

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: RUTH O. SHAW, ET AL., Appellants v.
JAMES B. HUNT, JR., GOVERNOR OF NORTH
CAROLINA, ET AL.; and JAMES ARTHUR POPE, ET
AL., Appellants v. JAMES B. HUNT, JR., GOVERNOR
OF NORTH CAROLINA, ET AL.

CASE NO: No. 94-923 and No. 94-924

PLACE: Washington, D.C.

DATE: Tuesday, December 5, 1995

PAGES: 1-76

CORRECTED COPY

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 RUTH O. SHAW, ET AL., :

4 Appellants :

5 v. : No. 94-923

6 JAMES B. HUNT, JR., GOVERNOR :

7 OF NORTH CAROLINA, ET AL.; :

8 and :

9 JAMES ARTHUR POPE, ET AL., :

10 Appellants :

11 v. : No. 94-924

12 JAMES B. HUNT, JR., GOVERNOR :

13 OF NORTH CAROLINA, ET AL. :

14 - - - - -X

15 Washington, D.C.

16 Tuesday, December 5, 1995

17 The above-entitled matters came on for oral
18 argument before the Supreme Court of the United States at
19 11:27 a.m.

20 APPEARANCES:

21 ROBINSON O. EVERETT, ESQ., Durham, North Carolina; on
22 behalf of Appellants Shaw, et al.

23 THOMAS A. FARR, ESQ., Raleigh, North Carolina; on behalf
24 of Appellants Pope, et al.

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APPEARANCES:

EDWIN M. SPEAS, JR., ESQ., Senior Deputy attorney General
of North Carolina, Raleigh, North Carolina; on behalf
of Appellees Hunt, et al.

JULIUS L. CHAMBERS, ESQ., Durham, North Carolina, on
behalf of Appellees Gingles, et al.

PAUL BENDER, ESQ., Deputy Solicitor General, Department of
Justice, Washington, D.C.; on behalf of the United
States, as amicus curiae, supporting the Appellees.

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

2 (11:27 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 94-923, Ruth Shaw v. James B. Hunt; Number
5 94-924, James Pope v. James B. Hunt.

6 Mr. Everett, you may proceed.

7 ORAL ARGUMENT OF ROBINSON O. EVERETT

8 ON BEHALF OF APPELLANTS, SHAW, ET AL.

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

11 I suppose I better do one thing at the outset to
12 maintain the honor of North Carolina. There was a
13 question about two of the districts in Texas being, I
14 believe, the least compact in the country, and I have here
15 perfect evidence that we have four of the least compact.

16 Justice O'Connor will remember this map, because
17 it was appended to her opinion in Shaw v. Reno, and the
18 twelfth, I think -- the snake -- leads the country.

19 QUESTION: The Court's opinion, Mr. Everett.

20 MR. EVERETT: I'm sorry, Your Honor.

21 QUESTION: The Court's opinion, not my opinion.

22 MR. EVERETT: The Court's opinion, one which you
23 authored. I apologize, Your Honor.

24 But in any event, the Court became aware of the
25 absence of compactness, which leads into another point.

1 There was a discussion of the difference between narrow
2 tailoring and broad tailoring. I think we have here the
3 exhibit of no tailoring.

4 And I'd like to make one other point, just to
5 explain why we are here, and perhaps it reflects a rather
6 naive understanding of the Constitution, of the Equal
7 Protection Clause, but my impression has been that if
8 there were two water fountains over there, one of which
9 said African American, and another of which said, women,
10 and another over here which said male, and said white, and
11 if that in effect was here, with the signs, that I would
12 be perfectly entitled to go to any one of those four
13 fountains and drink the water. The water would be the
14 same everywhere, but the Court nor other public body, no
15 State, no Federal body could approve racial
16 classifications.

17 And the reason we're here is because this map
18 reflects a redistricting plan which, in effect, is a
19 racial classification. That's what this is about. That
20 map says there are two black districts and there are ten
21 white districts.

22 QUESTION: Does it say that the people in those
23 districts can drink at either water fountain? Can they
24 vote both either Democratic or Republican, as they choose?

25 MR. EVERETT: They can vote as they please,

1 Justice Stevens, but on the other hand they are
2 preconditioned in their behavior by the fact that these
3 districts carry a message. They carry a message for the
4 voters --

5 QUESTION: The same message your signs carry.

6 MR. EVERETT: Your Honor?

7 QUESTION: The same message that your signs
8 carry, I guess, but they actually didn't inhibit.

9 MR. EVERETT: Exactly.

10 QUESTION: You pick the fountain you wanted to
11 pick.

12 MR. EVERETT: We are saying that these, though,
13 carry a message, and the signs would be impermissible.
14 This Court did that. It had these labels -- I would
15 certainly be entitled to make a motion and get an
16 injunction and have those signs taken down. We would
17 maintain by the same token --

18 QUESTION: I don't know who you'd get it from.

19 (Laughter.)

20 MR. EVERETT: I would hope at least we could get
21 a majority, but in any event, it would seem to me what we
22 are saying is these signs, these labels should be removed.

23 Now, in order that there's no question about the
24 status and the standing of the plaintiffs and the
25 plaintiff intervenors, I should note that according to the

1 Court's determination the plaintiffs and the plaintiff
2 intervenors have established -- this is on page 110a --
3 have established that they are registered to vote in North
4 Carolina congressional elections and that the challenged
5 redistricting plan assigns them to vote in particular
6 electoral districts, at least in part because of their
7 race.

8 Which is to say that Professor Shimm is assigned
9 to the 12th District at least in part because of the
10 racial determination. He is a white fill-a-person, and on
11 the other hand there are three of us who are plaintiffs
12 who are assigned to the 2nd District because of our race.
13 We -- because our district was bleached.

14 Now, interestingly enough, and Justice Scalia
15 called attention in the Texas case to an example of what
16 we might refer to as Orwellian doublespeak. The minority
17 opportunity district I think was the phrase.

18 QUESTION: Mr. Everett, there is some
19 difference, isn't there, with respect to the standing of
20 the plaintiffs in this case with respect to one district
21 and the other?

22 MR. EVERETT: We would maintain, Your Honor,
23 that due to the ripple effect all these plaintiffs have
24 standing as to all the districts.

25 QUESTION: Well, but supposing we don't accept

1 the ripple effect, there is some difference, isn't there?

2 MR. EVERETT: Oh, Professor Shimm and Mrs. Shaw
3 are in the 12th District. The rest of us are in different
4 districts. None of us is in the 1st District, but the
5 1st District was constructed by taking the -- what would
6 have been the 2nd District and playing around with it and
7 changing the boundaries, so that our position would be
8 that all those -- and this is really the rationale, I
9 think, of the court below, that all of us were affected
10 because of the seamless web --

11 QUESTION: Suppose --

12 QUESTION: What about our decision in Hays? I
13 mean, couldn't the plaintiffs there have made the same
14 argument about Louisiana, that it's a seamless web, and we
15 didn't accept that.

16 MR. EVERETT: I don't believe they made it, as I
17 recall -- I was here at the argument -- and I don't think
18 it was articulated in that particular fashion, but our
19 position would be this, Your Honor, as a practical matter.
20 The 12th District, because of its inner penetration, is
21 essential to the plan. If you knock out the 12th District
22 there is no plan, and as a consequence, and since
23 Professor Shimm and Mrs. Shaw clearly have standing, it
24 really doesn't make much difference.

25 The question is before you, is this plan a

1 violation of the Equal Protection --

2 QUESTION: You're saying that a person who has a
3 right to challenge one district by reason of residence in
4 that district has a right to challenge the entire plan.

5 MR. EVERETT: I would say, Your Honor --

6 QUESTION: That's a different argument from the
7 ripple effect.

8 MR. EVERETT: It's -- I would say that in this
9 particular situation, given the inner penetration of the
10 plan, that would be true.

11 Now --

12 QUESTION: Including the aspects of the plan
13 that you claim are invalid with respect to other
14 districts.

15 MR. EVERETT: We would think across the board in
16 this situation, and we would note this, Your Honor, that
17 the -- well, I will admit, Cherokee County, over here, up
18 into Tennessee, I'm not really saying that I'd have much
19 standing perhaps to challenge that, but as a practical
20 matter, everything in the middle and the eastern part of
21 North Carolina is so tied together as a practical matter
22 it is one plan.

23 It is like the unitary school system in the Hays
24 case, which was promulgated from one source. It's a
25 unitary plan, and we would maintain we have standing.

1 One thing I would like to call to the Court's
2 attention, and we stress it in our brief because we think
3 it's important. That is, what was said 2-1/2 years ago
4 when we were here, and what's happened in between.

5 When I argued the case 2-1/2 years ago the
6 counsel for the State appellee, and this is pointed out in
7 our brief on page 4, said this case is about the legal
8 significance of two facts. First, the North Carolina
9 General Assembly intentionally created two majority
10 minority congressional districts.

11 Second, the General Assembly did so for the
12 purpose of complying with section 5 of the Voting Rights
13 Act and of securing preclearance of its congressional
14 reapportionment plan from the Attorney General of the
15 United States.

16 In response to a question from the Court, the
17 same counsel stated -- he's not here this time. There's a
18 different counsel for the State, but he presumably spoke
19 with authority -- there's no dispute here over what the
20 State's purpose is. There's a dispute over how to
21 characterize it legally, but we're not in disagreement
22 about what the State legislature was trying to do.

23 Then again, and this is quoted on page 27 of our
24 brief in the footnote, counsel for the State defendant
25 stated to the Court the determining factor in this case is

1 that North Carolina is subject to section 5 preclearance,
2 and then later, section 2 may, depending upon the
3 particular demographics and the situation of the State,
4 require majority minority districting, but once again,
5 that's not this case.

6 So we were here 2-1/2 years ago thinking the
7 case had to do with whether or not section 5 was involved,
8 and the State put forth what we characterized as the
9 Nuremberg defense. The Department of Justice made us do
10 it. The Civil Rights Division made us do it. They
11 wouldn't give us preclearance.

