

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ZELL MILLER, ET AL., Appellants v. DAVIDA
JOHNSON, ET AL., LUCIOUS ABRAMS, JR. ET AL.,
Appellants v. DAVIDA JOHNSON, ET AL., and UNITED
STATES, Appellant v. DAVIDA JOHNSON, ET AL.

CASE NO: No. 94-631, 94-797, 94-929

PLACE: Washington, D.C.

DATE: Wednesday, April 19, 1995

PAGES: 1-59

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

ZELL MILLER, ET AL., :

Appellants :

v. : No. 94-631

DAVIDA JOHNSON, ET AL., :

LUCIOUS ABRAMS, JR., ET AL., :

Appellants :

v. : No. 94-797

DAVIDA JOHNSON, ET AL., and :

UNITED STATES, :

Appellant :

v. : No. 94-929

DAVIDA JOHNSON, ET AL. :

- - - - -X

Washington, D.C.

Wednesday, April 19, 1995

The above-entitled matters came on for oral
argument before the Supreme Court of the United States at
11:18 a.m.

APPEARANCES:

DAVID F. WALBERT, ESQ., Atlanta, Georgia; on behalf of
the State Appellants.

1 APPEARANCES: (Continued)

2 DREW S. DAYS, III, ESQ., the Solicitor General, Department
3 of Justice, Washington, D.C.; on behalf of the
4 Federal Appellant.

5 A. LEE PARKS, ESQ., Atlanta, Georgia; on behalf of the
6 Appellees.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF DAVID F. WALBERT, ESQ. On behalf of the State Appellants	4
ORAL ARGUMENT OF DREW S. DAYS, III, ESQ. On behalf of the Federal Appellant	25
ORAL ARGUMENT OF A. LEE PARKS, ESQ. On behalf of the Appellees	34

1 PROCEEDINGS

2 (11:18 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-631, Miller v. Johnson, consolidated
5 with United States v. Johnson.

6 Spectators are admonished, do not talk until you
7 get outside the courtroom. The Court remains in session.

8 Mr. Walbert, you may proceed.

9 ORAL ARGUMENT OF DAVID F. WALBERT

10 ON BEHALF OF THE STATE APPELLANTS

11 MR. WALBERT: Mr. Chief Justice and may it
12 please the Court:

13 We are in this courtroom today almost exactly
14 one half century after the decision by this Court in
15 Colgrove v. Green. I think that case is particularly
16 important to us today just to remember what Justice
17 Frankfurter said there as he warned against a foray into
18 the political thicket.

19 QUESTION: Wasn't that overruled later?

20 MR. WALBERT: That was -- for the last 30 years,
21 Your Honor, this Court has navigated that political
22 thicket through Baker v. Carr and Reynolds, but I would
23 suggest to this Court that we're at a fork in the road
24 where instead of going through a manageable political
25 thicket where one person, one vote decisions are made

1 based on mathematics, we are standing at the edge of a
2 precipice where if Shaw is applied like the district court
3 did here, the standards of open-ended review of why the
4 legislature did this, why they did that, the goodness or
5 the badness and the reasonableness of the particular
6 reapportionment decisions, we would respectfully submit on
7 behalf of the State of Georgia that we have a whole new
8 kind and character of political thicket, not like what
9 this Court has ever gone through before.

10 QUESTION: Is there an issue about the "why"
11 here? I thought in this case --

12 MR. WALBERT: Absolutely, Your Honor.

13 QUESTION: -- as in the other one, there's no
14 doubt that the object was to create a majority minority
15 district.

16 MR. WALBERT: The difference --

17 QUESTION: Is that contested?

18 MR. WALBERT: That there was a purpose and a
19 goal of drawing a majority minority --

20 QUESTION: If you'd like to say purpose or goal
21 instead of object, that's okay with me, but that was
22 indeed the purpose or goal, to create a majority
23 minority --

24 MR. WALBERT: The only difference that we have
25 on this, Your Honor, is whether that was the predominant

1 objective. There was indeed a purpose to draw that goal,
2 but we have -- I think I could not state the argument
3 better than Justice Breyer asked the question. It is
4 meaningless in these cases to have a district court try
5 and determine what the predominant, substantial,
6 significant type of decision is on how the lines are
7 drawn. There was a purpose always in this case. There
8 was a consensus politically before the Department of
9 Justice ever got involved in the State of Georgia to try
10 and draw a majority minority district in East Central
11 Georgia, no question about that fact.

12 QUESTION: There certainly wasn't a consensus to
13 draw a third one.

14 MR. WALBERT: That is correct, Your Honor.

15 QUESTION: Yes.

16 MR. WALBERT: As a matter of fact, that is
17 correct.

18 In terms of the second one, the Eleventh
19 District that is at issue here, the one that the findings
20 of the district court are made upon and the one that the
21 judgment of the district court in this case are involved
22 with, the Eleventh, however, in that location generally,
23 East Central Georgia, there was indeed a consensus
24 politically to have a district of this general location.

25 QUESTION: Well, Mr. Walbert, following Brown v.

1 Board of Education there were a number of challenges to
2 school districting in the north where there had never been
3 segregation by law, and those challenges were based on the
4 idea that the school district, the school boards drew
5 racially sensitive district lines tending to keep blacks
6 in one district, and those kind of inquiries were exactly
7 the same sort of inquiry here, what was the predominant
8 purpose of the school board, and apparently those matters
9 were dealt with without any great difficulty.

10 MR. WALBERT: I would have to beg to differ with
11 Your Honor's characterization of the relative complexity
12 of the two kinds of cases. This Court and the evidence in
13 this case, this Court has said any number of times, and
14 the evidence is undisputed if on one point in this case
15 that reapportionment is the most complex, politically
16 complex matter that ever comes before a General Assembly.

17 QUESTION: Well, I think if you asked a school
18 board what was the most complex matter came before it that
19 the school board would probably say redistricting --

20 MR. WALBERT: Well --

21 QUESTION: Drawing attendance zones.

22 MR. WALBERT: Your Honor, I think that the
23 relative complexity of that and the hundreds of issues of
24 the 236 members of the General Assembly of the State of
25 Georgia, the two would pale by comparison. I think that

1 is the evidence in this case. I don't --

2 QUESTION: So you say that although the motive
3 inquiry was handled apparently without any undue
4 difficulty in the claims of de facto segregation, the
5 similar motive inquiry can't be handled in a case like
6 this?

7 MR. WALBERT: It is unquestionably at least a
8 whole order of magnitude much more sophisticated and much
9 more complicated on the first hand.

10 On the other hand, we're talking about politics.
11 We're talking about that very thing that should never be
12 in the courts when it doesn't absolutely have to be,
13 attendance line drawing and the judgments of the district
14 courts about the whys, the wherefores, and the wisdom of
15 attendance line drawing is something that courts should,
16 and maybe could, manage.

17 QUESTION: Well, why should they manage that?

18 MR. WALBERT: Well, that's what this Court held
19 they can. I'm talking about the relative ability --

20 QUESTION: I don't think the Court -- this is a
21 little bit -- I don't think the Court held that. Go
22 ahead.

23 MR. WALBERT: In terms of politics, Your Honor,
24 the critical distinction between this case and what Your
25 Honor raises is this. The wall of separation of our

1 function of Government that this Court has talked about
2 for 100 years is what we're talking about crossing now
3 when we get into the wisdoms, the whys, and the wherefores
4 of reapportionment decisions.

5 If we're going to make the kind of open-ended
6 review of reapportionment decisions that was made by this
7 district court in this case, the wisdom of whether
8 Savannah should be coastal or whether it should be part of
9 this district --

10 QUESTION: You're saying if Georgia should
11 deliberately draw a district in order to prevent blacks
12 from electing a representative, there would be nothing we
13 could do about that?

