

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNITED STATES, Appellant v. RAY HAYS, ET AL.; and  
LOUISIANA, ET AL., Appellants v. RAY HAYS, ET AL.  
CASE NO: No. 94-558, 94-627  
PLACE: Washington, D.C.  
DATE: Wednesday, April 19, 1995  
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3 UNITED STATES, :

4 Appellant :

5 v. : No. 94-558

6 RAY HAYS, ET AL.; and :

7 LOUISIANA, ET AL., :

8 Appellants :

9 v. : No. 94-627

10 RAY HAYS, ET AL. :

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12 Washington, D.C.

13 Wednesday, April 19, 1995

14 The above-entitled matters came on for oral  
15 argument before the Supreme Court of the United States at  
16 10:16 a.m.

17 APPEARANCES:

18 RICHARD P. IEYOUB, ESQ., Baton Rouge, Louisiana; on behalf  
19 of the State Appellants.

20 DREW S. DAYS, III, ESQ., the Solicitor General, Department  
21 of Justice, Washington, D.C.; on behalf of the  
22 Federal Appellant.

23 EDWARD W. WARREN, ESQ., Washington, D.C.; on behalf of the  
24 Appellees.

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(10:16 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 94-588 -- 558, United States v. Ray Hays, consolidated with Number 94-627, Louisiana v. Ray Hays.

General Ieyoub.

ORAL ARGUMENT OF RICHARD P. IEYOUNG

ON BEHALF OF THE STATE APPELLANTS

GENERAL IEYOUNG: Mr. Chief Justice, and may it please the Court:

This is the Louisiana congressional reapportionment case, the first such case to reach this Court on the merits after Shaw v. Reno.

The district court held that Louisiana's Fourth Congressional District violated the Equal Protection Clause of the Fourteenth Amendment. The district court also held that all race-conscious redistricting, while not always unconstitutional, is always subject to strict scrutiny.

Louisiana's population is over 30 percent black. Since the end of Reconstruction until the 1980's blacks have never comprised a majority in any of Louisiana's congressional districts. It wasn't until 1983, compelled by Federal court order, that Louisiana drew its first majority minority district, and not until 1990 did



1 Louisiana send its first Congressman to Washington.

2 In this century, no black has been elected to  
3 either State-wide office, or to Congress, or the State  
4 legislature, except from majority-minority districts, and  
5 I hardly need to remind this Court --

6 QUESTION: What do you mean, General Ieyoub,  
7 about, what is a majority minority district?

8 GENERAL IEYOUB: Your Honor, I think a majority  
9 minority district is a district that will give minorities  
10 a fair opportunity to elect representatives of their  
11 choice.

12 QUESTION: Well then, it's almost self-defining,  
13 isn't it? I mean, if you say nobody has been elected  
14 except from a district which will give minorities a chance  
15 to elect a minority, is there any independent definition  
16 of a majority minority district?

17 GENERAL IEYOUB: Your Honor, I do not know of  
18 any independent definition. It's simply that the district  
19 contains a majority minority population. For instance,  
20 Louisiana's Fourth Congressional District has a 55 percent  
21 majority minority population.

22 QUESTION: Well, so that perhaps is the  
23 definition, that the district has a majority of a minority  
24 population.

25 GENERAL IEYOUB: Yes, Your Honor.

1 And of course, Louisiana has had, unfortunately,  
2 a history of past discriminatory practices. Act 1, Your  
3 Honors, is an effort on the part of a majority white  
4 legislature to afford minorities a fair opportunity -- I  
5 do not say a guarantee, but a fair opportunity to have a  
6 second minority voice in the halls of Congress.

7 Act 1 does not guarantee --

8 QUESTION: The assumption being that unless a  
9 minority is in a majority, they don't have a fair  
10 opportunity to get one of their members elected in  
11 Louisiana, an acceptance of, essentially, racial voting.

12 GENERAL IEYOUB: Your Honor, because of --

13 QUESTION: You acknowledge that in Louisiana you  
14 don't have a chance of being elected unless you're elected  
15 by a majority of your race.

16 GENERAL IEYOUB: Your Honor, the history that we  
17 have, the voting history in the State of Louisiana is an  
18 indication --

19 QUESTION: You accept that. You accept that as  
20 the reality and want to draw district lines on the  
21 acceptance of that reality, that people vote by race, and  
22 that we must district by race.

23 GENERAL IEYOUB: Your Honor, we will accept the  
24 reality that a black has never been elected to a  
25 legislative seat or to a congressional seat unless it was

1 from a majority minority district in the State of  
2 Louisiana. We have to accept that fact because that is  
3 the history.

4 As to the Fourteenth Amendment --

5 QUESTION: And if you accept that fact, do you  
6 draw these districts in order to perpetuate that practice?

7 GENERAL IEYOUB: No, Your Honor. We --

8 QUESTION: Or to try and eliminate it?

9 GENERAL IEYOUB: We try to draw the districts --  
10 we try to draw the districts in such a way as to give a  
11 fair opportunity to minorities to elect their candidates  
12 with the hope that soon we will not have to consider race  
13 in this situation.

14 QUESTION: You think this will help society to  
15 get away from considering race.

16 GENERAL IEYOUB: Yes, Your Honor.

17 QUESTION: By intentionally drawing the  
18 districts according to race, and having people run on the  
19 basis of race, presumably, in these racial districts, you  
20 think we're going to eliminate this terrible state of  
21 affairs in Louisiana, that people vote by race.

22 GENERAL IEYOUB: I think that --

23 QUESTION: You're going to eliminate it rather  
24 than entrench it.

25 GENERAL IEYOUB: I think, Your Honor, that it

1 can eliminate it. I think that if a State is reasonable  
2 and balanced in its drawing a majority minority district,  
3 I think that if we send a message that race does not  
4 submerge all other facts in the consideration of drawing a  
5 majority minority --

6 QUESTION: How are you sending that message when  
7 you draw a district on the basis of race, and when you  
8 come up and acknowledge that you don't have a fair chance  
9 of getting elected in Louisiana unless people of your race  
10 vote for you?

11 GENERAL IEYOUB: Your Honor, we send that  
12 message because this is a district that only gives a fair  
13 opportunity. It doesn't pack minorities into a particular  
14 district. It's 55 percent black population, which we have  
15 evidence to establish is almost necessary to give a fair  
16 opportunity.

17 If you look at the congressional districts that  
18 border District 4, you will find that those districts have  
19 between an 18 to 27 percent black population, which is  
20 more black population than 75 percent of all the other  
21 districts Nation-wide, so that's some indication that  
22 we're not trying to send out a message that we're trying  
23 to segregate or separate. Rather, we're trying to  
24 include. We're trying to give a fair opportunity here.

25 If you look at 5 of the 12 parishes that were



1 split in drawing District 4, you will find that the  
2 portion of the parishes that were brought into District 4  
3 actually had a greater white population than a black  
4 population. For instance, Evangeline Parish. That  
5 section of Evangeline Parish that came into District 4 had  
6 a 62 percent white population and only a 37 percent black  
7 population. What we are --

8 QUESTION: General, may I just be clear on one  
9 fact? We now know what a majority minority district is,  
10 and you said the population, the black population was 30  
11 percent of the State. Before 1983, was there any majority  
12 minority district?