12 And I was also here during the argument when the
13 Solicitor General was asked back in April this year about
14 the policy of the Department of Justice, and it seems very
15 clear from the findings made in the Hays case, the
16 original Hays case, from the findings in the Georgia case
17 which you're well familiar with, from everything about it,
18 that just as was said here to this very Court 2-1/2 years
19 ago and just as was admitted in the defendant's answer,
20 they did it in order to get preclearance.

21 What did they do? They enacted this
22 constitutional monstrosity, which replaced another
23 constitutional monstrosity but a less aggravated
24 monstrosity. They did it in order to get preclearance.

25 So when we left here, or when we got the

1 decision, actually, in summer of 1993, and we read about
2 the gerrymander, what the Court said, racial gerrymander,
3 strict scrutiny, we thought it was a fairly simple case.
4 Go back -- can we prove there's a racial gerrymander? Of
5 course we can. This map almost speaks for itself.
6 Everything else spoke for itself. The record, the
7 submission in Chapter 7 says the overriding purpose of the
8 State, the State of North Carolina, is to create these
9 districts and to obtain preclearance. How could it be
10 clearer?

11 So -- but there are some very ingenious counsel
12 on the other side, and then we learned that it wasn't
13 really a racial gerrymander, oh, no, and it wasn't just
14 section 2, oh, no, and it wasn't -- I mean, it wasn't just
15 section 5, pardon me. It was also section 2, and it was
16 also remedying past discrimination. Very innovative, and
17 moreover, we didn't have -- none of us had standing.
18 Everything, we had all of it. The State appropriated
19 half-a-million dollars to put up this defense. Various
20 people came in to battle us along the way.

21 QUESTION: Mr. Everett, may I ask you this
22 question? Do you find something legally or
23 constitutionally inconsistent with the position the last
24 time around, or at least the assumption the last time
25 around that the reason for the configuration was to obtain

1 section 5 preclearance and the reason found here -- strike
2 the word reason --and the fact found here that in fact the
3 configuration was a means to comply with section 2? Are
4 those two inconsistent?

5 MR. EVERETT: Your Honor, I used to teach
6 evidence a couple of times. We have prior inconsistent
7 statements that are admissible because they intend to
8 impeach. If that isn't a --

9 QUESTION: I'm asking you whether they're
10 inconsistent.

11 MR. EVERETT: Well, I'd say -

12 QUESTION: One says the motive -- the motive the
13 first time was to obtain section 5 preclearance, period.
14 Assume that. I'm assuming that.

15 MR. EVERETT: That's the only question, they
16 say.

17 QUESTION: And the finding now is that that
18 configuration was necessary and hence justifiable to avoid
19 a section 2 violation. Are those two propositions
20 inconsistent legally?

21 MR. EVERETT: They are in this context, Justice
22 Souter. They are inconsistent when it's a question of
23 what the North Carolina General Assembly intended in
24 January --

25 QUESTION: Well, that may be, but that wasn't my

1 question. My question wasn't whether they had two
2 different intents. My question was, if we assume that the
3 intent was in fact to get a section 5 preclearance, and we
4 know from Shaw that that is not adequate, is there
5 anything inconsistent with saying it is nonetheless
6 justifiable now, because in fact it was necessary to avoid
7 a section 2 violation and hence --

8 MR. EVERETT: Your Honor, let me --

9 QUESTION: -- can be upheld. Are those two
10 propositions inconsistent?

11 MR. EVERETT: Let me say in this context they
12 are very inconsistent.

13 QUESTION: No, they're not. I mean, the one
14 goes to intent and the other goes to the pure fact of
15 whether it was necessary, not whether it was intended.

16 MR. EVERETT: Well --

17 QUESTION: So they're not inconsistent.

18 MR. EVERETT: If --

19 QUESTION: If they can prove that it was indeed
20 necessary, that there's no other thing you could have
21 done -- I think that's a hard thing to prove, but -- that
22 no other configuration could possibly have been adopted
23 which would comply with section 2, I suppose if they can
24 prove that, it's certainly not inconsistent --

25 MR. EVERETT: Justice Scalia --

1 QUESTION: -- with the fact that they intended
2 to do section 5.

3 MR. EVERETT: Justice Scalia, if they didn't
4 intend to do it, they didn't intend to do it, they can't
5 justify it.

6 In other words, as I understand it --

7 QUESTION: That's a different argument, though.

8 QUESTION: But you're -- so you're saying that
9 the only justification at this stage is the justification
10 of their original intent, and we've now -- this Court has
11 found that that intent, i.e. conform to -- get section 5
12 preclearance is inadequate, so that's the end of the case.
13 Is that your position?

14 MR. EVERETT: That is part of our position, Your
15 Honor. We think that is --

16 QUESTION: Well, let me must pursue that for a
17 moment. Assume -- I'm not asking you to assume it's true
18 in this case, but just assume that it is, in fact,
19 reasonably necessary to conform to section 2, are we
20 supposed to ignore, or is a three-judge district court
21 supposed to ignore that fact?

22 MR. EVERETT: Your Honor, if it is a matter of
23 justifying something under strict scrutiny something that
24 is a racial gerrymander, and if the legislature that
25 adopted the racial gerrymander didn't even think about it,

1 then we would maintain that in order to have the integrity
2 of equal protection and to protect the constitutional
3 rights of us voters, yes, that should be disregarded.

4 QUESTION: Okay. The case goes back. The court
5 says, unconstitutional. Go back and come up with a new
6 plan. They go back, and they conclude, we'll assume again
7 not necessarily in this case, but we'll assume in the hypo
8 that it is necessary to avoid a section 2 violation.

9 So they redraw the map, and it looks like the
10 last map. New case. May the section 2 violation be
11 considered by the three-judge -- may the claim that it is
12 reasonably necessary to avoid a section 2 violation be
13 considered by the three-judge court?

14 MR. EVERETT: Your Honor, I would not say they
15 are estopped from considering it, or anything of that
16 sort. What I would suggest is, on the facts of this case,
17 since they said section 5 --

18 QUESTION: No, but I want you to answer my hypo.

19 MR. EVERETT: Fine.

20 QUESTION: And I'm not suggesting to you that my
21 hypo is this case --

22 MR. EVERETT: Sure.

23 QUESTION: -- and I'm not asking you to concede
24 that, but on my hypo, may the three-judge district court
25 consider the defense, if you want to put it that way, that

1 this is reasonably necessary to avoid a section 2
2 violation?

3 MR. EVERETT: Two aspects to that. In the first
4 place, they'd have to be sure there is no further
5 poisonous tree, there is no carryover from the alleged --

6 QUESTION: That goes to the, sort of to the
7 facts of the particular case. May they, just as a general
8 proposition, consider it as a defensive matter that it is
9 reasonably necessary to avoid a section 2 violation?

10 MR. EVERETT: Your Honor, we're going to take an
11 outlandish position. We don't believe that under
12 section 2 that's enough to protect it from
13 constitutional --

14 QUESTION: Maybe it isn't, but maybe -- and that
15 then may lead you to claim that section 2 is
16 unconstitutional, or whatever, but is it relevant as a
17 defense? May the court consider it?

18 MR. EVERETT: We would maintain that, given the
19 purposes of section 2 as we understand it, that it would
20 not be permissible to use it as a vehicle for imposing two
21 majority minority districts in a --

22 QUESTION: That wasn't my question. May the
23 court consider it as an appropriate defense?

24 MR. EVERETT: We would say no, Your Honor.

25 QUESTION: So are you saying, then, that a --

1 that the object to avoid a section 2 violation as a matter
2 of law may not be considered as a justification under
3 strict scrutiny?

4 MR. EVERETT: We do not believe, Your Honor,
5 that it constitutes a compelling interest, given the
6 purposes of section 2 and its process orientation, and by
7 the way, there's an excellent discussion of that by
8 Professor Blumstein in his recent Rutgers Law Review
9 paper.

10 QUESTION: Is the reason for your answer
11 essentially that section 2 is unconstitutional?

12 MR. EVERETT: Our position would be that
13 section 2 as properly construed and narrowed is probably
14 constitutional, but that certainly to use it as a vehicle
15 for compelling majority minority districts is
16 unconstitutional.

17 QUESTION: How about a voluntary majority
18 minority district? I think you said you were about to say
19 something some people would consider outlandish. Are you
20 saying that, that if the avowed purpose is to create a
21 majority minority district no matter how compact it is, if
22 people are honest about that's what they're trying to
23 accomplish, that that's unconstitutional?

24 MR. EVERETT: Your Honor, we say this. If it is
25 a label of race, they say we want a black district, we

1 want a Hispanic district, and that's the purpose, and
2 that's the label, then that in our view at least, right or
3 wrong, is a violation of the Equal Protection -- now,
4 obviously --

5 QUESTION: Am I right that there are many
6 congressional districts, many State districts across the
7 country where people said exactly that, we want a majority
8 minority district, so on your reasoning, a good deal of
9 the redistricting was unconstitutional.

10 MR. EVERETT: On our reasoning a good deal of
11 the redistricting that followed the 1990 census was
12 unconstitutional because it is result-oriented in a manner
13 of labeling just like labeling the water fountains in my
14 example.

15 QUESTION: Well, that -- would you take that
16 position even in circumstances in which to accomplish the
17 goal, the legislature did not resort to drawing the lines
18 on the basis of race, but rather on the basis of voter
19 registration?

20 MR. EVERETT: If it's a matter of, say,
21 Democrat-Republican, that's certainly -- if it --

22 QUESTION: Their goal was admittedly to get a
23 majority minority district, but to achieve it they put in
24 the computer program data about voter registration,
25 Democrat, Republican, Independent, and they drew the

1 districts on that basis.

