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PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION: GEORGE W. BUSH, GOVERNOR OF TEXAS, ET AL.,
Appellants v. AL VERA, ET AL.; WILLIAM LAWSON,
ET AL., Appellants v. AL VERA, ET AL.; and
UNITED STATES, Appellant v. AL VERA, ET AL.

CASE NO: No. 94-805, No. 94-806 and No. 94-988

PLACE: Washington, D.C.

DATE: Tuesday, December 5, 1995

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GEORGE W. BUSH, GOVERNOR OF :

4 TEXAS, ET AL., :

5 Appellants :

6 v. : No. 94-805

7 AL VERA, ET AL.; :

8 WILLIAM LAWSON, ET AL., :

9 Appellants :

10 v. : No. 94-806

11 AL VERA, ET AL.; :

12 and :

13 UNITED STATES, :

14 Appellant :

15 v. : No. 94-988

16 AL VERA, ET AL. :

17 - - - - -X

18 Washington, D.C.

19 Tuesday, December 5, 1995

20 The above-entitled matters came on for oral
21 argument before the Supreme Court of the United States at
22 10:05 a.m.

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APPEARANCES:

JAVIER AGUILAR, ESQ., Special Assistant Attorney General
of Texas, Austin, Texas; on behalf of the State
Appellants.

PAUL BENDER, ESQ., Deputy Solicitor General, Department of
Justice, Washington, D.C.; on behalf of the Federal
Appellant.

PENDA D. HAIR, ESQ., Washington, D.C.; on behalf of the
Private Appellants.

DANIEL E. TROY, ESQ., Washington, D.C.; on behalf of the
Appellees.

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

2 (10:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 94-805, George W. Bush v. Al Vera, William
5 Lawson v. Al Vera, and United States v. Al Vera.

6 Mr. Aguilar.

7 ORAL ARGUMENT OF JAVIER AGUILAR

8 ON BEHALF OF THE STATE APPELLANTS

9 MR. AGUILAR: Mr. Chief Justice and may it
10 please the Court:

11 At issue in this direct appeal is the
12 constitutionality of three congressional districts that
13 the court below erroneously ruled were racially
14 gerrymandered.

15 These districts are localized in two
16 metropolitan areas of the State of Texas, two counties,
17 Harris County and Dallas County. The districts involved
18 are Congressional Districts 18, which is a black
19 opportunity district that was created originally in the
20 1970's in Harris County, Congressional District 29, which
21 is a brand new congressional district, which is now a
22 Hispanic opportunity district in Harris County, and
23 Congressional District 30, which is a black opportunity
24 district in Dallas County, a brand new black opportunity
25 district.

1 QUESTION: Mr. Aguilar, what is this opportunity
2 district? This is new terminology.

3 MR. AGUILAR: Well, it's a majority minority
4 district that was created under --

5 QUESTION: Why don't we just call them majority
6 minority districts? I mean, you're entitled to use
7 whatever terminology -- you can call them, you know,
8 motherhood apple pie districts if you like, but you will
9 be insulting my intelligence every time you say it. Can't
10 we give it some, you know, unemotive terminology that we
11 can use in the argument?

12 MR. AGUILAR: Yes, Your Honor.

13 QUESTION: Thank you.

14 MR. AGUILAR: I'll refer to them as majority
15 minority districts.

16 The district court we believe legally erred in
17 its finding below that the three districts were racially
18 gerrymandered for two reasons. First, it held that race
19 predominated in the drawing of the districts, but it did
20 so because it refused to recognize the State's customary
21 and traditional redistricting principle of incumbency
22 protection, as well as other principles that it utilized,
23 including the equal population rule that it always follows
24 and it must follow --

25 QUESTION: That's pretty much a question of

1 fact, isn't it, Mr. Aguilar, whether it was basically a
2 desire to preserve incumbency or whether it was the desire
3 to create majority minority districts?

4 MR. AGUILAR: Well, yes, sir, it is a question
5 of fact, Your Honor, but in this case -- they decided this
6 case before Miller v. Johnson, and I think their opinion
7 is clear that they did not believe that incumbency
8 protection should be considered a traditional districting
9 principle because it was not among those listed in the
10 Shaw v. Reno case to begin with.

11 It is our contention that the determination of
12 what is a customary and traditional districting principle
13 is something that is determined by the State and its
14 practices, its historical practices, and there was no
15 doubt that in this case there's plenty of evidence to show
16 that Texas has followed the traditional practice of
17 incumbency protection to decide where it's going to draw
18 its districts, and incumbency protection as applied by the
19 Texas legislature, certainly in the 1990's, really has
20 four aspects, Mr. Chief Justice.

21 First, it is not pairing incumbents. It will
22 not vote for a plan that does not pair incumbents, simply
23 because they want to preserve the State's congressional
24 seniority.

25 Second, it means that if you're going to have to

1 redraw districts, which they had to because of the fact
2 that the population had increased so greatly in Texas that
3 we had been reapportioned three different districts, that
4 you try to maintain the constituency of each of the
5 Congresspeople.

6 QUESTION: Okay, but Mr. Aguilar, you made this
7 argument, I take it, to the district court, and you can
8 see it's a question of fact as to what the motivation for
9 drawing -- and the district court rejected those findings.
10 Are you contending here that they're clearly erroneous?

11 MR. AGUILAR: No, Your Honor. We're saying that
12 their decision is legally wrong because it did not
13 properly apply the rule of Miller v. Johnson. Now, in
14 fact, quite frankly they didn't have it to apply because
15 it wasn't decided until sometime after the opinion.

16 What we're saying is, they recognized --

17 QUESTION: Well, but Mr. Aguilar, the district
18 court did make findings that the districts were formed in
19 utter disregard for traditional redistricting criteria,
20 and were unexplainable on other than racial grounds.

21 Now, are those findings -- do you say either of
22 those are clearly erroneous?

23 MR. AGUILAR: Those findings are tainted, Your
24 Honor, by the legal error in not recognizing that the
25 State of Texas has a long tradition of protecting

1 incumbents, and that --

2 QUESTION: Well, do you argue that protection of
3 incumbents is a compelling State interest?

4 MR. AGUILAR: No, Your Honor. We're saying that
5 that is --

6 QUESTION: You're just saying it's a traditional
7 State interest that is followed in Texas --

8 MR. AGUILAR: It is something --

9 QUESTION: -- in drawing districts.

10 MR. AGUILAR: That is correct, Justice O'Connor.
11 What we're saying is, you -- if you're going to try to
12 determine whether there has been a racial motivation, you
13 look at all the different objectives --

14 QUESTION: Well --

15 MR. AGUILAR: -- that the State utilized.

16 QUESTION: -- all right, but you did present
17 evidence to the district court of protection of
18 incumbency. I mean, that evidence was apparently before
19 the district court, and it nevertheless found that that
20 may well be so, but it was overshadowed here by the
21 decision in drawing the district boundaries to totally
22 draw them along racial lines.

23 MR. AGUILAR: Yes, Your Honor, and if I may,
24 they certainly considered that, and they even acknowledged
25 in their opinion that incumbency protection was a major

1 objective in the State, all over the State.

2 QUESTION: Right.

3 MR. AGUILAR: And they didn't particularly like
4 it, and they said as much, but despite the fact that 24
5 out of the 30 districts, Justice O'Connor, were challenged
6 on these grounds, only these three districts were found to
7 be racially gerrymandered, and I'd like to point to the
8 Court -- refer to the Court to Joint Appendix at page 192.
9 I'd like to use that as an example, trying to flesh out
10 what I'm trying to say.

11 QUESTION: Mr. Aguilar, before you do that,
12 remind me -- I think you mentioned it just a moment ago.
13 Didn't this Court not credit incumbency on the same line
14 as the traditional factors that were mentioned in the Shaw
15 opinion? As you pointed out, Miller had not yet been
16 decided, and I -- can you be precise about how this Court
17 treated incumbency? Did it consider it a traditional
18 districting factor?

19 MR. AGUILAR: Are you asking in the Shaw
20 opinion, Your Honor?

21 QUESTION: No, in this opinion.

22 MR. AGUILAR: I think it recognized that it was
23 a motivation of the legislature all over the State. I
24 think it certainly recognized and accepted that. I think
25 that in the process of accepting that --

1 QUESTION: Did it treat it as something that
2 could dominate? My question is, did the Court recognize
3 that incumbency should be treated as a legitimate factor?

4 MR. AGUILAR: No, Your Honor. They believed
5 that incumbency protection was not something that this
6 Court referred to in the Shaw decision and, consequently,
7 since it didn't fall within the -- those factors that this
8 Court referenced in Shaw, therefore it wasn't something
9 that they could pay attention to, and I think --

10 QUESTION: Let me -- may I ask you to go one
11 step further? I take it, of course, because they were
12 deciding before Miller came down, I take it that what the
13 court was doing was saying that predominant racial motive
14 is an alternative to incumbency protection as a factor,
15 whereas your argument is after -- I think, after Miller,
16 we judge what is a predominant racial motive by asking,
17 among other things, whether it was done in disregard of
18 traditional districting practices, and your final step is,
19 incumbency protection is one of the objects of traditional
20 districting practices.

21 So that I think what you're saying is the court
22 made an either-or choice when there wasn't an either-or
23 choice. The two alternatives that it was opposing to each
24 other are not really opposing alternatives. It should
25 have considered incumbency protection in deciding whether

1 the motive was predominantly racial.

2 MR. AGUILAR: That is --

3 QUESTION: Is that fair?

4 MR. AGUILAR: That is exactly correct, Justice
5 Souter.

6 QUESTION: Counsel, I want you to get to
7 section -- to page 192, but let me ask you one question
8 before you do that.

9 If incumbency protection is the motive, but the
10 means used to effect it is racial gerrymandering, is that
11 constitutional? Does that comply with Miller?

12 MR. AGUILAR: Well, no, Your Honor. We are
13 saying that you can -- the legislature can apply its
14 traditional motivation of incumbency protection, and just
15 because it's applying it in an area where there are blacks
16 or Hispanics living, that doesn't necessarily mean that
17 the end result is a racial gerrymander.