13 GENERAL IEYOUB: No, Your Honor.

14 QUESTION: And no black had ever been elected,  
15 ever?

16 GENERAL IEYOUB: That's correct, Your Honor.  
17 That's correct, Your Honor.

18 As for the Fourteenth Amendment, we submit that  
19 the judgment below condemning Act 4 as a violation of the  
20 Equal Protection Clause is fundamentally wrong for three  
21 reasons. First, the district court misread Shaw v. Reno  
22 and applied strict scrutiny in condemning District 4,  
23 which is not bizarre on its face if you measure it by  
24 objective standards of past redistricting principles.

25 QUESTION: Well, was -- is District 4 the most

1 compact majority minority district that could be drawn  
2 outside New Orleans?

3 GENERAL IEYOUB: Yes, Your Honor, it is the most  
4 compact. It follows very closely the old Eighth  
5 Congressional District, which was a majority white  
6 district. It follows it extremely closely.

7 I invite Your Honors to look at the color  
8 depictions of the maps of the old Eighth Congressional  
9 District which we have supplied the Court. There you will  
10 see 25 years of redistricting history upon which the  
11 configuration of the old -- of the Fourth Congressional  
12 District is built.

13 QUESTION: But wasn't the old Eighth District  
14 deliberately gerrymandered just to keep Representative  
15 Long in office?

16 GENERAL IEYOUB: Your Honor, there was evidence  
17 that was -- that it was drawn in such a way as to assist  
18 Congressman Gillis Long into being elected, but obviously  
19 it was never challenged in any court.

20 QUESTION: And that's going to be our criterion.  
21 Any -- have we ever stricken down a gerrymander that was  
22 done for political purposes?

23 GENERAL IEYOUB: Yes, Your Honor, I think that  
24 the Court has struck down, but political considerations  
25 can be taken into consideration when drawing -- when

1       redistricting.

2                   QUESTION:   What case did that?

3                   QUESTION:   That's a new one to me.

4                   QUESTION:   I didn't know that we had a case that  
5       struck down political gerrymandering on the basis of  
6       protecting incumbents.

7                   GENERAL IEYOUB:   That is my mistake, Your Honor.  
8       I don't believe that the Court has ever struck down a  
9       political gerrymander to protect incumbency.   Incumbency,  
10      in fact, can be considered in redistricting.

11                  QUESTION:   So that's going to be our criterion  
12      as to whether this district is too weird.   If it were done  
13      for political purposes, and there's nothing too weird for  
14      political purposes --

15                  (Laughter.)

16                  QUESTION:   -- it can be done for racial  
17      purposes.   Is that the criterion you urge upon us?

18                  GENERAL IEYOUB:   No, Your Honor.   The criteria  
19      that I urge upon the Court is to use past redistricting  
20      history, past redistricting principles, ensuring that the  
21      district that is drawn is not significantly stranger in  
22      shape than any other district.

23                  QUESTION:   You didn't stick to the old district.  
24      You intentionally altered the old district, as unusual as  
25      it is.   You made it a little more unusual, or unusual in a

1 different way, in order to ensure that you had a certain  
2 majority of people of a certain race, isn't that right?

3 GENERAL IEYOUNG: There's no question, Your  
4 Honor, that the legislature considered race in trying to  
5 form a majority minority district.

6 QUESTION: That is, indeed, how the district was  
7 formed. You didn't just take this old gerrymandered  
8 district and leave it there. You changed it to be sure  
9 you could get a certain number of people of a certain  
10 race.

11 GENERAL IEYOUNG: To some extent, Your Honor, but  
12 not so dramatically that one could say it was a dramatic  
13 departure from past redistricting principles, and  
14 certainly District 4 does not look that much stranger than  
15 the old District 8, which was a majority white district.

16 QUESTION: The original one did. You reacted --  
17 Louisiana reacted to Shaw v. Reno. What was the  
18 difference between the district that's here before us and  
19 the original one that you had?

20 GENERAL IEYOUNG: Well, Your Honor, in some cases  
21 District 4 is actually more compact than the old District  
22 8. District 8 extended from the Texas border all the way  
23 to Lake Ponchartrain. That is not the case in District 4.  
24 It follows the same Red River parishes down the Red River  
25 and Mississippi axis through Central Louisiana and ends



1 around Baton Rouge.

2 QUESTION: But that represents quite a change  
3 from, what was it called, Act 42?

4 GENERAL IEYOUB: Yes, Your Honor, it does  
5 represent quite a change from Act 42. This we submit,  
6 Your Honor, is a compact district that does not depart  
7 dramatically from past historical configurations. In  
8 fact, it follows the old Eighth District quite a bit.

9 QUESTION: General, may I go sort of behind your  
10 present argument to what I understand your brief to say  
11 and raise a question about that?

12 As I understand it, the point of what you're  
13 arguing now is that because this district is not bizarre,  
14 since it -- on historical grounds there's nothing that  
15 unusual about it, there shouldn't be any strict scrutiny  
16 applied at all, because you say Shaw and Reno requires  
17 bizarreness as sort of the threshold showing in order to  
18 require a strict scrutiny analysis, is that your argument?

19 GENERAL IEYOUB: That's correct, Your Honor.

20 QUESTION: I have been assuming, and you correct  
21 me if I'm wrong, that just as you would try to define  
22 bizarre by what is traditional, that you would probably  
23 argue, and I guess I have assumed, that what is  
24 sufficiently compact for the Gingles test probably has the  
25 same sort of historical criterion. If it's compact to the

1 degree it historically has been, that's compact enough.

2 GENERAL IEYOUB: That's correct, Your Honor.

3 QUESTION: Here's the problem I have with the  
4 argument. If that is going to be the condition upon which  
5 we apply strict scrutiny, then once we find that a  
6 district is bizarre enough to be subject to the scrutiny,  
7 it's necessarily going to flunk the Gingles test, so that  
8 it could never, in effect, be justified as necessary or  
9 reasonably necessary to avoid a section 2 violation.

10 Conversely, if it doesn't flunk the Gingles  
11 test, if it's not bizarre, then if we adopt your position  
12 or adopt the bizarreness position, we would never, at  
13 least, be scrutinizing it for any other purpose. We  
14 would, for example, never get to the point of scrutinizing  
15 it for packing.

16 How do we get out of that bind, that if we  
17 scrutinize it at all it's necessarily going to flunk. If  
18 we don't scrutinize it, we never would look to other  
19 violations such as a packing violation?

20 GENERAL IEYOUB: Your Honor, I think that  
21 initially one can look at the particular configuration of  
22 the district and make a determination, at least looking at  
23 it, whether or not the configuration is bizarre.

24 QUESTION: No, but your argument was -- I  
25 realize that's what we're all going to do in the first

1 instance, but I thought your argument was that whether we  
2 ultimately classify it as bizarre or not is going to  
3 depend on whether it departs significantly from what had  
4 been produced by non -- we assume nonracial districting in  
5 the past, so that we may start out by looking at it, but  
6 ultimately what we're going to do on your theory is, is to  
7 ask, is this like what we used to do?

8 GENERAL IEYOUB: That's correct, Your Honor. I  
9 think that what needs to be done is to decide whether or  
10 not the district does follow historical redistricting  
11 configurations. If it's not stranger than other districts  
12 that have been drawn using other factors, if that is the  
13 case, then certainly it is not bizarre under Shaw v. Reno,  
14 and strict scrutiny should not apply.

15 QUESTION: All right, but then how do we solve  
16 the problems that are bothering me? How do we solve the  
17 problem that if it's bizarre enough to scrutinize, it  
18 necessarily is going to flunk the test? Maybe that's the  
19 easy part.

