

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JAMES B. HUNT, JR., :

4 GOVERNOR OF NORTH CAROLINA, :

5 ET AL., :

6 Appellants :

7 v. : No. 99-1864

8 MARTIN CROMARTIE, ET AL.; : No. 99-1865

9 and :

10 ALFRED SMALLWOOD, ET AL., :

11 Appellants :

12 v. :

13 MARTIN CROMARTIE, ET AL. :

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15 Washington, D.C.

16 Monday, November 27, 2000

17 The above-entitled matter came on for oral argument

18 before the Supreme Court of the United States at 10:04

19 a.m.

20 APPEARANCES:

21 WALTER E. DELLINGER, III, ESQ., Washington, D.C.; on

22 behalf of the Appellants.

23 ADAM STEIN, ESQ., Chapel Hill, North Carolina; on

24 behalf of the Appellants.

25 ROBINSON O. EVERETT, ESQ., Durham, North Carolina; on

1 behalf of the Appellees.
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1 P R O C E E D I N G S

2 [10:04 a.m.]

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in number 99-1864, James B. Hunt versus
5 Martin Cromartie, Alfred Smallwood versus Martin
6 Cromartie.

7 Mr. Dellinger.

8 ORAL ARGUMENT OF WALTER E. DELLINGER, III

9 ON BEHALF OF THE APPELLANTS

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

12 In the Shaw versus Reno line of cases this Court
13 established two important propositions. The first is that
14 the Constitution does not tolerate using race as the
15 predominant factor in drawing legislative districts. When
16 a district is drawn predominantly on racial lines, the
17 state reinforces harmful racial stereotypes. It sends a
18 message to elected officials that they represent only a
19 particular racial group.

20 Those cases stand also for a second proposition.
21 As this Court said in Miller, Federal court review of
22 districting legislation represents a serious intrusion on
23 the most vital of local functions. For this reason, the
24 important second principle is that Federal courts
25 adjudicating Shaw claims must exercise extraordinary

1 caution. The decision below would severely compromise
2 this second principle. That ruling is inconsistent with
3 this Court's admonition.

4 QUESTION: Mr. Dellinger, are you suggesting
5 that there is some different standard of proof of facts in
6 these cases or that we should not review a factual
7 determination of a clearly erroneous rule?

8 MR. DELLINGER: Mr. Chief Justice, I believe
9 that the decision below was clearly erroneous, and we're
10 perfectly happy to meet the standard that the conclusions
11 were clearly erroneous. Because the court did not separate
12 out findings of fact from conclusions of law, it is
13 possible to read the opinion as if the court did not
14 actually apply the standard, but requiring a predominance
15 of race to be shown, in which case it would have applied
16 the wrong legal standard, but taking them to have found
17 that race predominated here, in our view that is clearly
18 erroneous.

19 I only mean to suggest, as this Court has said
20 in Bush v. Vera, and in Miller that because redistricting
21 is such an exceedingly sensitive matter that the Court
22 should be awfully cautious before they conclude that a
23 state legislature --

24 QUESTION: That could be true, but to continue
25 the question that the Chief Justice asked, do we at bottom

1 have to apply a clearly erroneous test here to the
2 determination of the facts?

3 MR. DELLINGER: Not if you find that when you
4 read the District Court's opinion that the court simply
5 wasn't applying a standard that required the court to
6 conclude that race predominated and subordinated other
7 conclusions. You can say, well, it did refer to the
8 predominance test, but that's not what it was applying.
9 The evidence that it adduced at best was evidence that was
10 probative only of whether race was one of the factors that
11 was considered here.

12 QUESTION: I frankly have some difficulty with
13 your position in the case because it is possible that as a
14 fact finder I would not have found the facts as the court
15 below did, and yet the court below appears to have
16 believed one expert over another and made findings that
17 may have been within its power to make, and how are we to
18 upset that?

19 MR. DELLINGER: Justice O'Connor, it takes a
20 careful review because there is simply nothing probative
21 underlying the conclusions of the District Court. We set
22 out at pages 25 to 33 of our brief, we really have to go
23 through the trial transcript citations, the court says,
24 for example, that where splits occur in District 12 in the
25 six counties between District 12 and the other districts,

1 the splits invariably occur along racial rather than
2 political lines, if that's a fact it will certainly tend
3 to show predominance. It's simply not true. Neither the
4 District Court nor the appellees point to a single
5 instance of a split in which race trumps politics.

6 For example, in the plurality opinion in Bush v.
7 Vera, you find that in that case the Texas redistricters,
8 faced with precincts that were minorities, Hispanic or
9 African-American, but where the precinct itself was
10 majority Republican, went out and took that in, in order
11 to bring in the minority group, even though that was
12 contrary to the asserted goal. That's set out at page 917
13 of Bush v. Vera. There is simply no instance of that.

14 The two big items of proof -- I am quite
15 confident that reversing the court below and sustaining
16 the North Carolina plan will not in any way impair the
17 vitality of this Court's antiracial gerrymandering
18 principle either on --

19 QUESTION: You can say that about any number, no
20 one single decision would affect a stream of decisions,
21 but, you know, you've got factual findings here, and if
22 they're supported by some evidence, even though, as
23 Justice O'Connor said, perhaps we would not have made
24 those findings, they're not clearly erroneous.

25 MR. DELLINGER: Let me go to explain why those

1 findings are clearly erroneous. Let me give you one
2 example. The court says that -- or the appellees say, the
3 courts say that this is completely consistent with race
4 and not with politics, the appellees walk away from that
5 and say that the lines are more precisely correlated with
6 race than with politics.

7 What do they cite for that? They cite for that
8 the proposition that of the six counties, these six
9 counties take in -- District 12 takes in 90 percent of the
10 40 percent or more African-American precincts in the six
11 counties, 90 percent, whereas if you look at the
12 Democratic counties, even as measured by reliable voting
13 day Democrats, only about half of the Democratic counties
14 -- I'm sorry, only about half of the Democratic precincts
15 in the six counties are taken in. That was their proof
16 that the lines follow race more precisely than politics.