2 MR. EVERETT: If the goal is defined by race,
3 then our position is it's impermissible, as, for example,
4 in the case --

5 QUESTION: You say that cannot be done even if
6 the boundaries are drawn on the basis of voter
7 registration?

8 MR. EVERETT: If it's voter -- I'm not sure I
9 understand exactly, Your Honor, but if --

10 QUESTION: You get a computer program to draw
11 the boundaries, and you plug into the computer how the
12 voters are registered, Democrat, Republican, independent,
13 Dixiecrat, whatever it might be, and the lines are drawn
14 on that basis.

15 MR. EVERETT: There's no race there, as I
16 understand it.

17 QUESTION: The goal was to create a majority
18 minority district, but it is accomplished by using
19 nonracial data.

20 MR. EVERETT: Your Honor, we think the goal is
21 impermissible. Let me analogize this. I can see the --
22 well, if you want to have Democrats control or
23 Republicans, or whatever it is, look at the registration
24 of those, you may know that there's a heavy Democratic
25 registration, say in North Carolina where 95 percent of

1 the African Americans are registered as black.

2 You may know that where there's a 95 -- a heavy
3 Democratic registration there probably is a very
4 substantial African American population. So what? But
5 what I am concerned about, and perhaps this is because of
6 my reading or misreading of the peremptory challenges
7 cases, my understanding is that if I look at a juror, I
8 have a peremptory challenge, and I say, that juror is
9 black, therefore I don't want him in this particular case,
10 or that juror is a woman and I don't want her in that
11 particular case, and I use a stereotype, and I use a
12 classification, that is wrong.

13 If, on the other hand, as in the Hernandez case
14 where you were dealing, as I recall, with peremptory
15 challenges, I say, this Hispanic may be interpreting for
16 himself or herself the testimony being given, rather than
17 going through an interpreter, then I can challenge him
18 off.

19 It's -- as we view it, and we perhaps take
20 Hirabayashi and the later cases too seriously, but we
21 really take it very seriously that racial classifications
22 are odious and are subject to stricture.

23 QUESTION: So then you would say the same
24 principle applies to every, whether it's a city council,
25 whether it's any of the hundreds of thousands of elections

1 that if people draw boundaries to a significant extent on
2 the basis of race, I take it, of religion, of ethnic
3 background, of sex, of anything of that nature, that that
4 then will come into Federal court and they will then look
5 and see if significant boundaries in this local city
6 council race, or whatever, a significant number of those
7 boundaries was drawn with religion in mind or ethnicity.
8 Is that actually what you're thinking?

9 MR. EVERETT: Your Honor, that may sound
10 extreme. If I take that position --

11 QUESTION: No, no, that maybe preferable to --

12 MR. EVERETT: Well --

13 QUESTION: -- saying that you can't do this in
14 the case of a black effort but you can do it in the case
15 of any other effort. I don't see how you can make a
16 distinction between --

17 MR. EVERETT: Well, we --

18 QUESTION: I agree with you on that failure and
19 difficulty of distinguishing, if that is your position.

20 MR. EVERETT: Well, Justice Breyer, we do view
21 race as having a special significance.

22 QUESTION: You mean, you could in fact say they
23 cannot gerrymander or draw boundaries on the basis of
24 race, but you can draw -- if the person is -- to benefit
25 African Americans, but you can do exactly the same thing

1 for the purpose of benefiting the Jews or the Catholics or
2 any other group in society?

3 MR. EVERETT: No. We would say that if there
4 is, let's say, a Jewish district, and if Professor Shimm,
5 who is Jewish, is put there because he is Jewish --

6 QUESTION: Well, I mean, are you distinguishing
7 whether it's a whole district, or part of a district, or
8 what is -- I'm trying -- what are you distinguishing?

9 MR. EVERETT: Our distinction is in terms of
10 purpose, very much like the Batson situation, where, if
11 there is a purpose to do it on a racial basis or an ethnic
12 basis or a religious basis or a gender basis, then that is
13 impermissible.

14 Now, hopefully -- hopefully, when this Court
15 makes that message loud and clear that this is
16 impermissible unless it can survive strict scrutiny,
17 hopefully people will get the message and it's not going
18 to happen in that city council, just like now you don't
19 have problems about equipopulousness to the same extent.

20 QUESTION: Classification on the basis of gender
21 has not been subject to strict scrutiny in the past. It's
22 been subject to a kind of intermediate or quasi strict
23 scrutiny.

24 MR. EVERETT: Your Honor, Mr. Chief Justice, I
25 leaped over in my enthusiasm into another area of gender,

1 and that is certainly a different --

2 QUESTION: May I ask you, Mr. Everett, supposing
3 you have a case in which it's perfectly clear that the
4 legislature decided to create two majority minority
5 districts, is there any way in the world in which the plan
6 could survive strict scrutiny? What factors would enable
7 it ever to survive?

8 MR. EVERETT: Well, Your Honor, we would think
9 that there would have to be so many circumstances totally
10 different from those in North Carolina --

11 QUESTION: No, but just hypothetically, what are
12 the kind of factors that would enable -- is there any set
13 of facts -- your argument is pretty firm, it seems to
14 me --

15 MR. EVERETT: Well --

16 QUESTION: -- that if we know they wanted two
17 minority majority districts, that's the end of the ball
18 game.

19 MR. EVERETT: Well, one thing that would be very
20 important is the sort of consideration that was outlined
21 of totality of circumstances in Johnson --

22 QUESTION: Mr. Everett, I haven't understood
23 everything you've been saying -- if your answer to that
24 isn't a clear yes, I don't know what you've been saying.

25 MR. EVERETT: I --

1 QUESTION: I thought you've been saying the
2 motivation cannot be racial.

3 MR. EVERETT: That's it.

4 QUESTION: And if I set out to create two
5 majority minority districts --

6 MR. EVERETT: That's exactly --

7 QUESTION: -- that's the end of it, right?

8 MR. EVERETT: I think --

9 QUESTION: There is no way to get by the strict
10 scrutiny hurdle if that original intent is established,
11 and I don't think there's much doubt about it in this
12 case. I don't think you need all this funny map.

13 They wanted to comply with what they thought was
14 necessary to satisfy the Department of Justice, and they
15 created two majority minority districts. Why do we have
16 to have a trial? That's really your position, isn't it?

17 MR. EVERETT: Yes. Our position is that --

18 QUESTION: Yes.

19 MR. EVERETT: -- race is impermissible. You
20 can't use it for a purpose -- we cannot really think of
21 any situation where it could be --

22 QUESTION: And really the shape merely confirms
23 the other evidence of intent.

24 MR. EVERETT: The evidence --

25 QUESTION: So you take the position that if

1 strict scrutiny is applied, it's fatal in fact,
2 necessarily, that nothing survives strict scrutiny.

3 MR. EVERETT: As to majority minority districts
4 in almost anything, any situation we can conceive of, if
5 they are created for a racial purpose per se, we believe
6 they cannot survive.

7 QUESTION: I had --

8 QUESTION: What about a case where -- I'm sorry.

9 QUESTION: I had thought that we had indicated
10 that it is possible to survive strict scrutiny if there is
11 a compelling State interest and if the plan is narrowly
12 tailored. I had thought that's what this Court had said,
13 but you're arguing for something else, it sounds like.

14 MR. EVERETT: Well, Your Honor, I suppose I'm
15 descending from the theoretical to the practical in that
16 we have been unable to conceive of anything, at least in
17 our limited experience, which --

18 QUESTION: Compliance with section 2 could not
19 be a compelling State interest, or it could?

20 MR. EVERETT: We would consider that it could
21 not be, for the creation of majority minority districts.

22 QUESTION: Do you have to take that position to
23 prevail in this case?

24 MR. EVERETT: Absolutely not.

25 QUESTION: What is your secondary position with

1 respect to this case?

2 MR. EVERETT: Our secondary position is that it
3 is clear there was not a reevaluation of section 2, that
4 the section 5 denial of preclearance tainted everything,
5 that just as the State represented when it came up here
6 the first time, it was a matter of fulfilling the mandate
7 of the Justice Department just as it was in Miller, and
8 therefore this should fall, just as the Georgia
9 redistricting fell.

10 Moreover, there was no totality of circumstances
11 analysis. There is no ability to satisfy the Gingles
12 preconditions to whatever extent they still are
13 preconditions. There is an actual, very overt,
14 mathematically demonstrable error in the opinion of the
15 court that there can be created two geographically compact
16 majority minority districts. You can tell from this map
17 and from the maps that show the concentrations of black
18 population that it is simply impossible. The court
19 completely misconstrued the numerical facts, including one
20 of the tables, and when you take all of that together, the
21 section 2 compliance argument is an afterthought.

22 QUESTION: I have a map here that says plan NEC
23 Shaw II type TGB, Shaw II, map 2 --

24 MR. EVERETT: Oh, Your Honor --

25 QUESTION: Isn't that the compact one? Do you

1 know what I'm talking about?

2 MR. EVERETT: I know what you're talking about.

3 QUESTION: Why wasn't that the compact, with
4 two?

5 MR. EVERETT: Well, Your Honor, majority black
6 is 50 percent. The very table that was relied on by the
7 majority below shows 44 percent. Forty-four percent is
8 less than 50 percent, and therefore as a matter of
9 mathematically demonstrable fact, the court was wrong.

10 They also refer to other examples of
11 geographically compact districts. Those other districts
12 contain the equivalent of section 12.

13 Now, if anyone here -- some things you can see,
14 and I'm sure all of you all have 20/20 vision juridically
15 and otherwise. You can see that that is not
16 geographically compact.

17 So they create new concepts, functional -- I'm
18 sorry, Your Honor.

19 QUESTION: Thank you, Mr. Everett.

20 Mr. Farr, we'll -- I think we'll recess and
21 resume at 1:00 p.m.

22 (Whereupon, at 11:57 a.m., the Court recessed,
23 to reconvene at 1:00 p.m. this same day.)

24

25

1 AFTERNOON SESSION

2 (1:00 p.m.)