14 MR. WALBERT: Well, I think that's the Busbee v.
15 Smith case this Court affirmed which we stand behind.

16 QUESTION: We cannot --

17 MR. WALBERT: But no --

18 QUESTION: -- you said we can't do anything
19 about it.

20 MR. WALBERT: The Court did something about
21 that.

22 QUESTION: Indeed we did, but you're now telling
23 us we can't. Isn't it the same problem?

24 MR. WALBERT: No, I don't believe so, Your
25 Honor.

1 QUESTION: Why not?

2 MR. WALBERT: Those courts -- first of all,
3 those cases had the prerequisite that helps you get away
4 from the political complexities of harm. Harm was proved.
5 There is no harm proved here. There is no vote dilution.
6 There's no claim and no evidence of any sort --

7 QUESTION: This is harm proven. The harm proven
8 is that someone who said he would be in this district has
9 been excluded from it because of his race.

10 QUESTION: You're arguing Shaw v. Reno now.

11 MR. WALBERT: No, I don't think so, Your Honor.
12 In the Busbee case we're talking about whether there was
13 an actual effort and an ability to keep blacks out of
14 office, but that --

15 QUESTION: I don't see how it's any more
16 difficult to figure out whether the legislature drew its
17 lines to put blacks in or to keep blacks out. The one
18 question is the same as the other question, and the notion
19 that one is impossible for us to determine but the other
20 is not, I don't understand the reason for that.

21 MR. WALBERT: I would respectfully -- there's no
22 question again, Justice Scalia, that there is an element
23 of -- and the purpose, there was a purpose, a goal to draw
24 a majority minority district here.

25 What I am taking about is whether you can get in

1 there and talk about the predominant purposes, and whether
2 you can parse it down and talk about 100 legislators.
3 This line, once you have the overall objective -- let's,
4 you know, concede this at the outset. Once you have the
5 overall objective of creating a majority minority
6 district, I'm not sure you can say that any segment or
7 part of that line is indistinct from that. It does not
8 have some purpose in it.

9 Every time you look at a -- this is an 1,184
10 mile congressional district line. Is there 5 miles of it
11 anywhere that have nothing to do with race, given that the
12 overall purpose was in fact to create a majority minority
13 district? I don't know. I don't know if you can -- if
14 there's an answer to that. I'm not sure intellectually
15 there is such a thing as an answer to that question.

16 There are a hundred but-fors at every segment of
17 the line. But for one person one vote, no piece of the
18 line would be where it was. But for where counties are,
19 no piece of the line would be where they are. But for
20 race the line would not be for where it was.

21 And our difficulty is that the Court, to make
22 those decisions, would be drawn in just like it is. The
23 Court here talks about the majority of the opinion talks
24 about how it would be better to have Savannah being part
25 of the coastal district, and the distinction between the

1 majority and the dissent I think shows up quite clearly
2 what the Court's choices in this case were.

3 Judge Edmondson writes in dissent, I don't think
4 we should be getting into the minds of legislators like
5 that. I don't think we should be making judgments about
6 what is good or bad about reapportionment, and the thing
7 that we are distinguishing between school desegregation in
8 other cases is, where politics are the issue, as they are
9 in this case, that is the single most important area where
10 this court should tread only at the very --

11 QUESTION: Suppose you're the Attorney General
12 of the United States, do you have a constitutional
13 obligation to refrain from telling the State, do
14 everything you can to create majority minority districts
15 to the maximum amount possible?

16 MR. WALBERT: We don't think what Your Honor
17 just stated is part of section 5 or section 2, so I
18 guess --

19 QUESTION: I'm asking whether or not it's
20 consistent with the Constitution of the United States and
21 the Equal Protection Clause for the Attorney General of
22 the United States to direct a State to proceed as I've
23 indicated.

24 MR. WALBERT: I think that would not be
25 appropriate, certainly under --

1 QUESTION: Why?

2 MR. WALBERT: -- the statutory framework.

3 QUESTION: Why? Why wouldn't --

4 MR. WALBERT: The statutes don't require that.

5 QUESTION: Pardon me?

6 MR. WALBERT: Neither section 2 nor section 5
7 require it.

8 QUESTION: Suppose the statute did permit the
9 Attorney General to do that, would there be a
10 constitutional violation?

11 MR. WALBERT: I think it would very much depend
12 on the particular facts of the particular case.
13 Maximization --

14 QUESTION: The facts of the case are
15 maximization for maximization's sake.

16 MR. WALBERT: If it was nothing but
17 maximization, without regard to any other considerations,
18 that would be unconstitutional.

19 QUESTION: Why?

20 MR. WALBERT: Because that at some point would
21 get -- it would violate Shaw. Shaw as we see it --

22 QUESTION: And what is the principle of Shaw
23 that would be violated?

24 MR. WALBERT: What see in Shaw, I suggest, and
25 we don't see it, we don't read it, and we hope it doesn't

1 mean that you cannot have the goal of a majority minority
2 district for the purpose, given the facts of Georgia, and
3 those facts in a nutshell are the reality of having black
4 people elected to office. The General Assembly in Georgia
5 when it did this reapportionment had a simple choice. We
6 will draw districts to have blacks elected, or we won't.

7 QUESTION: But you acknowledge that at some
8 point it's a violation of the Constitution --

9 MR. WALBERT: Yes, Your Honor.

10 QUESTION: -- to direct racial districting.

11 MR. WALBERT: Where it is done without regard to
12 anything else whatsoever is what I was going to say.

13 In other words, in our case we have taken, and
14 out of the 1,184-mile district boundary, 71 percent of
15 that follows the State boundary, county boundaries, and
16 city boundaries. The great bulk of the remaining 29
17 percent follow precinct boundaries --

18 QUESTION: But I assume in answering my question
19 that there's a constitutional violation, that the
20 Constitution means something. It stands for protecting a
21 significant interest.

22 MR. WALBERT: Yes, sir.

23 QUESTION: But you're telling us that it's
24 beyond judicial capacity to protect that significant
25 interest.

1 MR. WALBERT: We're saying this, Your Honor, and
2 nothing more than this. We're saying that to apply Shaw
3 and to reach that question about what is permissible and
4 what is not permissible under the Fourteenth Amendment, we
5 respectfully urge this Court as most strenuously as we can
6 to try and draw an objective set of standards to implement
7 the Shaw case rather than this generalized subjective
8 intent thing, rather than a generalized review of the
9 goodness or the badness of the redistricting decisions of
10 the --

11 QUESTION: Well, why is district shape any more
12 objective as a criteria than discriminatory purpose? I
13 don't see that it is. I think they're both objective.

14 MR. WALBERT: Your Honor, we would certainly
15 urge the Court to stay away from shape as a talisman where
16 it's the eye of the beholder type of shape, does it look
17 good, does it look bad.

18 What we think and what we urge the Court is,
19 where the district line is predominantly composed and
20 based upon the kind of county boundary, State boundary,
21 city boundaries, and the precinct lines then is the last
22 remaining part, that are locally determined based on
23 geographical markers, major highways, roads, and so on,
24 that's an objective standard, that we say that is where
25 the line should be drawn, and that's where we say it's the

1 most appropriate way because that will not draw the courts
2 into the political thicket any deeper than they otherwise
3 have to be.

4 QUESTION: Well, what if the lines in fact are
5 conveniently drawn precisely as you say. They follow
6 various political boundaries, and a plaintiff who is a
7 member of the district in question comes in and says, yes,
8 they were lucky, they had these boundaries, but in fact
9 the only motivation behind the drawing of these lines was
10 simply to find a set of lines that would give a majority
11 minority district when there in fact is no justification
12 for it. Is that person out of court?

13 MR. WALBERT: That person's out of court, Your
14 Honor, and I think as a matter of law when you're
15 following the existing lines that have been drawn for
16 other purposes, that is by --

17 QUESTION: So in effect you're telling us that
18 the old jurisprudence of dilution is in fact to be thrown
19 out.

20 MR. WALBERT: No, not in any way, shape, or
21 form, Your Honor, and for this reason --

22 QUESTION: Well, let's assume that my mythical
23 plaintiff in my hypo comes in and says that was their
24 predominant purpose, and in fact the result and the intent
25 was racial packing. You're saying, I thought, he's out of

1 court. If he's out of court, then at least one category
2 of traditional dilution jurisprudence is overruled.