18 QUESTION: Well, suppose I say I want to protect
19 incumbents and, incidentally, I take it this means any
20 incumbent who is an officeholder can protect his or her
21 interests by running for some other office. A State
22 Senator can be a Congressman, and that's incumbency
23 protection in Texas.

24 Let's assume that that is the goal, and we say,
25 in order to do this we're going to have racial

1 gerrymanders. Does this -- is this consistent with the
2 Court's holding in Miller?

3 MR. AGUILAR: Well, if the predominant
4 motivation is just collecting as many minorities that you
5 can within one district, and you don't care whether it
6 protects your incumbents, you don't care about --

7 QUESTION: No, no, that's not my hypothetical.
8 My hypothetical is, we want to protect incumbents, and the
9 way we're going to do this, the principal way, the
10 principal mechanism we're going to use is assigning voters
11 to districts on account -- by race. Does that comport
12 with the command of Miller?

13 MR. AGUILAR: I think it would, Your Honor. You
14 have to find out why race is considered. We're not saying
15 that we cannot consider race, but in our case, Your
16 Honor --

17 QUESTION: Well, that's one of the things we're
18 going to ask.

19 MR. AGUILAR: Well, in our - for instance, if we
20 had a case where there was no reason to create this
21 district -- in other words, there was very little reason
22 to create a majority minority district under the Voting
23 Rights Act, then I would say we would be running afoul of
24 this Court's ruling in Miller, but when you have a
25 situation where --

1 QUESTION: Well now, Mr. Aguilar, was there
2 evidence here that majority minority districts could have
3 been drawn in 18, 29, and 30 that would have been more
4 compact, and that would not have presented this racial
5 gerrymander problem, and nevertheless have satisfied some
6 of the incumbents?

7 MR. AGUILAR: Let me --

8 QUESTION: I mean, there were proposals made --

9 MR. AGUILAR: That's correct, there were.

10 QUESTION: -- were there not --

11 MR. AGUILAR: Yes, Your Honor.

12 QUESTION: That still would have provided
13 majority minority districts for --

14 MR. AGUILAR: Yes.

15 QUESTION: -- blacks and Hispanics.

16 MR. AGUILAR: Yes, Your Honor.

17 QUESTION: But wouldn't have been drawn, you
18 know, house to house to pick up certain particular voters
19 in the racial base.

20 MR. AGUILAR: Well, they weren't drawn house to
21 house, Your Honor, but yes, there was in the evidence --
22 in fact, the State itself presented alternative districts
23 in these three areas that were geographically more
24 compact. The plaintiffs presented alternative plans.
25 Their expert, Mr. Weber, Dr. Weber, they had another plan,

1 the Owens-Pate plan. All of their plans that they
2 presented were more geographically compact. The problem
3 with the --

4 QUESTION: Yes, so this case doesn't present,
5 does it, a situation where Texas had no means of assuring
6 a racial composition and balance, even if these peculiar
7 districts are tossed out?

8 MR. AGUILAR: Well, that's right. We could draw
9 other alternative districts, there was no question about
10 that. The reason we didn't --

11 QUESTION: Does that go to narrow tailoring, do
12 you suppose?

13 MR. AGUILAR: No, Your Honor.

14 QUESTION: No.

15 MR. AGUILAR: Our position --

16 QUESTION: I would have thought it might.

17 MR. AGUILAR: Well, our position on narrow
18 tailoring is that once there is a reason to draw the
19 districts under the Voting Rights Act, the narrow
20 tailoring means you just draw the district that's
21 necessary that affords that group an opportunity to elect
22 someone of their choosing.

23 QUESTION: You mean, the number of districts?

24 MR. AGUILAR: The number of districts, that's
25 correct, Your Honor.

1 QUESTION: What would be an example of broad
2 tailoring, then, once you find that the -- you want to
3 draw those kinds of -- are there any kind of boundary
4 lines you can't have?

5 MR. AGUILAR: Well, I think that -- I guess the
6 best example would be in the Miller case. The boundaries
7 there were much -- we're talking about a totally different
8 district that spanned some 200, 250 miles, that linked
9 together different cities, different disparate black
10 populations that had very little in common with them,
11 where the district boundaries themselves, the black
12 population was located in the outer ridges of the
13 district. That's not what we have here. We believe
14 narrow --

15 QUESTION: So you do recognize that narrow
16 tailoring would outlaw some kinds of districts drawn after
17 a decision to draw majority minority -- but you say this
18 is narrowly tailored in your case.

19 MR. AGUILAR: It's narrowly tailored because we
20 first of all realized that there was a sufficiently large
21 minority population in a geographically compact area, and
22 there was racially polarized voting.

23 Having made that determination, we then drew a
24 district in that location. Now, I agree with the
25 suggestion of Justice O'Connor that there were different

1 alternatives. We could have drawn all kinds of different
2 boundaries, but it was -- you know, politics is a contact
3 sport --

4 QUESTION: Do you --

5 MR. AGUILAR: -- and people don't want to --
6 sorry, Your Honor.

7 QUESTION: If, in fact -- suppose for the sake
8 of argument that it was accepted that under Miller you
9 could use race as a basis for creating a
10 section 2-required district of the Voting Rights Act, a
11 reasonably compact one. Suppose you also thought that
12 insofar as a district departs from a compact shape, that's
13 okay if the motive for the departure from the compact
14 shape has nothing to do with race, such as protecting
15 incumbents.

16 If you thought both of those things, then would
17 you have to remand this case in order to decide if the
18 reason that these districts depart from the compact shape
19 is incumbency protection?

20 MR. AGUILAR: No, Your Honor. I think the
21 evidence is sufficient here to be able to reverse, Your
22 Honor, and render. I think that the error is one of law.
23 I think that --

24 QUESTION: But Mr. Aguilar, in answer to Justice
25 O'Connor you said that they could have -- perhaps I

1 misunderstood your answer, but I thought you said that
2 they could have satisfied the minority majority district
3 composition with a more compact -- that they could have
4 satisfied both incumbency and race. Perhaps you didn't
5 complete your answer.

6 MR. AGUILAR: I did not complete my answer. The
7 reason why they didn't, they would not have, the
8 legislature I'm talking about, would not have accepted the
9 proposed plans that the plaintiffs proposed and even the
10 State plans -- the districts that we drew for litigation
11 purposes show that we could, in fact, draw more
12 geographically compact districts -- was because they would
13 pair incumbents. It's because we would lose some of our
14 Congressmen in Congress, and we did not want to do that.

15 QUESTION: Mr. Aguilar, let me understand what
16 you're saying about the incumbency justification. Is it
17 that if -- let's say you have a black or Hispanic
18 Congressman. It is okay to use race as a criterion in
19 drawing a district so long as its purpose is to protect
20 the seat of that Congressman. That is, I draw a majority
21 black district or a majority Hispanic district because the
22 incumbent happens to be a black or a Hispanic. Is that --
23 would that be constitutional?

24 MR. AGUILAR: If the question ignores the
25 requirements of the Voting Rights Act, I would say there

1 would be a problem, if that's your only goal, but
2 that's --

3 QUESTION: I don't --

4 MR. AGUILAR: What I'm saying, we have -- the
5 Texas legislature has the obligation to satisfy Federal
6 requirements, and the Voting Rights Act is a Federal
7 requirement, but in doing so, the State legislature ought
8 to have, under our federalism, the right to use the same
9 districting objectives as it uses for all the districts.

10 QUESTION: But you say that's a valid objective
11 even though race is the means of achieving that objective,
12 is that your position?

13 MR. AGUILAR: Well --

14 QUESTION: Or do you say that race was not used
15 here? I --

16 MR. AGUILAR: Race was used. It had to be,
17 because our prime -- because one of our objectives was to
18 create a majority minority district --

19 QUESTION: So your question --

20 MR. AGUILAR: -- pursuant to the Voting Rights
21 Act.

22 QUESTION: But your answer to my question must
23 be yes, then. If I have a black Congressman, I can say, I
24 want to protect that Congressman's seat and therefore,
25 simply because I want to protect that Congressman's seat,

1 it is okay to draw a black district.

2 MR. AGUILAR: Well, I didn't finish the four
3 different aspects of incumbency. It's just not protecting
4 the incumbent's, black incumbent's seat, but rather, it's
5 also protecting those around them, the Congressmen around
6 them, and in this --

7 QUESTION: Well, let me ask you this. Suppose
8 you have a district that's a majority white district, and
9 the incumbent says, look, we have to redistrict, and don't
10 put any blacks in my district. They won't vote for me,
11 and I won't have it. You have to protect me. Now, is
12 that okay?

13 MR. AGUILAR: Well, it's --

14 QUESTION: Can the legislature then say, fine,
15 we're concerned about you, Mr. Incumbent, and so we'll
16 exclude all blacks from your district. Is that
17 constitutional?

18 MR. AGUILAR: Well, no, Your Honor, not in the
19 hypothetical that you just posed to me, but that was not
20 what we did here, Your Honor. What we did here was, we
21 made a determination that we --

22 QUESTION: Well, you may have -- it may have
23 been done in reverse.

24 MR. AGUILAR: Well, in fact, many blacks that
25 could have been in a more compact jurisdiction, or a more

1 compact district, in fact didn't go into the majority
2 minority district. They remained in other districts, and
3 in fact they became impact districts, if you will.

4 QUESTION: May I ask, is this what you're saying
5 in substance, that incumbency protection had nothing to do
6 with the number of majority minority districts. It merely
7 explains the shape of the districts, because after you
8 decided the number you had to satisfy the incumbents and
9 draw all these squiggly lines.

10 MR. AGUILAR: Absolutely, Your Honor. In fact,
11 and if I may before my time expires, if you look at page
12 192, that's the map of the Dallas area, District 6 and
13 District 12 were not impacted by the drawing of
14 District 30, and yet the shape of both 6 and 12 look
15 rather strange. In fact --

16 QUESTION: Were they challenged? Did anybody
17 file suit to challenge 6?

18 MR. AGUILAR: They were challenged, Your Honor,
19 but the court held there was no racial gerrymandering.
20 These are predominantly and overwhelmingly white
21 districts.