20 And how do we also solve the problem that if  
21 it's not bizarre enough to scrutinize, we wouldn't look  
22 for other violations such as packing?

23 GENERAL IEYOUB: Well, Your Honor, if it's  
24 bizarre -- if you say that it is bizarre, and strict  
25 scrutiny applies, then I think you have to look at the

1 compelling State interest, and then whether or not it's  
2 narrowly tailored, or the plan is narrowly tailored to  
3 satisfy that compelling State interest.

4 If you apply strict scrutiny, then I think that  
5 the Court has to prove, or show the compelling State  
6 interest, and it can be done that, even if the Court -- it  
7 can be done even if the Court finds that it is bizarre.

8 QUESTION: Thank you, General Ieyoub. General  
9 Days, we'll hear from you.

10 ORAL ARGUMENT OF DREW S. DAYS, III

11 ON BEHALF OF THE FEDERAL APPELLANT

12 GENERAL DAYS: Mr. Chief Justice, and may it  
13 please the Court:

14 I'd like to begin my argument by trying to  
15 address the question that Justice Souter was putting to  
16 General Ieyoub about the relationship between bizarreness  
17 and the nature of the inquiry. First of all, I agree with  
18 Justice -- General Ieyoub that the Court here used the  
19 wrong legal standard in determining whether the district  
20 was bizarre sufficient to trigger strict scrutiny under  
21 this Court's decisions in Shaw.

22 QUESTION: Well, General Days, let's suppose  
23 that the evidence discloses -- and remove it from this  
24 case for a moment. Let's just suppose the evidence  
25 discloses clearly that the predominant purpose of drawing



1 the particular district boundaries was to achieve a  
2 certain racial goal. That was the predominant purpose,  
3 regardless of appearance. Is there a claim made?

4 GENERAL DAYS: I think it, as this Court had  
5 addressed it in Shaw v. Reno, there would have to be a  
6 showing of the bizarreness of the district, otherwise what  
7 would happen is courts could justify --

8 QUESTION: Well, of course, the extreme  
9 appearance of a district boundaries might be strong  
10 evidence of just that, that the predominant or sole  
11 purpose was to draw it along racial lines. Now, if that's  
12 established by other means, is the Court not to look at  
13 that?

14 GENERAL DAYS: Justice O'Connor, we don't read  
15 Shaw v. Reno to authorize that type of inquiry. What we  
16 see Shaw v. Reno, with respect, as doing is imposing some  
17 limiting principles on preexisting precedent.

18 QUESTION: You think it's a purely visual test?

19 GENERAL DAYS: No, I don't think it's a purely  
20 visual test. I think, as General Ieyoub indicated, there  
21 has to be some inquiry on the part of the Court with  
22 respect to what has been done in the past. It's an  
23 objective and comparative analysis, not simply eyeballing.

24 QUESTION: But only looking at the shape of the  
25 district.

1                   GENERAL DAYS: Only looking at the shape of a  
2   district I think does not provide the type of information  
3   that we believe this Court was seeking.

4                   QUESTION: Well, what I'm trying to get at  
5   perhaps is the same thing I think --

6                   GENERAL DAYS: Yes.

7                   QUESTION: -- Justice O'Connor was trying to get  
8   at. Supposing that the shape itself does not prove to be  
9   really "bizarre" but a finding of fact is made that the  
10   predominant purpose of the legislature was to construct a  
11   majority minority district.

12                  GENERAL DAYS: Well, under those circumstances I  
13   think the case would move into strict scrutiny and the  
14   State would have to show a compelling interest for doing  
15   what it was doing.

16                  QUESTION: So bizarreness by -- is not an  
17   essential ingredient of a claim.

18                  GENERAL DAYS: I think it is, because prior to  
19   Shaw v. Reno, and as I indicated I don't think Shaw v.  
20   Reno changed the law, it was not possible to set out an  
21   equal protection claim unless one could show that there  
22   was some injury. That is, intent to discriminate and a  
23   discriminatory effect, and it is not our reading of Shaw  
24   v. Reno that it changed that law.

25                  QUESTION: Well, you agree that in the Shaw v.

1 Reno context it is a violation of the Constitution to draw  
2 a district with the predominant purpose of composing it on  
3 the basis of one race, or substantially one race.

4 GENERAL DAYS: With respect, Justice Kennedy, I  
5 don't think that's what Shaw v. Reno says. It says that  
6 the district is drawn in a way that can be reasonably  
7 understood as being solely for the purpose of separating  
8 the races.

9 QUESTION: But that itself, I take it, is the  
10 evil that the constitutional protection is designed to  
11 prevent.

12 GENERAL DAYS: That is correct, that Shaw v.  
13 Reno --

14 QUESTION: And if that is so, why should it be  
15 confined just to districts with an irregular shape?

16 GENERAL DAYS: Because I think this Court's  
17 prior precedent dictates that.

18 Let me give an example of how the Court's  
19 standard here --

20 QUESTION: Other than the precedent, what would  
21 be the explanation for that?

22 GENERAL DAYS: The explanation would be that  
23 Shaw v. Reno did not create a new cause of action that  
24 rejected prior causes of action.

25 We understand Shaw v. Reno to say that if it is

1 shown that the district is so bizarre that it can be  
2 understood in only a racial gerrymandering fashion, then  
3 the State is responsible for justifying that under strict  
4 scrutiny.

5 QUESTION: In your view, why should that be a  
6 constitutional violation under Shaw?

7 GENERAL DAYS: Because this Court did not change  
8 the prior law, and what the prior law said, what this  
9 Court recognized, was that race is something that is  
10 always a part of the redistricting process. There is no  
11 such thing as a neutral redistricting line, so --

12 QUESTION: But then it seems to me that the  
13 Chief Justice is right. All you're imposing is a visual  
14 test, and that makes very little sense to me, other than  
15 that as one threshold indicator of the prohibited intent.

16 GENERAL DAYS: Well, Justice Kennedy, I think  
17 what this Court recognized in Shaw v. Reno and other  
18 cases, as I was about to describe, was that race is a  
19 consideration along with other criteria in the  
20 redistricting process, so if what you're saying, Justice  
21 Kennedy, is that whenever a State uses race as one of the  
22 considerations in the redistricting process, it's  
23 automatically moved over into strict scrutiny. Then the  
24 consequences are as follows.

25 If Louisiana, for example, drew a district that



1 recognized the interest of Creoles, decided that Creoles  
2 had a different language, had a different religious view,  
3 had different political views and different economic  
4 concerns, that would not trigger any constitutional  
5 review.

6 But if the State looked at a group of blacks and  
7 decided that those blacks had commonalities of interest  
8 that coincided with race but did not turn solely on race  
9 and tried to recognize those communities of interest, the  
10 reading that's being suggested would automatically shift  
11 that determination by the State into strict scrutiny, and  
12 it is our position that for this Court to suggest that  
13 every time a State or a locality or a municipality goes  
14 through a redistricting process and uses race as one of  
15 the considerations that it moves into strict scrutiny has  
16 several problems.

17 QUESTION: General, I don't think the question  
18 has been whether they use it at all. I thought the  
19 question has been whether that has been the predominant  
20 consideration.

21 GENERAL DAYS: I understand that, Justice -- you  
22 know, whether that's the basis on which the district was  
23 drawn, and I thought that that had been conceded here,  
24 that these are not hypothetical questions you're getting.  
25 I thought that that is the case here, that the Attorney

1 General for the State acknowledges that that's how the  
2 district was drawn, with the precise purpose of getting a  
3 majority minority district.