17 But look at those figures. They're set out in
18 Exhibit 309 on page 515. There are 429 precincts in these
19 six counties. Of those 429 precincts, 79 of them are 40
20 percent or more African-American. Understandably, those
21 are the most reliable Democratic voting precincts, and
22 therefore they form the core of a difficult attempt to
23 create the Democratic congressional district in this
24 Republican area. So 76 of the 79 African-American
25 precincts which are the most reliable Democratic precincts

1 are included in this.

2 Now, there are another 300 -- another 290 --
3 there 290 precincts, including those that are Democratic,
4 about half of those are included within the district, but
5 there's no need for any more. The ones that aren't
6 included would, A, blow this district way past the equal
7 population point and, B, they are less reliable Democratic
8 than the 76 African-American precincts included.

9 QUESTION: Dr. Weber was asked was there any
10 majority black district or precinct, precinct, that
11 conceivably could be included in this district that was
12 not included, and he said, rather astonishingly, no.

13 MR. DELLINGER: That is correct, and he also
14 gave the following answer. He talked about how there were
15 -- and Justice Kennedy, the reason that makes sense, that
16 all the African-American precincts that could reasonably
17 have been included are included is that those are the core
18 Democratic precincts in what is basically a Republican
19 area of North Carolina in the Piedmont Carolinas, so that
20 is naturally the core that is the overlap, and that is the
21 correlation.

22 There are other Democratic precincts, Dr. Weber
23 noted, that are not included, and he was asked the
24 following question at page 140 of the Joint Appendix.
25 Question: Are the white precincts as heavily Democratic?

1 Answer: No. So that --

2 QUESTION: You're basically saying that race can
3 be used as a proxy for partisan affiliation. And if you
4 say that then it seems to me that we're on collision
5 course with Shaw and Miller, and it seems to me that's the
6 heart of your argument.

7 MR. DELLINGER: No, I am so glad you asked that.

8 QUESTION: And it's just contrary to those
9 cases.

10 MR. DELLINGER: I have to say that I'm so glad
11 you asked that because that is a misconception I most want
12 to correct. We are absolutely not saying that you can use
13 race as a proxy for Democratic voting behavior.

14 QUESTION: But I thought that was the whole
15 basis that you've just given in your answer to justify
16 what happened here.

17 MR. DELLINGER: No. With all due respect,
18 Justice Kennedy, that is exactly not the case. This is a
19 districting process in which the state used voting
20 statistics of how people actually voted, not the color of
21 their skin, how did they vote, in constructing this
22 district, unlike the districts in Miller and Bush v. Vera.
23 Instead of using racially encoded census blocks, they used
24 precinct voting day election patterns.

25 This precinct -- these precincts were used to

1 make up the heart of -- these Democratic precincts made up
2 the heart of the Democratic-leaning district. It is the
3 appellees and the court below which point out to you that
4 those districts are African-American. Our response is, but
5 the legislature and its leadership told you that the
6 reason they were selected is that they were creating a
7 Democratic precinct, and they use -- it's absolutely
8 critical because we do not believe and do not contend that
9 you can sort voters into congressional districts by using
10 race as the criteria on the assumption that that is
11 correlated with political behavior. What we are saying is
12 what this Court said in --

13 QUESTION: And are you're saying that a
14 legislature can always defend a racial gerrymander post
15 hoc by saying that it accords with partisan voting
16 patterns?

17 MR. DELLINGER: Yes, where the plaintiffs are
18 unable to disprove that --

19 QUESTION: So if it's easier to use race, we'll
20 just use race, just save ourselves all the trouble.

21 MR. DELLINGER: No, no, because there is a very
22 great difference between using race and using politics.
23 This is Washington against states. To use something which
24 correlates with race, for example, in Batt and Hernandez,
25 the Texas case involving, requiring English speakers on

1 the jury, it may correlate with race, but you can't use
2 race itself. You can't use being Hispanic as a proxy, but
3 you can use English.

4 QUESTION: Did the court below make any findings
5 as to the intent of the legislature?

6 MR. DELLINGER: Its overall conclusion was that
7 the legislature intended to use race as a district, and
8 that is correct.

9 QUESTION: Supported by the statement that was
10 referred to in your opponent's brief, if I remember it
11 correctly, the red brief pointed out the statement of
12 Senator Cooper's on the floor of the legislature to the
13 effect that the plan that was being proposed was not an
14 incumbency protection plan, which lends obvious weight to
15 the interpretation that it was a racial protection.

16 MR. DELLINGER: All right, Justice Souter, I
17 believe that was a matter of his objecting to the labeling
18 of the incumbency protection. He goes on to say in the
19 same sentence that the -- literally in the next sentence,
20 that the purpose of the plan is to protect the state's
21 existing 6-6 Republican-Democratic split. This was a
22 bipartisan state legislature, a Republican House, a
23 Democratic Senate. Neither side could agree to reduce. I
24 think Senator Cooper was only objecting to the terminology
25 and not to the fact that to maintain a 6-6 balance you had

1 to have a district here, but if I may respond, again, to
2 Justice Kennedy's very important point, I understand the
3 thought that, well, look, if it turns out if a legislature
4 does undertake to create a Democratic district, for
5 example, in a Republican seat like this, in order to keep
6 that 6-6 balance, and it turns out that those precincts
7 are at the core of it also happen to be African-American,
8 won't they simply have accomplished the objective that we,
9 you know, tried to stop in Shaw v. Reno.

10 The answer is no. That was the use of race, and
11 it is also the case that when in most all instances,
12 perhaps not every, that a state undertakes to make race
13 drive the process, there will be plenty of evidence of it.
14 For example, you will find areas whereas in Bush v. Vera,
15 if you have, say, a Republican district that has a
16 significant number of minorities in it, we put it in a
17 supposedly Democratic district, so that shows it following
18 ways. That's how you prove it. Moreover --

19 QUESTION: Mr. Dellinger, there is some evidence
20 here, I mean, besides Senator Cooper's statement, which,
21 you know, you offer an alternate explanation for, but you
22 have to explain it, and once it becomes debatable, it's
23 hard for us to say that the finding of the court below was
24 clearly erroneous.