3 MR. WALBERT: I think not, Your Honor. I would
4 respectfully suggest this is the reason why. That
5 requires proof of harm. It's a totally different case. A
6 packing case would be very difficult to prove. As Your
7 Honor mentioned in the Johnson, and discussed in the
8 Johnson v. De Grandy case, this Court has, and for good
9 reason, shown a much greater reluctance to get into how
10 should particular lines be drawn rather than multi-member
11 versus single member challenges.

12 QUESTION: Then are you saying that the -- I
13 thought in your brief you thought there was something to
14 the notion that bizarreness would be the threshold.

15 MR. WALBERT: Yes, sir.

16 QUESTION: You're really saying it's not
17 bizarreness, it's harm?

18 MR. WALBERT: For Shaw cases.

19 QUESTION: I'm sorry?

20 MR. WALBERT: For Shaw cases, bizarreness is the
21 threshold. For a packing case, that's a totally different
22 matter.

23 QUESTION: Well, Shaw cases and packing cases
24 are all Fourteenth Amendment cases.

25 MR. WALBERT: They are, but the elements of them

1 and what they constitute are different as we read that
2 jurisprudence. That is -- those are harm cases,
3 Gingles -- packing, and of course, the Court never found a
4 packing case to my knowledge, has ever found proof of one.

5 QUESTION: Well, what would the harm be in a so-
6 called Shaw case that would not also constitute harm under
7 the old line of packing -- the old line of dilution cases?

8 MR. WALBERT: Well, there is no proof of harm in
9 a Shaw case as I understand the Shaw theory.

10 QUESTION: No, but I'm just asking your
11 position. If harm is, in fact, going to be the criterion,
12 and bizarreness is to be identified by harm, what kind of
13 harm would qualify that would not also have qualified
14 under the old dilution cases?

15 MR. WALBERT: Your Honor, I think I must have
16 misspoken myself, because we're not saying that the proof
17 of harm is essential to the Shaw case as that -- as we're
18 reading that case. I was trying to distinguish how you
19 prove a Shaw case from how you deal with a packing case
20 and I was drawing a distinction, saying that in a packing
21 case the element of harm must be proved, harm in the
22 sense of diminishment, purposeful diminishment.

23 QUESTION: All right. Then, do we then come
24 back to the fact that there is a so-called Shaw case if,
25 and only if, the lines are drawn in such a way as not to

1 respect preexisting political boundaries? Is that the
2 essence of the Shaw case?

3 MR. WALBERT: Well, we would say that that is an
4 objective standard where there is -- the lines are first
5 of all drawn for a purpose to create a majority minority
6 district, but then in terms of the objective --

7 QUESTION: Well, then what is grotesque is a
8 question of purpose --

9 MR. WALBERT: No, I think not, Your Honor.

10 QUESTION: -- and I thought a moment ago you
11 were saying that purpose is a thicket we'd better not get
12 into.

13 MR. WALBERT: I think the thicket of how much
14 purpose goes into each part of the line, whether it's a
15 good reapportionment decision is a thicket that I -- we
16 urge the Court not to get into, and I think that the
17 objective standards we're talking about, the objective
18 standards as to the extent to which the district line in
19 fact follows traditional boundaries, geographical markers
20 and physical features and major highways, that is the kind
21 of objective standard that makes a decision of a district
22 court number 1 predictable so the legislature can know in
23 advance what do we have to do and what can't we do?

24 Number 2, it ensures that the district court
25 adjudication process is predictable, and I think that's of

1 critical importance, because there's two sides -- the two
2 sides to the separation of powers question are, 1) the
3 legislature is entitled to have their reapportionment
4 prerogatives. Politics belong in the courts. The other
5 thing is, it is inevitable in our judgment, and I think
6 Justice Powell was the one that wrote so eloquently about
7 this is, if the courts start making these kinds of
8 judgments, the integrity of the courts will be perceived
9 by the people to be jeopardized.

10 QUESTION: Mr. Walbert, let's assume I think
11 strict scrutiny is needed. Why -- did Georgia do any
12 study about whether there's a compelling State interest in
13 having majority minority districts? Did it do any studies
14 as to whether blacks are better off in having all of their
15 power concentrated in a few districts rather than being
16 dispersed more throughout the State so that
17 representatives from all the districts will have to take
18 into account black people's point of view?

19 MR. WALBERT: We would --

20 QUESTION: I mean, you know, some people think
21 that's the best way to reduce the influence of black
22 groups.

23 MR. WALBERT: We had that system of Government
24 in Georgia for some time, Justice Scalia. We had all
25 white districts and black people weren't very happy under

1 that process. We had a majority --

2 QUESTION: The State did a study to see how much
3 the blacks' interests were taken into account by white
4 politicians, even though the politicians elected might be
5 white, did they not have to cater to the interests of the
6 black one in their district?

7 MR. WALBERT: With all due respect, no one had
8 to commission a study. The political process made that
9 judgment, which is the appropriate way for that judgment
10 to be made in the reapportionment process, and if I
11 might --

12 QUESTION: If we have to consider whether that's
13 a compelling State interest or not, I don't know we can
14 just sort of say, well --

15 MR. WALBERT: Justice Scalia --

16 QUESTION: -- the political process made that
17 judgment. I think -- it isn't self-evident to me that
18 that's a better way to do it.

19 MR. WALBERT: We have 236 Representative and
20 Senate districts in our General Assembly. Of those, there
21 is one that has elected a black person. 181 of those 236,
22 Justice Scalia --

23 QUESTION: That may mean nothing.

24 MR. WALBERT: Well, it may be compelling.

25 QUESTION: The point is whether the political

1 desires of black people are being taken into account. We
2 don't in this country -- you know, supposedly we're not
3 supposed to care about the color of people. The point is
4 whether the political interests of black people were being
5 taken into account. Do you know of any studies that say
6 they're better off by having all blacks lumped into a
7 couple of districts who can elect somebody who is black?

8 MR. WALBERT: I would put a great more judgment
9 and worth in the testimony of the black people who
10 testified in this case than a study one might hire a
11 university professor to do. I would put a great deal more
12 credence in the number of elected black officials who have
13 been elected under single member district plans where the
14 majority black members --

15 QUESTION: Oh, I'm sure the officials elected
16 think it's a grand idea --

17 MR. WALBERT: -- and their constituents. Excuse
18 me.

19 QUESTION: -- but I'm talking about whether
20 it's a grand idea for the racial minority that you assert
21 to protect.

22 MR. WALBERT: Justice Scalia, I think that if
23 the Equal Protection Clause in this country were construed
24 so that it was prohibited to have majority minority
25 districts, which would empirically mean that the

1 delegation in Georgia would revert to all white like it
2 was in the old days, that would be a construction of the
3 Equal Protection Clause that I think would stand the
4 history and the purpose of that clause and the Civil War
5 itself on its head.

6 I'd like to reserve --

7 QUESTION: Don't you think the answer to Justice
8 Scalia's question was provided by the statement of
9 judicial notice?

10 MR. WALBERT: Well, Your Honor, I would --
11 that's part of it. I would say there's something even
12 more important than that, Justice Stevens, and I think
13 instead of looking at the past history, let's look at the
14 present reality and the empirical facts:

15 181 districts in Georgia are majority white in
16 the General Assembly, House and Senate combined. One of
17 those 181 at the time of trial had a black person
18 representing it. That tells us that if we're going to
19 have an integrated congressional delegation we're going to
20 do it through this technique, period. That is Georgia's
21 justification. That's why it did it, and we advocate that
22 that is totally significant, adequate, and sufficient
23 under the Constitution of the United States.

