conditions that Justice
12 O'Connor mentioned in her concurring opinion.

13 Because here you have District 32, which is the
14 blue district. This an Anglo district which has come
15 down, crossed the Dade County line -- again, they're not
16 limiting their districts to Dade County. It crosses the
17 Dade County line and submerges the Hispanics that live in
18 this portion of North Hialeah, which is right there below
19 the Dade County area.

20 Down at the bottom, the purple district you
21 have, which is an Anglo district, creates a wall that
22 separates the otherwise cohesive minority -- Hispanic
23 minority populations in South Miami. That wall runs up
24 Highway 1, if you've ever driven down to the Keys. Like
25 the district you looked at in Shaw v. Reno, during most of

1 the area where it runs up Highway 1 -- and you can barely
2 see it on the map -- it's no wider than the highway. But
3 this is an Anglo district that was created.

4 And what these plaintiffs are complaining about
5 is that they haven't been treated equally. That is the
6 very violation that section 2 speaks to, not only in its
7 words but I believe philosophically.

8 QUESTION: Counsel, what is District 30, is that
9 an Anglo district?

10 MR. FOSTER: District 30.

11 QUESTION: That's the long tall one up
12 between --

13 QUESTION: Yellow.

14 MR. FOSTER: Oh, the yellow one, District 31.

15 QUESTION: No, no, not yellow, the one to the
16 left of the yellow district.

17 MR. FOSTER: That is an Anglo district. And I
18 would also point out, Justice Stevens, that it makes it
19 look a lot prettier than it really is, because the line as
20 drawn by the computer here goes offshore for 4 or 5 miles.

21 QUESTION: No, no, I'm not talking about the
22 yellow district.

23 MR. FOSTER: The yellow district, yes, sir.

24 QUESTION: No, I'm talking about the one
25 immediately to the one to the left of the yellow district,

1 the purple district.

2 MR. FOSTER: Oh. The little purple district.

3 QUESTION: The long --

4 MR. FOSTER: Oh, I see. I believe that's an
5 African-American district.

6 QUESTION: And do you have any problem with the
7 way that's drawn?

8 MR. FOSTER: That wasn't my case, sir.

9 (Laughter.)

10 MR. FOSTER: It was not necessary, under any
11 circumstances, to draw districts like that that respected
12 Hispanic communities of interest.

13 QUESTION: But it was to respect the
14 African-Americans.

15 MR. FOSTER: Yes, sir.

16 QUESTION: Thank you, Mr. Foster.

17 MR. FOSTER: Thank you.

18 QUESTION: Mr. Klein, you have 18 minutes
19 remaining.

20 REBUTTAL ARGUMENT OF JOEL I. KLEIN

21 ON BEHALF OF FLORIDA, ET AL.

22 MR. KLEIN: I would ask the Court -- with
23 indulgence, I want to refer to the Appendix, the Joint --
24 Jurisdictional Appendix on 92, 5/19, the JSF, to the
25 district court's opinion, because I think that we need to

1 have a couple of points of grounding here.

2 The lawyer for the De Grandy people just made an
3 argument about natural communities and compact districts.
4 On the bottom of 43a, in the district court's opinion, I'd
5 like to read the Court. The court says: "This court does
6 not find that the districts drawn by the De Grandy
7 plaintiffs are significantly less geographically compact
8 than those districts by the State of Florida."

9 All right. So to begin with, so we have a
10 baseline, the district court has said that their map,
11 which counsel didn't include in his handout -- their map
12 is not more compact, it's less compact, less natural. You
13 were shown a district, 102.

14 QUESTION: Well, I don't -- if you're depending
15 on the sentence you just read for the conclusion that
16 they're less compact, I don't think that sentence supports
17 you.

18 MR. KLEIN: They say they are not significantly
19 less geographically compact. I take it it means they are
20 less compact, just not significantly so, right?

21 QUESTION: Well, that's reading it very
22 favorably.

23 MR. KLEIN: Well, but at a minimum --

24 (Laughter.)

25 MR. KLEIN: But at a minimum, Mr. Chief Justice,

1 this notion that somehow we did all these unnatural
2 things -- their plan draw districts, again, that were, in
3 the court's words, at least as noncompact.

4 Second of all, you were shown a district, 102,
5 on the House plan, and you were told all sorts of
6 representations about this district. Let me tell you the
7 facts. The district goes across the Everglades of
8 Florida. It's largely nonpopulated in Collier County. In
9 fact the numbers are that 78 percent of that district is
10 from Dade County. It's largely Hispanic.

11 QUESTION: 78 percent of the population.

12 MR. KLEIN: Of the population, yes. 78 percent.
13 The reason it goes across the Everglades and picks up a
14 group in Collier County is Collier County is a section 5
15 county and we had to preclear that county with the
16 Department of Justice. We picked up a group of Hispanics
17 in that county, a small group, so that they would be in a
18 majority district.