3 QUESTION: Mr. Farr, we'll hear from you.

4 ORAL ARGUMENT OF THOMAS A. FARR

5 ON BEHALF OF THE APPELLANTS POPE, ET AL.

6 MR. FARR: Mr. Chief Justice, and may it please
7 the Court:

8 Speaking for the plaintiff intervenors, I would
9 like to state what we think is at issue in this case, and
10 what is not at issue. We do not believe that the
11 constitutionality of the Voting Rights Act is at issue.
12 We believe that it is constitutional.

13 Nor do we think that whether compliance with
14 section 2 might, under the right case, serve some
15 compelling governmental interest, that is not an issue in
16 this case. We think under the right case it may be a
17 compelling governmental interest, so you create a district
18 that would satisfy section 2.

19 QUESTION: If it can be a compelling State
20 interest in some cases, why isn't it in this?

21 MR. FARR: It is not a compelling State interest
22 in this case, Your Honor, for two reasons. First, there
23 is no evidence in this record that would show that the
24 district adopted -- met the Gingles preconditions.

25 There would be no plaintiff, I think, in the

1 United States would walk into a district court with this
2 map and say these are two geographically compact districts
3 that entitle us to remedial relief under section 2 of the
4 Voting Rights Act.

5 The other reason, Your Honor, why that is not an
6 issue in this case is because no one in the North Carolina
7 General Assembly believed that they were creating these
8 districts to remedy violations under section 2 of the
9 Voting Rights Act, and it's very clear that what North
10 Carolina believed it was doing, because they said so, they
11 made this statement in their submission in support of
12 Chapter 7 to the Justice Department pursuant to section 5,
13 was that they were creating these districts to respond to
14 the dictates of the Justice Department for --

15 QUESTION: May I go back to your first reason?
16 Why does that map bear on the question of whether it was
17 possible to create a compact district, majority minority
18 compact district? That map doesn't tell us anything about
19 where people live.

20 MR. FARR: Your Honor, I think that there's
21 evidence in this case from which it might be concluded
22 that a majority black district could be created in
23 northeastern North Carolina --

24 QUESTION: Right.

25 MR. FARR: -- and that a majority minority

1 district could be created running from Charlotte to the
2 southeastern part of the State. There's no evidence in
3 this case that two majority black districts that are
4 reasonably geographically compact could be created in this
5 case. It's not been presented by anyone.

6 Now, we believe, Your Honor, aside from the fact
7 that the State did not comply with what is stated in
8 Croson and Wygant, that they have to have substantial
9 racism evidence at the time that they adopt a racial-
10 based remedy, assuming that they had done that, Your
11 Honor.

12 The only defense that they have in this case is
13 if the Court adopts the notion that you may place a
14 remedial district somewhere else in North Carolina besides
15 the part of the State where the violation has been proven,
16 and we think that's a very novel concept under every other
17 area of law, and it ought to be a novel concept under
18 section 2 of the Voting Rights Act.

19 QUESTION: Well, would you --

20 QUESTION: Why --

21 QUESTION: No, please.

22 QUESTION: I don't know why that would be. I
23 mean, if you buy the proposition of racial entitlement,
24 that is, it doesn't matter whether a particular black man
25 has been discriminated against, that the object is the

1 race as a whole has to be made good, why wouldn't that
2 follow? It doesn't really matter what part of the State
3 you're not properly creating the black district in, so
4 long as you create a black district somewhere.

5 MR. FARR: Your Honor --

6 QUESTION: It's sort of a racial entitlement
7 theory. It has nothing to do with particular individuals
8 who are being disadvantaged.

9 MR. FARR: Your Honor, we think that this right
10 under the Voting Rights Act is not a right that is enjoyed
11 by any minority in the State of North Carolina. It is the
12 right to be free from vote dilution, and I believe that
13 Justice O'Connor's concurring opinion in the Gingles case
14 makes it very clear that these cases are very district-
15 specific, that you've got to prove the Gingles conditions
16 in the district in which you're trying to show the
17 violation.

18 And if I might explain a little bit what
19 happened in North Carolina, there is an argument that you
20 could make a reasonably compact majority minority district
21 running from Charlotte to the southeastern part of the
22 State. This was not done for incumbency protection
23 reasons. That's undisputed that that's why this was not
24 adopted.

25 It's the only district that the Justice

1 Department pointed out in its objection letter, and again,
2 as stated earlier, there's no evidence -- Justice
3 certainly did not suggest a majority black district. They
4 suggested a majority minority district.

5 In running this district up I-85, the district
6 to in the black population in Charlotte, which constituted
7 approximately a third of the total minority population
8 that would have been in existence if we had adopted a
9 majority minority district.

10 QUESTION: The reason, I take it, is that the
11 specific argument would be that section 2 requires the
12 creation of two districts in North Carolina because, just
13 as you pointed out, one could be done in that part of the
14 State and the other in the other part of the State, and
15 the only reason that they're in a different place is for
16 incumbency protection reasons, and that latter reason has
17 nothing to do with race, and if you say that you can't do
18 that, then you're saying that you can't do it when black
19 districts are involved but you could do it when white
20 districts are involved, and so the latter proposition is
21 an impossible one to maintain.

22 MR. FARR: Your Honor, we --

23 QUESTION: Legally.

24 MR. FARR: We would --

25 QUESTION: And so I mean, that's the specific

1 argument, so I'd appreciate your addressing that.

2 MR. FARR: Well, we respectfully disagree with
3 Your Honor's position on that.

4 QUESTION: I'm not taking that as a position.
5 I'm simply asking you to address it because I think that's
6 the specific argument.

7 MR. FARR: Your Honor, we don't think that
8 there's evidence, nor was there ever any intention to say
9 that the State legislature should look at the State of
10 North Carolina and conclude that minorities are entitled
11 to proportional representation in the State of North
12 Carolina. We believe what --

13 QUESTION: So the first possibility is, it isn't
14 true that they'd be in violation of the Voting Rights Act.
15 That would be, I guess, an issue.

16 But if it turns out that they would have been,
17 is there anything wrong with their having drawn the
18 boundaries solely for incumbency protection, which --

19 MR. FARR: Yes, Your Honor.

20 QUESTION: And what's that?

21 MR. FARR: We believe, Your Honor, that that
22 would fail the narrow tailoring requirement of strict
23 scrutiny, and specifically, Your Honor, it's these people
24 in this part of North Carolina that had their votes
25 diluted. They're the ones that have been subject to an

1 injury.

2 QUESTION: But I thought the point would be that
3 they would not be drawing it solely on the basis of
4 incumbency protection. They'd be -- still be drawing the
5 boundaries on the basis of race, although in order to
6 protect incumbents.

7 MR. FARR: That's very true, Your Honor.

8 QUESTION: But it would still be racial boundary
9 drawing, and your position is that's okay when you're
10 doing it in order to comply with section 2, but it's not
11 okay when you're doing it to protect incumbents, I
12 suppose.

13 MR. FARR: Yes, I don't think incumbency
14 protection is a compelling governmental interest, Your
15 Honor, and in fact --

16 QUESTION: Well, it may not be a -- and no, I
17 don't think anybody is claiming that it's a compelling
18 governmental interest, but it is a relevant consideration,
19 as I understand it, under Miller, in determining the
20 extent to which race predominates, because one of the
21 things you ask, the principal question you asked, I guess,
22 is, has race subordinated traditional districting
23 principles?

24 Now, if one districting principle is incumbency
25 protection, if that as a matter of historical fact is

1 true, that that has been an object pursued over the years,
2 and if that can be pursued, let's say with political data
3 as opposed to racial data which may or may not be a good
4 surrogate for political data, if it's pursued with
5 political data alone, then do you not concede that the
6 boundary can vary from the compact boundary that would
7 satisfy Gingles without flunking the narrow tailoring
8 test? Don't you concede that?

9 MR. FARR: No, Your Honor, I don't concede that.

10 QUESTION: Then tell me why not.

11 MR. FARR: Well, if I understood your question,
12 you were saying, and Justice Scalia, we believe it's a
13 very difficult case to prove a section 2 violation, and I
14 hope I have a chance to explain that before I sit down,
15 but Justice Souter, we again believe that the remedy must
16 go to the people who have been injured, and if --

17 QUESTION: No, but you are saying not that the
18 remedy must go to the people who have been injured, but
19 that the remedy must go to all and only the people
20 injured, and no other consideration may play a role --

21 MR. FARR: I think -

22 QUESTION: -- and if you are saying that, I
23 think, you are asking the Court to depart at least in one
24 respect from Miller, because Miller says a consideration
25 as to whether race has subordinated, whether race is

1 predominant, is, has race subordinated traditional
2 districting principles, and if a traditional districting
3 principle is incumbency protection, you are saying, well,
4 you've got to modify Miller to the extent that incumbency
5 protection will never be cognizable here, so I think
6 you're asking for a change in Miller.

7 MR. FARR: Well, I don't believe we are, Your
8 Honor.

9 QUESTION: Well, why not? If -- and my
10 assumption is incumbency protection can be shown
11 historically to have been a districting objective. It's
12 one of the things that's considered. If that is true,
13 that historically that has been an objective pursued, and
14 you're now saying no, you can't pursue it --

15 MR. FARR: Yes, Your Honor.

16 QUESTION: -- because that would modify the
17 boundary --

18 MR. FARR: Yes.

19 QUESTION: -- then to that extent you're
20 modifying Miller.

21 MR. FARR: Well, Your Honor, first you're
22 assuming that incumbency protection is the type of
23 traditional districting principle that the Court was
24 referring to in the Miller case.

25 QUESTION: Well, is it legitimate or not?

1 QUESTION: Well, why isn't it?

2 MR. FARR: Your Honor, I think there's a great
3 distinction, because when you're talking about political
4 subdivisions or county lines, you're talking about neutral
5 criteria, and I believe that the Court discussed those
6 issues as a frame of reference to show in a case involving
7 circumstantial evidence whether or not you could prove the
8 intent element of the Miller claim.