24 QUESTION: The Constitution has as an objective
25 integrated delegations?

1 MR. WALBERT: The Constitution --

2 QUESTION: I mean, I can understand the
3 Constitution has as an objective that the political
4 interests of every individual, including minority races
5 and everything, should be taken into account, but the
6 Constitution says that the Georgia delegation has to have
7 people of various races. Is that what the Constitution
8 says?

9 MR. WALBERT: The Constitution says this, Your
10 Honor. It only prohibits the States from doing certain
11 things. It does not mandate, and in its prohibitions --

12 QUESTION: Like treating people on the basis of
13 their race.

14 MR. WALBERT: And making a decision that we
15 should have an integrated delegation rather than a
16 segregated one is one that is a legitimate decision that
17 falls within the ambit, and is permitted by the Equal
18 Protection Clause. That's all we're saying. We're not
19 saying that the State was mandated to do this.

20 QUESTION: Ah. I thought you were saying --

21 MR. WALBERT: We-re saying --

22 QUESTION: I thought you were saying that was a
23 constitutional -- desirable. You're just saying the
24 Constitution was neutral about it.

25 MR. WALBERT: We're saying to construe the

1 Constitution in the opposite direction to prohibit what
2 the State did, that's our problem. We think that would be
3 inappropriate.

4 If I may reserve the last --

5 QUESTION: Yes.

6 MR. WALBERT: -- seconds --

7 QUESTION: Thank you, Mr. Walbert.

8 General Days.

9 ORAL ARGUMENT OF DREW S. DAYS, III

10 ON BEHALF OF THE FEDERAL APPELLANT

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

13 I want to address first the issue that members
14 of the Court have raised on several occasions in both the
15 prior argument and this argument, and that is the
16 predominant or motivating factor.

17 Our position is that that is not the proper
18 analysis. The proper analysis under Shaw or under this
19 Court's prior precedents is whether the State is doing
20 something for blacks that it would not do for others.
21 That is, where blacks are being treated differently, given
22 different treatment, arguably to assist blacks, that it
23 would not provide for other groups. If that can be
24 established either by looking at the shape of the district
25 or of some other evidence, that is sufficient to move the

1 case into strict scrutiny.

2 But in our estimation, that has to be the
3 threshold analysis. It picks up many of the questions
4 that have come from the bench today. That is, if the
5 State is drawing districts that it would draw for Polish
6 Americans, or for Scottish Irish in Louisiana, or for
7 other groups, then our position is that does not trigger
8 strict scrutiny.

9 QUESTION: But are you stipu -- are you assuming
10 that Irish descent, Polish descent is subject to strict
11 scrutiny the same way that race is?

12 GENERAL DAYS: No, I'm not arguing that it is
13 subject to strict scrutiny, but the point I'm making is
14 that if the State were not to treat blacks who have a
15 community of interest, and that can be established in the
16 record, as it would treat other groups, then blacks are
17 being denied the equal protection of the laws, because the
18 only reason they're being denied the treatment that others
19 receive is because of the color of their skins.

20 QUESTION: Well, that just repudiates, though,
21 our equal protection jurisprudence. Categorization by
22 race is subjected to a much more demanding standard of
23 inquiry than something else.

24 GENERAL DAYS: I don't believe it does, with
25 respect, Mr. Chief Justice. If one looks at this case,

1 for example, what the district court found was that there
2 was evidence that was partially convincing of the fact
3 that there was a community of interest among African
4 Americans within the Eleventh District, but what the Court
5 said is as follows, and this is at 44a of the
6 jurisdictional statement appendix:

7 It says, "The problem with this tack is that,
8 while partially convincing, such a community of interest
9 is barred from constitutional recognition." That cannot
10 be correct under the Constitution. It cannot be the case
11 that blacks who share political interest, social interest,
12 economic interest, a history of discrimination against
13 them based upon their race, cannot be recognized as a
14 community that has a right to representation in the halls
15 of Congress.

16 QUESTION: It wasn't recognized on that basis.
17 There was no study done to show that the people in this
18 particular district have a whole lot of community -- the
19 judgment was made, blacks have a community interest.

20 GENERAL DAYS: But Justice Scalia --

21 QUESTION: That is racial --

22 GENERAL DAYS: -- just read you --

23 QUESTION: That is simply racial classification.

24 GENERAL DAYS: I just read you what the court
25 said about this, that there was partially convincing -- in

1 other words, there was evidence that there was a community
2 of interest that transcended race.

3 QUESTION: But wasn't there also evidence that
4 community of interest or no community of interest, the
5 only reason this was done was that the Justice Department
6 was demanding a third district, time was growing short,
7 you didn't want to take your chances and perhaps, indeed,
8 didn't have time, or the State didn't, in the District of
9 Columbia Court, and so that in fact something was being
10 done here differently for blacks from anything that would
11 have been done from any other identifiable group, and that
12 in effect was to say, we surrender to the Justice
13 Department. Your demand is going to carry the day.

14 GENERAL DAYS: Well, I don't concede that. I
15 think that what happened here --

16 QUESTION: Well, there was certainly an
17 evidentiary basis for the judge to find that, wasn't
18 there?

19 GENERAL DAYS: I think that what the Court did
20 here was apply an incorrect legal standard. That is,
21 rather than trying to determine whether Georgia had done
22 something differently for blacks than it had done for
23 other groups, it concluded that because race was involved
24 in the process, even a predominating --

25 QUESTION: Well, and indeed --

1 GENERAL DAYS: -- consideration, that it
2 automatically moved into strict scrutiny.

3 QUESTION: I will assume that that was error,
4 but even on your own criterion, wasn't the -- wasn't there
5 also an evidentiary basis for the court to do what it did?

6 GENERAL DAYS: I think what the court did was
7 not look at the extent to which the district that was
8 drawn was consistent with principles that Georgia had
9 applied in a variety of other circumstances.

10 QUESTION: All right, wasn't the evidence
11 equally clear that Georgia was in fact not applying them
12 here, that Georgia had no intention to apply them to
13 create a third district, and the only reason the third
14 district was created was that the Justice Department was
15 demanding it and time was running out?

16 GENERAL DAYS: I don't believe that's correct,
17 Justice Souter.

18 I think what the court did here was ignore the
19 fact, which the dissent brings out very clearly, that what
20 Georgia was doing was consistent with what it had done in
21 the past, that there was no State requirement of
22 compactness, that there had been no State requirement that
23 you couldn't split counties, that you couldn't split
24 cities.

25 That's what Georgia had done in the past, so the

1 question becomes one of, was Georgia doing something
2 different in this case --

3 QUESTION: General Days, maybe I can help get
4 you to focus on the question I think Justice Souter was
5 trying to put. There is in this record two plans,
6 successive plans --

7 GENERAL DAYS: Yes.

8 QUESTION: -- that the State legislature put
9 forward with two, not three districts. Both were turned
10 down by the Department of Justice.

11 GENERAL DAYS: Yes.

12 QUESTION: What relevance, if any, does that
13 have that Georgia tried for two and only when it was
14 turned down by the Department of Justice did it come up
15 with three?

16 GENERAL DAYS: The relevance is that if one
17 looks at the letters from the Department of Justice, what
18 those letters reflect was that Georgia was doing not only
19 with respect to the Congress, congressional delegations,
20 but with respect to the State Senate and the State lower
21 body things that it was not doing with respect to other
22 groups. That is, it was fragmenting black populations, it
23 was moving blacks out of districts where they
24 appropriately belonged, and those were the reasons why the
25 objections were lodged against those two plans.

1 QUESTION: Well, the findings of the court below
2 indicated that the Department of Justice was insisting
3 upon maximization of any possible black voting strength.
4 It was not retrogressive for the State to create two
5 districts, but the Department of Justice insisted on three
6 majority minority, and the court found that to be the
7 case, and was it the policy of the Department of Justice
8 to insist upon maximization --

9 GENERAL DAYS: Absolutely --

10 QUESTION: -- of all possible --

11 GENERAL DAYS: Absolutely not.

12 QUESTION: -- strength? I mean, it certainly
13 appeared to be the case, and --

14 GENERAL DAYS: Well --

15 QUESTION: -- even to the extent that
16 confidential informants were used by the Department of
17 Justice and within the State legislative process. It was
18 quite a dramatic story, actually.