25 Another thing that has to be explained away is,

1 is the E-mail, Cohen to Cooper, as part of the legislative
2 exchange which refers to Greensboro black, that portion of
3 Greensboro at one of the two ends of this salamander, and
4 referring to those districts from Greensboro as simply
5 Greensboro black. Now, you say that's just shorthand for
6 those portions of Greensboro that were reliably
7 Democratic. Maybe. But certainly the other interpretation
8 is a reasonable one as well, in which case it becomes
9 evidence that predominantly they were trying to put
10 together a district that had predominantly black voters in
11 it.

12 MR. DELLINGER: Let me suggest why I think that
13 is really utterly insufficient as being really probative,
14 to set aside a fundamental act of political
15 self-definition by a state legislature. This is a sentence
16 in an E-mail from a staffer to members that says that in
17 the districting context where they have to talk about race
18 because of the Voting Rights Act, he notes that the change
19 he has been making is that they're now going to for very
20 good nonracial reasons include Greensboro in District 12,
21 the Democratic parts of Greensboro, and refers to that by
22 saying, I have moved the Greensboro black community into
23 the 12th.

24 Now, I am not going to tell you that that is
25 without any probative value, but in order for it to play

1 any significant role in invalidating a state law, you have
2 to conclude first of all that it's not merely descriptive,
3 it's not like saying what are these new precincts the
4 legislature has, so this is a working class Italian
5 neighborhood and the other new precinct in your district
6 is a Jewish retirement community. No, it is -- you have
7 to read it as being an explanation of the motive for the
8 move, and you would have to assume that you attributed
9 that to the whole legislature, not to the staff or to the
10 two recipients, and you have to assume that that would be
11 evidence of the predominance of race. I simply don't
12 think it will bear that kind of weight. A stray remark
13 like this, to use a stray remark like this would be akin
14 to a stringent speech code where legislators who engage in
15 the sensitive redistricting process found state law
16 brought into jeopardy, and that's why there's very good
17 reason for predominance.

18 The other way to prove a Shaw violation, if I
19 may turn just for a moment to Justice Kennedy's question,
20 the other way to prove a Shaw violation is quite simple.
21 When the state says we're using politics, not race, it
22 turns out that there are a lot of high proportion of
23 African-Americans, that's because they're reliable
24 Democrats. You can often come in and show, now, wait a
25 minute, there would be a very easy way, more sensible

1 district that you could have created here that would have
2 been reliably Democratic, and this 1 through 6 counties is
3 completely unnecessary to accomplish that goal. The
4 different district has to be more central. There is no
5 showing here of a different district that would in any way
6 suggest that it was pretextual for the state to utilize
7 politics.

8 I'll reserve the remainder of my time.

9 QUESTION: Very well, Mr. Dellinger.

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

11 ORAL ARGUMENT OF ADAM STEIN

12 ON BEHALF OF THE APPELLANTS

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

15 I would like to turn first to a couple of
16 instances of erroneous fact findings, clearly erroneous
17 fact findings.

18 The court below made the following finding. Of
19 particular note is Dr. Weber's contention that a much more
20 compact solidly Democratic cross district could have been
21 created had race not predominated.

22 As Mr. Dellinger has just pointed out, no such
23 evidence is in the record that plaintiffs have pointed to.
24 Another one is the statement by the --

25 QUESTION: Are you reading from the District

1 Court's opinion or from the --

2 MR. STEIN: Yes, District Court's opinion, I'm
3 sorry. And that was at 26A.

4 The Court also found that --

5 QUESTION: This witness, Weber, that was his
6 testimony?

7 MR. STEIN: That was his testimony that the
8 court was crediting in its fact findings.

9 QUESTION: And you're saying that the court
10 could not have credited his testimony as a so-called
11 expert witness?

12 MR. STEIN: Well, he may have been an expert
13 witness, Your Honor, but there was no showing in the
14 record anywhere that such a district that he described
15 existed.

16 QUESTION: You're showing --

17 QUESTION: But he did make that assertion,
18 you're not saying that the court --

19 MR. STEIN: He did make that assertion, Your
20 Honor.

21 QUESTION: I just am trying to find out why the
22 court couldn't have relied on his opinion if he was
23 somehow knowledgeable about legislative districting.

24 MR. STEIN: Well, he -- Justice O'Connor, he was
25 asked about that, and he did not produce, he didn't

1 describe a district that would be -- that would meet that
2 statement.

3 QUESTION: When you say he was asked about it,
4 was he asked a question saying, point out the
5 configuration of precincts that would have produced this
6 less racially correlated and more Democratically
7 correlated district, and he was unable to do so?

8 MR. STEIN: That's my memory, Justice Souter.

9 QUESTION: There are some examples in the briefs
10 of this, is it footnote 25, districts that might have been
11 made, Mr. Stein.

12 MR. STEIN: Yes, Justice Ginsburg, and the state
13 and the first -- and those are examples that the
14 plaintiffs have put forward in their briefs but were not
15 before the trial court, and there is no evidence that they
16 were before the General Assembly.

17 QUESTION: But you're trying to discredit the
18 expert witness by showing that some of his factual
19 statements were unsupportable, and I don't think it's up
20 to the trial judge when he has an expert witness to, in
21 effect, do all of the scientific evaluation himself. He's
22 relying on -- that's why you have an expert witness, to
23 some extent, upon the credibility of the expert witness.
24 It especially seems improper to me when you're attacking
25 the validity of the expert witness on appeal in this

1 fashion to try to exclude the districts mentioned in the
2 footnote on the grounds that, well, that was never brought
3 up at the trial. But you're trying to say that this expert
4 was not really an expert. That's really what you're
5 trying to say, and it seems to me perfectly valid to bring
6 in some examples whether they were brought in at the trial
7 or not, unless you think that the district judge cannot
8 rely upon the generalization of the expert when he says
9 this could have been done, you could have had a more
10 compact district without including just the black
11 precincts.

12 MR. STEIN: I would respond, Your Honor, that
13 the examples that are pointed out in the plaintiff's brief
14 simply prove the fact that no such district can exist.
15 They pointed out the swap of some precincts, Republican
16 precincts in High Point that they said should have been
17 made or could have been made with two Democratic precincts
18 that weren't in the district and Greensboro some 15 miles
19 apart.

20 If you look at the map that was attached to the
21 State's reply brief, you see that that would be an
22 unreasonable swap, and it was a swap that nobody had ever
23 proposed before the state filed its reply brief -- its
24 brief.

25 I would point out that there are other fact

1 findings of the District Court that are clearly erroneous.
2 The court said at page 29A, more heavily Democratic
3 precincts were bypassed in favor of precincts with a
4 higher African-American population, and this has been
5 explored, and as Mr. Dellinger has pointed out, that's
6 just simply not true. It would be good evidence if it
7 were true, but it's not true.

8 The court also --

9 QUESTION: Is there a difference in registration
10 and voting record?

11 MR. STEIN: No, Your Honor. Even if you --

12 QUESTION: I take it that's sometimes a
13 question.

14 MR. STEIN: That is a question, in that
15 registration is not as reliable as the voting record. But
16 if you look only at voting registration statistics, that
17 statement still isn't true. And the maps and the records
18 show that's not true.

19 The District Court also found, and I quote, Dr.
20 Weber showed that, not just in his opinion, showed that
21 without fail Democratic districts adjacent to District 12
22 yielded their minority areas to that district, retaining
23 quite Democratic precincts.

24 And of course this would be an important finding
25 if it were true. It would be very much like Vera where

1 there was exchanging of Hispanic and African-American
2 communities by census block back and forth, but that
3 didn't happen here. There's no evidence of that. In
4 fact, there's only one Democratic precinct of the five
5 that surround District 12. That's District 8, which is
6 separated from District 12 by the county line between
7 Cabarrus and Mecklenburg County. The maps show there are
8 no African-American areas even near that county line. So
9 that is an important finding, we submit, that the court
10 made which is simply not supported by the record and is
11 clearly erroneous.

12 I would point out that in choosing between Dr.
13 Weber and Dr. Peterson, it said that Dr. Peterson's
14 evidence was unreliable because it ignored the core, but
15 this Court said in Vera that the difference between areas
16 just inside and just outside the district is particularly
17 probative in this sort of case, and that's exactly what
18 Dr. Peterson did, but that's what Dr. Weber criticized him
19 for.

20 I would like to address an argument advanced by
21 appellees that was relied on by the court below, but they
22 offer it here in support of the judgment below. They say
23 that the district, 12th District in 1997 plan is an
24 inadequate remedy because it overlaps too much with the
25 population and geography of the former 1992 district in

1 that it gives Congressman Mel Watt a good chance for
2 reelection.

3 We urge the Court to reject this submission
4 because it's inconsistent with our understanding of basic
5 Shaw doctrine. We understand the Shaw doctrine that the
6 ultimate question for this case would be, did the General
7 Assembly in 1997 act with a dominant and controlling
8 racial motivation overriding all political and other
9 legitimate considerations?

10 QUESTION: Well, that's true, but I must say
11 when your response to the -- one of your responses to the
12 allegation of racial districting is, no, this was
13 incumbent protection, and when the incumbent you're trying
14 to protect is an incumbent who was elected from an
15 unconstitutionally constituted district, that is the prior
16 district which was held to be unconstitutional, I think
17 that the defense of incumbent protection just washes out
18 to say you're going to protect this incumbent means you're
19 going to make sure that the person who was elected by
20 racial gerrymandering will continue to be elected. I find
21 that not a valid defense.

22 MR. STEIN: Well, in this case, the district was
23 different from the district that he had originally been
24 elected in, and in any event it's never been the law in
25 any of the redistricting cases that an incumbent for

1 instance in a one-person, one-vote case can't be protected
2 by the use of the core in those districts.

3 If this doctrine were to apply, it would only
4 apply to those minorities who were elected in districts
5 that were ultimately found to be unconstitutional. This
6 incumbent now has been elected five times in three
7 different versions of the district. It's not only his
8 rights but the voters' rights to continue to be able to
9 have an opportunity to vote for him.

10 I would like to point out that the -- in looking
11 at the basic Shaw doctrine of the decision -- it turns on
12 motivation, that the decision-maker in 1997, the General
13 Assembly is a different decision-maker from the body that
14 created the unconstitutional district in 1992. By 1997
15 there had been a good deal of turnover. For the first
16 time in nearly a century, Republicans controlled the
17 House, it was divided, they were not under Federal
18 pressure to --

19 QUESTION: Thank you, Mr. Stein.

20 Mr. Everett, we'll hear from you.

21 ORAL ARGUMENT OF ROBINSON O. EVERETT

22 ON BEHALF OF THE APPELLEES

23 MR. EVERETT: Mr. Chief Justice, and may it
24 please the Court:

25 At the outset, let me suggest this, in the last

1 arguments, I heard some description of what was said by
2 the court, and I would request that the Court at a later
3 time look at the argument of opposing counsel and match it
4 up with the opinion of the court below, and I would
5 suggest there was very little resemblance between the two.
6 So that -- that needs to be taken into account.

7 Secondly, I think it's very important that near
8 the end of the opinion of the court in the previous appeal
9 of this case, it was pointed out that this case was to be
10 remanded to a court which was familiar with the
11 circumstances and would be in a better position to assess
12 the motives of the General Assembly than would be true of
13 a Court of Appeals.

14 Now, this Court set -- the District Court sat
15 there for two-and-a-half days and heard testimony, they
16 heard testimony from experts, they heard other testimony.
17 Pursuant to the authority that they have under Rule 52A,
18 they assessed credibility, and unfortunately for the
19 appellants, they didn't believe the appellants' witness,
20 and fortunately for us, they believed our witnesses.

21 QUESTION: Mr. Everett, there were whole parts
22 of the opinion after the hearing that were identical to
23 the opinion on summary judgment, were there not?

24 MR. EVERETT: Oh, absolutely, Your Honor. I
25 think they may have been very identical, and given the

1 circumstance they were dealing with undisputed facts,
2 concerning such things as percentage of racial breakdown,
3 that need very little reason to vary them. The facts were
4 the same, they were undisputed. And the opinion in many
5 regards is the same.