4 GENERAL DAYS: Well, but Justice Scalia, we can  
5 talk about whether the State satisfied strict scrutiny,  
6 but the point I think that is very important to make in  
7 terms of the process is, it's not merely a matter of  
8 shifting burdens, it is that even with a completely  
9 regular traditional district with no deviations  
10 whatsoever, the standard that the district court used,  
11 namely, where race-conscious redistricting is involved it  
12 is not necessarily unconstitutional but always subject to  
13 strict scrutiny, is a very powerful and I think very  
14 disruptive and incorrect way of looking at the districting  
15 process.

16 QUESTION: Don't you think a distinction can be  
17 made between situations where race is one of a lot of  
18 factors that's considered in districting and situations in  
19 which race is the determinative factor, where you set out  
20 to create a majority minority district? Can't that  
21 distinction be made?

22 GENERAL DAYS: The distinction can be made, but  
23 I think the process is important.

24 If a State uses an approach that happens to  
25 coincide with concentrations of racial minorities, I think

1 the test that's being presented here would automatically  
2 haul before the Court the legislative officers who were  
3 involved in this process to probe their intent, to find  
4 out what they were thinking, what all of them had in mind  
5 when they passed the statute.

6 QUESTION: But General Days, isn't it the case  
7 here that it's conceded the endeavor was to create a  
8 majority minority district, and I think you answered  
9 Justice O'Connor's question by distinguishing Reno v. Shaw  
10 from simply endeavoring to create a minority majority  
11 district.

12 GENERAL DAYS: Yes.

13 QUESTION: And you cited precedent. I thought  
14 you had in mind United Jewish Organizations v. Carey, and  
15 wasn't the predominant purpose there to create a minority  
16 majority district?

17 GENERAL DAYS: Absolutely, Justice Ginsburg, and  
18 that's what I meant when I said that we did not understand  
19 Shaw v. Reno to repudiate prior precedent, and in UJO,  
20 five justices of this Court very clearly said --

21 QUESTION: UJO was a badly splintered Court.

22 GENERAL DAYS: It was badly splintered, but  
23 Mr. Chief Justice, I think one can find in that opinion a  
24 recognition that in the limited circumstance where the  
25 State was trying to respond to a denial of preclearance by

1 the United States Attorney General under the Voting Rights  
2 Act, that what New York did there was consistent with the  
3 Constitution.

4 There are other positions there that we're  
5 not -- we recognize were not shared by a majority --

6 QUESTION: In your view --

7 QUESTION: As I understand it, what you're  
8 saying is that, you're saying we should read what we --  
9 what the majority said in Shaw is a mechanism basically to  
10 make the first cut so that every time there is not an  
11 automatically litigable issue.

12 GENERAL DAYS: That's correct.

13 QUESTION: My problem is, why isn't that also  
14 going to function for reasons raised in my question as a  
15 last cut?

16 In other words, if you flunk the bizarreness  
17 test, you're necessarily going to flunk any attempt to get  
18 a section 2 justification because it won't be compact with  
19 Gingles. Conversely, if you pass the bizarreness test  
20 based on historical comparison you don't look at anything  
21 else, like packing? How do we get out of that?

22 GENERAL DAYS: Well, let me take the second part  
23 of that. I think the Court has indicated it's always  
24 available for plaintiff to bring a packing claim. That's  
25 independent of this process, and it would be like a

1 traditional lawsuit showing dilution, which was not a  
2 right that was abrogated or altered in any way insofar as  
3 we're concerned by Shaw v. Reno, so that claim would still  
4 be available.

5 QUESTION: So Shaw and Reno basically is just  
6 one entrance gate to equal protection. It's not  
7 exclusive.

8 GENERAL DAYS: That's absolutely correct.

9 Now, on the question of whether a district is  
10 found bizarre by the Court, then what happens at the point  
11 of meeting strict scrutiny and showing a compelling  
12 interest are narrow tailoring. I think that if  
13 bizarreness were found, it might be impossible to satisfy  
14 the claim that it was a strong basis in evidence for  
15 thinking that a section 2 violation might occur.

16 QUESTION: Would there be an opportunity to  
17 justify it on avoiding section 5?

18 GENERAL DAYS: I think there would be a  
19 possibility under section 5, and there would also be a  
20 possibility of justifying it under the Fourteenth  
21 Amendment, because the compelling interest that the State  
22 has put forward here --

23 QUESTION: It simply is the State's autonomous  
24 effort to -- yes.

25 GENERAL DAYS: That's correct, and therefore



1 there is obviously a connection between a bizarreness  
2 finding and a section 2 defense, but not between  
3 bizarreness and some of the other claims that are made.

4 QUESTION: General Days, speaking of section 5,  
5 in preclearing does the Department of Justice assume that  
6 unless the legislature of the State creates a majority  
7 minority district where it is possible to do it, that  
8 otherwise there -- you would assume discrimination on the  
9 part of the State?

10 GENERAL DAYS: No, that's not the position.  
11 It's a more totality of the circumstances analysis, and  
12 it's not an automatic determination as to how that would  
13 be resolved.

14 QUESTION: Well, I guess we'll get into that  
15 more in the next case, but let me ask you one other thing.

16 GENERAL DAYS: Yes.

17 QUESTION: The plaintiffs in this case did not  
18 live in District 4, is that right?

19 GENERAL DAYS: That's correct.

20 QUESTION: And they did not -- they lived in  
21 some district, was it contiguous to it?

22 GENERAL DAYS: I believe it was a contiguous  
23 district, yes.

24 QUESTION: And do you assume that they have  
25 standing to raise this claim?

1 GENERAL DAYS: Well, Justice O'Connor, as you  
2 are aware, we did not raise the standing issue, but I  
3 think that it is a problematic concern in this case. If  
4 Shaw v. Reno in fact entitled people because of certain  
5 stigmatic harm or the possibility that they would not be  
6 adequately represented to bring a Shaw v. Reno claim,  
7 those who are either in the district or in adjoining  
8 districts who might be affected by the district I think  
9 probably have the type of standing that the Court had in  
10 mind in Shaw v. Reno.

11 The problem is how far to take that, and whether  
12 it can go to the extent of the entire State, anyone, any  
13 place in the State can bring this type of lawsuit with  
14 respect to one district.

15 QUESTION: Well, if you're included in because  
16 you're black, I presume you're excluded out because you're  
17 white.

18 GENERAL DAYS: Yes.

19 QUESTION: Certainly a person who's contiguous  
20 enough that he might have been included in but for the  
21 fact that they wanted to exclude any more white votes, I  
22 assume he'd have some complaint, but he might have to show  
23 that, I guess.

24 GENERAL DAYS: Yes. The only thing I'm trying  
25 to point out is that prior to the Shaw v. Reno -- may I

1 complete my answer --

2 QUESTION: Yes.

3 GENERAL DAYS: -- Mr. Chief Justice?

4 Prior to Shaw v. Reno standing was consistent  
5 with a number of decisions of this Court like the Wright  
6 case, where there had to be something shown. Injury, in  
7 fact, traceability and redressability.

8 Under Shaw v. Reno there appears to be some  
9 variation in those standards.

10 Thank you very much.

11 QUESTION: Thank you, General Days.

12 Mr. Warren, we'll hear from you.

13 ORAL ARGUMENT OF EDWARD W. WARREN

14 ON BEHALF OF THE APPELLEES

15 MR. WARREN: Chief Justice Rehnquist, may it  
16 please the Court:

17 Before discussing this morning how this case  
18 fits within the Court's traditional equal protection  
19 framework, I think it's probably important to set the  
20 record straight.