22 The reason the districts look like this has
23 nothing to do with race. It has to do with the fact that
24 the legislature was trying to draw districts that those
25 incumbents could be elected from, trying to not only keep

1 as many constituents there, but also they're going to have
2 to bring in constituents, bring in constituents that would
3 be supportive of that Congressman.

4 QUESTION: Thank you, Mr. Aguilar.

5 Mr. Bender, we'll hear from you.

6 ORAL ARGUMENT OF PAUL BENDER

7 ON BEHALF OF THE FEDERAL APPELLANT

8 MR. BENDER: Thank you, Mr. Chief Justice, and
9 may it please the Court:

10 Even if strict scrutiny is applicable to the
11 districts in this case, the district court decision
12 invalidating those districts was legally incorrect and it
13 must be reversed.

14 The district court held that although Texas
15 might have a compelling interest in creating majority
16 minority, or minority opportunity districts in Dallas and
17 Houston in order to protect the rights of minorities in
18 those communities, who are the victims of polarized
19 voting, to protect their right to participate in the
20 process in a fair way, that even if Texas had those
21 compelling interests, the districts that Texas actually
22 created were not narrowly tailored.

23 The court held that because it found that Texas
24 could have created three districts that were more compact
25 than the ones that it actually created, and that in

1 departing from compactness, the court flunked the narrow
2 tailoring test.

3 QUESTION: Do you agree with Mr. Aguilar that
4 that is basically a confusion of categories, that narrow
5 tailoring goes basically to number of districts, and the
6 niceness of the lines with which they are drawn is
7 essentially the question, or is essentially an issue that
8 you look at when you're deciding whether, in fact, the
9 motive was predominantly racial as distinct from a motive
10 consistent with customary districting practices?

11 MR. BENDER: I think the niceness of the lines
12 is relevant probably to both aspects of it. One of the
13 ways that you can depart from narrow tailoring would be to
14 draw racial lines gratuitously.

15 QUESTION: Well, I suppose if you -- there's a
16 point at which the line is crossed between protecting an
17 incumbent who draws votes predominantly from one race, on
18 the one hand, and packing on the other hand, but that is
19 an inquiry, I take it, that you would make at the point
20 where you're saying, what is the predominant motive here
21 in order to determine whether strict scrutiny applies at
22 all? Is that fair to say?

23 MR. BENDER: Well, I think it's fair to say, but
24 I think a State could have a compelling interest to create
25 a majority minority district and then put many more

1 minorities in that district than were necessary.

2 QUESTION: That would be packing.

3 MR. BENDER: That would be packing, and that
4 would be a violation of the narrow tailoring test.

5 QUESTION: But not the shape of the district.

6 MR. BENDER: The shape of the district might be
7 a violation of the narrow tailoring.

8 QUESTION: Yes. I thought that narrow tailoring
9 applied to kicking over any more of the normal criteria
10 for district drawing than is necessary to achieve the
11 objective.

12 MR. BENDER: Right, and --

13 QUESTION: One of which would be compactness and
14 contiguity.

15 MR. BENDER: And another would be incumbency
16 protection.

17 QUESTION: Yes. Mr. Bender --

18 QUESTION: No, but you don't have -- excuse me.

19 QUESTION: Well, go on. I was going to --

20 QUESTION: Let me just follow up on one of
21 Justice Scalia's questions.

22 But if you cannot draw a majority minority
23 district without jettisoning your traditional districting
24 principles, you don't have to do it. In other words,
25 section 2 does not require you to throw out the tradition

1 of districting in order to create a majority minority
2 district, and if that were the case, then you wouldn't
3 have the compelling interest of complying with section 2.

4 MR. BENDER: Right, and so here, the fact that
5 the State could have drawn three compact districts, two in
6 Houston and one in Dallas -- it could have drawn a compact
7 district in Dallas to provide black minorities there with
8 an opportunity to participate fairly in the process.

9 It didn't do that, and the record is absolutely
10 clear on this. The district court was absolutely clear on
11 it. It didn't do that because of the interests of the
12 incumbents who were surrounding that district. They did
13 not want that compact district because it took too many
14 Democratic voters away from them, and so they pulled
15 Democratic voters out of that compact district, which
16 required the minority district to get voters from some
17 place else in order to both satisfy the one-person-one-
18 vote requirement and remain a majority minority district.

19 QUESTION: Mr. Bender, is your answer the
20 same -- well, let me ask this first. The appellees' brief
21 cites a law review article in the Michigan Law Review
22 which rates districts in the country for irregularity, and
23 according to that law review article, districts 18 and 29
24 are tied for first with one other district in the country,
25 as the district with the least regular borders in the

1 country. Is that accurate or not?

2 MR. BENDER: I wouldn't say that they were
3 necessarily tied for first, but they are certainly --

4 QUESTION: They're up there -- yes.

5 MR. BENDER: -- among the most irregular
6 districts in the country, yes. I think everybody concedes
7 that.

8 In Dallas, that irregularity occurred, I think
9 nobody doubts this, because of the interest in protecting
10 incumbents, and Texas' amazingly strong interest in
11 protecting incumbents. That is a very strong interest
12 that Texas traditionally has had and continues to have in
13 districting. They used --

14 QUESTION: Well, it's no different than in any
15 other State, is it? I used to serve in a State
16 legislature, and I can well remember scrambling around to
17 protect incumbents. That's a typical thing, isn't it.

18 MR. BENDER: I think -- but the strength of it
19 must vary from place to place.

20 QUESTION: But do you think that that overrides
21 the need to avoid deciding boundaries on purely racial
22 grounds? Is that your position?

23 MR. BENDER: No, it doesn't override the need.
24 The question is, if a State could draw a compact minority
25 district and it has a compelling interest in doing that to

1 satisfy the Voting Rights Act and perhaps even the
2 Constitution, and it also has a very strong interest in
3 protecting incumbents, does the State have to choose
4 between those two interests and jettison one in order to
5 do the other?

6 QUESTION: Or does the State have to follow the
7 constitutional requirement not to draw lines on primarily
8 a racial basis?

9 MR. BENDER: That's not a constitutional
10 requirement, Justice O'Connor. I think you said in Shaw
11 and Reno in writing for the Court, and Justice Kennedy
12 repeated for the Court in Miller and Johnson, that that's
13 not an absolute prohibition. It's just something that
14 requires strict scrutiny, and that strict scrutiny is
15 satisfied if there's a compelling interest.

16 Here, the district court did not deny that there
17 was a compelling interest, but said, you've got to choose
18 between your compelling interest in Dallas in having a
19 majority district and protecting incumbents.

20 And in Houston the situation was a little more
21 complicated. There was incumbent protection interest
22 there, but there was also the fact that the State had a
23 compelling interest in creating a Hispanic majority
24 district in Houston, which could have been compact, and in
25 creating a black majority, or in keeping a black majority

1 district in Houston.

2 QUESTION: Well, and there are also degrees of
3 incumbent interest. Some incumbent officeholder might
4 say, I want a certain type of voter in my district. It
5 wouldn't double up officeholders, but nonetheless I want
6 you to draw this along racial lines because I think I can
7 pick up voters that are going to go to the polls more
8 often than would be the case if it were compact.

9 MR. BENDER: That would require strict scrutiny.
10 In this case I think the evidence shows that the
11 incumbents did not say, give us black voters just because
12 they're black voters. They were looking for Democratic
13 voters to keep their incumbency safe, and in looking for
14 Democratic voters there is a large correlation in that
15 part of Dallas.

16 QUESTION: If we disagreed with that
17 characterization of what happened, would we have to find
18 that there was an illegality that occurred here?

19 MR. BENDER: I think if you found that their
20 motivation was to get black voters just because they're
21 black voters, that would be unconstitutional.

22 QUESTION: But it's all right to get black
23 voters just to protect incumbents.

24 MR. BENDER: It's all right to get Democratic
25 voters.

1 QUESTION: That's not my question.

2 MR. BENDER: And if in getting Democratic voters
3 one of the ways they try to determine whether voters are
4 likely to be Democratic or not was to look at their race,
5 I don't think --

6 QUESTION: So race can be used as a surrogate.

7 MR. BENDER: In that sense the motive is a
8 nonracial one, namely to protect incumbency.

9 QUESTION: Do you know of any other area where
10 we allow this, where we allow race to be used as a
11 surrogate for some other desirable policy?

12 I thought that what our Constitution requires is
13 that no matter how accurate the generalization may be, you
14 can't use race.

15 MR. BENDER: I think in this situation, if the
16 political reality is that if you're looking for
17 incumbent --

18 QUESTION: I'm not asking about this situation.
19 Do you know any other situation in the law in which we
20 allow race to be used as a surrogate for anything?

21 MR. BENDER: I can't think of one off-hand.

22 QUESTION: I can't, either.

23 MR. BENDER: But I think that --

24 QUESTION: But if race is, in fact, as you
25 suggest, a real surrogate, then you don't have to use

1 race.

2 MR. BENDER: Well, I don't think --

3 QUESTION: You just look for Democrats.

4 MR. BENDER: I think you look for Democrats, and
5 there are a lot of things you look for when you're looking
6 for Democrats, and I think one of the things you -- if all
7 they did was say, we want Democrats, therefore we want
8 black voters, Justice Scalia, I agree with you that would
9 be unconstitutional. That kind of mindless racism would
10 be unconstitutional, but to use it as a --

11 QUESTION: This was a more thoughtful racism?
12 How was this done? I thought that's why you said this was
13 done.

14 MR. BENDER: No, this wasn't done -- no.

15 QUESTION: We wanted Democrats. We know, you
16 know, blacks are Democrats, and therefore we ended up with
17 these --

18 MR. BENDER: I think they used it as one of a
19 number of factors in deciding who would be Democratic
20 voters to put in that district.

21 QUESTION: Didn't they have actual computer
22 printouts of how people had voted?

23 MR. BENDER: Yes.

24 QUESTION: And so was there any need at all to
25 consider their race if they wanted Democrats? They knew

1 how people voted in certain areas, and they knew that
2 people in certain areas both voted Democrat and were
3 black.