6 The court below each time recognized that this
7 Court does not wish it to be interfering unduly with
8 legislative matters.

9 QUESTION: Mr. Everett, can I ask kind of a
10 basic question, prompted by Justice Scalia's question. Do
11 you think that incumbency protection is a permissible
12 justification for a gerrymander?

13 MR. EVERETT: I don't think it's permissible
14 justification for a racial gerrymander.

15 QUESTION: No, no, someone who is just totally
16 incumbency protection. Do you think that's a permissible
17 political activity for the legislature to get involved in?

18 MR. EVERETT: Your Honor, I think it has been
19 held it is permissible, not unconstitutional. On the other
20 hand, my recollection of Vera v. Bush is that one of the
21 persons involved there was a lady who was in Congress who
22 was utilizing race as incumbency protection, and there was
23 held unconstitutional, so I think to whatever extent
24 incumbency protection is involved in this context, it
25 would be unconstitutional for many of the reasons that

1 Justice Scalia has stated, the derivation, but also
2 because in deciding to protect the incumbent, that was
3 really subsidiary to the primary purpose of creating a
4 racially predominant --

5 QUESTION: I understand that, but assuming there
6 was no racial aspect at all, you would not challenge
7 incumbency protection itself as somehow politically
8 suspect?

9 MR. EVERETT: If John Smith, a person who had --

10 QUESTION: If people in power want to draft the
11 lines to keep themselves in power, that's perfectly okay
12 with you?

13 MR. EVERETT: Your Honor, I think if it was
14 simply a matter of incumbency and nothing more, we would
15 not be here. If there were no racial aspect --

16 QUESTION: We so held in Karcher, the Karcher
17 case from New Jersey, didn't we?

18 MR. EVERETT: Certainly, certainly. So there
19 doesn't seem to be any question in that regard, but the
20 real problem is that in this instance, as the facts
21 demonstrate and the statistics apply to the facts, what
22 was done by the legislature was to take away more of the
23 geographic area of the 12th District than any of the other
24 prior districts, but to retain the racial core.

25 Now, you find that of the people who are in the

1 12th District in the 1997 plan as compared to the '92
2 plan, 90 percent of the African-Americans were there
3 before. On the other hand, with respect to the white
4 portion of the population, less than 50 percent. It's
5 pretty clear what was happening. If you look at -- there
6 are two maps here. If you look at them you'll find that
7 although they are parallel, there has been some change of
8 territory with respect to precincts that are predominantly
9 white. There was none with respect to the core, the
10 racial core.

11 We find the legislature was using phrases, the
12 leaders of the legislature were using phrases like racial
13 balance and core, which in this context was a clever way
14 of trying to say we have reserved a district where it is
15 almost certain that an African-American --

16 QUESTION: May I ask you one other general
17 question, and then I will be through. Proving the racial
18 motivation was predominant, then you've got to have strict
19 scrutiny to see if it was justifiable and all the rest.

20 Now, why is it, I just have been a little
21 puzzled about the case, this was pulled with respect to
22 both the 1st and the 12th Districts. With respect to the
23 1st, which was even more racially dominated, as I
24 understand it, than the 12th, the court said that's okay,
25 but not with respect to the 12th. Why could there be a

1 difference between the two?

2 MR. EVERETT: I might note two circumstances in
3 that regard. First, the court did find that both in the
4 1992 and the 1997 1st District, race had predominated.
5 Secondly, they gave statistics as to the 12th District
6 which recognizes that it is one of the I think five least
7 compact districts in America, while on the other hand, in
8 terms of geographical compactness, the 1st District had
9 been remedied. Then frankly, as I understand it, Your
10 Honor, it was not a matter of the motive, it was a matter
11 of strict scrutiny that save the 1st District, they found
12 there had been a compelling interest primarily I believe
13 to get preclearance. So under those circumstances --

14 QUESTION: The compelling interest that applied
15 to the 1st District did not apply to the 12th District. I
16 just never quite understood the difference.

17 MR. EVERETT: Well, we frankly think the 1st
18 District might be unconstitutional but we did not raise
19 that issue on appeal. We chose not to appeal it. But by
20 the same token, there is much more logic as to the 1st
21 District in terms of the area involved. A lot of counties
22 there are over 50 percent African-American in population
23 in the northeastern part of the state. That is all rural,
24 virtually all rural, although there are some smaller towns
25 there.

1 Here, on the other hand, you're dealing with a
2 district where less than 30 percent of the population in
3 any of the six counties is African-American. We're unlike
4 any other district in America. They split six counties,
5 and every county was split. There is no other district in
6 America where that was done.

7 QUESTION: Mr. Everett, the one thing that
8 puzzles me about that argument is in this footnote 25 in
9 your brief, when you try to answer the question, what
10 swaps could be made, and you give a few examples, and in
11 every example the result would be a more bizarre shape,
12 not a more compact shape. You concede that by saying each
13 substitution affects the compactness and appearance. But
14 the legislature has already ignored those rules to such a
15 degree that further distortion appears immaterial. So the
16 only answers that you could come up with would run right
17 into this bizarre shape, you would make it more bizarre
18 shape.

19 MR. EVERETT: Your Honor, as I remember, that
20 footnote we said something to the effect that since the
21 State didn't bother with compactness anyway, we didn't
22 feel that constrained in --

23 QUESTION: But you didn't come up with one
24 example of a swap that would work to make it more compact.

25 MR. EVERETT: Your Honor, let me come up with

1 several. Let me point out that in the --

2 QUESTION: They're not in that footnote.

3 MR. EVERETT: There were in the plans and the
4 maps that were shown. The history of the drawing of the
5 maps was before Dr. Weber and also the maps were before
6 the court. There were alternatives which were more
7 compact and still would have preserved the Democratic
8 aspect of it, and it would have been less racially
9 gerrymandered. The best example of all, Your Honor, is
10 the plan that was adopted in 1998 as a remedial plan,
11 which was only 35 percent African-American, which had one
12 whole county and involved only five counties.