21 First is the district court held Act 1, which is  
22 challenged here, is a cosmetic makeover of Act 42, which  
23 the State of Louisiana concedes was in violation of the  
24 Fourteenth Amendment.

25 Specifically, District 4 in Act 1 joins together

27

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1 four widely separated cities.

2 QUESTION: But Mr. Warren, certainly it is not a  
3 cosmetic makeover in the sense that is -- it follows  
4 closely the lines of the earlier district. It's quite  
5 different.

6 MR. WARREN: Well, Chief Justice Rehnquist, I  
7 think that's a misperception in this sense. There are  
8 four major metropolitan areas.

9 QUESTION: Well, I mean, geographically it's  
10 quite different.

11 MR. WARREN: It looks different. If you're  
12 simply --

13 QUESTION: Well, it sure does.

14 MR. WARREN: -- talking about visual  
15 appearances, it looks different, but let me stress that  
16 the key to this District 4 is four metropolitan areas  
17 which heretofore in Louisiana history had always been in  
18 three or four separate congressional districts. The key  
19 to creating this district was joining them together in one  
20 district, combining them in one district.

21 Now, when they were combined in one district, in  
22 order to accomplish that, you end up having to split  
23 parishes, and this district splits 12 of its 15 parishes.  
24 No previous district in the history of Louisiana ever  
25 split more than four parishes. Indeed, no entire plan in

1 the history of Louisiana ever split more than seven.

2 QUESTION: Mr. Parks, where do the plaintiffs  
3 reside, in what district?

4 QUESTION: He's Mr. Warren.

5 QUESTION: Excuse me, Mr. Warren.

6 MR. WARREN: Justice --

7 QUESTION: Where do the plaintiffs reside?

8 MR. WARREN: Justice O'Connor, they reside in  
9 Grambling and Ruston, Louisiana. Those two communities  
10 were in the previous District 4, the Zorro district that  
11 Chief Justice Rehnquist was referring to.

12 When the lines were redrawn, they were therefore  
13 separated out from the new District 4.

14 QUESTION: They were in the 1992 --

15 MR. WARREN: Yes.

16 QUESTION: -- district.

17 MR. WARREN: Yes, Your Honor.

18 QUESTION: Do they contend --

19 QUESTION: Are they contiguous now?

20 MR. WARREN: Yes, they are.

21 QUESTION: Are they in a district that is  
22 contiguous now to 4?

23 MR. WARREN: Yes. They were in District 5, and  
24 it is contiguous to District 4.

25 QUESTION: Did they contend that the Zorro



1 district was correctly designed?

2 MR. WARREN: No, Chief -- I mean, no Justice  
3 Kennedy. Their position was and is that they have a right  
4 not to be classified by race for purposes of districting.  
5 Their claim is really closely analogous to the kind of  
6 claim that is made with respect to jury selection.

7 QUESTION: Well, assuming that their contention,  
8 and I think that would be their contention, is that both  
9 the Zorro district and this district are improper, how  
10 have they been mistreated in this case?

11 MR. WARREN: Well, they've been mistreated, and  
12 this is what I was trying to address, Justice Kennedy,  
13 they have been mistreated by the State of Louisiana by  
14 being classified by race for purposes of districting. It  
15 was their race, and it was the race of Louisiana citizens,  
16 which determined the lines which were drawn, and I think  
17 we've proved that.

18 QUESTION: But Mr. Warren, they're all of  
19 different races. Aren't these plaintiffs of different  
20 races?

21 MR. WARREN: Yes.

22 QUESTION: That's a little hard to -- I could  
23 see if you had white plaintiffs who said we were put out  
24 of this district because we were white, but you have a  
25 black plaintiff and a white plaintiff and an Asian

1 American plaintiff, so every race is equally discriminated  
2 against, treated the same. I don't see how you get racial  
3 discrimination by an exclusion that equally affects a  
4 black and a white.

5 MR. WARREN: Justice Ginsburg, our claim is that  
6 our plaintiffs are entitled to be treated without regard  
7 to race. It is true --

8 QUESTION: And these people are left out without  
9 regard to their race, or put in another district.

10 MR. WARREN: No, but citizens in the State are  
11 being classified by -- on racial grounds in order to draw  
12 these district lines, as the district court so found in  
13 this case.

14 QUESTION: Then you really are arguing a kind of  
15 standing that I up until now thought existed only in the  
16 Establishment Clause area. Is anybody -- anybody in the  
17 State can object to this kind of districting?

18 MR. WARREN: Justice Ginsburg, I don't think  
19 that's true. We are making a claim which is closely  
20 analogous to the standing found in the jury selection  
21 cases.

22 QUESTION: Yes, but in the jury cases the people  
23 who are objecting are rather narrowly identified. It is a  
24 party who can challenge, and it is a party who can  
25 challenge based upon the interests of excluded jurors, not

1 on the basis of the whole world, or the whole State  
2 population.

3 MR. WARREN: But still and all, it is based upon  
4 the right of every citizen not to be put on a particular  
5 petit jury based on his or her race.

6 QUESTION: Well, yes, but if I happen to be  
7 going about my business on the street below the courthouse  
8 and I find that, or I have reason to believe that a  
9 discriminatory jury selection is going on, I can't walk in  
10 and be given standing to object to it, and yet the analogy  
11 is that if I am at the furthest corner of Louisiana I can  
12 do precisely that with respect to this district.

13 MR. WARREN: Well, first let me say that it --  
14 the jury pool from which juries are selected is very much  
15 like the electorate from which districts are being drawn,  
16 but let me go further to say our plaintiffs were, as I  
17 responded to Justice O'Connor, in District 4 of Act 42,  
18 which was then invalidated. Now they are -- they --  
19 whether black or white, they are outside of the new  
20 District 4, that is true, but we --

21 QUESTION: But they weren't put out because of  
22 their race, since they were --

23 MR. WARREN: Well --

24 QUESTION: -- all different race.

25 MR. WARREN: -- they weren't individually,

1 perhaps, but the district lines were drawn based upon race  
2 so that individuals who were black or white or lived in  
3 those communities where the lines were being drawn on race  
4 were being classified by race.

5 QUESTION: But they haven't personally been  
6 denied equal protection treatment, have them?

7 MR. WARREN: I think that they have --

8 QUESTION: Some kind of generalized grievance?

9 MR. WARREN: -- a personal right not to be  
10 classified by race. We analogize it in our brief to  
11 Brown. I mean, the question in Brown was not whether or  
12 not there was a different education. It was stipulated,  
13 albeit probably not truly, the fact that the education was  
14 equal. The question was being classified by race for  
15 purposes of education. This is classification by the  
16 State for -- by race for purposes of voting.

17 QUESTION: Except for the Zorro, their brief  
18 residence in the evanescent Zorro district, how are they  
19 any different from any citizen in Louisiana, following  
20 Justice Souter's question? It seems to me you're arguing  
21 for a generalized standing, which I think would take us  
22 quite beyond our existing case law.

23 MR. WARREN: First of all, I think we are  
24 arguing that persons who are in districts adjacent to this  
25 district are being affected, because the district -- let

1 me say, I don't want to engage in the very racial  
2 stereotypes which are the problem of this case in order to  
3 defend standing. I don't want to say that my black  
4 plaintiff is being harmed because he's being put in a  
5 vastly white majority district. That is feeding the very  
6 stereotype which is the vice in this case.

7 QUESTION: Well, but you have to show some  
8 particularized injury, and I'm simply asking you how your  
9 plaintiffs are different than plaintiffs in any other part  
10 of the State, other than the fact they're contiguous, but  
11 they would have always been contiguous, other than the  
12 Zorro district, which they, too, challenged.

13 MR. WARREN: Well, I think again, unless I  
14 engage -- it's easy enough for me to make the allegation  
15 that my plaintiff Ed Adams, who is black, is being harmed  
16 by being put in a district that is 85 percent white. I  
17 could do that. Sure I could make that allegation, but if  
18 I made that allegation, I would be predicating that  
19 allegation on the very vice at issue in this case, and  
20 that is racial stereotyping.

21 QUESTION: You wouldn't have to do that. You  
22 would satisfy me if you could show some evidence that but  
23 for racial districting one of your plaintiffs would have  
24 been in a different district. I mean, that seems to me a  
25 concrete harm. A person would have been in one district.



1 He is put in another district solely by reason of racial  
2 districting, even though the racial districting might not  
3 have had anything to do with his race, but you haven't  
4 even demonstrated that, as far as I can see.

5 MR. WARREN: I think we have demonstrated that,  
6 because -- because --

7 QUESTION: But for this racial districting any  
8 one of your plaintiffs would have been in a different  
9 district?

10 MR. WARREN: Well, but for this entire process  
11 they would have been in district 4 and Act 42. They were  
12 taken out of that when the lines were redrawn, but because  
13 those lines were redrawn on a racial basis they were put  
14 out of a previous district.

15 QUESTION: They had to be redrawn.

16 MR. WARREN: Of course they had to be redrawn.

17 QUESTION: They had to be redrawn because the  
18 prior system was unconstitutional. It seems to me you  
19 have to make some showing that the redrawing would have  
20 included them in a different district but for this racial  
21 factor.

22 MR. WARREN: I --

23 QUESTION: And I don't know that you've made any  
24 such showing.

25 MR. WARREN: Well, I think I've made the

1 following showings. Let me try to summarize, because I  
2 don't want to -- Justice Ginsburg --

3 QUESTION: Mr. Warren, you did start out with  
4 plaintiffs who were voters in the district that you  
5 challenged.

6 MR. WARREN: Indeed.

7 QUESTION: And then the State too it back and  
8 said, we realize this plan has infirmities.

9 MR. WARREN: Right.

10 QUESTION: We're coming up with a new -- and  
11 that left your people out. There's no way to connect them  
12 back to the plan that is moot. It's academic. Compare  
13 them to where they were before there was any 42.

14 MR. WARREN: But Your Honor, you're missing one  
15 major point that I keep trying to stress. We challenged  
16 Act 1. We did not challenge District 4. We challenged  
17 Act 1. We challenged the entire State law which  
18 districted by race State-wide.

19 QUESTION: So you do say that anybody in the  
20 State has a claim.

21 MR. WARREN: I do say anybody in the State has a  
22 claim.

23 QUESTION: Okay.

24 MR. WARREN: I'm not trying to duck that at all.

25 QUESTION: Well, you tried to avoid it once.

1 Can I --

2 MR. WARREN: Well, I apologize. I didn't mean  
3 to avoid that, because we do say that.

4 QUESTION: Can I ask you a hypothetical question  
5 that's been running through my mind?

6 MR. WARREN: Yes, Justice --

7 QUESTION: The heart of the case you say is  
8 driven by race.

9 MR. WARREN: Yes.

10 QUESTION: Supposing the State legislature had  
11 two alternative plans to consider, both of which had  
12 completely compact districts, had followed State county  
13 lines, or parish lines, were equal in population, they  
14 were equal in all respects in terms of neutral factors  
15 except one.

16 In one plan there are two majority minority  
17 districts, in the other plan there are no majority  
18 minority districts, and the history of the case, the  
19 legislative history, is perfectly clear that everybody in  
20 the legislature unanimously voted for the two minority  
21 minority districts, minority majority, simply because they  
22 thought it would be a good thing for the State of  
23 Louisiana to have two black Congresspersons.

24 Would that be unconstitutional?

25 MR. WARREN: First, that's not our case, but --

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QUESTION: I think it is your case.

MR. WARREN: Well, I mean, I think it's not our case because I think these lines don't meet any of the criteria you're talking about, but let me continue and not argue --

QUESTION: I'm assuming -- I'm trying to follow up on Justice O'Connor's question as, how important is the shape of the district, and I'm assuming there's no shape problem at all in my hypothetical --

MR. WARREN: Oh, in your hypothetical, if we assume --

QUESTION: -- and no doubt at all about the controlling factor in the decision between these two plaintiffs.

MR. WARREN: We're assuming away shape. We're assuming away traditional districting principles. That is, we don't have the split parishes and split cities and all the things that I was referring to previously.

If we have only the concession that race was the predominant factor, it is still subject to strict scrutiny.

QUESTION: But is it unconstitutional in my example?

MR. WARREN: It is unconstitutional unless the

1 State can come forward with a compelling interest.

2 QUESTION: Their only reason, in my example --

3 MR. WARREN: They have no --

4 QUESTION: Their only reason is they think they  
5 have a history they're not proud of, and they would like  
6 to have two black Representatives in Congress.

7 MR. WARREN: The history won't do it.

8 QUESTION: Well, of course --

9 QUESTION: Now, supposing the other choice is,  
10 the majority in fact voted the other way and said, we'll  
11 vote for the other plan because we don't want two black  
12 Representatives. Would that be unconstitutional?

13 MR. WARREN: That would be equally questionable.

14 QUESTION: So they couldn't choose either one.

15 (Laughter.)

16 MR. WARREN: I don't think we would -- in a real  
17 world I don't think we get stymied in the way in which  
18 you're talking. Race cannot be the predominant factor  
19 under this Court's equal protection analysis.

20 QUESTION: Mr. Warren, I assume when --

21 MR. WARREN: Yes.

22 QUESTION: -- you have regular districts and  
23 it's one of the elements of regular districts, ordinarily  
24 race is not the predominant factor. There are a lot of  
25 other factors you're taking into account. Geographic



1 proximity, same schools, community of geographic  
2 interests, and so forth. That's what makes regular  
3 districts ordinarily less challengeable, but if you find  
4 one where the only reason they picked this particular  
5 regular district is race, then you have a different  
6 situation, but an unusual one, I suppose.

7 MR. WARREN: But I think an extremely unusual  
8 one. I mean, this is a hypothetical that is really  
9 impossible to be true in reality, because I think --

10 QUESTION: You only assert it's bad if race is  
11 the predominant consideration.

12 MR. WARREN: Yes. I think this is --

13 QUESTION: Do you acknowledge that race can be  
14 one of the considerations in a whole bunch?

15 MR. WARREN: Sure.

16 QUESTION: Or not at all.

17 MR. WARREN: Sure. Race -- I agree with what -  
18 -

19 QUESTION: Supposing it's the predominant  
20 consideration for only those legislators who are frank in  
21 their voting in the legislature. They said candidly what  
22 they were doing and others said nothing. When does it  
23 become predominant? Does it have to be a majority that  
24 say so?

25 MR. WARREN: This Court has had for 20 years a

1 framework for evaluating these cases, these questions of  
2 mixed motive. That framework applies here just as it does  
3 in a whole variety of different settings.

4 QUESTION: But it requires a careful examination  
5 of legislative history to find out what the real motive  
6 was, is that right?

7 MR. WARREN: It requires a careful examination  
8 of facts, and those facts can include consideration of the  
9 real purpose of the legislature.

10 Let me say, though, it's a lot easier than that  
11 is suggested, because what you could look at, and Shaw was  
12 an example of one type of evidence, the bizarre shape of  
13 the district. Another is exactly what I was trying to  
14 start with, which was -- which is, did you follow  
15 traditional district principles? Did you follow  
16 Louisiana's own history? The answer is no.

17 QUESTION: I suppose for many -- I mean, the  
18 basic thing that I have a lot of trouble is, I don't  
19 understand this word predominant. Are you saying that  
20 people can draw district boundaries in order to put into  
21 one district large numbers of Catholics, Jews, Germans,  
22 Hispanics, Italians, all kinds of things, but not blacks,  
23 and if there is some distinction there, what is the  
24 distinction, particularly in light of the history in this  
25 country, and how do you in fact draw a line where you've

1 gone too far?

2 I mean, those are the problems that are in my  
3 mind, and this word predominant seems like a keystone, but  
4 what does it mean? I can understand what it might mean if  
5 you have a very -- maybe it's something to do with shape.

6 I mean, 'what is your view of the standard? Are  
7 you saying that under your principle all of the districts  
8 in the United States, or many of them, or most of them are  
9 suddenly going to be redistricted? What sort of workable  
10 principles are there, and what are you aiming towards?  
11 That's what I -- the questions in my mind.

12 MR. WARREN: I understand exactly, and Justice  
13 Breyer, the starting point is this Court's traditional  
14 analysis under Vandermeer -- I mean, under Washington v.  
15 Davis and Arlington Heights.

16 Now, the question is always going to be factual.  
17 The question that you're asking, though, is always was the  
18 factor which drove this district a suspect classification?  
19 Was it race, in this case.

20 If the answer to that was yes --

21 QUESTION: Well, that would be true in many,  
22 many, many districts in the United States. Since the time  
23 of 1789 people did look to not only racial but  
24 characteristics of nationality, religion, class,  
25 occupation, a host of different things in drawing

1 districts, and I imagine that in any case whether you were  
2 an Irish American, an African American, or whatever the  
3 legislature thought might produce a vote for their side,  
4 that if we go back and look at those little jogs, and so  
5 forth, in the boundary, there is a little jog there or  
6 here where that's what was in the legislator's mind.

7 Now how, in fact, is a court going to go into  
8 this and say when that little jog is or is not --

9 MR. WARREN: First -- first of all --

10 QUESTION: -- appropriate or not appropriate?

11 MR. WARREN: First of all, Justice Breyer, this  
12 Court said in Shaw, and I think Justice O'Connor's opinion  
13 on this draws about the right line, and that is that race  
14 can help us to define the boundaries of a community. I  
15 mean, it's not irrelevant. It is one of these things that  
16 is going to be before the legislature, and we know it is  
17 going to be before the legislature.

18 The problem is when race takes over and the  
19 district is being drawn based upon racial stereotypes, and  
20 if I could quote from what our opponents said in their  
21 brief, because they make this point, they say that blacks  
22 and presumably whites also vote differently and, as they  
23 say, are different politically cohesive groups, and they  
24 argue that without race dominant districting, those groups  
25 are going to be put at a competitive disadvantage, but

1 what that is doing, it is making assumptions that all  
2 blacks are going to vote the same way, all whites are  
3 going to vote the same way, that blacks can't represent  
4 whites and whites can't represent blacks. What it is  
5 doing is erasing us as individuals. We should --

6 QUESTION: But Mr. Warren, does it make that  
7 assumption really that all will vote the same way, or that  
8 a sufficient number of them will vote the same way to make  
9 a political judgment that makes sense, such as all  
10 Catholics tend to vote in a certain way in the City of  
11 Chicago or all Polish Americans tend to vote in a  
12 certain -- are you saying they are all going to vote the  
13 same way? I don't think anybody thinks --

14 MR. WARREN: No, I don't think you're saying  
15 all --

16 QUESTION: You're just saying there's a  
17 political reality at work here.

18 MR. WARREN: But I think what you're saying,  
19 you're making again, it is just as --

20 QUESTION: It's invidious to assume that all  
21 blacks --

22 MR. WARREN: Yes.

23 QUESTION: Is it less invidious to assume that  
24 all Polish Americans will vote the same way?

25 MR. WARREN: If being a Polish American is a



1 suspect classification, it's the same --

2 QUESTION: Well, it's only if it's a suspect  
3 classification that you don't get the benefit of being  
4 able to have your group interest treated as a group  
5 interest.

6 MR. WARREN: I think it's -- I think you're  
7 making an assumption of it being a benefit, and what I'm  
8 saying is that it is a stereotype --

9 QUESTION: Well, certainly, don't you think more  
10 black legislators would have voted for this plan than  
11 against it, and is it invidious to make that political --

12

13 MR. WARREN: I'm not at all sure, and I think  
14 that black legislators, who knows, but I think that --  
15 those are the presumptions that we cannot rest on.

16 And let me say again, you come back to the jury  
17 selection cases I find extremely helpful in this regard,  
18 because what is the prosecutor doing but making  
19 assumptions about how blacks or white or men or women are  
20 going to vote in a particular case, and it is that  
21 stereotypical assumption, even if it has some factual  
22 basis --

23 QUESTION: Mr. Warren, what  
24 do you do with --

25 MR. WARREN: -- that lies at the heart of the  
problem.

1 QUESTION: It was a badly splintered opinion,  
2 but there were two, if you will, stereotypes involved in  
3 the UJO case, and both of them, both groups accepted the  
4 proposition that if we can have our district not every  
5 Hasidic Jew is going to vote the same way but a lot of  
6 them are, and the same assumption was made -- what is the  
7 difference between Louisiana and New York, or do we just  
8 say, UJO is a hopeless precedent, forget it?

9 MR. WARREN: Well, I think this Court in Shaw  
10 did deal with UJO and probably dealt with it about right.  
11 I mean, UJO was filed as a vote dilution case. It was not  
12 filed and was not pursued as this case is being pursued.  
13 This case is predicated on the assumption that classifying  
14 voters by race is precluded by the Fourteenth Amendment.  
15 Now, how you prove that is a different question, and it's  
16 difficult, and there's going to be difficult problems of  
17 proof in some cases.

18 QUESTION: Supposing -- supposing, Mr. Warren,  
19 that the evidence before the -- shows that the Louisiana  
20 legislature simply paired off this district because they  
21 wanted about a 70 percent Democratic majority in it. Can  
22 you come into court and say well, the statistics from past  
23 voting in Louisiana show that 90 percent of blacks vote  
24 Democratic, therefore, although ostensibly it was  
25 Democratic it was really racially motivated?

1 MR. WARREN: It would be a very hard proof.  
2 That's a very different case for two reasons. Number 1,  
3 when you join a political party you're making a choice.  
4 By contrast, when the State makes assumptions about you  
5 as -- because of the color of your skin, the State is  
6 engaged in prohibited racial stereotyping.

7 Number 2, this Court's precedents make a  
8 distinction between race and political considerations.  
9 Justice Brennan said it very eloquently in the UJO case.  
10 This Court recognized that again in Shaw. This Court has  
11 a line that it has drawn between political gerrymandering  
12 and racial stereotyping, which is what is at issue in this  
13 case.

14 QUESTION: Mr. Warren, may I ask you just to  
15 clarify something about your position? When you were  
16 addressing Justice Breyer's question, one of the things he  
17 said that was bothering him was how we deal with the  
18 concept of predominant purpose.

19 MR. WARREN: Yes.

20 QUESTION: As I understand it, your position is  
21 not that it must be the predominant purpose. If it is a  
22 motivating factor at all, that is sufficient to trigger  
23 the scrutiny on your position, isn't that correct?

24 MR. WARREN: We suggest that what this Court  
25 said in Arlington was that it must be a substantial

1 motivating factor to create a prima facie case.

2 QUESTION: But not predominant.

3 MR. WARREN: But substantial motivating and  
4 predominant first of all I think are simply semantic --

5 QUESTION: Academic distinctions.

6 MR. WARREN: -- distinctions, but let me say  
7 secondly, under Arlington Heights, substantial motivating  
8 factor is what triggers -- what creates a prima facie  
9 case. The State always has an opportunity to come back  
10 and say no, it's not the --

11 QUESTION: Okay.

12 MR. WARREN: -- predominant factor.

13 QUESTION: Did the judge then in this particular  
14 case go too far? I take it what you're describing is the  
15 criterion that the judge in the Johnson case used. Didn't  
16 the judge in this case take a more -- adopt a lower  
17 threshold for strict scrutiny than yours?

18 MR. WARREN: I really don't think that's the  
19 case. This Court relied from the very outset on this  
20 Court -- I mean, the district court relied from the very  
21 outset on this Court's decisions in Arlington and Wright  
22 v. Rockefeller, and they conducted three long hearings of  
23 2 days each, and had it simply been a matter of, was race  
24 considered at all, well, it would have been an easy case.

25 What they found on the record was that race was

1 the fundamental factor, and I'm quoting from the Court's  
2 opinion, fundamental factor driving Act 1 was race.

3 QUESTION: Mr. Warren, I'd like to be clear on  
4 whether you make a distinction between race and other  
5 suspect categories. Would you make any different argument  
6 if we were talking about Polish Americans, about Italian  
7 Americans, about Irish Americans? Suppose the dominant or  
8 a substantial purpose was to have a district where the  
9 dominant national origin group would be Irish.

10 MR. WARREN: Justice Ginsburg, we address that  
11 in our brief, and we said that if a suspect classification  
12 becomes the touchstone, it's invalid. We used the Kiryas  
13 Joel case as an example of that and several justices on  
14 this Court actually cited Shaw in connection with their  
15 opinions in that case. The question is, and it was in  
16 that case, the defining feature was the Hasidic sect, the  
17 Satmar sect, and that, if it becomes the touchstone, is, I  
18 think, the basis for invalidation.

19 QUESTION: What if, and this raises both Kiryas  
20 Joel and the UJO case, what if a racial, ethnic, or  
21 religious group has certain social characteristics that  
22 render it cohesive? I always viewed UJO as not lumping  
23 these people together because they were Hasidic Jews but  
24 because they had a lifestyle that rendered them a natural  
25 political community. You would have no objection to --



1 MR. WARREN: Not at all. Not at all.

2 QUESTION: -- to a city which has an area that  
3 is a social unit, all of which is black, and perhaps the  
4 blackness has something to do with the social unit of it,  
5 that being lumped together, would you?

6 MR. WARREN: No, not at all. I mean, I --

7 QUESTION: Well then, why isn't the fact that  
8 they typically vote together sufficient?

9 MR. WARREN: Because that is the racial  
10 stereotyping. The question --

11 QUESTION: You mean, it's a stereotype if it's a  
12 social affinity --

13 MR. WARREN: No, no, no.

14 QUESTION: I mean, a stereotype if it's a  
15 political affinity but not a stereotype if it's a social  
16 affinity?

17 MR. WARREN: The question --

18 QUESTION: And why then doesn't -- wouldn't  
19 proof that they in fact have a social affinity overcome  
20 the presumption?

21 MR. WARREN: These are always going to be  
22 difficult factual questions, but it's a different issue.

23 What is the boundary of the community? In  
24 Justice Scalia's question, the social aspects of the  
25 community are helping to define the community.

1 QUESTION: We can take judicial notice of that.

2 MR. WARREN: Right.

3 QUESTION: But we can't take similar judicial  
4 notice whenever the characteristic is a racial  
5 characteristic, is that it?

6 MR. WARREN: Race is different, and it's not  
7 just race, it is suspect classifications.

8 QUESTION: So normally race is different because  
9 it's normally totally irrelevant to the decision. But  
10 see, in this case, apparently Louisiana made a decision  
11 that it was not irrelevant, and therefore the normal  
12 reason for strict scrutiny does not apply.

13 MR. WARREN: Well, race comes into play in lots  
14 of decisions that are made in society which are subject to  
15 the Arlington Heights analysis. This is not the only  
16 place where the decisionmaker is going to be aware of  
17 race. The question is factual. The question is difficult  
18 sometimes. A lot of times it's easy.

19 Here it's easy. Here it's easy because the  
20 district court held three separate hearings, it sorted  
21 through all the facts, it heard all the evidence, it's  
22 evident, self-evident, I think, to anyone who examines the  
23 record that this district was drawn based on race, it  
24 split parishes, cities, it was designed for this purpose.

25 There can be hard cases, sure. There's going to

1 be hard cases under any Arlington Heights analysis, but  
2 this Court has concluded -- this Court did conclude in  
3 Gingles, when we're talking about difficult factual  
4 questions like this, that the district court's judgment  
5 should be respected unless the decision is clearly  
6 erroneous, unless the findings are clearly erroneous, and  
7 here they plainly are not clearly erroneous.

8 QUESTION: Mr. Warren, when you speak about  
9 difficult decisions, one of the many problems in this case  
10 is when you deal with Shaw v. Reno, when you've got one  
11 criterion, bizarreness, and that's not hard to apply, but  
12 to determine predominant, substantial, and it can spread  
13 to other groups, national origin groups that have been  
14 classified as suspect, it seems you're getting -- you're  
15 opening the door to the kinds of challenges that the  
16 Federal courts were into of necessity in the school  
17 segregation cases and to a limited extent in the  
18 redistricting cases. It just -- well, how can you contain  
19 this thing once you open the door in this way?

20 MR. WARREN: Your Honor, I don't think it's  
21 difficult to contain. I think most districts Nationwide,  
22 the majority of any race, are there because that's where  
23 the communities are and we don't have this problem, but  
24 let me tell you the problem, and that is that the Justice  
25 Department has a program which is maximizing the number of

1 majority minority districts Nationwide and forcing States  
2 to engage in the kind of racial stereotyping that is at  
3 issue here. That is the problem. If the Justice  
4 Department were to follow Beer and back away from a  
5 maximization approach, we would have far fewer challenges,  
6 and most of these problems could be resolved by district  
7 courts if and when challenges are made. These challenges  
8 are being made --

9 CHIEF JUSTICE REHNQUIST: Thank you -- your time  
10 has expired, Mr. Warren.

11 MR. WARREN: Thank you.

12 CHIEF JUSTICE REHNQUIST: Thank you.

13 The case is submitted.

14 (Whereupon, at 11:17 a.m., the case in the  
15 above-entitled matter was submitted.)  
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## CERTIFICATION

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

UNITED STATES, Appellant v. RAY HAYS, ET AL.; and  
LOUISIANA, ET AL., Appellants v. RAY HAYS, ET AL.

CASE NO.: 94-558, 94-627

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

BY Don Mani Frederico

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