4 MR. BENDER: Right.

5 QUESTION: Is there anything in the record that
6 suggests that they went beyond looking at the precinct
7 lists to see that they were Democrats when they did
8 this --

9 MR. BENDER: No. I think, however, the record
10 shows that in doing that what they ended up doing was
11 bringing black voters into their districts, but the motive
12 was, what they were doing was looking for Democrats.

13 Justice Scalia, in that area of Dallas there are
14 a lot of black voters, and so that's what you're going to
15 do if you look for Democrats.

16 Thank you.

17 QUESTION: Thank you, Mr. Bender.

18 Ms. Hair, we'll hear from you.

19 ORAL ARGUMENT OF PENDA D. HAIR

20 ON BEHALF OF THE PRIVATE APPELLANTS

21 MS. HAIR: Mr. Chief Justice, and may it please
22 the Court:

23 I think I'll just pick up with the last point,
24 which is whether race was being used as a surrogate, and
25 let me use the Dallas area as an example.

1 Representative Frost and Bryant, Congresspeople
2 Frost and Bryant were the two white Democrats that
3 bordered on the new opportunity district that was being
4 squeezed in between them in Dallas County. They took
5 about 483,000 people out of Dallas County and of those
6 53 -- roughly 53,000 were African American. Those two
7 Democrats were looking for Democratic voters of any race,
8 and they were looking for voters that they had previously
9 represented.

10 The district court erred because the district
11 court said that -- and it's a legal error. The district
12 court said that protection of incumbents is the equivalent
13 of a racial factor, so all of the district court's
14 findings of fact that race predominated in the
15 construction of these districts is tainted by the legal
16 error that protecting incumbents constituted a part of the
17 racial gerrymander.

18 QUESTION: Ms. Hair --

19 QUESTION: Did it say --

20 QUESTION: Justice Kennedy asked a question
21 earlier, and he said, if one would concede that incumbency
22 protection is a legitimate traditional factor, still, how
23 can you justify giving effect to incumbency by using race?

24 I think that was his question, and I'd like to
25 get your response to that. The position is, you got this

1 strange shape because in satisfying the incumbents' desire
2 to protect their turf, you used race.

3 MS. HAIR: Your Honor, I would say that race was
4 used to decide whether a majority minority district can be
5 created, and again I'll use Dallas as the example. In
6 Dallas what you see is, you see the compact part of the
7 minority opportunity district, District 30, is South
8 Dallas. It's a neighborhood with a community of interest
9 that is 69 percent African American. It shows up nice and
10 almost oval on the district map.

11 The arms of that district that go to the north
12 are majority white, and what happened is that when
13 Congressmen Frost and Bryant came into Dallas County and
14 peeled off, as I said, almost half a million white voters,
15 the district had to go north to pick up population. In
16 going north, race was one of the factors that was
17 considered, but it certainly was not the only factor.

18 The irregular arm to the west goes out to Grand
19 Prairie and picks up white voters. Congressman --
20 Senator, then Senator Johnson was eager to represent those
21 white voters in Grand Prairie because they had been in her
22 Senate district. That was not on the basis of race.

23 Another arm to the left goes out and picks up
24 the airport, and the main northern arm goes up through the
25 center of Dallas County, picks up about 20 percent African

1 American voters and 80 percent non-African American
2 voters.

3 QUESTION: Well, I doubt that we assume that in
4 any case there would ever be a situation in which nothing
5 but race is considered. Of course, there are always other
6 factors, but that doesn't prove anything.

7 MS. HAIR: Yes, Your Honor. Our position is
8 that a minority community of interest existed in South
9 Dallas that could be recognized. It could have been
10 recognized, as Justice O'Connor points out, in a nice
11 compact district that would have been similar to the
12 districts that this Court upheld summarily in the
13 California case, DeWitt.

14 Instead, what happened is that that minority
15 community of interest, like all other communities of
16 interest across the State, saw its district become
17 irregular not because of race -- there was a nice district
18 there that would have satisfied the Voting Rights Act --
19 but because of protection of incumbents.

20 QUESTION: May I go back to an earlier statement
21 that you made on that point? Did the court say in so many
22 words that we identify the protection of incumbents with
23 racial gerrymandering?

24 MS. HAIR: Yes, Your Honor.

25 QUESTION: Did it put it neatly somewhere?

1 MS. HAIR: Your Honor, on page 65a of the
2 jurisdictional statement appendix --

3 QUESTION: Okay.

4 MS. HAIR: The court said that incumbency
5 protection is part of the racial gerrymander, and the
6 court did that because it confused the fact that some
7 African Americans were taken out of the area that normally
8 would have been the most compact version of District 30 in
9 Dallas, for example, but a lot more whites were taken out,
10 and that was error.

11 QUESTION: May I ask you a question about
12 your -- may I finish my question, please? May I ask you a
13 question about the district court's holding?

14 If the district court -- if the districts did
15 not have all these strange appendices, they had precisely
16 the same number of majority minority black districts, but
17 they would be nicely shaped instead, assuming that they
18 were given a bad shape because of incumbency protection,
19 under your view, would that be an adequate remedy under
20 the district court's holding?

21 MS. HAIR: Your Honor, they would not be, and
22 let me tell you why. That's a very important question,
23 because there is no Federal constitutional requirement of
24 compactness.

25 QUESTION: No, I'm not -- really didn't -- I

1 want -- what I'm really asking is, what is your
2 interpretation of what the district court would do with
3 those facts?

4 MS. HAIR: Oh, if a minority opportunity
5 district were compact?

6 QUESTION: Yes.

7 MS. HAIR: I think the district court would
8 uphold it, but the problem --

9 QUESTION: So what is at issue is not the number
10 of minority majority districts, but their shape.

11 MS. HAIR: But how they look, and I want to make
12 the point that that is very important, because my clients
13 who live in these districts need to be able to bargain and
14 compromise in the political process just like all other
15 communities of interest across the State, and to single
16 out minority opportunity districts and say that they have
17 to have a special Federal rule of compactness that does
18 not apply to majority white districts or any other
19 districts in Texas we believe disadvantages them in the
20 process.

21 QUESTION: Well, do you suppose the same rule
22 applies in reverse, that it would not be constitutional
23 for the legislature to protect a white incumbent in a
24 majority white district by fencing out all black voters?

25 MS. HAIR: I think, Your Honor, that would not

1 be constitutional, and that would be race as predominant,
2 but that's not what happened here. These are integrated
3 districts that were drawn with bare populations sufficient
4 to satisfy the Voting Rights Act, and then for other
5 reasons they became noncompact.

6 QUESTION: What if the district that Justice
7 O'Connor hypothesized were drawn the same way, not all
8 whites but just enough whites to guarantee the election of
9 the white incumbent?

10 MS. HAIR: Intentionally to --

11 QUESTION: Yes. Yes.

12 MS. HAIR: To guarantee the election of a
13 white --

14 QUESTION: An intentional adjustment of just the
15 right amount of whites.

16 MS. HAIR: Your Honor, I believe that that would
17 be subject to strict scrutiny under the Voting Rights Act.
18 I'm sorry, under the Constitution, and the difference is
19 that where you have the Voting Rights Act, the Voting
20 Rights Act does provide a justification for taking race
21 into account, because we do have racially polarized --

22 QUESTION: We've never held that, have we?

23 MS. HAIR: Well, the Court has not explicitly -

24 - QUESTION: No.

25 MS. HAIR: -- upheld the Constitution -- the

1 constitutional of the Gingles standard, but it has not
2 been --

3 QUESTION: No, we've never held that the Voting
4 Rights Act is a basis that survives strict scrutiny, I
5 don't believe.

6 MS. HAIR: Yes, Your Honor, that's correct. We
7 would submit that it does.

8 QUESTION: Ms. Hair, would you help me out? I
9 looked at page 65a of the appendix. What is the precise
10 language you rely on in the opinion on 65a? I find the
11 court saying, we conclude that the policy of incumbent
12 protection to the extent it motivated the legislature --

13 QUESTION: Where you are reading from?

14 QUESTION: Page 65a of the joint -- of the
15 appendix to the jurisdictional statement, which is what
16 counsel cited. Maybe I got the wrong one.

17 MS. HAIR: Okay. With regard to District 30 --
18 it's at the top -- we conclude that the policy of
19 incumbent protection --

20 QUESTION: Right.

21 MS. HAIR: -- to the extent it motivated the
22 legislature was not a countervailing force against racial
23 gerrymandering. Instead, racial gerrymandering was an
24 essential part of incumbency protection.

25 QUESTION: Right. I take that to mean that the

1 court says you can't -- you can protect incumbents, but
2 not by using race as the basis.

3 MS. HAIR: And our position is that the court
4 was legally in error when it said that the fact that
5 Congressmen Frost and Bryant came in and took a huge
6 amount of population, that that was part of a racial
7 gerrymander.

8 That was solely to get Democratic voters that
9 they had previously represented and black voters, just
10 like a bunch of white voters, got caught up in there.

11 QUESTION: They took them as blacks, that's what
12 this sentence says, that to the extent incumbent
13 protection motivated the legislature, it was incumbent
14 protection achieved by race.

15 MS. HAIR: Your Honor, our position is that --

16 QUESTION: That's how I read it.

17 MS. HAIR: That -- no, if you -- the district
18 court committed legal error because it confused taking
19 people -- taking Democratic voters with taking people on
20 the basis of race, and that caused it to reach that
21 conclusion.

22 QUESTION: If we find the statement is more
23 ambiguous than you say, should we simply remand this case?

24 MS. HAIR: I think the record is clear, Your
25 Honor, that Congressmen Frost and Bryant came in and took

1 voters of all races that they had previously --

2 QUESTION: All right, but let's assume that
3 we've read that and we still find the court's statement
4 ambiguous. Should we remand?

5 MS. HAIR: Your Honor, yes. If you cannot find
6 that incumbent protection was not equivalent to race, then
7 I think it should be remanded so that we can establish
8 that in the district court.

9 QUESTION: Thank you, Ms. Hair.

10 Mr. Troy, we'll hear from you.

11 ORAL ARGUMENT OF DANIEL E. TROY

12 ON BEHALF OF THE APPELLEES

13 MR. TROY: Mr. Chief Justice, and may it please
14 the Court:

15 With regard to the point that was just being
16 made, at page 19 of our brief we cite to what the district
17 court says.