13 Now, that one was much better than this one.

14 QUESTION: Was it good enough?

15 MR. EVERETT: Was it what?

16 QUESTION: Was it good enough?

17 MR. EVERETT: Your Honor, that would be an
18 interesting question. We did not think it was at the
19 time, but let me put it this way, we're gradually moving
20 toward improvement and the thing that bothers us about
21 this is you've got it down from 55 to 47, invalidated the
22 47 down to 35, and now back up to 47 percent
23 African-American concentrated.

24 What's the message there? Well, the message is
25 a pretty sad one, but anyway, even before the Greensboro

1 black community was moved into the 12th District, and they
2 didn't say Democratic, they didn't mention Democratic
3 anywhere in that E-mail, even before that there were
4 alternatives such as not having Greensboro in there at
5 all, not having High Point, not having Guilford County,
6 the sort of plan that ultimately emerged in 1998. They
7 had a really good fall-back position, so that there were
8 alternatives. But the alternatives did not yield the
9 result that was being sought by the leaders of the House
10 and -- by the leaders of the legislature.

11 One point deserves emphasis. There were
12 different people in the legislature, but there was a
13 continuity of some of the people who devised the 1992
14 plan. For example, Mr. Jerry Cohen was the draftsman of
15 the '91 plan, the '92 plan, the '97 plan, and the '98
16 plan, who defended all of them as being -- or at least the
17 last three as not being racial.

18 QUESTION: Do we start with a presumption that
19 the legislature acted in good faith and for proper motives
20 in drawing these plans?

21 MR. EVERETT: Your Honor, I'm sorry, I didn't
22 hear the --

23 QUESTION: Do we start with the presumption that
24 the legislature drawing a district plan acted in good
25 faith and with proper motives?

1 MR. EVERETT: Your Honor, we start with that,
2 but after hearing testimony -- well, two things in that
3 regard. After hearing testimony --

4 QUESTION: Your answer is yes. Now, does it
5 totally drop out after there is evidence put in or what
6 happens to that presumption?

7 MR. EVERETT: Your Honor, two things in that
8 regard. First, is there a presumption when you start from
9 an unconstitutional base and say that that is your
10 starting point? Secondly, after hearing testimony not
11 only from the legislators who were called on the other
12 side, but the legislators who we called, and the other
13 people who we called, and after studying the legislative
14 record which inevitably points to particular conclusions
15 in this case when it's considered in context, and when
16 considering points like that made in Arlington Heights
17 where one of the important ingredients is to look at the
18 history of what has happened. When you take all that
19 together, you can say all the presumption in the world
20 about good faith, but in this instance, regardless of what
21 presumption you want to give, the facts as found by that
22 court after hearing witnesses and determining the
23 credibility is that the predominant motive was racial.

24 Now, back in 19 -- on the '92 plan, they were
25 saying it wasn't racial. To say something is political or

1 incumbent protection is very convenient. It's a nice dodge
2 that has been developed, and it's a dodge that has been
3 developed because --

4 QUESTION: Well, it isn't usually a dodge.
5 Legislatures constantly have -- are faced with drawing
6 legislative districts, and my own experience is that the
7 motive in most cases is political in drawing those
8 boundaries.

9 MR. EVERETT: Your Honor, it is political in
10 many instances, but on the other hand if you have a strong
11 racial minority well-positioned in a particular political
12 party, they can say, as we think the evidence indicates
13 was said in this case, and remember that the 1st and the
14 12th Districts were really the first two that they started
15 with. Then they began worrying about some other things.
16 They can say, we want a district where we can be assured
17 that a minority candidate will be nominated and will be
18 elected.

19 Now, in North Carolina, given the legal
20 constraints and given the primary situation, you need to
21 have really about 40, 45 percent to be perfectly sure. On
22 the other hand, with 35 percent, Congressman Watt has been
23 readily reelected by huge majorities, but in any event if
24 you put it in context, there was a primary purpose with
25 respect to the 1st and the 12th to create for a racial

1 motive and to draw lines on racial grounds and give the
2 message that was condemned in Shaw v. Reno. This is a
3 message where if you look at statistics and you are
4 resident of those areas and know anything about them, you
5 come to the conclusions that we had six witnesses come to,
6 to the effect it was predominantly racially motivated, so
7 that putting it all in context --

8 QUESTION: Mr. Everett, when you're over there,
9 would you point out to us where on the map District 12 is.

10 MR. EVERETT: All right. Here is the old '92
11 map, and let me just show you here's Guilford County.
12 Guilford County has the Greensboro black community. The
13 Greensboro black community would be up at this -- I'm
14 sorry if you can't all see it, and by the way, there is a
15 map -- these maps are in the -- right at beginning, near
16 the beginning of Volume 2 of the Joint Appendix.

17 You have Guilford, which was added on out of the
18 whole county, Greensboro was the second stage, the
19 Greensboro black community. Before this they had the High
20 Point black community. Now, meanwhile, there were
21 alternative proposals similar to those --

22 QUESTION: Could you just tell us, is it the
23 yellow district?

24 MR. EVERETT: It's the yellow, I beg your
25 pardon, Your Honor. There is yellow running here from

1 Mecklenburg down near the South Carolina line.

2 QUESTION: And Mecklenburg is the county that
3 Charlotte is in?

4 MR. EVERETT: Mecklenburg is where Charlotte is,
5 and this is viewed as the hub for these particular
6 purposes.

7 QUESTION: Your expert, Mr. Weber, said that the
8 defendant's expert, Mr. Peterson, used an unconventional,
9 untried theory. Because as I understood it, the criticism
10 was that he concentrated only on the fringe districts and
11 not the core, but I thought it was the fringe districts
12 that were the problem here.

13 MR. EVERETT: Your Honor, when you read the
14 affidavit -- I would suggest apropos of Weber's criticism
15 of Peterson's analysis and the segment analysis, if you
16 read, I think it's 302 to 307 or 8 in the Joint Appendix,
17 you will find, I think, a devastating criticism by Weber
18 of Peterson. He shows why this boundary segment analysis
19 is totally unreliable because it places emphasis on almost
20 infinitesimal differentiations between adjacent precincts,
21 ignoring the number of people that are involved of
22 African-American or white race.

23 Secondly, he points out, that it ignores the
24 entire core.

25 QUESTION: But I thought that's what you wanted

1 to ignore?

2 MR. EVERETT: I'm sorry?

3 QUESTION: I thought that's what you wanted to
4 ignore. Or am I missing something?

5 MR. EVERETT: We think in the analysis, that you
6 look at the core, and then you determine if they were
7 trying to get the racial core, why it is that they drew it
8 in the particular manner, and that is what Dr. Weber
9 stressed. I think if you look at his report, look at his
10 responses under cross-examination, look at his background
11 as someone who has done a large number of redistricting
12 cases, and then look at the curriculum vitae of Dr.
13 Peterson, who has done no redistricting cases, look at the
14 circumstances in his boundary analysis has received no
15 peer review, has not been utilized in any other case, you
16 will understand readily why the court, even apart from
17 credibility, which was a better witness, decided to
18 believe the analysis by Dr. Weber and to reject the
19 analysis by Dr. Peterson.

20 QUESTION: One other point. The appellants say
21 that the court's just wrong or the expert's just wrong to
22 say there were more heavily Democratic precincts with
23 white populations, with heavier white populations that
24 were excluded. In oral argument this morning they said
25 there is just no basis for that.

1 MR. EVERETT: Well, the basis -- they make the
2 point that there's no basis for it. If you read the
3 report, read the examination, you understand quite readily
4 that there's adequate basis for saying that the primary
5 consideration in drawing these districts was to group
6 these African-American precincts, that was the primary
7 purpose, and the circumstances --

8 QUESTION: No, but they say the proof for that
9 purpose, according to your expert, is that there were some
10 we'll call them mixed districts that were heavily
11 Democratic that were excluded, and they said that is just
12 not so.

13 MR. EVERETT: Well, we disagree. We would
14 submit --

15 QUESTION: Where do I look to find if that's so
16 or not?

17 MR. EVERETT: We would submit that from the
18 exhibits we've submitted including maps that show
19 precincts that could have been readily added in, that
20 their statement --

21 QUESTION: Are those other than the ones in the
22 footnote 25?

23 MR. EVERETT: Your Honor, I think there are
24 other -- I think there are maps there in addition. If you
25 look at the maps beginning in Volume 2, you'll see several

1 maps that we think tend to support the position --

2 QUESTION: I going to ask you about the maps.

3 MR. EVERETT: In the footnote there is a
4 reference to other --

5 QUESTION: I'm just awed that you would think
6 you would pick your best cases to give to supply the
7 missing link in the experts' testimony, and yet the ones
8 that you pick as your presumably best cases all make this
9 district even odder shape than it's ever been.

10 MR. EVERETT: Your Honor, my recollection is
11 that the expert, Dr. Weber, testified that he had looked
12 at a number of maps and there were alternatives. I do not
13 recall -- apparently opposing counsel does -- his being
14 asked to identify particular maps that would be usable.

15 We know from the history that there were maps
16 that were in existence that were used in evolving the plan
17 that was ultimately used. Plans that were in existence
18 before the Greensboro black community was created that
19 could have achieved purposes of a Democratic --

20 QUESTION: But none of them were brought to our
21 attention, and none of them were in the District Court's
22 --

23 MR. EVERETT: I'm sorry, Your Honor, I can't
24 hear.

25 QUESTION: There is one traditional criterion

1 that you don't mention, and that at least some people in
2 the Senate gave credence to, and that is linking together
3 the cities that had commonality of interest, a community
4 of interest in problems like health care and housing and
5 deteriorating public schools. They may have been distant
6 from each other, but they're all cities with those
7 problems that are common to the urban poor.

8 MR. EVERETT: Your Honor, you really have raised
9 a point that I think is significant from our standpoint.
10 In terms of community of interest, what was done was take
11 cities like Greensboro, High Point, Winston-Salem, and
12 Charlotte, among the largest cities in North Carolina,
13 Charlotte is the largest, and divided the population
14 between white and black.

15 Now, the white citizens on one side of that line
16 have the same interests, they listen to the same TV shows,
17 they read the same newspapers. They have a much more
18 commonality than the African-American in Charlotte has
19 with the African-American in, let's say, Greensboro.

20 If you look at it in terms of community of
21 interest, then this splitting, the splitting of cities is
22 irreconcilable to that concept of community of interest.
23 Moreover --

24 QUESTION: I'm not a hundred percent sure that's
25 true. I can think of some areas of this city that might

1 have more in common with areas of, say, Boston than with
2 each other. Take the difference between Anacostia and
3 Northwest in Washington, D.C. in the same city but perhaps
4 it's a greater commonality of interest with other cities,
5 with similar populations in other cities.

6 MR. EVERETT: Well, Your Honor, given the
7 circumstance of different standard metropolitan areas,
8 you've got large concentration up at the north of
9 African-Americans, a large concentration down toward the
10 south in Charlotte.

11 QUESTION: You know any other state, Mr.
12 Robinson, that has chosen to divide its electorate into
13 urban dwellers and rural dwellers?

14 MR. EVERETT: I'm not aware of anything which in
15 this context could define similarity, community of
16 interest among urban dwellers.

17 QUESTION: And this wouldn't be an unusual
18 district if other states linked their major cities with a
19 ribbon in between to make it contiguous?

20 MR. EVERETT: Well, here what they've done is
21 link portions of urban areas with rural connectives, and
22 the rural connectives are basically white fillers. And I
23 don't know of any other situation at the present time that
24 corresponds to that in other districts. I think this is
25 still a unique district, unique in so many ways and unique

1 in sending a very clear message that race is
2 predominating.

3 QUESTION: One of your arguments the first time
4 was that race was predominant because they kept heavily
5 Democratic districts out but they put less Democratic
6 African-American district precincts in, right? That was
7 the first time you argued, when you were here before, one
8 of your arguments was --

9 MR. EVERETT: Referring to when I was here in
10 Hunt v. Cromartie, not --

11 QUESTION: Yeah, I mean this side, this side.
12 And then in response -- am I right so far that one of the
13 main arguments was, look, this is not Democrats, this is
14 race, and you can show it by looking at the heavily
15 Democratic districts that they left out and the heavily
16 less Democratic, the heavily African-Americans that they
17 put in. That's the argument.