9 With incumbency protection that is a far more
10 subjective factor, and Justice Souter, drawing a majority
11 minority district has to be done for a compelling
12 governmental interest, and we would suggest that doing it
13 to protect an incumbent is not compelling. Doing it to
14 possibly comply with a section 2 violation is, and if you
15 are doing that, you must draw the district where the
16 section 2 violation exists.

17 QUESTION: Thank you, Mr. Farr.

18 Mr. Speas, we'll hear from you.

19 ORAL ARGUMENT OF EDWIN M. SPEAS, JR.

20 ON BEHALF OF APPELLEES HUNT, ET AL.

21 MR. SPEAS: Mr. Chief Justice, and may it please
22 the Court:

23 This matter first came to this Court on the
24 granting of defendant's Rule 12(b)(6) motion, and all of
25 the facts of the complaint, of course, were presumed to be

1 true.

2 The matter was remanded to court for trial, to
3 the district court for trial, and at the trial, extensive
4 evidence was taken by the court. Among that evidence were
5 specific statements by legislators and the drafters of the
6 map that they intended to draw the 12th District as an
7 urban district.

8 Demographers told us without any question the
9 12th District is an urban district. It is the most urban
10 district created in North Carolina. Historians told us
11 also that the 12th District is located within the Piedmont
12 Urban Crescent.

13 QUESTION: What color is the 12th District on
14 the map?

15 MR. SPEAS: The 12th district is orange, Your
16 Honor.

17 QUESTION: Oh, okay.

18 MR. SPEAS: It is located entirely within the 10
19 counties that make up the Piedmont Urban Crescent, an area
20 that the historians tell us has historic integrity. The
21 historians also -- excuse me. The demographers also told
22 us that this area is laced together by interstate
23 highways, that the district is accessible both for voters
24 and their representatives.

25 All of these factors combined to lead the

1 district court to conclude that this district and all
2 districts provided fair and effective representation for
3 North Carolina citizens, and we think that's very
4 important in this case, because, as this Court has said,
5 the ultimate purpose of redistricting is to provide fair
6 and effective representation for all of North Carolina's
7 citizens, both black and white.

8 QUESTION: That's what a district court is
9 supposed to sit in judgment of, of whether a particular
10 redistricting scheme provides fair and effective
11 representation?

12 MR. SPEAS: It would seem to us, Your Honor,
13 that those are very pertinent issues for -- the issues for
14 the Court to consider in regard to the issues in front of
15 you. We think --

16 QUESTION: I mean, it's a nice thing, who could
17 be against it, but I wouldn't want to have to -- this is
18 the kind of thing that judges and lawyers are good at
19 doing?

20 MR. SPEAS: In this case, the evidence was
21 presented that the district does provide fair and
22 effective representation, and the district court found
23 that it does, in fact, do that, so we think it is
24 important, Your Honor.

25 QUESTION: Is that a test that every

1 redistricting plan and every State must meet, that the
2 particular district provides fair and effective
3 representation?

4 MR. SPEAS: No, Your Honor, but we think in this
5 case that the issue of whether the district provides fair
6 and effective representation is relevant to the issue of
7 standing, is relevant to the issue of whether race was the
8 predominant motive -- if race was the predominant motive,
9 you would assume that the district might not provide fair
10 and effective representation for white citizens, and in
11 fact --

12 QUESTION: Maybe so, maybe not. I'm not sure
13 there's any correlation between the two. I -- you know, I
14 suppose if we wanted to go to a system in which everybody
15 is represented by his race, I guess that might be fair and
16 effective representation. I --

17 MR. SPEAS: But it was fair and effective --

18 QUESTION: Where do you get this test? I mean,
19 I don't see it in any of our cases.

20 MR. SPEAS: We get it, Your Honor, from your
21 statements that the purpose, the ultimate purpose, the
22 fundamental purpose of redistricting is to provide fair
23 and effective representation.

24 QUESTION: Well, of course it is, and there are
25 certain subrules that we follow and apply to determine

1 whether that's been done, but we just don't sit in the
2 abstract and decide whether there's fair and effective
3 representation.

4 MR. SPEAS: This wasn't done in the abstract,
5 Your Honor. Specific evidence was presented that it does
6 provide fair and effective representation.

7 QUESTION: But I thought it was remanded to
8 apply strict scrutiny, and I'm not sure how that's
9 relevant. I thought the court below had to decide whether
10 there was a compelling State interest and whether it was
11 narrowly tailored, and I'm surprised you're not talking
12 about that.

13 MR. SPEAS: Well, certainly we do believe that
14 this particular plan meets strict scrutiny. We also
15 believe that the district court applied a too-lenient test
16 to determine whether this was a racial gerrymander subject
17 to strict scrutiny in the first instance.

18 QUESTION: What was the compelling interest that
19 the district court found? Was it to comply with the
20 requirements of section 2?

21 MR. SPEAS: With section 2 and section 5, Your
22 Honor.

23 QUESTION: All right. Now, with respect to
24 section 2, in District 12, I take it that the westernmost
25 part is Gaston County, am I correct in that?

1 MR. SPEAS: That's correct, Your Honor.

2 QUESTION: Before this district was drawn, would
3 the black voters in western -- that western part in Gaston
4 County have had standing to bring a section 2 vote
5 dilution claim?

6 MR. SPEAS: Yes, I believe a black voter would
7 have had standing to bring --

8 QUESTION: Oh, you think that there was -- that
9 they were then in a district which was compact --

10 MR. SPEAS: Oh, I'm sorry.

11 QUESTION: -- and contiguous under the Gingles
12 test?

13 MR. SPEAS: I believe that a black voter in
14 North Carolina would have had standing --

15 QUESTION: No, no, I'm talking about --

16 MR. SPEAS: -- to bring a section 2 claim
17 asserting a violation of section 2.

18 QUESTION: No, no, based on -- based on the
19 voters in Gaston County being unrepresented in a black
20 district. How would the Gingles requirements comply with,
21 with reference to those voters, just assuming initially a
22 section 2 case?

23 MR. SPEAS: The question under a section 2 case,
24 would there been, have been the potential for the State of
25 North Carolina to created, to have created a

1 geographically compact district to -- that would have --

2 QUESTION: But they necessarily fail that, don't
3 they?

4 MR. SPEAS: No, Your Honor. We think that the
5 issue for the State is whether such a district can be
6 drawn. If it is established, and there is strong evidence
7 for believing that a district can be drawn, then
8 principles of federalism and the discretion the States
9 must have in this area give to the States discretion as to
10 where they will place that district --

11 QUESTION: So --

12 MR. SPEAS: -- so long as it provides fair and
13 effective representation.

14 QUESTION: So then the remedy has nothing to do
15 with the initial violation. That's a very strange
16 doctrine of law.

17 MR. SPEAS: Well, Your Honor, we believe that in
18 this case the evidence is, and certainly the district
19 court found, that there was racially polarized voting
20 within this particular area, or these areas where these
21 districts were created, so it is our position that there
22 is a fit between these particular districts and the
23 section 2 --

24 QUESTION: You must also find, under Gingles at
25 least, that the other factors are present.

1 MR. SPEAS: Yes.

2 QUESTION: And you can't just talk about racial
3 polarizing. You have to talk about compact and cohesive
4 districts.

5 MR. SPEAS: And certainly there's no question,
6 it's unrefuted in this case, that black citizens vote
7 together cohesively.

8 QUESTION: Two districts -- is there not just
9 unrefuted evidence, is there any evidence that two compact
10 black districts, black majority, not minority majority,
11 but black majority districts could have been created?

12 MR. SPEAS: Many different districts were
13 presented to the North Carolina General Assembly. Some
14 were here, in the southeast, where there's some
15 concentration of black citizens, some were here, in the
16 northeast, where there is a concentration of black
17 citizens --

18 QUESTION: Could two --

19 MR. SPEAS: -- and some were here.

20 QUESTION: Could two have been created? Is
21 there testimony and evidence, and I'd like you to cite it
22 to me, because your opponent contends not, that you could
23 have had a justification for creating one majority black
24 and one majority minority, but that there is no
25 justification on the Gingles standards, even if you're not

1 going to use the Gingles standards in the districts where
2 you apply them, for two black majority districts. Now,
3 what would you cite me as refuting that?

4 MR. SPEAS: I would cite you Shaw I, Shaw I, II,
5 and III, to begin with. That is a district where, if you
6 add blacks and Indians, you do have a majority minority
7 district. I would cite to you --

8 QUESTION: I want two black majority, not
9 majority minority. I want two majority black districts,
10 compact.

11 MR. SPEAS: I would cite to you the plan
12 prepared and presented by Representative Larry Justus,
13 which was labeled Compact 2, which I believe creates, and
14 was presented in January of 1992 to the General Assembly,
15 which is contained -- a map of which is contained in the
16 maps lodged with the court, and I will obtain those.

17 I would cite to you a district running from
18 Winston-Salem to Halifax County that was before the
19 General Assembly that was a majority black district, and
20 that was described in the State's response to the
21 Department of Justice as a reasonably compact --

22 QUESTION: And these plans had two black
23 districts. I mean, obviously a lot of different plans can
24 have one majority black district, but these plans you're
25 referring me to had two majority black districts, compact

1 majority black districts.

2 MR. SPEAS: I don't believe that any individual
3 put before the General Assembly at a time --

4 QUESTION: But that's the whole point.

5 MR. SPEAS: -- a plan that had two districts --

6 QUESTION: Can you create two?

7 MR. SPEAS: Yes.

8 QUESTION: I know you could create one here, or
9 you could create one somewhere else, but is there any
10 evidence that you could create two simultaneously majority
11 black, which is what your remedy proposes to do.

12 MR. SPEAS: I believe, Your Honor, that the
13 legislators believed that could be done. There is in the
14 record of this case --

15 QUESTION: Well, they have to be right. Is
16 there any evidence in this case that they were right about
17 that?

18 MR. SPEAS: Well, yes, Your Honor. At page 155
19 of the joint appendix is an article which recounts a
20 private meeting of North Carolina Democratic legislative
21 leaders at which -- and Congressmen, at which they
22 conclude that yes, two districts can be drawn.

23 This was, of course, just 2 days -- or 2 weeks
24 before the plan itself was enacted.

25 QUESTION: Well, two districts can be drawn in

1 the sense of, we can legislate them, or two districts can
2 be drawn under the Gingles test?

3 MR. SPEAS: Two districts that can be drawn, I
4 believe is the thrust of their statements, that some
5 people --

6 QUESTION: We know that.

7 MR. SPEAS: -- would perceive to be --

8 QUESTION: It's been done. It's been done. The
9 issue is whether two compact districts can be created,
10 which is what would create -- which would -- what would
11 produce an alleged section 2 violation if you didn't
12 create two black districts, but you -- it seems to me you
13 have to do step one, which is, under Gingles -- Gingles,
14 whatever you want to say it, that there have to be two
15 creatable, compact black majority districts.

16 MR. SPEAS: Of course, Your Honor, to a large
17 extent, compactness is in the eye of the beholder.

18 QUESTION: Can you create two or not? What
19 about this map 1, map 2, and map 3? Does that show it, or
20 not? Well, I mean, if you don't know, don't bother
21 answering that.

22 MR. SPEAS: I'm sorry, Your Honor.

23 QUESTION: Just -- I mean, has anybody sat down
24 and done it, so that you could show that you could create
25 two compact majority minority districts in the State, or

1 majority black districts?

2 MR. SPEAS: There are -- there were numerous
3 plans presented to the General Assembly --

4 QUESTION: Compact.

5 MR. SPEAS: Fact.

6 QUESTION: Compact.

7 MR. SPEAS: Which included two majority minority
8 districts.

9 QUESTION: That were compact.

10 MR. SPEAS: In several of the plans, one of the
11 districts was compact to the eye, and the others, the
12 district might not have been compact to the eye, but all
13 together --

14 QUESTION: Majority black is what we're talking
15 about, not just majority minority -- majority black.

16 MR. SPEAS: I understand -- I understand.

17 QUESTION: The last time you said majority
18 minority. I don't think you meant that.

19 MR. SPEAS: I understand the distinction you're
20 making.

21 QUESTION: Let me ask -- oh, I'm sorry, are you
22 still answering Justice Breyer's question?

23 MR. SPEAS: No.

24 QUESTION: Okay. Let me ask you a different
25 question.

1 Do you take the position that if a given
2 majority minority district can be created so that the
3 Gingles -- subject to the Gingles criteria, that then, in
4 pursuit of other districting objectives, a majority
5 minority district can be created somewhere else in the
6 State that is in no way coincident with the compact
7 Gingles district? Do you take that position?

8 MR. SPEAS: Yes, we do.

9 QUESTION: No overlap at all.

10 MR. SPEAS: We take that position --

11 QUESTION: It's not merely the case that you can
12 modify around the edges, move to the right, move to the
13 left a bit here and there, in order to obtain other
14 objectives. You can go to an entirely different part of
15 the State and have a district which is in no way
16 geographically coincident with the one that would -- you
17 use to satisfy the Gingles condition.

18 MR. SPEAS: Charlotte, of course, was
19 coincident.

20 QUESTION: That's -- that's -- your answer is
21 yes.

22 MR. SPEAS: Virtually all of these districts in
23 Charlotte and Gastonia are a large part of --

24 QUESTION: But your answer is yes to my
25 question, is that --

1 MR. SPEAS: My answer is that it is within the
2 State's discretion once it has a basis to believe that a
3 section 2 violation could be established, to determine
4 where to place the district. That discretion is not
5 without limits.

6 QUESTION: How does that comport with narrow
7 tailoring? I thought narrow tailoring meant, and correct
8 me if I'm wrong because we've used it in slightly
9 different formulations in different cases.

10 MR. SPEAS: Yes.

11 QUESTION: But I thought that narrow tailoring
12 meant that there is a wrong, and that the remedy has to be
13 as closely designed to cure that evil as possible, and
14 what you're telling me now is that once you find that
15 there's a violation, you can adopt any remedy you want --

16 MR. SPEAS: No.

17 QUESTION: -- and that seems to me quite the
18 polar opposite of narrow tailoring.

19 MR. SPEAS: No, Your Honor. There are,
20 obviously, limits on the State's discretion in determining
21 where to place the district.

22 The two most obvious are first, Your Honor, that
23 there must be some racially polarized voting within the
24 area in which you locate the district, and I believe the
25 evidence in this case is that there is racially polarized

1 voting throughout North Carolina, including the area
2 encompassed within the 12th District, and because, Your
3 Honor, I believe narrow tailoring includes, and perhaps
4 most importantly includes, a requirement that the harm to
5 innocent third parties be minimized, I believe that fair
6 and effective representation is a limit on the discretion
7 of the State. You must --

8 QUESTION: What is the harm to innocent third
9 parties?

10 MR. SPEAS: My understanding of your prior
11 decisions is that the existence of harm, of some harm to
12 innocent third parties as a consequence of the action
13 taken to remedy a discrimination is an important element
14 of narrow tailoring.

15 QUESTION: That would comprehend exclusion of
16 whites from a district because of their race. That's harm
17 to an innocent third party, I take it.

18 MR. SPEAS: Well, Your Honor, the evidence in
19 this case establishes that the 12th District provides, and
20 the court found, fair and effective representation for all
21 citizens.

22 QUESTION: I'm asking what harm, an example of
23 harm to an innocent third party is in the context of
24 redistricting. I take it, it's the exclusion of some
25 people by reason of their race from a different -- from a

1 district that they otherwise would be in.

2 MR. SPEAS: A harm --

3 QUESTION: That has ties to their community and
4 to their former district.

5 MR. SPEAS: A harm to an innocent third party
6 could be denial of accessibility between them and their
7 representatives.

8 QUESTION: Yes.

9 MR. SPEAS: This district doesn't do that.

10 QUESTION: Well now, wait. You would say
11 there's no harm to a racial group if they're made to ride
12 in a separate railroad car, so long as it's just as nice
13 as the railroad car in which other people are made to
14 ride?

15 MR. SPEAS: No, Your Honor.

16 QUESTION: No harm to fair and effective
17 transportation, or schooling, if they're made to go to a
18 separate school? No harm to fair and effective
19 legislation? It seems to me you're making the same
20 argument. There's no harm to fair and effective
21 representation. But I've been excluded from my district
22 because of my race, the individual says, and that
23 shouldn't happen.

24 MR. SPEAS: I don't think that's what I'm
25 saying, Your Honor. What I'm saying is this 12th

1 District, for example, provides fair and effective
2 representation for black voters, obviously.

3 It also provides fair and effective
4 representation for all voters, both black and white,
5 because it's an urban district.

6 It provides fair and effective representation
7 for all voters, both black and white, because it's located
8 within an area of the State that geography --

9 QUESTION: Well, now we're back to that same
10 peculiar test, and I don't know what it has to do with
11 narrow tailoring.

12 MR. SPEAS: It was certainly our understanding,
13 and the district court found, that an element of narrow
14 tailoring is whether there's harm to innocent third
15 parties.

16 QUESTION: Then why shouldn't it also be an
17 element of narrow tailoring whether there is any
18 amelioration to the black voters who were the subject of
19 the Gingles qualifying analysis in the first place?
20 Apparently, they are ignored.

21 MR. SPEAS: This district --

22 QUESTION: No, but on your theory, they can be
23 ignored, because you said you can put the district
24 anywhere else in the State, and it need not in any way be
25 coincident with, we'll call it the Gingles qualifying

1 district, which allows you to do this in the first place.

2 MR. SPEAS: The harm to black citizens, Your
3 Honor, is the dilution of their votes, the racially
4 polarized voting.

5 QUESTION: And those whose votes were diluted
6 and subject to a Gingles remedy on your analysis can be
7 ignored entirely.

8 MR. SPEAS: I don't believe that's the
9 consequence of --

10 QUESTION: Then why don't you take the position
11 that there's at least got to be some coincidence between
12 the ultimate majority minority district and the Gingles
13 district, which allows you to do this in the first place?

14 MR. SPEAS: Your Honor, there -- you -- I
15 believe there is coincidence between the harms and
16 North --

17 QUESTION: Then I don't understand your answer.
18 There's no coincidence of the actual voters in what I will
19 call the Gingles district and the ultimate resulting
20 district on your theory. There need not be any
21 coincidence on your theory.

22 MR. SPEAS: All North Carolina black citizens
23 have been the victims of racially polarized voting. I
24 believe that's the evidence in this case, and the State
25 cannot --

1 QUESTION: So your position is a kind of racial
2 entitlement theory, as opposed to individual group of
3 voters entitlement theory.

4 MR. SPEAS: It would -- the group of voters
5 within the district where the racially polarized voting
6 exists would be --

7 QUESTION: Any district in which racially --

8 MR. SPEAS: Would be -- receive the benefit of
9 the Ameliorative black vot --

10 QUESTION: Mr. Speas --

11 QUESTION: Wait a minute, is racially polarized
12 voting a constitutional violation? Does somebody who
13 votes on the basis of --

14 MR. SPEAS: It is --

15 QUESTION: -- race commit a constitutional
16 violation? I didn't realize that.

17 MR. SPEAS: Vote dilution through racially
18 polarized voting is --

19 QUESTION: Ah. So the constitutional harm is
20 having a concentrated number of persons of a certain race
21 which has been denied -- which has been denied
22 representation. It seems to me the harm assumed by
23 Gingles-Gingles is within the district that could have
24 been made a voting district but has not been.

25 That's the harm. It's not the fact that

1 somebody engages in racial voting. That's regrettable,
2 but it's not unconstitutional.

3 MR. SPEAS: The evidence in this case, Your
4 Honor, is that there are significant concentrations of
5 black citizens in this district. They reside within each
6 of --

7 QUESTION: Mr. Speas, your answers to the
8 questions that is part 2 of your argument seem to be
9 colored by what is your main position, which you haven't
10 had an opportunity to state.