18 What the district court found exactly was that
19 Texas, quote, repeatedly segregated African American,
20 Hispanic, and Anglo populations by race 1) to further the
21 prospects of incumbent officeholders -- I'm adding the
22 one -- or 2) to create majority minority congressional
23 districts.

24 These districts were conceived for the purpose
25 of providing safe seats in Congress for two African

1 American representatives and Hispanic representatives.

2 Your Honors, the indirect and direct evidence
3 overwhelmingly supports the district court's finding that
4 race was the predominant factor in the drawing of these
5 bizarre, single race majority districts.

6 QUESTION: Why did anyone care from a racial
7 point of view, the interest being to elect a minority
8 Congressman or woman? That can be achieved with a compact
9 district, so why, from that point of view, would anyone
10 care whether the district is noncompact? What human
11 motive could there be for these irregular shapes other
12 than incumbency protection?

13 MR. TROY: Your Honor, what the district court
14 found was that they pursued a maximization policy
15 basically constructing these majority minority single --
16 actually single race majority districts essentially for
17 their own sake, and then race was used as a tool for
18 partisan advantage. That --

19 QUESTION: Sorry, I don't understand. I'm just
20 trying to get clear on a person who is interested in
21 having a black Congressman or a black Congresswoman would
22 be interested, I assume, many, in having a majority
23 minority district which could be achieved with a compact
24 district.

25 Now, given that fact, what possible reason could

1 a person who has that interest have --

2 MR. TROY: Well --

3 QUESTION: -- in seeing that it's an odd shape?

4 In other words, what would the reasoning be?

5 I can understand why you might want an odd shape
6 for the purpose of incumbency protection, but I don't
7 understand what the reasoning would be to want an odd
8 shape for racial reasons.

9 MR. TROY: First of all, Your Honor --

10 QUESTION: Unless, of course, you think a lot of
11 black people happen to be Democrats, but you have the
12 voting record, and so you can look at the voting records
13 and not worry about race.

14 MR. TROY: First of all, in Harris County what
15 they did was, they were separating the races, Hispanics
16 and blacks, because the communities were demanding their
17 own districts for their own sake.

18 But with respect to Dallas County what the
19 record shows, Your Honor, is that the architect of the
20 district, Eddie Bernice Johnson, went -- tried to create a
21 performing single race majority black district, and the
22 reason why -- one of the main reasons why it was not
23 compact, in fact the court found the predominant reason
24 why it was not compact was she testified in the Terrazas
25 v. Slagle litigation that she shed black voters in the

1 South Dallas area, and she testified because they tend to
2 be more transient, they tend to not turn out as well, and
3 so then, in order to preserve the single raceness of the
4 district she went north into Colin County, west into
5 Tarrant County, hither and yon in order to gather as many
6 blacks as possible in order to preserve that as a single
7 race majority district. That was the overall goal.

8 QUESTION: In your view, if it were proved --
9 I'm not saying this is this case, but if it were proved
10 beyond any doubt that the only reason that the districts
11 were not compact in shape was to protect incumbents, and
12 that that had nothing to do with race, under those
13 circumstances would these -- would such districts be
14 constitutional, even under Miller?

15 MR. TROY: Not necessarily, Your Honor,
16 because --

17 QUESTION: Why not?

18 MR. TROY: Miller says that if the predominant
19 motivation in drawing the district was race, then it's
20 subject to strict scrutiny, so the only --

21 QUESTION: Mr. Troy, can we go back to, then,
22 stage 1. We have a very compact district. It has no arms
23 or elbows, but it was created to be a minority -- a
24 majority minority district. Race was the consideration,
25 but it's got wonderfully compact bounds, but race was why

1 that district was created.

2 MR. TROY: I think --

3 QUESTION: Would that be unconstitutional?

4 MR. TROY: I think, Your Honor, that that is, in
5 essence, a hypothetical that would not really arise in
6 part because by definition, if you're taking into account
7 compactness, contiguity, traditional political
8 subdivisions, you are -- race is not the predominant
9 motivation. It may be an important motivation, but it is
10 one of a number of motivations.

11 QUESTION: Why isn't it the predominant
12 motivation? The motivation is to create a majority
13 minority district. That means race.

14 MR. TROY: If you're creating a compact majority
15 minority district, then you are necessarily taking into
16 account other factors, i.e., compactness, contiguity,
17 traditional subdivisions, and the fact that you've got a
18 naturally occurring community of people.

19 QUESTION: So what you're saying is, it's okay
20 to do it for racial purposes, and I -- and you and I are
21 both assuming that the racial purpose is justified by the
22 Voting Rights Act, I take it, or at least by the -- by
23 correcting the Fourteenth Amendment violation.

24 It's okay to do that if you do it consistently
25 with normal districting practices.

1 MR. TROY: I would say that it is -- it is
2 permissible to take race into account in districting so
3 long as it is not the predominant factor. That is what
4 Miller says.

5 QUESTION: But what -- aren't you assuming that
6 what determines whether it's the predominant factor or
7 not, what determines whether that factor is treated as
8 predominant for purposes of Miller and Shaw, is a function
9 of whether it is created consistently with districting
10 practices as traditionally understood, and if the answer
11 is yes, then it's not predominant, race is not predominant
12 for Miller purposes. If the answer is no, it is. I
13 understood that to be the thrust of your answer.

14 MR. TROY: I think if you create it consistent
15 with -- with, again, looking for naturally occurring
16 communities, so it is clear that what you're not trying to
17 do is achieve a certain racial goal, and that's not your
18 primary -- that's not your predominant --

19 QUESTION: It is.

20 QUESTION: Of course it is.

21 QUESTION: Just in saying, we are going to
22 create three minority majority districts, race is what we
23 are after. We want three racially determined districts.
24 We are willing to give up the incumbency and everything
25 else. We're willing to subordinate everything to race,

1 and we will have a nice compact district. Race is so
2 important that we'll subordinate everything to it, and it
3 will look just fine. That's okay under your analysis.

4 MR. TROY: I think that's -- that, if -- again,
5 I think if someone swears on a stack of Bibles the only
6 reason I tried to do this was race, and that was -- then
7 under Miller it would be subject to strict scrutiny.
8 Then --

9 QUESTION: Well, wasn't that in effect -- Texas
10 is candid. It says, we have a census. We have additional
11 seats. We want three minority majority -- majority
12 minority districts. That's our objective, and we're not
13 going to disguise it and say, compactness was our
14 objective, but we're going to achieve our objective
15 consistent with compactness.

16 MR. TROY: But Your Honor, they did not achieve
17 their objective consistent with compactness.

18 QUESTION: But I'm just asking you, if race is
19 the driving factor --

20 MR. TROY: I think --

21 QUESTION: -- is that okay?

22 MR. TROY: If race is the driving factor, it
23 seems to me that under Miller, then it's subject to strict
24 scrutiny.

25 QUESTION: Then I don't see why you're not

1 changing the Miller definition, because the Miller
2 definition of what was predominant was a definition that
3 considered whether the racial motivation subordinated the
4 application of traditional districting principles, and it
5 seems to me that your definition is rejecting the Miller
6 definition.

7 MR. TROY: I don't --

8 QUESTION: In other words, we all recognize that
9 sometimes -- that race is going to be used, and sometimes
10 it's good, and sometimes it's bad, and we've got to have
11 some way to figure out, as a threshold matter, which it
12 is, and Miller says it's predominant, and it's going to
13 trigger strict scrutiny, if it subordinates traditional
14 districting practices.

15 MR. TROY: Well --

16 QUESTION: Isn't that -- do you understand
17 Miller to hold that?

18 MR. TROY: Yes.

19 QUESTION: All right. Then --

20 MR. TROY: And I think that's -- it's -- sorry.

21 QUESTION: -- let me ask you the next question.

22 If it can be shown, as a matter of historical
23 fact, that a traditional districting practice includes
24 incumbency protection, then it has to follow, if we're
25 going to follow Miller, that if the court finds that

1 incumbency protection was the reason for the arms and the
2 squiggles, then it cannot follow from the fact of arms and
3 squiggles that the motivation was predominantly racial
4 within the meaning of Miller. Is that correct?

5 MR. TROY: I don't think so, Your Honor. I
6 think --

7 QUESTION: Then where did I go wrong?

8 MR. TROY: It seems to me that --

9 QUESTION: Perhaps in assuming that it's okay to
10 do incumbent protection not by deciding who are Democrats,
11 but by deciding who are blacks.

12 MR. TROY: I totally agree with that.

13 QUESTION: That is not --

14 QUESTION: So --

15 QUESTION: That is making one of the traditional
16 criteria itself depend upon race.

17 MR. TROY: I think that --

18 QUESTION: Is that your answer?

19 MR. TROY: I think whatever label you --

20 (Laughter.)

21 QUESTION: No, I want to know. Is --

22 MR. TROY: Yes, that is --

23 QUESTION: That was a good answer.

24 (Laughter.)

25 QUESTION: Is that your answer? All right.

1 MR. TROY: That is my answer.

2 QUESTION: Now, let me ask you a good question.

3 (Laughter.)

4 QUESTION: If, in fact, the incumbency

5 protection is achieved by knowing who is a Democrat, and

6 by drawing the lines according to which neighborhood is

7 Democratic and which neighborhood isn't, then the fact

8 that those neighborhoods are Democratic happen to be

9 black, and therefore the arms and the squiggles end up

10 including black voters and not white ones, that's not

11 wrong on your view.

12 MR. TROY: Your Honor -

13 QUESTION: Yes or no.

14 MR. TROY: -- Miller explicitly --

15 QUESTION: Yes or no.

16 MR. TROY: If --

17 QUESTION: Wrong or not wrong?

18 MR. TROY: If it so happens --

19 QUESTION: If the lines are drawn because you're

20 getting in Democrats, the fact that the Democrats happen

21 to be black is not going to disqualify that as an

22 application of districting practices, and it won't result

23 in a conclusion that the racial motive was -- that the

24 motive was predominantly racial within Miller. Isn't that

25 true?