19 Now to move to the more important things. The
20 question is was this a Statewide case or was this is a
21 Dade County case? And I think this is an important
22 question because I think there was a lot of confusion
23 generated. I would start with page 30a of the Appendix,
24 the JSF, the district court's opinion. And I would refer
25 the Court to the key statement made by the district court

1 with respect to the Senate plan -- this is right before it
2 becomes application of the Gingles factors.

3 It says with respect to the Senate Plan,
4 Hispanic and African-American vote dilution exists in Dade
5 County. In Dade County. Additionally, under the totality
6 of the circumstances, Hispanic vote dilution exists in
7 Dade County under the House plan.

8 That's what the district court found. Now, the
9 United States says you've got to look at lots of records.
10 The United States put evidence on in this case. What did
11 it put evidence on? It put evidence on about Dade County
12 only. There is no dispute about that. The district court
13 in this opinion -- if you look at its findings on the
14 three Gingles factors, just read them one at a time.

15 Geographic compactness, cohesion, and white-bloc
16 voting, and I represent to the Court each and every one of
17 those findings unmistakably is in Dade County. Indeed, on
18 73a in the concurring opinion -- just because it's more
19 compact here -- the court flatly says in paragraph 2:
20 "For Dade County, the second and third parts of the test,"
21 referring to Gingles, "are established."

22 The De Grandy people say in their brief that
23 they said on the record, we are presenting evidence of
24 vote dilution, quote, only as to Dade County. And the
25 district court's opinion --

1 QUESTION: Mr. Klein, do you have -- did you
2 participate in the trial?

3 MR. KLEIN: I did not.

4 QUESTION: Do you have any idea when the
5 reference is made to Dade County, as in that sentence you
6 just quoted or some other, is that referring to the Dade
7 County in the sense of all districts which touched on Dade
8 County or is it referring to Dade County as a geographical
9 entity regardless of what districts might extend both in
10 and out of it?

11 MR. KLEIN: I think it's referring to Dade
12 County as a geographical entity, and let me explain why,
13 Mr. Chief Justice. The Hispanic group of plaintiffs is
14 concentrated in Dade County. They do not spill over in
15 any numbers into other counties, that is like Broward
16 which is north. Of the House districts there are 5 out of
17 7 solidly in Dade County, one that starts in the south of
18 Dade and the only southern county beneath it, and one that
19 goes in the north, that's in the Senate. In the House,
20 there are 17 districts in Dade County, one largely in Dade
21 County, and 2 that touch a piece.

22 This was a Dade County case. That's what the
23 evidence showed. And I think the notion that this was a
24 Statewide dilution claim is really wholly insupportable.
25 And let me give a few additional facts. When --

1 QUESTION: Were there other previous proceedings
2 in the same case? Do we have to look at other
3 proceedings?

4 MR. KLEIN: There were proceedings in the
5 Congress.

6 QUESTION: Do we have to look at other findings
7 and opinions?

8 MR. KLEIN: I don't think that's right. I think
9 the only finding, so to speak -- the quote that you're
10 getting is racial polarization existed to varying degrees.
11 That is the only thing lifted from any other proceeding,
12 in a context of a district court drawing a Statewide
13 congressional plan, Justice O'Connor.

14 Now, that statement, on its face, does not
15 support Hispanic cohesion. Let me tell you why. You can
16 have Hispanics in North Florida who are Democrats who get
17 outvoted by Republican whites. That might show cohesion
18 and bloc vote, polarized voting, but that doesn't show
19 anything about Hispanics in North Florida and Hispanics in
20 Dade County.

21 We know one undisputed fact which the United
22 States concedes in its brief. Outside of Dade County
23 there's one other House member in the State of Florida
24 who's Hispanic. He was elected in Hillsborough County,
25 the Tampa area, all right. That person is a Democrat.

1 There are -- all the other Hispanics, from Dade County,
2 are Republicans. That person was elected with strong
3 Hispanic support.

4 So the idea -- the only other city in the whole
5 State where there's a large bloc of Hispanics of any
6 number, they vote for a Democrat, and in South Florida, in
7 Dade County, they all vote Republican. The idea that
8 there's cohesion is simply untenable.

9 If you want -- and I agree with the Court, I
10 don't think we need to go beyond the opinion --

11 QUESTION: Just to be sure I understand where
12 this is coming -- you're telling us what the record shows
13 about voting patterns by Hispanics in other parts of the
14 State?

15 MR. KLEIN: Yes. The record shows where -- that
16 is there are data in the record that in Hillsborough
17 County, in Tampa, a Hispanic was elected in a district
18 that is a Hispanic-influence district and it's a
19 Democratic Hispanic. That is undisputed in this case.
20 And what I'm saying is that, if anything, suggests that
21 far from cohesion there's noncohesion.