19 GENERAL DAYS: Well, I --

20 QUESTION: And if, in fact, that is what the
21 Department was requiring, can that serve as a
22 justification?

23 GENERAL DAYS: What the -- I don't accept the
24 characterization of the Court, but I won't dignify it by
25 going into the details. The point is, the Justice

1 Department was doing what the Congress of the United
2 States directed it to do and what the decisions of this
3 Court have given the Attorney General the power to do.

4 QUESTION: If the Justice Department said that
5 as a matter of preclearance policy we will litigate with
6 you unless you maximize all black districts, would that
7 raise constitutional concerns?

8 GENERAL DAYS: Your Honor, first of all, I don't
9 know what you mean by maximization, but the answer --

10 QUESTION: That you draw as many majority black
11 districts as you possibly can within the population.

12 GENERAL DAYS: Absolutely not. I mean, that is
13 not the policy of the Justice Department.

14 QUESTION: Would that -- if that were the
15 policy, would it raise constitutional concerns?

16 GENERAL DAYS: Yes, it would.

17 QUESTION: Why?

18 GENERAL DAYS: Well, because the mandate of the
19 Voting Rights Act is to remedy discrimination and to
20 prevent actions that would harm groups that are protected
21 under the act.

22 To the extent the Attorney General is carrying
23 out her responsibilities in ways that don't connect with
24 the purpose underlying the act, then there would be
25 problems under the Fifteenth Amendment, under the

1 Fourteenth Amendment.

2 QUESTION: What if the legislature is found by
3 the court to have been so driven by racial considerations
4 that it ignores compactness and contiguity in a way that
5 it would not and has not for any other group, and that it
6 was driven to do it for the purpose of maximizing a
7 particular race in the district.

8 GENERAL DAYS: If maximization means that the
9 Justice Department was requiring something that was not
10 reflective of the fact that there was reason to believe
11 that there was discriminatory purpose or effect, then that
12 would create constitutional problems, but that is not what
13 happened here.

14 I think if one looks at the record, looks at the
15 letters at 99 and 120 of the joint appendix, it is clear
16 that -- may I complete my answer?

17 QUESTION: Yes.

18 GENERAL DAYS: That the Justice Department was
19 looking at what Georgia had done, looking at the fact that
20 there had been prior findings of unconstitutional purpose,
21 and simply saying, you've got to do more, given these
22 facts.

23 Thank you very much.

24 QUESTION: Thank you, General Days.

25 Mr. Parks, we'll hear from you.

1 ORAL ARGUMENT OF A. LEE PARKS

2 ON BEHALF OF THE APPELLEES

3 MR. PARKS: Mr. Chief Justice, may it please the
4 Court:

5 The plaintiffs in this case ask the Court to
6 affirm the judgment of the district court that the
7 Eleventh Congressional District was an intentional racial
8 gerrymander that is at constitutional odds with the equal
9 protection jurisprudence of this Court.

10 All parties in this case I think would agree
11 with this opening premise: race-based remedies are a
12 constitutional evil that will be condoned only on a
13 limited basis, and if they're temporary. We have fallen
14 in love with the assumption that race-based is remedial,
15 and in this case the illness was not defined before the
16 remedy was assumed.

17 The real world of this case is beyond much of
18 what we have talked about here today. The real world of
19 this case is simple, and put forward in length in the
20 district court's opinion.

21 The State of Georgia was confronted with a
22 regional plan of the Department of Justice that required
23 maximization of black voting strength based upon a
24 heretofore unavailable technology. That technology
25 allowed reapportionment to be done at a census block level

1 with such scalpel-like precision that the races could be
2 separated to achieve particular racial percentages.

3 Not only within the district, but because of
4 that precision, the Department of Justice made the
5 assumption that the Voting Rights Act requires racial
6 proportionality within the districts. That is the only
7 explanation for why Georgia would have been required to
8 rip out the core of two traditionally established
9 districts and to change from what they originally proposed
10 to what ended up as the Georgia districting plan.

11 QUESTION: Mr. Parks, let me change the facts
12 just a little. Let's say that the Georgia legislature,
13 anticipating that they were going to have some difficulty
14 in retaining the white vote -- let's say, the Democrats --
15 decided that our loyal constituent, 90-percent voters for
16 the Democratic Party, are blacks, so now that we have this
17 additional district, let's make sure that we have a solid
18 Democratic district, and the Eleventh District was drawn
19 solely to have a solid Democratic district, and to include
20 the most loyal Democratic voters. What's wrong with that?

21 MR. PARKS: I think the Court in the first Hays
22 opinion dealt with Your Honor's hypothetical, and the
23 Court made, I think, the appropriate distinction between
24 motive and intent. It may well be that a motive would be,
25 we want to increase the Democratic strength of a

1 particular district, but if the intent was to strictly use
2 racial classifications, then I think --

3 QUESTION: That's not my question. I'm sorry to
4 interrupt you, but that's really not my question. My
5 question is purely political. The State of Georgia is
6 becoming increasingly Republican. We don't want to lose
7 the entire State. The -- to retain at least three
8 districts, we will go -- we will create three districts
9 with our most loyal Democratic voters, who happen to be
10 black. Let's say that is the purpose for the three
11 districts. What is wrong with that?

12 MR. PARKS: I think because it employs racial
13 classifications, whether -- now, the State would come in
14 and say -- at least you would move to direct scrutiny
15 because it employed the racial classification. I don't
16 think that the desires of the Democratic Party rise to the
17 level of a compelling State interest --

18 QUESTION: So then in your -- sorry.

19 MR. PARKS: That -- the direct answer is, that's
20 not going to avoid the traditional strict scrutiny
21 analysis, and if you get into that, I think that the
22 political issue is not going to rise to the level of a
23 compelling State interest that would allow that type of
24 districting to succeed.

25 QUESTION: So then, in your view, if people in

1 the legislature take race, or religion, or nationality
2 into account and put lots of members of one group into a
3 district for a host of political reasons, then the court
4 system, the 700 Federal judges, or whatever, will start to
5 reexamine that. Is that what your statement is?

6 MR. PARKS: No, Justice Breyer. I think that --
7 I think your hypothetical takes it a step further. As I
8 understood Justice Thomas', there was only one
9 consideration, that these black voters were going to be
10 moved.

11 QUESTION: And --

12 MR. PARKS: If we begin to broaden the spectrum
13 of consideration, then I think that it becomes a more
14 difficult question.

15 QUESTION: They do the same thing, but a lot of
16 Democrats are also of Group X that isn't black, and they
17 put them in, or in California they put in another group,
18 and in Illinois -- you understand the problem.

19 MR. PARKS: Right.

20 QUESTION: The problem is the same problem
21 throughout, that is there -- how do you define --
22 throughout -- if I put the problem in my mind, it's this
23 way. Throughout history, maybe race, religion,
24 nationality, and a host of similar factors have been taken
25 into account in districting.

1 I take it under Shaw v. Reno that sometimes the
2 single factor of race, while it could be taken into
3 account, goes too far. All right. What's the criterion
4 by which you measure going too far?

5 Now, I understand the opposite side's criteria.
6 They say, you don't go too far. You don't even get into
7 this matter unless you have a bizarrely shaped district
8 that differs in significant ways from what used to be in
9 this State, because that bizarrely shaped district is a
10 signal, a signal that the consideration went too far.

11 Now, there could be other kinds of signals.
12 What are the other signals, in your view, because if we
13 could find a signal, then perhaps -- and I could
14 understand an application of Shaw that wouldn't turn
15 everything topsy-turvy, but what are the signals?