1 MR. TROY: If it -- if there is a confluence and
2 a coincidence, and race was not the reason why, race was
3 not the tool for finding out who are Democrats, then
4 certainly, if it just so happens that the district is more
5 black than not and more Democratic than not, that's okay,
6 but --

7 QUESTION: All right, then why shouldn't we then
8 send this case back and say to the district court, tell us
9 exactly, based on the evidence, whether, in fact, the
10 discriminations that were made here were made based on
11 political data which happened to disclose a racial
12 composition, or whether it was made on data which was
13 purely racial, and used merely as an unthinking surrogate
14 for a political determination. Why shouldn't we ask them
15 to make that discrimination for us, and on which the case
16 would turn?

17 MR. TROY: With respect, Your Honor, I think
18 they have made that determination. The only data that was
19 put on the computer that was on a block-by-block level was
20 racial data. Chris Sharman, who drew -- the computer
21 operator sat at the computer and inevitably racial numbers
22 came up no matter what.

23 QUESTION: In this case, is the evidence that
24 the computer program design used to draw the lines such
25 that race became a surrogate for whatever was desired in

1 the incumbency protection?

2 MR. TROY: I think the record does show that,
3 Your Honor. The record clearly shows that race was used
4 as a tool for protecting incumbents, and Miller explicitly
5 rejects use of race as a proxy.

6 QUESTION: I thought that page 65a, which we
7 just read before, said that. I thought that's exactly
8 what it said, that instead, racial gerrymandering was an
9 essential part of incumbency protection, it was the tool
10 for incumbency protection.

11 MR. TROY: I agree with that, Your Honor.

12 QUESTION: Now, the State didn't have to do
13 that. It could have drawn districts in your view that
14 could have majority minority figures for Democratic voters
15 that would enable a black to be elected and an Hispanic to
16 be elected in the two adjacent districts.

17 MR. TROY: That's exactly right, Your Honor.
18 You can't use race for mere administrative convenience.
19 Simply because it's easier to use race to determine who's
20 a Democrat does not justify the use of race.

21 QUESTION: Didn't it say on the -- there must
22 have been a computer printout, and it must have shown,
23 let's say block by block, who the voters are, and didn't
24 it have in that computer printout, or whatever they were
25 looking at, the registration of a voter?

1 MR. TROY: No, Your Honor.

2 QUESTION: It didn't?

3 MR. TROY: It did not. Registration data was
4 not available on that computer. What was available on
5 that computer below the block level -- below the precinct
6 level was only racial data. At the precinct --

7 QUESTION: At the block level - at the level of
8 each block they had --

9 MR. TROY: At the level of each block, of each
10 census block they had racial data, and racial data only.

11 QUESTION: And --

12 MR. TROY: And that was the primary tool that
13 was used for dividing up these districts.

14 QUESTION: But what's the smallest level that
15 they had political party affiliation.

16 MR. TROY: The precinct level, and they could
17 only bring up --

18 QUESTION: Precinct level.

19 MR. TROY: On this computer they could only
20 bring up a single election, and the district court found
21 that that is really not what they used.

22 In fact, what the district court found was that
23 to the extent that partisan data was used in the process,
24 it was only known to the congressional incumbents and to
25 their staffers, and they might occasionally call up Chris

1 Sharman and tell him some stuff, but by and large he used
2 race as the tool, and the partisan data was not
3 systematically available.

4 QUESTION: All right, so in your view, if the
5 legislature was trying to create a district to comply with
6 Voting Right Act section 2, and in doing that they used
7 race, and I don't know how else they would do it, that
8 would be constitutional.

9 In your view, if, after doing that, they created
10 an odd shape, and the oddness of that shape had nothing to
11 do with race, it was pure -- that would be constitutional,
12 but you think that's not what happened here.

13 MR. TROY: That is not -- that is exactly not
14 what happened here.

15 QUESTION: But are the two principles right?
16 Are the two principles correct, in your view?

17 MR. TROY: The two principles are right, but
18 that is by no means what happened here. What happened --

19 QUESTION: All right, the two principles are
20 correct, and then we'd have to argue about what happens
21 here.

22 MR. TROY: In Harris County, they were --

23 QUESTION: But that is correct, isn't it, that's
24 your view?

25 MR. TROY: If there's absolutely no link between

1 the shape and the racial demographics, then -- then race
2 was not the motivating factor.

3 QUESTION: But a mere correlation is not the
4 kind of link that you're condemning.

5 MR. TROY: Your Honor --

6 QUESTION: I mean, if this case -- let's assume
7 that this judgment stands, and they have the same
8 objective, and for the sake of incumbency protection this
9 time they use whatever data they've got, let's say
10 precinct level data, so that the lines are not going to be
11 quite so fine but you still get a funny-looking shape for
12 purposes of incumbency protection, and your incumbency
13 protection data is entirely political Democratic data or
14 Republican data as opposed to race, and it ends up looking
15 something like this, there will still be a factual
16 correlation.

17 You can say, well, gee, the Democrats seem to be
18 black, and most blacks seem to be Democrats, but you would
19 not find that a violation of the Shaw rule.

20 MR. TROY: If the State accomplished its
21 asserted goal of partisan gerrymandering through the use
22 of nonracial data, then that is permissible, but -- but,
23 here they used racial data to accomplish that goal, and
24 that is we think completely foreclosed by -- for example,
25 if, in Gomillion, someone had said, well, we didn't fence

1 out the blacks in order to -- in order merely for
2 discriminatory reasons, we fenced out the blacks because
3 we wanted to be sure that we could be reelected because we
4 know blacks won't vote for us, that is completely
5 impermissible.

6 QUESTION: Okay.

7 MR. TROY: Similarly, in -- this Court has never
8 permitted a township to say, well, we want to maintain
9 property values, and the best way that we could do that is
10 by using -- is by using something that is discriminatory
11 in purpose, but our real goal -- our real goal is to
12 preserve --

13 QUESTION: Right, it's going to be bona fide,
14 sure.

15 MR. TROY: Okay. That's --

16 QUESTION: May I ask you a different -- I guess
17 the next step question. Let's assume that the political
18 correlation -- let's assume that the political data in the
19 computer about prior voting patterns is going to be a
20 basis for drawing funny lines, for making these
21 adjustments, and the purpose is incumbency protection.

22 Assume, secondly, that you've got two
23 essentially adjoining Democratic districts. No matter how
24 you draw the lines, 1 and 2 are both going to be
25 Democratic districts, and they've got a choice between

1 drawing the lines in such a way that puts a lot of blacks
2 in a white district and a lot of whites in a black
3 district.

4 And somebody says, traditionally, if we were
5 worried about the feelings between the French and the
6 Irish, we draw the line in such a way so that the -- most
7 of the French could be in a predominantly French ward, and
8 most of the Irish could be in a predominantly Irish ward.
9 Now we've got a situation in which instead of Irish it's
10 black and Hispanic, black and white. Can they do the same
11 thing for the blacks who want to be in a black district
12 that they could do for the Irish in the old days who
13 wanted to be in an Irish district?

14 MR. TROY: I think if you have two compact,
15 contiguous, naturally occurring --

16 QUESTION: No, it's not compact in the sense
17 that the lines are nice. They're protecting incumbents.
18 They can protect Democratic incumbents either way, and
19 they've got a choice between doing what they used to do
20 for the French and the Irish or the Poles and the Jews or
21 whatever, and the choice is now doing it for blacks and
22 whites. Can they do the same thing, if, in fact, there is
23 such a tradition?

24 MR. TROY: No, Your Honor, I think it would be
25 impermissible for a State to go block by block dividing up

1 an integrated Polish or Jewish community.

2 QUESTION: Okay. Can they still do it for the
3 French and the Irish, then?

4 MR. TROY: I don't think so. I do not think you
5 can go block by block, house by house --

6 QUESTION: So it's one rule for everybody. No
7 more of this kind of --

8 MR. TROY: Absolutely. A religious gerrymander
9 is as impermissible as a racial gerrymander.

10 QUESTION: Yes, but --

11 MR. TROY: If you're going --

12 QUESTION: -- if they're just interested -- I
13 mean, a Democratic legislator or city councilman who wants
14 to be reelected I take it is interested only in one thing,
15 people who will vote for him, and he doesn't care what
16 their color.

17 So if he sees St. Mary's Church on the corner,
18 and thinks there must be a lot of Catholics in that
19 neighborhood, and they usually vote for me because they're
20 a certain political party affiliation, or a State
21 legislator who thinks, I know the synagogue of a certain
22 kind is over there, and he really knows it, and happens by
23 accident to tell somebody that's what he's thinking, is
24 that now all contrary to the Constitution?

25 MR. TROY: I think if at a certain point the

1 predominant goal is the separation of races or religions
2 or ethnicities, if that is the tool that is used to
3 accomplish incumbency protection, then that is
4 constitutionally --

5 QUESTION: Yes, but Justice Breyer's example is
6 different from mine. In mine, I'm talking about making
7 the Irish or the Poles or the Jews or the Wasps or what-
8 not happy to be together. In his, the sole motivation is
9 incumbency protection. Why isn't your answer different
10 from him from what it was for me?

11 MR. TROY: Well, I think I gave the answer on --
12 the motivation -- the motivation does not matter if the
13 means is race or ethnicity. This Court has said it
14 doesn't matter what your ultimate goal is, you cannot use
15 certain forbidden tools. Race is forbidden by the
16 Fourteenth Amendment to be used as a tool --

17 QUESTION: But in his example the people -- St.
18 Mary's gets in not because they're Catholics but because
19 they're Democrats.

20 MR. TROY: Well, that's in essence --

21 QUESTION: He knows that.

22 MR. TROY: -- a question of fact --

23 QUESTION: He knows that.

24 MR. TROY: -- for the district court as to
25 whether or not the predominant motivation was whether they

1 were Democrats or whether they were blacks.

2 QUESTION: So if, in fact, the Court says they
3 only wanted the St. Mary's Parish in there because they
4 were Democrats, no problem on your theory.

5 MR. TROY: Again, it's a question of fact as to
6 what --

7 QUESTION: Yes, but I mean, if that's what the
8 fact-finding is, that's not -- that is not suspect on your
9 theory, right?

10 MR. TROY: It is not suspect to get Democrats.
11 It is suspect to use race as a tool or religion as a tool
12 to tell who is of one party affiliation or another because
13 race is immutable and politics are not, and the use of
14 race is so dangerous that this Court has said that it
15 should not be used unless there is a compelling
16 governmental interest and it is being used in a narrowly
17 tailored way.

18 QUESTION: But Mr. Troy, this is the part of
19 your argument that I have great difficulty grasping. If
20 race were used alone and nothing else, that would have
21 been all right.

22 If the districts had been created so that they
23 would be majority minority districts, and then the white
24 incumbents were not part of the picture, so we had a
25 district determined solely by race and not by incumbency,

1 and not by anything else, that would be all right.

2 But once you intrude something that's nonrace,
3 then it's unconstitutional. That's the part that I don't
4 understand, the logic of that, but you conceded, because
5 that was the first step in the argument, that if -- that
6 the State has a goal, wants three majority minority
7 districts, a racial goal, that's okay.

8 MR. TROY: Well, Your Honor --

9 QUESTION: Counsel, did you concede that --

10 MR. TROY: I don't really think I conceded that.

11 QUESTION: -- or did you say it would require
12 strict scrutiny if that were the case? I thought that was
13 what I understood your response to be.

14 MR. TROY: Thank you, Your Honor. That's what I
15 thought I said.

16 QUESTION: Have you made some other response to
17 Justice Ginsburg that I missed?

18 MR. TROY: No, I don't think I did. I think --

19 QUESTION: No, I thought you said in the
20 hypothetical that it would be compactness and other
21 factors that would be in addition to race, and that's why
22 you say that --

23 MR. TROY: Your Honor, I think if you start out
24 and race is your only goal, then maybe the Voting Rights
25 Act --

1 QUESTION: You said if the district were
2 compact, the fact that they might have been motivated by
3 an interest in getting two or three majority minority
4 districts would not have invalidated the plan. You did
5 say that, didn't you?

6 MR. TROY: Let me explain.

7 QUESTION: I thought that's --

8 QUESTION: Did you say that or not? Let me find
9 out, did you say that or not? If they were compact
10 districts, contiguous, nicely square in every case, but it
11 was perfectly clear that there was a motive to get two or
12 three majority minority districts, did you not say that
13 would be okay?

14 MR. TROY: I don't think so.

15 QUESTION: Okay.

16 MR. TROY: And if I did, perhaps I misspoke.

17 QUESTION: You did, then.

18 MR. TROY: Okay, I misspoke.

19 (Laughter.)

20 MR. TROY: I apologize.

21 If your goal, your dominant goal is racial, then
22 strict scrutiny applies, okay. Now, it may well be --

23 QUESTION: So that in --

24 QUESTION: What does the statute require, then?
25 I mean, I certainly agree with you, I had understood our

1 Constitution to prevent the use of race as a surrogate
2 for -- however good the objective may be, you can't use
3 it, but then what does the -- doesn't the Voting Rights
4 Act, or our interpretation of it make the opposite
5 assumption? How am I to reconcile the two?

6 Doesn't it assume that in order to have what is
7 being called here minority opportunity you need to herd
8 minority voters together because they will all vote the
9 same way? Isn't that the assumption of our interpretation
10 of the act, or of the act itself?

11 MR. TROY: I don't think so, Your Honor.

12 QUESTION: It isn't. Well, then, I don't --

13 MR. TROY: I think the Voting Rights Act
14 prohibits --

15 QUESTION: Why are they worried about creating
16 minority -- majority minority districts in order to comply
17 with the act, then?

18 MR. TROY: I think the Department of Justice's
19 maximization policy was hanging like a Sword of Damocles
20 over this entire process. They went in with the
21 assumption -- and this case is sort of Miller but without
22 the Department of Justice playing its heavy hand.

23 They went in with the assumption that so long as
24 they maximized they would be okay with the Department of
25 Justice, and therefore they could do anything else they

1 want, use race as a tool for purposes of incumbency
2 protection, and that they did not have to narrowly tailor
3 these districts to make them comport to requirements of
4 section 2, if, indeed, section 2 is implicated.

5 But section 2 only requires geographically
6 compact districts. These are not geographically compact
7 districts.

8 QUESTION: All right, but why, then --

9 QUESTION: But what if they were?

10 QUESTION: -- isn't your answer to Justice
11 Stevens --

12 QUESTION: Yes, but what if they were? Would
13 that make any difference?

14 MR. TROY: It seems to me if the Voting Rights
15 Act requires you to draw these districts --

16 QUESTION: I'm just asking you, if they were
17 compact, would that make any difference?

18 MR. TROY: If the Voting Rights Act required you
19 to draw --

20 QUESTION: No, no, no. No, I'm just saying, in
21 this case, if we had compact districts such as they
22 started out with before they got into all the incumbency
23 protection, would the case be any different in your view,
24 and I'll give you a second question. You can give me the
25 answer to both.

1 Under the district court's reasoning, if they
2 did create the same number of majority minority districts
3 but they had gone back to where they had a few more
4 Republican districts and a few less Democrat districts, as
5 I think would make the difference, would that have been
6 all right?

7 MR. TROY: I don't think I follow your second
8 question.

9 QUESTION: Well --

10 MR. TROY: Sorry.

11 QUESTION: What is the remedy that the district
12 court is requiring? They have to redraw the districts.

13 MR. TROY: They have to redraw the districts.

14 QUESTION: In redrawing them, can they continue
15 to have the same number of majority minority districts but
16 differently shaped?

17 MR. TROY: Your Honor, we do not think that
18 under the Voting Rights they can create single race
19 majority districts here because the communities in
20 question do not live in a sufficiently geographically
21 compact area to require drawing of single race majority
22 districts, and that is what they tried to do here. They
23 set out to draw single race majority districts.

24 QUESTION: Can you answer the first question
25 that Justice Stevens asked?

1 MR. TROY: I'm sorry.

2 QUESTION: And the reason -- the reason is, at
3 least I break this question into two parts, or maybe
4 three, and to get to an answer I have to have your opinion
5 on just his first question, which was, if these were
6 compact, and drawn to comply with section 2, and race was
7 used -- of course, section 2 is about race -- wouldn't
8 that be a compelling interest?

9 I agree that Justice O'Connor says under Miller
10 it's a compelling interest. Would that not be a
11 compelling interest?

12 MR. TROY: Oh, yes.

13 QUESTION: Yes.

14 MR. TROY: We believe that if section 2 --

15 QUESTION: All right. So you then do concede --

16 MR. TROY: Absolutely.

17 QUESTION: -- which is what I thought at the
18 beginning --

19 MR. TROY: If section 2 required these districts
20 to be --

21 QUESTION: All right.

22 MR. TROY: Yes.

23 QUESTION: So if they're drawing them now in
24 order to comply with section 2 --

25 QUESTION: Why do you concede that, counsel?

1 (Laughter.)

2 QUESTION: The Court has never held that
3 compliance with the Voting Rights Act is a compelling
4 State interest.

5 MR. TROY: That is true, the Court has never
6 held that, but --

7 QUESTION: May I ask you an alternative --

8 QUESTION: I think he's finishing answering my
9 question.

10 QUESTION: Oh, I'm sorry.

11 MR. TROY: We believe that in trying to have the
12 State avoid the horns of a dilemma, a dilemma which, by
13 the way, we think they falsely posit because they
14 overinterpret the Voting Rights Act in far too broad a
15 way, but we think that if you interpret the Voting Rights
16 Act in a constitutional way to say that it simply
17 prohibits discriminatory packing and cracking, then
18 avoiding discriminatory packing and cracking can be a
19 compelling governmental interest.

20 But it turns upon, Your Honor, how you interpret
21 the Voting Rights Act, and we think that certainly if the
22 State sought to comply with their interpretation, or with
23 the Department of Justice's maximization policy, then it
24 would never be -- it could not be a compelling
25 governmental interest, so it depends upon how you

1 interpret the Voting Rights Act.

2 QUESTION: All right, may I go back to the
3 Miller definition. I understood you to say a moment ago
4 that if the motive was simply to create a majority
5 minority district, and we didn't know anything more than
6 that, that that would, in fact, be unconstitutional.

7 Now let me add something to what we know. Let
8 us assume that in creating that majority minority
9 district, number 1, the motive was to comply with the
10 Voting Rights Act, and number 2, that in fact the district
11 shape that came out of that process was a shape which was
12 consistent with the shape that traditionally gets arrived
13 at in districts when traditional districting practices are
14 followed, as, for example, in Justice Stevens' case, it is
15 a compact district.

16 MR. TROY: It --

17 QUESTION: If that is -- if those three facts
18 are what we know, is it fair to say under the Miller
19 definition of what is a subordination of districting to
20 race, that we would not have an apparent case of
21 subordinated districting to race? That would be okay
22 under the Miller definition, and it would not trigger
23 strict scrutiny. Is that correct?

24 MR. TROY: If you start out and your goal is to
25 create -- it seems to me that you can't really have it

1 both ways. If you want to say, we are going to draw
2 remedial districts to comply with the Voting Rights Act,
3 then you're almost by definition, I believe, going to be
4 in strict scrutiny, because you are using race for a
5 remedial purpose. Then the question --

6 QUESTION: Then what happens if -- let's
7 assume -- all right, if I take that example, then it seems
8 to me I am varying Miller, because Miller didn't say that
9 any use of race, whether for compliance of section 2 or
10 any other, is wrong.

11 Miller says it's only wrong when it is
12 subordinated to traditional districting practices. Miller
13 puts a limitation on it, and it seems to me that your
14 answers to us do not recognize that limitation, so that if
15 we were to agree with you, the Court would have to expand
16 Miller.