18 And what this Court said in response is, wait a
19 minute, if you're going to argue that, don't measure it by
20 registration, measure it by how people vote because a lot
21 of registered Democrats vote Republican. That's what this
22 Court said in its opinion. Is that fair?

23 MR. EVERETT: I think that was certainly one of
24 the points raised.

25 QUESTION: And now when I look at the district

1 judge's opinion, one of his points, one of them was not
2 just the war of experts. One of them was -- and he says
3 it, he says it, one of them, like 21 or where is it here?
4 He says it specifically. He says that additionally, the
5 evidence shows that the more heavily Democratic precincts
6 are bypassed, i.e. they're out, in favor of the more
7 heavily African-American, which are in.

8 When I look to what he based that on on page 13A
9 and 14, it is two pages -- registration, registration,
10 registration. Just what we said he shouldn't use.

11 And then I looked at your maps, which very
12 honestly, are not registration, they are how people really
13 vote, and the yellows are the Democrats and the yellows
14 are in, in, in, and there are just a handful of the
15 hundred precincts that are out.

16 So what am I supposed to do about that finding?
17 It looks as that finding is a finding that's based on the
18 very thing we said not to use -- registration.

19 MR. EVERETT: Your Honor --

20 QUESTION: I think it's all right when it seems
21 to work the other way. I wanted to get your response if
22 there's a chance.

23 MR. EVERETT: Your Honor, I think you said --
24 you're there to look at other considerations. I don't
25 think you said registration was totally out.

1 QUESTION: No, no, it's not out, but they said
2 don't do registration alone, and so when I looked at pages
3 13A and 14, it looked to me in that appendix that for that
4 point the judge is using registration alone, and when I
5 looked at your maps, which are not registration alone, it
6 looked to me as if all the Democratic precincts are in
7 except for a handful.

8 MR. EVERETT: Well, it depends what you mean by
9 handful, particularly in the context of large cities where
10 they're glued together. In Charlotte, in Winston-Salem,
11 and in Greensboro. I believe there was testimony by Dr.
12 Weber that he had looked at all three aspects -- he looked
13 at the three elections which had been considered by the
14 General Assembly and were before them, and came to the
15 same conclusion. This was all grouped under party
16 affiliation. So he certainly came to that conclusion.

17 The Court may have pointed out simply a few that
18 were left out, and maybe there were only a few. But there
19 was a lot of evidence that was generated by Dr. Weber that
20 concerned the primacy of race as a motive over politics.

21 So I think, if you look at it in context, Your
22 Honor, and look at the other things, look at some of the
23 statements in the record, look at what we termed the
24 smoking gun, the E-mail, look at the testimony of the
25 legislators who we called and other persons who we called,

1 when you take all that together, it seems to us just
2 unmistakably clear that this Court which was familiar with
3 the circumstances and which was familiar with the motives
4 of the workings of the General Assembly came to a
5 permissible conclusion.

6 One other thing that deserves note. Given the
7 use of pretext, and the Court found that one of the
8 persons on one aspect of testimony was simply not
9 credible, you have a very significant circumstantial
10 evidence, maybe it's more than that, the use of pretext,
11 as I recall from the Reeves case that was decided this
12 summer can itself be positive evidence of a particular
13 state of mind, and we would submit that the pattern
14 followed by the State in terms of concealment, excuses,
15 and it's a pattern that continues from the past in respect
16 to the 1992 plan, that this in itself is evidence. You
17 take the whole thing, you look at what they were doing
18 with the 1st District where they were concentrating on
19 percentages, you look at the district here, District 12,
20 where it was announced to the Senate by Senator Cooper
21 that as long as they were under 50 percent they were home
22 free, and then look at the way they increased the
23 percentages.

24 QUESTION: Thank you, Mr. Everett. Mr.
25 Dellinger, you have three minutes remaining.

1 REBUTTAL ARGUMENT OF WALTER E. DELLINGER, III

2 ON BEHALF OF THE APPELLANTS

3 MR. DELLINGER: Mr. Chief Justice, if you look
4 at the map and with some understanding of the demographics
5 of North Carolina, you can see that the bipartisan
6 legislature faced a difficult task in attempting to create
7 a sixth Democratic-leaning congressional district in this
8 part of the state.

9 One of the joys of North Carolina is that we
10 don't have a big metropolitan area like Atlanta. We have a
11 nice string of more medium-sized cities, and Charlotte
12 running through. So you simply take North Carolina --

13 QUESTION: Charlotte is about a million, isn't
14 it?

15 MR. DELLINGER: It's getting too big for my
16 taste, but it's -- but the -- they accomplish this in
17 every instance by creating districts, one for the
18 Republican Sue Myrick in Mecklenburg county and one for
19 the Democrat Mel Watt, each a rising star. Their expert
20 thought Mecklenburg should be entirely within one
21 district, but Charlotte is very happy to have rising stars
22 in each party represent Charlotte, and neither of the
23 political parties wanted to cede Charlotte to the other.

24 So you really have an expert who is making
25 political judgments.

1 This case may be your final opportunity to
2 address redistricting before the 2000 -- post-2000
3 redistricting occurs, and I think it's worth asking again
4 why is predominance the standard. The Court has
5 consistently rejected the idea that any consideration of
6 race, however small, should trigger strict scrutiny.
7 That's properly because of the nature of the Shaw harm.

8 The Shaw harm is not hostility towards
9 individuals. It is communication of a message that people
10 are defined by their race, and when race predominates, you
11 have the Shaw harm.

12 To move to a more extreme exclusion of race
13 would create a hair trigger in which legislatures would be
14 completely uncertain of their ability to legislate. We'll
15 have judges creating election districts and rather than
16 state legislatures doing this critically important task
17 that involves political judgment, we usually say plans
18 that do not cause expressive harms should not be declared
19 unlawful. Thank you.

20 QUESTION: Thank you, Mr. Dellinger. The case
21 is submitted.

22

23

24

25