16 The Solicitor General says, I'll tell you one,
17 that the shape is so bizarre when considered with the past
18 that that fact, together with the racial motivation,
19 provides a threshold.

20 Now, maybe I don't -- maybe that isn't the right
21 signal, maybe I don't have it right, but I'm trying to get
22 your view on that question.

23 MR. PARKS: In looking at that question, I went
24 back to the oral argument that was presented to this Court
25 in Shaw v. Reno to see if the Court engaged in any

1 discussion of that. There is only a single question in
2 response on whether the shape of the district would either
3 be an element or some some threshold test or merely
4 evidence of racial classifications.

5 Justice O'Connor asked the question at page 38
6 of the transcript, I guess you would agree that district
7 12 is a highly irregular shape. Do you think that
8 districts such as that could be, in and of itself, some
9 evidence of an invidious intent, and the State of North
10 Carolina agreed. I have always assumed that we would
11 never create some type of a threshold that would be visual
12 in nature that might, in fact, mask more sophisticated --

13 QUESTION: Then --

14 MR. PARKS: -- of racially gerry --

15 QUESTION: -- then, fine. Then that -- you've
16 righted my question, and I'm sorry to -- but then, 1) I
17 can understand this possibility, as several of the briefs
18 have stated and the amicus briefs have stated. First, you
19 have a threshold. Maybe it is visual, to show that it
20 went too far.

21 Then, once you go beneath the threshold, you
22 look to see if there's a compelling interest, namely a
23 remedy for past discrimination, of which there has been
24 plenty.

25 MR. PARKS: Right.

1 QUESTION: All right, and then you look for
2 tailoring under the five traditional criteria of
3 whether -- that this Court has put out. I understand,
4 that. I'm not saying it's correct. I understand it.

5 I understand the alternative, which would be to
6 go into every district in half the counties in this State,
7 and what I'm looking for, is there some other way of doing
8 it?

9 MR. PARKS: Your Honor, the -- there's one
10 additional fact I don't know if Your Honor has included,
11 but when we talk about visual, there are two maps you have
12 to look at. You cannot just look at the map that shows in
13 macro form the geographical boundaries of the district.
14 No matter how irregular and how elongated their
15 appendages, they might just show that a municipality was
16 on that appendage.

17 QUESTION: No, but all you're saying -- all
18 you're saying, I think, is that the so-called visual test,
19 the bizarreness test, will not, in fact, smoke out
20 everything that is wrong.

21 MR. PARKS: That's correct.

22 QUESTION: And I think General Days was very
23 clear in answering me that that is not his position. He's
24 saying that that is a sufficient test to identify a case
25 in which there should be strict scrutiny.

1 He is also, I think, clearly saying that the
2 other tests, those tests, for example, that we have
3 identified for a traditional dilution jurisprudence, are
4 still there, so that in the point that you made that we
5 might, in fact, have a nonbizarre district which
6 nonetheless masked quite invidiously intentional
7 discrimination, they're not saying that you can't look at
8 that. They're simply saying that you have to state a
9 different kind of claim, e.g., a packing claim, whatever
10 it might be.

11 MR. PARKS: Well, but then maybe, but if we have
12 just this specific claim, voters contending that there has
13 been intentional racial classifications that has resulted
14 in a gerrymandered district, but we're not allowed to look
15 past the visual to juxtapose the race map to see that
16 these lines are drawn --

17 QUESTION: No, you are allowed to look beyond
18 it, but if you want to look beyond it for purposes other
19 than bringing what I will call a bizarreness Shaw claim,
20 you've got to allege those kinds of harms, for example,
21 i.e., those are your thresholds that are identified with
22 dilution, and there may be other reasons, too, but that
23 would be one reason, and that, it seems to me, would be
24 one answer that you could give to Justice Breyer.

25 MR. PARKS: And I would agree with that, but I

1 don't think it is the end-all. For example, in this case
2 we have not only the bizarre shape of this district
3 compared to the past districting principles, but we also
4 have facts as found by the district court that this entire
5 districting plan was driven by proportionality, and that
6 proportionality far exceeded the racial and geographic
7 demographics of this State to sustain it.

8 QUESTION: Well, would you say that if the
9 legislature is so driven by race that it ignores
10 compactness and contiguity in a way that it would not and
11 has not for any other group, that that would state an
12 equal protection claim?

13 MR. PARKS: Yes, Your Honor, and I think that is
14 the essence of Shaw v. Reno. I think what Shaw v. Reno is
15 trying to give us is an operative way of dealing with
16 these cases.

17 QUESTION: So if there has been a political
18 gerrymander, as occurred in the case we heard just before
19 this one, then you could do a racial district that more or
20 less matches that political gerrymander, right?

21 MR. PARKS: No, Your Honor, I don't think so.

22 QUESTION: I thought that's what you just said,
23 so long as you conform to past practice.

24 MR. PARKS: Well, I would assume that if there
25 has been a gerrymander it is not a past practice, it is an

1 aberration from past practices.

2 QUESTION: No. They've been doing this in
3 Louisiana for a long time. They have --

4 (Laughter.)

5 MR. PARKS: Well, they haven't in Georgia. We
6 have --

7 QUESTION: No, but I mean, you're lucky, or
8 you're unlucky, depending on whether you want to use
9 racial districting or not. If you're lucky enough to come
10 from a State that's been using gerrymanders, you can do
11 it, and if you're unlucky enough to come from a State that
12 hasn't been, as you tell me Georgia is, then you can't do
13 it. Does that make very much sense?

14 MR. PARKS: No, it doesn't, Your Honor, because
15 it then allows racial -- it allows racial gerrymanders to
16 escape the strict scrutiny that this Court wants to apply,
17 and I think --

18 QUESTION: You ought to reconsider your position
19 about whether, you know, the criterion is whether you've
20 done it like this before.

21 MR. PARKS: Well, I didn't view that as the end-
22 all of the case. I viewed that that would be, again, some
23 evidence that there exists a racial gerrymander.

24 QUESTION: You don't need evidence if there's an
25 admission. I mean, what if you come in --

1 MR. PARKS: Exactly. You don't.

2 QUESTION: -- we've done it for this purpose?

3 MR. PARKS: And we have that in this case.

4 QUESTION: No, but where does your answer leave
5 you in response to the question, is everything, in fact,
6 going to qualify for attack, because the Shaw bizarreness
7 criterion says look, there is a point at which the
8 consideration of race may indeed become just outrageous.

9 MR. PARKS: Right.

10 QUESTION: We accept the fact that some
11 considerations of race are necessary. I mean, you can't
12 be blind when you draw the line. Some are outrageous.

13 The traditional dilution jurisprudence says
14 well, we identify certain kinds of harms as triggering a
15 cause of action, but it seems to me that you were saying
16 well, we're not going to depend on bizarreness, and we're
17 not going to depend on the kind of dilution harms, and
18 doesn't that leave you as saying, whenever you consider it
19 for any purpose, which in fact is always, because you
20 can't district without taking it into consideration
21 somehow, it's going to be subject to strict scrutiny, and
22 therefore every single districting decision in a
23 multiracial district is at least going to get you into
24 court. How do you avoid -- what is your answer to that
25 problem?

1 MR. PARKS: The answer that the district court
2 had to that problem, Your Honor, was elevating the
3 standard, and I think it made an intentional elevation
4 from the Arlington Heights standard to a higher standard
5 in recognition that reapportionment is a legislative act
6 where race is frequently taken into consideration.

7 "Predominant and overriding," in the words of
8 our court, created a demonstrably higher standard than I
9 think the one that the justice is concerned about. I do
10 think that that higher standard was a reasoned choice by
11 the district court that spoke to that issue, and I
12 disagree with the appellants that predominant intent is
13 some unworkable, unmanageable standard that courts can't
14 deal with.