17 MR. TROY: I think, Your Honor, that if you set
18 out to create a racial goal, and your goal is to comply
19 with the Voting Rights Act, and that is a remedial
20 statute, and your purpose in complying with it is
21 remedial, then it seems to me that your overwhelming
22 purpose, because we're talking about the use of race here,
23 must be remedial, and that --

24 QUESTION: All right --

25 QUESTION: It depends on what Miller means by

1 subordinated. I suppose one could say that if you start
2 out with objection number 1 to create a majority minority
3 district, that is your primary goal. Everything else,
4 even though you follow other criteria, could be regarded
5 as subordinated to that.

6 MR. TROY: That --

7 QUESTION: So that's your starting point.

8 MR. TROY: I think that's right, that is your
9 starting point.

10 QUESTION: All right, but that's not what Miller
11 says, is it?

12 Miller says that it's predominant if it
13 subordinates traditional districting practices to race,
14 and I think what you're saying is, whenever you start out
15 with the motive of creating a majority minority district,
16 you in fact trigger strict scrutiny, and by definition you
17 have always -- you have subordinated every other
18 consideration to race. Is that your answer?

19 MR. TROY: If you start out with --

20 QUESTION: I think that's what you're saying.

21 MR. TROY: Yes.

22 QUESTION: Okay.

23 MR. TROY: If you start out with the goal --

24 QUESTION: So isn't it --

25 MR. TROY: -- of accomplishing race, and you use

1 race as -- at all times to make sure -- abandoning
2 compactness, abandoning requirements of the Voting Rights
3 Act --

4 QUESTION: No, no, no, let's assume you don't
5 abandon them. You end up with a compact -- we get into
6 court. The redistricting is done. You've got a compact
7 district. It goes back to Justice Stevens' question.
8 You've got a compact district. The traditional
9 districting principles have, in fact, apparently been
10 honored here. Strict scrutiny or not?

11 MR. TROY: Strict scrutiny.

12 QUESTION: So I think -- is it fair to say,
13 then --

14 MR. TROY: If race was the predominant factor in
15 drawing --

16 QUESTION: Oh, I grant you that.

17 MR. TROY: -- strict scrutiny.

18 QUESTION: Is it fair to say, then, that you are
19 in fact asking us to recognize a cause of action which is
20 broader than Miller recognized, because otherwise that
21 language in Miller did not mean what it said. It was in
22 fact a misspeaking by the Court.

23 MR. TROY: I think, Your Honor, if race is the
24 predominant motivation, and you look --

25 QUESTION: No, but that's the question.

1 MR. TROY: Right.

2 QUESTION: Miller says, in deciding whether it
3 is predominant or not, you look to whether it has excluded
4 the application of traditional districting principles. If
5 it hasn't excluded it, then either it isn't predominant,
6 or you've got a pretty tough row to hoe to show that it
7 is, and you're saying, never mind whether the result is
8 consistent with traditional districting principles or not,
9 and that's why I say I think you're asking us to expand on
10 Miller.

11 MR. TROY: I don't think so, Your Honor, because
12 Miller talks about the indirect and the direct evidence,
13 and in this case --

14 QUESTION: Well, I guess you don't have that
15 here, do you? I thought the finding was these districts
16 did not follow normal compactness and, indeed, are quite
17 irregular, so you don't have the hypothetical here, I
18 assume.

19 MR. TROY: That is certainly true, Your Honor.

20 Texas tries to say that their only districting
21 principle ever has been incumbency protection, and the
22 district court found as a matter of fact that Texas had
23 traditionally adhered to and followed other traditional
24 districting principles and it had, in fact, abandoned
25 compactness.

1 QUESTION: The three judges of the district
2 court were all Texas judges here?

3 MR. TROY: They were all Texas judges.

4 QUESTION: The thing I wonder about the
5 particular finding on page 65a is, I've got the point that
6 if these were compact maybe you apply strict scrutiny,
7 that section 2 perhaps we'd agree would justify it.

8 If they depart from the compactness solely for
9 nonracial reasons, I think we agree, but I'm not certain,
10 that solely for nonracial reasons it would be okay, and
11 then the question is, what did they do here, and what he
12 says is, in order to protect incumbents other African
13 American voters were deliberately fenced out.

14 But what it doesn't say is whether those African
15 American voters were fenced out because they were African
16 Americans or because there was an inference about their
17 voting behavior in respect to one incumbent or another --

18 MR. TROY: If I --

19 QUESTION: -- and wouldn't that be key as to why
20 they were fenced out, just as you've said you might have
21 Jews in a district knowing that they're Jews and likely to
22 vote Democrat, and you say okay, that's all right, if the
23 reason is that they're likely to vote Democrat, and isn't
24 this silent as to what the reason that the African
25 American voters were or were not fenced out?

1 MR. TROY: Your Honor, in this case the African
2 American and the Hispanic communities in Harris County
3 were simply pulled apart for their own sake. That is what
4 the district court found. They were pulled apart because
5 the Hispanic community said, we want our own district, and
6 we don't care about Gingles, we don't care about
7 compactness, we want our own district.

8 QUESTION: Mr. Troy, I didn't understand you to
9 say what Justice Breyer just said. Maybe you agree with
10 him. I didn't understand you to say that you could
11 include, let's say Jews in a district because you know
12 that Jews will vote Democratic.

13 MR. TROY: In fact, I did not say that. I said
14 you cannot --

15 QUESTION: I thought you said just the opposite.

16 MR. TROY: In fact, I did. I said that neither
17 race nor religion may be used as a proxy for determining
18 political affiliation.

19 QUESTION: So then that means you do favor, or
20 somebody could bring a lawsuit in any kind of city council
21 election, any of the thousands of elections in the United
22 States and try to show that what the council had in mind
23 was, it -- all it knew was, this is an Irish neighborhood,
24 this is a Catholic neighborhood, this is a some other
25 neighborhood, and we're only interested in whether they

1 vote Democrat or Republican, but if you could show that's
2 in the councilman's mind at the time and he's making that
3 inference, all this would become unconstitutional, thrown
4 into the Federal courts, et cetera.

5 MR. TROY: The reason why I don't think that's
6 going to happen, Your Honor, is because of compactness,
7 contiguity, respect for political subdivision.

8 What I understand what happens in city councils
9 throughout the country is they take a look at particular
10 neighborhoods, particular areas of interest, where people
11 have things in common like the schools they go to, the
12 places they shop, the water supply, the potholes in the
13 streets.

14 What they did in this case was, they abandoned
15 that and they said we are going to, particularly in Harris
16 County, we're going to separate the races. We're going to
17 take someone who lived in the northwest corner of the city
18 and who's always voted in District 18, who's Hispanic,
19 we're going to take Al Vera and we're going to lump him
20 with the Hispanics in the southwest -- in the southeastern
21 part of the city because he is Hispanic. That seems to me
22 to not respect traditional principles and to be
23 affirmatively unconstitutional.

24 And Your Honors, in Texas what the court found,
25 in Dallas what the court found is that simply, there was

1 capitulation to a demand by the Dallas black community
2 that -- I'm quoting the Department of Justice's narrative,
3 the narrative to the Department of Justice. This is what
4 Texas told the Department of Justice, that "the Dallas
5 black community insisted that a safe black district be
6 drawn that had a total black population of at least 50
7 percent." That's at the joint appendix at 106.

8 Your Honors, we've gotten off on the -- because
9 we've been entertaining hypotheticals we've gotten far
10 away from what happened in this case, and what happened in
11 this case was that race was used as a tool for incumbency
12 protection only secondarily.

13 Primarily, there was this maximization policy of
14 the Department of Justice that everybody knew about.
15 They -- Eddie Bernice Johnson specifically said, my policy
16 was, if it could be drawn it must be drawn, and all other
17 concerns were subordinated to that, and so that is what
18 happened here, and that, we submit, is unconstitutional.

19 If there are no further questions --

20 QUESTION: I have one if you do have a minute
21 left.

22 Supposing you started out with three compact
23 districts that were contiguous, and race was one of the
24 reasons for drawing them that way, but if you drew them
25 that way, the Democrats were in control, they found they

1 would create a few more Republican seats than they wanted
2 to, so they redrew them with squiggles to get more
3 Democrat seats -- forget about incumbents, just party
4 politics, simply -- would that be a permissible reason to
5 do it, in your view?

6 MR. TROY: I'm sorry.

7 QUESTION: Would that be a permissible reason to
8 redraw and get unattractive districts in order to protect
9 the number of Democrats, as opposed to the number of
10 incumbents?

11 MR. TROY: I'm not quite sure I caught your
12 first hypothetical, and my time is up, but I'd be happy if
13 the Chief Justice will permit me to --

14 QUESTION: Just go ahead and answer.

15 MR. TROY: The first part --

16 QUESTION: The hypothetical is that you start
17 with compact districts that you would say would barely
18 pass muster, even though race was an important factor in
19 picking them up, but you get into noncompactness and
20 gerrymandering in districts like this not to protect
21 incumbents as such, but to make sure that the Republicans,
22 who do not control the legislature, won't get too many
23 seats.

24 MR. TROY: I think if your motivations are
25 political, then your motivations are political. If your

1 motivations are racial, your motivations are racial, and
2 if your motivations are --

3 QUESTION: The question is whether a political
4 motivation would be a justification.

5 MR. TROY: Political -- for noncompactness?

6 QUESTION: Yes.

7 MR. TROY: It can be, yes.

8 QUESTION: I think he's asking for
9 noncompactness on the basis of race.

10 MR. TROY: Noncompactness on the basis of race,
11 no. If it's noncompactness -- if --

12 QUESTION: Well, look, your time is up.

13 MR. TROY: If there are just whites, and it's
14 just a Democrat, and you jiggle the lines, that's okay.

15 CHIEF JUSTICE REHNQUIST: I think you've
16 answered the question, Mr. Troy.

17 The case is submitted.

18 (Whereupon, at 11:25 a.m., the case in the
19 above-entitled matters was submitted.)

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CERTIFICATION

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

GEORGE W. BUSH, GOVERNOR OF TEXAS, ET AL., Appellants v. AL VERA, ET AL.; WILLIAM LAWSON, ET AL., Appellants v. AL VERA, ET AL.; and UNITED STATES, Appellant v. AL VERA, ET AL.

CASE NO.: 94-805, 94-806 and 94-988

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

BY Ann Marie Federico

(REPORTER)