11 I think you said that despite Shaw I the
12 district court did not have to go right into the strict
13 scrutiny compelling State interest mold. Your first
14 argument seemed to be that race didn't predominate, and my
15 question to you is, if it didn't, what did?

16 Your main argument is not this section 2, so
17 maybe in the time remaining you have an opportunity to say
18 what is your main position in this case.

19 MR. SPEAS: Our first position is, the district
20 is not subject to strict scrutiny.

21 QUESTION: And why not?

22 MR. SPEAS: The district court did not have the
23 benefit of this decision, of this Court's decision in
24 Miller when it decided this case. It applied a test
25 that's too lenient. It said, the test is whether race was

1 one of several substantial and motivating factors in the
2 local redistricting process.

3 The evidence in this case, and the district
4 court found, that race was used in combination with five
5 other factors. The district court found in this case that
6 the desire to create a homogeneous district was one factor
7 given primacy, and I think it's important the Court
8 examine --

9 QUESTION: I think you've finished the answer to
10 the question, Mr. Speas.

11 MR. SPEAS: Thank you.

12 QUESTION: Mr. Chambers, we'll hear from you.

13 ORAL ARGUMENT OF JULIUS L. CHAMBERS
14 ON BEHALF OF APPELLEES GINGLES, ET ALL.

15 MR. CHAMBERS: Mr. Chief Justice, and may it
16 please the Court:

17 I would first begin pointing out that this case
18 is not Gomillion v. Lightfoot. Nobody has excluded any
19 citizen of North Carolina from participating in the
20 electoral process. Black and white citizens are, through
21 this legislation, provided for the first time in over
22 90 years an opportunity to now have a voice -- an
23 opportunity to have a voice in the election of
24 Congresspeople in North Carolina.

25 We have gone through a period in North Carolina

1 where we have purposely discriminated against black
2 people. We've then moved, only through the urging of
3 legislation and this Court, to periods where we have
4 permitted blacks to register and vote. We've moved to the
5 Voting Rights Act.

6 We now for the first time have gotten to a point
7 where black people will have a voice, or an opportunity to
8 have a voice in the election of Congresspeople, and I hope
9 in the Court's review of this case it appreciates that
10 we're operating not in a vacuum, but in a situation where
11 we've had a history of purposely excluding black people.

12 And now we're trying to devise a remedy, and
13 that remedy is one, I submit, this Court has approved,
14 where we say it is necessary to have a majority black
15 district in order to give black people an opportunity to
16 have a choice in who represents them in the legislature.

17 Nobody is guaranteeing any black representative.
18 We are only giving people a voice, and we know from the
19 decision in Gingles that this Court, and that the Congress
20 in enacting section 2, felt it imperative that we create
21 districts where people would have a real voice and not a
22 farce.

23 QUESTION: Mr. Chambers, many people think that
24 black people can have a greater voice when they are close
25 to a majority, or at least a substantial minority in a lot

1 of districts, rather than a majority in one or two
2 districts. Indeed, the charge is made that it is very
3 much in the political interests of some people to
4 aggregate all blacks into one or two districts so that the
5 rest of the districts can ignore their interests.

6 I don't -- you know, I am in total sympathy with
7 the objective that you're urging upon us, but it certainly
8 isn't clear as a matter of principle or logic that this is
9 the only way to achieve that objective. Indeed, there are
10 many who think that this is moving in precisely the wrong
11 direction, that its net effect is to reduce the
12 opportunity of blacks to have their interests taken into
13 account.

14 I frankly don't know what the answer is, but I
15 certainly can't agree with you that this is the only way
16 to achieve it.

17 MR. CHAMBERS: I understand that, Your Honor.
18 We had a district in North Carolina that provided, we
19 thought, an opportunity, with 42 percent black votes.
20 Because of racially polarized voting we couldn't elect a
21 candidate of choice.

22 QUESTION: What does that mean, you couldn't
23 elect a candidate of choice? is it clear that the
24 candidate you elected ignored the interests of black
25 people, or is it just that he was not black?

1 MR. CHAMBERS: It's because the candidate was
2 not the representative of choice for African Americans in
3 North Carolina.

4 QUESTION: I don't know what that means. I
5 don't know what that means.

6 MR. CHAMBERS: It means, Your Honor, the same
7 thing it would mean for you if you didn't have a voice in
8 the election of your representative.

9 We've gone through periods where we know,
10 through the legislation that's been passed in Congress,
11 where the interests of black people haven't been
12 represented.

13 Congress sought through the legislation in 1982
14 to ensure for at least once we would move beyond that, and
15 now we have this chance and this opportunity through
16 section 2 of the Voting Rights Act to ensure that black
17 people -- and we know through experiences in North
18 Carolina, and this Court found this in Gingles, that
19 simply providing an opportunity district would not ensure
20 the kind of opportunity that African Americans needed.

21 QUESTION: Well, let me ask you this. Assuming
22 that it can be shown that the Gingles factors are met to
23 establish a section 2 violation, and that there is an area
24 in the State where there is a reasonably compact block of
25 black voters that could be combined in a district and

1 where there is evidence of racially polarized voting, or
2 block voting, so that you could create a district there,
3 then Gingles would suggest that's what you look at to see
4 if there's a section 2 violation.

5 Now, if you establish that, can the remedy be to
6 create a district in a different part of the State, not
7 where the evidence showed at all that would satisfy
8 Gingles, but go to a completely different part of the
9 State and create something there?

10 Is that a narrowly tailored remedy?

11 MR. CHAMBERS: Your Honor, in this case, in this
12 State --

13 QUESTION: Well could --

14 MR. CHAMBERS: Yes.

15 QUESTION: Just in general could you answer?

16 MR. CHAMBERS: Well, in general, I would say
17 that if we're looking at a congressional district, and
18 we're looking at a State, I would submit that it would
19 permit the State, using its discretion, which is the
20 second point I wanted to raise with you, to decide how to
21 locate that particular district in that State in order to
22 accommodate that injury.

23 The injury, I submit, is to all the people in
24 North Carolina who, because of the way we structured the
25 system, are suffering from dilution of their votes and not

1 having a voice in the election of representatives.

2 Now, in this district here, we had two plans --
3 the Court asked about this -- that assured that blacks
4 would be able to elect a representative of choice. These
5 plans are in the record. They are Exhibit 10, and they're
6 filed with the Court, and they're maps that were run
7 through the legislature.

8 What the State saw was it could draw a district
9 running from Charlotte or Gastonia down through, either to
10 Wilmington or up back through, near Raleigh. These were,
11 in your words, compact districts, which is the third point
12 that I wanted to raise with you, and they saw the
13 potential violation of section 2.

14 And Justice Kennedy, you asked about whether
15 Gastonia residents could file a lawsuit. I submit to you,
16 they could. You're not confining this to Gastonia. You
17 could begin in Gastonia.

18 QUESTION: Well, don't they have to show the
19 Gingles factors?

20 MR. CHAMBERS: They would show it.

21 QUESTION: Well, I --

22 MR. CHAMBERS: We're talking about --

23 QUESTION: We can examine that later, but let me
24 ask you, are you trying to suggest, or are you suggesting
25 that perhaps the Gingles factors have been

1 overemphasized --

2 MR. CHAMBERS: Yes.

3 QUESTION: -- or unimportant?

4 MR. CHAMBERS: I would submit, the way we have
5 proceeded with the Gingles factors -- and this is the
6 compactness that the Court has talked about here today.

7 Compactness ought to be viewed in terms of
8 what's meaningful, functional, what works.

9 QUESTION: But you see, what -- where we are,
10 Mr. Chambers -- as you know this as well or better than I,
11 two very volatile areas, race and politics, in which there
12 has been no long tradition or settled juridical principles
13 about what are neutral, fair, adequate districting
14 considerations. It's been the law of the jungle.

15 And the point of Gingles was to try to introduce
16 some neutral, controlled factors that could be the
17 beginning point for building a principles jurisprudence,
18 and I'm somewhat concerned that you suggest that we
19 somehow now sweep those under the rug and put us back in
20 the anything-goes area.

21 MR. CHAMBERS: That's not what I said, Your
22 Honor.

23 Remember, too, in Gingles we were dealing with a
24 State legislature, State Houses, State Senate seats, not
25 with a congressional district, and second, as we talked

1 about compactness and contiguity, we were assuming that
2 that was what was necessary in order to ensure that we
3 bring people together with a community of interest.

4 We now see from the findings in this Court, now
5 before this Court, that we can look at things that, of the
6 way the State develops, and that's the peculiarity of
7 North Carolina, to help ensure the same kind of community
8 of interest, the same kind of opportunity of people
9 working together, not just because they're black, but --

10 QUESTION: But that leads us just to
11 proportional representation --

12 MR. CHAMBERS: No, it doesn't.

13 QUESTION: -- and quite apart from the
14 section 2, which points in these different directions,
15 quite apart from there, it seems to me proportional
16 representation is the last thing that you should argue
17 for --

18 MR. CHAMBERS: I'm not arguing for proportional
19 representation.

20 QUESTION: -- that it's ultimately very, very
21 dangerous and divisive.

22 MR. CHAMBERS: Your Honor, I'm not arguing for
23 proportional representation. Even if we -- if the Court
24 sustains the plan here, we will not have proportional
25 representation.

1 We make up 22 percent of the population. The
2 plans would guarantee about 2 percent, or may guarantee at
3 least an opportunity for 18 percent. We're not talking
4 about proportional representation.

5 What we're talking about is ensuring at once, at
6 least for once, a chance now to have a chance to have a
7 voice in the election of your representatives.

8 QUESTION: Thank you, Mr. Chambers.

9 MR. CHAMBERS: Thank you, Your Honor.

10 QUESTION: Mr. Bender, we'll hear from you.

11 ORAL ARGUMENT OF PAUL BENDER

12 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

13 SUPPORTING THE APPELLEES

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

16 Let me start with the question that has occupied
17 the Court during much of this argument, and that is the
18 question of whether, if the Gingles factors are satisfied
19 so that there's a compelling interest in satisfying
20 section 2 by drawing minority majority districts, whether
21 the State can then locate those districts anywhere in the
22 State.

23 It is not our position that the State can locate
24 them anywhere in the State, and in this case the State did
25 not locate them anywhere in the State.

1 The District 12 which was ultimately drawn here
2 contains two areas, the Charlotte area here, and the
3 Durham area here, which are -- contain a substantial part
4 of the black population. In this district Charlotte alone
5 contains a little over 30 percent of the black population
6 in this district. Durham contains some more.

7 Both of those areas were in a compact district
8 in the Shaw II plan that's in the joint appendix. It's
9 this plan here.

10 Charlotte was in this district, and Durham was
11 in this district, so there's a substantial overlap between
12 those people.

13 And in addition, another limiting criterion,
14 Justice Kennedy, is that the district must be placed in an
15 area so that the majority of the black population in the
16 district has been a victim of the polarized voting that
17 invoked section 2, and a majority of that population is
18 politically cohesive with other minorities in the State
19 who have been the victims of that, and the findings of
20 fact in this case, which are amply supported by the
21 evidence, are that that was exactly true here.

22 QUESTION: Is it the case that if, in fact,
23 those criteria are met -- you see, what -- I find it quite
24 difficult, because there's a constitutional principle that
25 you're permitted to do this when there's a compelling

1 need, and then it has to be narrowly tailored.

2 And by itself, narrowly tailored might suggest
3 compactness, but is there a principle involved that, if it
4 is compact, and you insist on it, then only black-related
5 districts would have the requirement of not taking into
6 account protecting incumbencies, while white districts
7 would not have such a requirement, and can the
8 Constitution permit such a result, if that's right?

9 And what I want you to address, if you can, is
10 if that's right, there's a constitutional principle each
11 way. Narrow tailoring cuts in favor of compactness, but
12 the basic principle of equal protection of the law would
13 seem to cut in the opposite direction, so how can those be
14 reconciled?

15 MR. BENDER: Well, I think that's exactly right.
16 If North Carolina had wanted to create a district in which
17 farmers were a majority, there's no constitutional
18 principle which would stop it from creating a noncompact
19 district like that.

20 QUESTION: Well, Justice Breyer's question asked
21 you about the creation of a white district. Would that be
22 constitutional?

23 MR. BENDER: No, not a district based on race.
24 Section 2 only would justify a district for minority's
25 interests. But I was saying, there are other -- take the

1 desire of a State to create the district that has a
2 majority of farmers in it. I take it that that's a
3 legitimate interest that a State could have, and that a
4 State in vindicating that interest could design a
5 noncompact district.

6 In this case, the district court found that the
7 State acted not to satisfy a desire of the States, but to
8 satisfy an obligation of the States, an obligation to
9 comply with Federal law, an obligation to comply with
10 section 2 of the Voting Rights Act.

11 I can't believe that when the State acts to
12 satisfy a statutory and perhaps even a constitutional
13 obligation, it has less discretion in doing that, in
14 employing its other --

15 QUESTION: Well, the problem -- the problem, of
16 course, is the Fourteen Amendment and its prohibition that
17 the State not act on the basis of race alone in handing
18 out public benefits, or in drawing district lines, or
19 whatever it is.

20 I mean, that's why we're into this, and
21 that's -- it doesn't talk about farmers, it talks about
22 race, doesn't it?

23 MR. BENDER: Well, I think in this area, Justice
24 O'Connor, the State can act on the basis of race in order
25 to create a majority minority district in order to

1 counteract the effects of past voting discrimination,
2 which was present in North Carolina for a long time, and
3 the legacy of that discrimination, which is the polarized
4 voting.

5 It's unusual that a State can do that, and it --

6 QUESTION: Mr. Bender, what are the two
7 districts, the two Gingles-Gingles concentrated districts
8 that you rely on for this compulsion? Two at the same
9 time.

10 MR. BENDER: There are not --

11 QUESTION: Not two in different programs.

12 MR. BENDER: As far as we can tell, there were
13 not two majority black districts.

14 QUESTION: Yet that is what this strange
15 configuration --

16 MR. BENDER: This is the majority --

17 QUESTION: -- was intended to create, right?

18 MR. BENDER: But the obligation under Gingles is
19 to create a minority opportunity district. That is what
20 the statute says.

21 QUESTION: But this degree of departure from
22 normal districting principles was not necessary to comply
23 with what you say section 2 required.

24 MR. BENDER: That's right, but that would have
25 forced the State --

1 QUESTION: You could have had a much more
2 concentrated second district if you were only going for
3 majority minority, but instead, the State chose to go for
4 two majority black districts in spite of the fact that no
5 one has given us any indication of why the failure to have
6 a second majority black district could possibly have been
7 a section 2 violation.

8 MR. BENDER: Two points there. One, they chose
9 to do that because if they had done this district, this
10 would be a district that had almost no coherence except
11 that it was a minority majority district. This district
12 mixed rural and urban people together, there was no
13 community of interest there, and a second reason they
14 didn't --

15 QUESTION: Whereas the community of interest
16 here is what, that they're all black?

17 MR. BENDER: No, that 80 percent of them are
18 urban, and the State deliberately decided to create an 80-
19 percent urban district here, and an 80-percent rural
20 district here, as a purpose.

21 QUESTION: In figuring it out --

22 MR. BENDER: Yes.

23 QUESTION: -- did they take into account
24 minority, or did they punch into the computer just black?

25 MR. BENDER: In doing this --

1 QUESTION: Yes, in figuring out this strange
2 scheme.

3 MR. BENDER: I don't know what they punched into
4 the computer, but they --

5 QUESTION: My impression is that they punched
6 in -- that they punched in black, that they were looking
7 specifically for two majority black districts, and there
8 is no justification that anyone has asserted under
9 section 2 for punching that into the computer.

10 MR. BENDER: No, there is. Section 2 says that
11 if minorities are denied a fair opportunity to participate
12 in the political process because of racial polarization in
13 voting and because the minorities -- and when the
14 minorities are cohesive, then you have to create a
15 majority minority district for them.

16 Now, it's true that in this case, as you pointed
17 out a number of times, the second district that was
18 compact was not a majority minority district, it was a 49-
19 point-something percent minority district, and of that
20 49 percent, I think about 42 percent were black, and about
21 7 percent were Native Americans.

22 The statute, section 2, which is what we're
23 applying here, doesn't require a majority minority
24 district. Gingles said that, but I think it said that as
25 an approximation. What the statute requires is to give

1 the minorities a fair opportunity to participate in the
2 political process, and how much of a percentage of
3 minorities you need to do that depends upon the extent of
4 polarized voting.

5 QUESTION: What about the other minorities that
6 form the almost majority in the concentrated district that
7 was identified but not used? What about them? They were
8 what, Hispanic and Indian?

9 MR. BENDER: You're talking about the
10 district --

11 QUESTION: Yes. You said you formed, you know,
12 49-point-some-odd percent.

13 MR. BENDER: Yes.

14 QUESTION: Almost a majority, though not even a
15 majority, much less a majority black, but you formed that
16 out of a district in which only 42 percent were black.

17 MR. BENDER: That district would have had about
18 42 percent black.

19 QUESTION: Well, what --

20 MR. BENDER: But that would have been a district
21 in which minorities would have had a fair opportunity to
22 have candidates of choice elected, because they would have
23 had a sizeable enough population so that with a right
24 cross-over voting --

25 QUESTION: And the theory is that Hispanics and

1 Indians in that concentrated district, their interests
2 will be well enough taken care of by the all-black
3 district in the northern part of the city.

4 MR. BENDER: There was evidence, I believe, that
5 the two groups voted as a cohesive minority, and all of
6 those factors are perfectly relevant, completely relevant,
7 necessarily relevant under section 2.

8 So you shouldn't have -- if it's 49.9 percent
9 it's no good, and if it's 50.1 it is. That doesn't make
10 any sense. The sense here is to give minorities a chance
11 to participate fairly in the political process and North
12 Carolina has done that.

13 You can't force North Carolina to abandon other
14 nonracial redistricting principles like keeping
15 communities of interest, urban and rural, together, or
16 like satisfying incumbency protection.

17 QUESTION: Do those principles --

18 MR. BENDER: You can't force them to give those
19 up.

20 QUESTION: Do those principles have to be
21 historically justified?

22 MR. BENDER: Those nonracial principles?

23 QUESTION: Yes, urban with urban, rural with
24 rural?

25 MR. BENDER: I don't think they have to be

1 historically justified. They have to be nonracial, and
2 principles that the State wishes to use for nonracial
3 reasons.

4 QUESTION: Didn't you refer to traditional
5 principles, and wasn't -- I assume the reason we did so
6 was that we assume the -- if there is tradition behind the
7 principles, they are less manipulable --

8 MR. BENDER: I agree.

9 QUESTION: -- to come out -- yes.

10 MR. BENDER: Tradition is a very good way of
11 showing that they weren't done here for racial reasons,
12 but if you are convinced, as the court was in this case,
13 that they are not done for racial reasons, I don't think
14 the fact that this is the first time they decided that
15 they needed to have an urban district because of urban
16 problems that had recently arisen and they think that it's
17 important for those people to vote together, I don't think
18 the fact that that's just happened in the last 10 years
19 should disqualify them from doing it.

20 QUESTION: Suppose a State passed a law, and the
21 law said, we can use incumbency protection as a principle
22 except in one instance. Anyone who's elected out of
23 section 2 districts and who is black can't use that
24 principle. Would that law survive constitutional
25 challenge?

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MR. BENDER: I think it would be unconstitutional.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bender. The case is submitted.

(Whereupon, at 1:51 p.m., the case in the above-entitled matters was submitted.)