15 QUESTION: Is there any way to comment on -- and
16 maybe there isn't, but is there any way to comment on the
17 likelihood that the predominance standard is in fact going
18 to raise a series of claims subject to strict scrutiny in
19 greater numbers than the bizarreness threshold would do?
20 How do we compare those two?

21 MR. PARKS: In terms of the potential litigation
22 that either test might generate?

23 QUESTION: Yes.

24 MR. PARKS: I think that if you're talking about
25 bizarreness in the eye of the beholder --

1 QUESTION: Well, they're saying bizarreness in
2 the --

3 MR. PARKS: -- that could be any --

4 QUESTION: Bizarreness in the eye of history is
5 what they're saying.

6 MR. PARKS: But that ultimately becomes in the
7 eye of the beholder. I mean, everyone can look at a map
8 and see their own animal, just like you look at the
9 clouds, but hard and fast evidence of intent is hard to
10 prove.

11 QUESTION: Yes, but you've got to find an animal
12 in the past, too, and that makes it a little harder.

13 (Laughter.)

14 MR. PARKS: Right. But I submit to you that
15 visual versus the burden that the district court placed on
16 us of showing that the United States Department of Justice
17 drove this plan to the point of irrationality --

18 QUESTION: No, but that --

19 MR. PARKS: -- that that evidence is so
20 overwhelming --

21 QUESTION: That may be, but that -- I don't want
22 to interrupt you unduly --

23 MR. PARKS: Yes.

24 QUESTION: -- but that gets it to a pretty fact-
25 specific point. How, as a general criterion, would we

1 compare what predominant purpose and bizarre district
2 would result in?

3 MR. PARKS: I'm not --

4 QUESTION: Are we going to get a lot more cases
5 on predominant purpose than there would --

6 MR. PARKS: I think not.

7 QUESTION: -- be on bizarre district? Why not?

8 MR. PARKS: Because I --

9 QUESTION: If not, why not stick with bizarre
10 district?

11 MR. PARKS: First of all -- let's back up.

12 These districts were drawn before Shaw. This was a
13 legislature that assumed that all districts possible was
14 the law. This legislature now has that.

15 They are going to be able to conduct legislative
16 hearings when they put these districts together that make
17 sure that there are other considerations. They will
18 create their legislative record which will insulate the
19 district, and if they don't, they should be challenged.

20 This is a pre-Shaw prototype, where they
21 couldn't do it and they were open and honest about what
22 they were doing, and I don't think --

23 QUESTION: They didn't know how to manufacture
24 legislative history, is what you're saying.

25 (Laughter.)

1 QUESTION: May I ask --

2 MR. PARKS: Your Honor, that is not far off the
3 point.

4 QUESTION: Yes, I understand. May I ask you a
5 question about your view of a portion of the district
6 court's holding --

7 MR. PARKS: Yes, Your Honor.

8 QUESTION: -- that grows out of Justice Scalia's
9 suggestion that perhaps community of interest among
10 persons in a group might justify an odd-shaped district,
11 and the district court, as the Solicitor General pointed
12 out, said that the problem with doing that is that such a
13 community of interest is barred from constitutional
14 recognition if it's defined by racial group. Do you think
15 that's a correct statement of the law?

16 MR. PARKS: I think that if you're talking
17 about, in Your Honor's question, a bizarre shape, yes, I
18 do, because the only thing that I can --

19 QUESTION: Well, let's assume we don't have a
20 bizarre shape, if you just have evidence of predominant
21 motive, and then the response is, yes, we had the
22 predominant motive, but we were trying to justify -- we
23 tried to justify it on the grounds of a community of
24 interest.

25 MR. PARKS: Right.

1 QUESTION: And my question is, is that barred
2 from constitutional recognition, in your view? You could
3 probably tell me yes or no, I suppose.

4 (Laughter.)

5 MR. PARKS: If you all continue to believe that
6 UJO is the law, then that is not barred from
7 constitutional permissibility. If you're meeting sound
8 districting principles --

9 QUESTION: Do you think it should be barred from
10 constitutional recognition?

11 MR. PARKS: I think it depends upon the extent
12 to which there is a community.

13 QUESTION: I assume you -- if it's barred from
14 constitutional recognition, it could be a perfect
15 community. They could all go to the same church, all
16 belong to the same athletic clubs, and all do everything
17 in common, but it would still be impermissible under the
18 court -- as I read the court opinion.

19 MR. PARKS: Yes, that's right, Your Honor, and
20 the only reason --

21 QUESTION: And do you think that's a correct
22 statement of the law?

23 MR. PARKS: The only reason that I hesitate is
24 that the community of interest that was sought to be put
25 forward in our case was pure race, and as I understand in

1 Your Honor's hypothetical you're going beyond that, and if
2 you go beyond that, and it's not race-based --

3 QUESTION: And you say as in Justice Thomas'
4 hypo for example, they're all members of the -- 90 percent
5 members of the Democratic Party, they're -- 90 percent go
6 to the same church, 90 percent share certain athletic
7 interests, or other community interests, would that be
8 permissible justification? That's the question.

9 MR. PARKS: Yes, because -- I think it would,
10 because race has fallen out of the mix in terms of
11 predominant characteristic here. You're talking about
12 things that have nothing to do with race.

13 QUESTION: I envision rather long, factual
14 trials on these cases, on both sides, both on the motive
15 issue and on the justification issue.

16 MR. PARKS: Well, Your Honor, this is a case
17 that we got done in about a week, and the State never
18 really --

19 QUESTION: But as you say, you didn't have Shaw
20 v. Reno. After Shaw v. Reno, do you think you can do it
21 in a week?

22 MR. PARKS: Well, I don't know if it will even
23 need to be done then, because what we'd be facing then is
24 a legislature that made a reasoned judgment and made sure
25 that it did not violate those tenets. That is an

1 overwhelming burden that a plaintiff is going to have.

2 Not only do we have --

3 QUESTION: Well, what if you had a legislative
4 finding that all the people in the district shared a
5 community of interest, a legislative finding tracking the
6 language that they tried to put in, the evidence they
7 tried to put in in this case.

8 MR. PARKS: Right.

9 QUESTION: Would that be the end of the case,
10 then?

11 MR. PARKS: No, obviously not, but again, I
12 would assume, hearkening back to Justice Scalia's question
13 earlier on, there would be a study or some basis for that,
14 and that we would then, as plaintiffs, evaluate that and
15 determine whether this is pretext or whether -- I mean,
16 race cases in employment law, in contracting law, in
17 admissions to colleges, we all -- they all deal with these
18 issues, and we don't say that we're going to ignore quotas
19 at a university, or we're going to ignore quotas on public
20 contracting because the give-and-take of a political fight
21 might make uncovering the racial animus that drives those
22 programs difficult.

23 We elevate the burden of proof to plaintiffs
24 because it's reapportionment, but we don't close the
25 courthouse door because it may be bothersome.

1 QUESTION: Can I ask you a question about an
2 earlier question that Justice Thomas asked about adopting
3 an odd-shaped district in order to maximize the number of
4 Democratic voters, or Republican voters, whatever. You
5 said it would be bad if you simply crammed a lot of voters
6 of a certain race into that district in order to maximize
7 the vote of a party, knowing that that race votes 90
8 percent one way or the other.

9 Suppose you didn't do it that way, however.
10 Suppose you just looked at the voting returns, and without
11 considering race, drew the same weird-shaped district. It
12 would come out the same way.

13 MR. PARKS: You say by precincts?

14 QUESTION: By precincts, about which precincts
15 voted Republican, which voted Democratic, and when you
16 ended up, you had an odd-shaped district that was
17 60 percent black.

18 MR. PARKS: Right.

19 QUESTION: Would that be a violation?

20 MR. PARKS: No. No, race did not predominate.
21 No, I don't think so. It's similar to drawing our Fifth
22 Congressional District. You would draw our Fifth
23 Congressional District --

24 QUESTION: Which is probably the way parties do
25 political gerrymandering, isn't it, by looking at the

1 returns and including within the gerrymandered district
2 those precincts that have returns going for one party, the
3 other whatever, whether it's blacks or whites that were
4 responsible for the returns.