22 The De Grandy experts, Justice Stevens, said --
23 and they don't dispute this -- they said Hispanics in
24 South Florida are different from Hispanics everywhere
25 else, including in the rest of Florida.

1 QUESTION: Now, are they different because
2 they -- one group votes Democratic and the other votes
3 Republican, or are they also different because they have
4 different ethnic backgrounds?

5 MR. KLEIN: They have different ethnic
6 backgrounds. But principally for our purposes, they're
7 not politically cohesive. One group votes Democrat --
8 and, indeed, this goes to the polarized voting point you
9 discussed -- they join together with blacks in North
10 Florida to vote for Democrats.

11 QUESTION: Under this statute, if one group of
12 Hispanics with one ethnic background achieves sufficient
13 political power to take advantage of another group of
14 Hispanics of a different ethnic background, would the
15 statute apply?

16 MR. KLEIN: I don't know the answer to that
17 question. But if you say one group, if there's
18 noncohesion between those two groups --

19 QUESTION: You have two cohesive groups, both
20 Hispanic but different ethnic backgrounds, one is strong
21 enough to discriminate against the other successfully.
22 Would the statute apply?

23 MR. KLEIN: If they -- I think they could make a
24 subgroup claim. If they could show that their subgroup,
25 that is, let's say, Hispanics who are from Puerto Rico and

1 not from Cuba -- yes, I think they could make that claim
2 out under this statute.

3 So I think, in fairness, the record is
4 absolutely clear on this. And a single line that says
5 there's racially polarized voting when you're dealing with
6 three different racial groups, is not evidence. And if
7 the United States thought this was all done, they wouldn't
8 have put on their case in this case. They put on evidence
9 about racial polarization in Florida. The district court
10 understood that. That's this case.

11 Two other factors, if I might. Even if you
12 prove cohesion, there is simply no showing of compactness.
13 And I think the United States seriously misreads Gingles.
14 Let me explain why. Gingles says you have to show
15 compactness, not for a remedy but for liability, and
16 there's a reason for that.

17 Section 2 only applies to State procedures,
18 standards, and so forth that dilute votes. There's no
19 automatic cure for vote dilution. You've got to show
20 something that the State did. Now, what is the State --
21 what is the allegation here that's in play? That is the
22 State drew lines on a map and diluted votes. Now, if
23 you're not compact, the State lines don't dilute your
24 votes. That's the geography.

25 QUESTION: Let me ask you a question -- another

1 question there. Did you hear the argument in the
2 preceding case, the similar case this morning?

3 MR. KLEIN: Yes, I did.

4 QUESTION: Where they suggested that five
5 districts should be drawn in place of one. Are you
6 arguing that in order to sustain that argument they'd have
7 to prove that all the relevant minority voters were in the
8 one district that would be minority black?

9 MR. KLEIN: I -- they'd have to show a
10 geographically compact group, absolutely. I think --

11 QUESTION: So that they shouldn't even count the
12 black voters who are not within the black majority
13 district that might be created.

14 MR. KLEIN: They have to show that the black
15 voters in a single district, Justice Stevens, would make
16 up a majority. Now, in fact, the question that came up is
17 if you assumed 20 percent blacks in that group and you
18 have five seats, then if you had 12 percent of the blacks
19 in a compact group they could constitute a majority in one
20 of five. But there's no question in --

21 QUESTION: Does that mean that in determining
22 whether there's a violation or whether there's dilution,
23 you ignore the other 8 percent?

24 MR. KLEIN: Absolutely. Because you cannot --
25 the State's drawing compact single district lines. That's

1 exactly what the Court says in Gingles itself.

2 In drawing a line -- let's just think of the map
3 as we draw it. Here you have a group. Let's say you have
4 5 percent of blacks who live in one part of this large
5 county, and the other 15 percent are dispersed. You
6 cannot draw a single-district map that would give them a
7 majority. It can't be done. You've got to give them a
8 gerrymander of extreme proportion.

9 If that's true, the question is under section 2,
10 what is the State procedure or standard that's diluting
11 their vote? And the Court in Gingles says there is none
12 because the lines can't do it. So I submit to you at a
13 minimum -- and that's why I think it's called the
14 precondition -- if a group of minorities, of any group of
15 minorities, if that group cannot make up a majority within
16 a compact single district, they have no vote dilution
17 claim. Their vote, if it's diluted so to speak, is
18 diluted not by the State but by geography, and section 2
19 doesn't address it.

20 The last point I'd make before I sit down is you
21 notice nobody mentioned the issue of citizenship. And the
22 reason is whatever else is said, there is Statewide
23 proportionality on the basis of citizenship. And the
24 statute, clear as it can be, refers to citizens, not to
25 population.

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We submit, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Klein.

The case is submitted.

(Whereupon, at 2:24 p.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:

Johnson v. De Grandy (Consolidated Case)

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BY Ann Marie Federico

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