5 MR. PARKS: Your Honor, we are very naive in
6 about political --

7 QUESTION: Oh --

8 MR. PARKS: -- gerrymandering in Georgia.

9 QUESTION: -- I'm sure.

10 (Laughter.)

11 MR. PARKS: But I would assume that would be a
12 good way to do it, and the further reason I say that is
13 this. The computer -- I have seen this computer. We
14 bought this computer that does this work, and it sat on
15 the bench at this trial, and this computer can bring that
16 information up just like that, show you the precinct, show
17 you the last election, and you can draw that Democratic
18 precinct anywhere you want, and you can do that
19 independent of race.

20 Then you can overlay race. Then you can overlay
21 any, and unbelievable amounts of demographic information.
22 It truly is the Big Brother of Government, and that
23 technology has led us into this abyss. That -- the law
24 has got to catch up with the technology. Legislatures
25 now --

1 QUESTION: You don't think precinct captains
2 used to do this?

3 (Laughter.)

4 MR. PARKS: Huh?

5 QUESTION: You don't think precinct captains
6 ever did this?

7 MR. PARKS: I don't -- I can't conceive that
8 they could do it with the surgeon-like precision we can do
9 it now.

10 QUESTION: They did it in Chicago.

11 (Laughter.)

12 QUESTION: Justice Stevens is from Chicago in
13 the good old days.

14 (Laughter.)

15 MR. PARKS: I stand corrected.

16 Let me read to you what the State of Georgia
17 said 2 weeks before it gave in and threw its towel in,
18 what it said to a Federal district court when faced with a
19 Department of Justice demand that three districts be
20 created. This is on page 22, footnote 22 of our brief:
21 "This plan amounts to nothing more than a complaint that
22 the State should have but has not sought proportional
23 representation for minority citizens as a goal."

24 The State went on to lambast the Department of
25 Justice as asking for not only unprecedented but a

1 dangerous plan regarding the political proces of this
2 Nation. It then contended that the plan, as it was
3 ultimately passed, would cause racial polarization and
4 encourage candidates of one race to be unresponsive to the
5 needs and wishes of another race, thereby breeding
6 extremism in both races to the detriment of all citizens.

7 A Max Black's plan, which was the proponent and
8 the blueprint for their plan, in the opinion of the State
9 2 weeks before they accepted it, "will most certainly have
10 the effect and result of diminishing minority
11 effectiveness in the political process" -- "diminishing
12 minority effectiveness in the political process."

13 QUESTION: Mr. Parks --

14 QUESTION: But they're here defending it today,
15 aren't they?

16 MR. PARKS: They're here defending it today, but
17 I submit to you that the record is overwhelmingly clear
18 that that is out of expedience rather than any compelling
19 State justification.

20 QUESTION: I thought your footnote described the
21 complaint in another case, that they were describing, the
22 complaint in Jones -- is this Jones v. Miller?

23 MR. PARKS: Yes, but the State -- in that case,
24 they sought through section 2 to have these three minority
25 districts drawn. The State was defending it and filed a

1 motion to dismiss the case, and those quotes are from the
2 State's brief opposing the implementation of the plan.

3 QUESTION: And they're describing the complaint
4 in that case.

5 MR. PARKS: Yes, but that plan is seeking to
6 have the Department of Justice mandate made the law
7 through section 2.

8 The State of Georgia admits that the Voting
9 Rights Act could not stand as a compelling State interest
10 for this plan. When you remove the Voting Rights Act from
11 this type of racial gerrymandering, what else is there?
12 What else could there be?

13 The State says, a fair shot. A fair shot is
14 code for proportionality, because proportionality is all
15 they argued at the district court. They read De Grandy as
16 sanctioning proportionality, and I read --

17 QUESTION: Why isn't it a compelling -- isn't
18 it --

19 MR. PARKS: -- that opinion very differently.

20 QUESTION: Couldn't it be a compelling interest
21 that in a particular place for many, many years -- many,
22 many, many, many yeas the State was set up in such a way
23 to prevent African Americans from having the same kind of
24 vote, or even having a vote, as other persons had? I
25 mean, wouldn't that be a justification, possibly, in

1 particular circumstances for overcoming the effects of a
2 history of discrimination?

3 MR. PARKS: Yes, that would become -- but then
4 we would go into traditional equal protection analysis.
5 Have you, the State of Georgia, come up with a limited
6 race-based remedy, temporary in nature, and narrowly
7 tailored to the purpose.

8 QUESTION: So then, would we then use --

9 MR. PARKS: It can't just automatically be
10 proportionality.

11 QUESTION: But then would we then use, if we got
12 past the threshold and then we found such a compelling
13 interest, then would you not use what the Abrams briefs or
14 some of the briefs have, the five, the traditional tests
15 that this Court's developed in order to show narrow
16 tailoring that -- limited in duration -- you know the
17 five.

18 MR. PARKS: Yes, sir.

19 QUESTION: Limited in duration, it's roughly --

20 MR. PARKS: Right.

21 QUESTION: -- equivalent to the --

22 MR. PARKS: Right. But we get to the point,
23 they're not contending that. They are contending that
24 proportionality in and of itself is a State sovereign
25 legislative prerogative that they don't -- that they --

1 they're asking this Court to politely butt out.

2 They're saying to the courts of the United
3 States that we want, under some States' rights theory, the
4 right, even though we really did this because the Justice
5 Department made us do it, we have to defend it, and what
6 we want to say is, is that if we want to manipulate
7 racially our political boundaries, it's no business of the
8 Federal Government.

9 QUESTION: Well, you would agree, would you not,
10 that if the city, say, was composed of one-third Polish
11 Americans, one-third Swedish Americans, and one-third
12 Irish Americans, they could set out to divide up the city
13 council in thirds for representation of each. That would
14 be constitutionally permissible, wouldn't it?

15 MR. PARKS: If that is the only --

16 QUESTION: That's the only reason, yes.

17 MR. PARKS: I would hope not, Justice Stevens.

18 QUESTION: You'd hope they wouldn't do it, but
19 would it be --

20 MR. PARKS: No, I hope that would not be
21 constitutional. That was the only expressed reason -- no
22 communities of interest, no nothing.

23 QUESTION: Other than a presumption that may or
24 may not be valid --

25 MR. PARKS: Right.

1 QUESTION: -- that Swedish Americans tend to
2 share certain interests, they have Swedish clubs and --

3 MR. PARKS: And that's why strict scrutiny helps
4 us with this. It makes --

5 QUESTION: But you'd say strict scrutiny would
6 be required even though there was no racial basis in that
7 one?

8 MR. PARKS: Shaw says racial or ethnic enclaves.
9 Are these not ethnic enclaves, and is an ethnic enclave
10 somehow more constitutional than a racial enclave? We
11 read -- we don't read a distinction in the Shaw case. If
12 you are separating people because of their race, and
13 ethnicity is certainly a subcategory of race, I want the
14 State to have to go through the hoops.

15 It may well get through it, because it will show
16 that when we go into Chinatown, the signs are all in
17 Chinese, and everyone worships a different God, and these
18 people have genuine, independent community-based needs to
19 have a political voice that is weighted in a plethora of
20 other interests, rather than --

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Parks.

22 MR. PARKS: Thank you.

23 CHIEF JUSTICE REHNQUIST: The case is submitted.

24 (Whereupon, at 12:18 p.m., the case in the
25 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:

ZELL MILLER, ET AL., Appellants v. DAVIDA JOHNSON, ET AL.,
LUCIOUS ABRAMS, JR., ET AL., Appellants v. DAVIDA JOHNSON,
ET AL., and UNITED STATES, Appellant v. DAVIDA JOHNSON, ET AL.

CASE NO.: 94-631, 94-797, 94-929

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

BY Don Mari Federico

(REPORTER)

'95 APR 26 P 3:32

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE