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In the

Supreme Court of the United States

United Jewish Organizations Of Williamsburgh, Inc., et al.,

Petitioners,

v.

Hugh L. Carey, et al.,

Respondents.

No. 75-104

Washington, D. C.
October 6, 1976

Pages 1 thru 72

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UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., et al.,

Petitioners,

v. No. 75-104

HUGH L. CAREY, et al.,

Respondents.

Washington, D. C.,

Wednesday, October 6, 1976.

The above-entitled matter came on for argument at 11:36 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
shall HARRY A. BLACKMUN, Associate Justice
ent LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

NATHAN LEWIN, ESQ., Miller, Cassidy, Larroca & Lewin, 2555 M Street, N.W., Suite 500, Washington, D. C. 20037; on behalf of the Petitioners.

LOUIS H. POLLAK, ESQ., 3400 Chestnut Street, Philadelphia, Pennsylvania 19174; on behalf of Intervenors NAACP, et al.

ROBERT H. BORK, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530; on behalf of the United States.

APPEARANCES [Cont'd]:

GEORGE D. ZUCKERMAN, ESQ., Assistant Attorney General of New York, New York, New York; on behalf of Carey, et al.

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C O N T E N T S

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[P.M.Session - pg. 22]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 75-104, United Jewish Organizations against Carey.

I think we'll wait a moment or two, Mr. Lewin, until the noise subsides here.

I think you may proceed now whenever you're ready, Mr. Lewin.

ORAL ARGUMENT OF NATHAN LEWIN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. LEWIN: Thank you.

Mr. Chief Justice, may it please the Court:

The constitutional issue presented by this case, which is here on certiorari to the Court of Appeals for the Second Circuit, is whether a legislative apportionment which deliberately limits the white population of certain Assembly and Senate Districts for New York State to not more than 35 percent of the total number of citizens in each of those Districts is consistent with the Fourteenth and Fifteenth Amendments.

A majority of the court below, two judges, said that our argument that such districting is unconstitutional has, and I quote, "intellectual appeal on the surface". And even the Solicitor General, in his brief, says that our contention has, quote, "considerable superficial appeal".

Each then proceeds with an involved effort to justify

what was done here by the New York Legislature. In each case, we submit, the effort simply failed. We believe that the instinctive response to this set of facts, the simple reaction that such a districting scheme cannot be correct and cannot be constitutionally valid is the proper result, and that the contrary view is not what Congress contemplated in the Voting Rights Act and not what is contemplated by the Fifteenth Amendment.

QUESTION: Mr. Lewin, in your opening statement you said "deliberate"; what do you mean by way of intent or knowledge or that sort of thing by the use of that adverb?

MR. LEWIN: By the use of that adverb, Mr. Justice Rehnquist, I mean that the individuals drawing that line had that as the primary and dominant criterion in their mind. They said not the result of what we have done is by happenstance, or because it's one of many factors to produce a not more than 35 percent white citizenry in that district; but that is what we are going to achieve. That's what we intend to achieve. Districts that will have not more than 35 percent whites in them. And that's what I mean by deliberate.

I think more so than any other case that has previously been before this Court, where allegations of racial gerrymandering have been made, the record in this case is undisputed. I think there's really no question about the fact that the individuals responsible for drawing the lines did it for that

reason, and I would say almost that reason only. That's why the line was drawn.

QUESTION: But if we adopt your principle, and I suppose in all future cases like this the committee chairman, perhaps the Legislators themselves, could be examined on depositions as to what their primary motive was when they voted this or when they sat on committee and decided to recommend it.

MR. LEWIN: I think in the ordinary, Mr. Justice Rehnquist, there's a lot of difficulty in determining what such a motive is. That's why this Court has prevented interrogations or investigations of legislative motive, because there's a variety of motives that combine to produce a particular result. And there's really no way of knowing what a Legislature has done.

But in this case there's just no question, where, in the unique cases, as this one is, where the legislative purpose is set out and is stated in the legislative record and is not disputed, we believe it's entirely proper for a court to say, "May a Legislature do this? Is it permissible for a Legislature to act in that way?"

And we think, on that account, that our claim is really quite different from what the -- the way the respondents would like to characterize our claim, both the Solicitor General and the NAACP, which is intervenor in this case, in its brief, have been asserting, I think throughout, that our contention is

that legislators may not take a count, in some way that legislators of course do in the real world, of what the racial distribution is of districts which result from apportionment.

We're not saying that they may not review the Census material, and others know what is happening; what our argument is is that that may not be the criterion, the principle, standard, and guideline that they're using.

Now, let me --

QUESTION: But here you don't have to call on any subjective factors, that's what you're saying, isn't it?

MR. LEWIN: That's absolutely right, Mr. Chief Justice. In this case there is no subjective factor, there's no dispute as to the fact.

QUESTION: And yet, if you lay down a principle, as you say, in this case that where the primary factor that they considered was what you've outlined, in any future case, on the basis of normal rules of evidence, you're going to open up to proof on the part of the plaintiffs the issue of whether or not this or that was the primary fact.

MR. LEWIN: Well, I must say, Mr. Justice Rehnquist, it seems to me that the courts can set up a threshold which you have to meet with a preliminary showing before you can engage in such an investigation. I don't think we're suggesting that it be open for any plaintiff to come in and say, I'll put the entire Legislature on the stand and interrogate them as to their

motive.

In this case we have, I think, from the legislative report itself, from the undisputed history of how this apportionment developed, the necessary inference that any court and, indeed, the defendants, I think, admitted as much in their answer. We --

QUESTION: But you don't need to go beyond the proposition that where it appears on the face of the legislative record that this was the purpose, would that take care of the subjective problem that Mr. Justice Rehnquist raises?

MR. LEWIN: Yes, I think it would, Mr. Chief Justice. And we'd accept that test, certainly, that where it appears on the face of the face of the reports in the legislative record, that that is what the Legislature is doing. Then it's impermissible. And then, maybe, the burden falls on the other side, which was represented in court -- I mean that's one of the reasons, really, that we filed this suit against the Attorney General, where we're here being challenged in this Court over the fact that the Attorney General is a party.

Well, one of the reasons why the suit was filed against the Attorney General was precisely to afford all parties an opportunity to come in and explain whether there was any justification for this, and there was no justification for this apportionment, and not justification for what preceded it.

And that's why the record comes to this Court in its

present state, where the facts are undisputed and lead invariably to that one conclusion.

QUESTION: But couldn't you have intervened in the action by the State against the Attorney General, when the State was challenging the Attorney General's rather amorphous reaction to its districting plan?

MR. LEWIN: There's two reasons why we couldn't do that. One is that, unfortunately, the State, because of the exigencies of time, never challenged. They never took it to court, and when several legislators who were dissatisfied with what the Attorney General had done and had instituted suit in the district court, it was dismissed for lack of standing.

But the second, more important, reason, really, is that we didn't know, my clients didn't know what the product was going to be of the Attorney General's decision. It wasn't until the New York State Assembly sat down in several very frenzied days in May and determined that they were going to draw the line in these legislative districts in such a manner that this community was split in half between two districts that we even knew what had happened, that we even knew that there was anything to complain about.

We would, simply along with all other citizens in New York, possibly, or many other citizens in New York, have supported the '72 reapportionment. But until the '74 reapportionment was enacted, we just didn't know what it was going to

do to us.

Let me just briefly, then, describe what exactly happened with this apportionment and then proceed to outline the relationship between the '74 apportionment and the prior Attorney General's decision under the Voting Rights Act; a relation that is important both to our position and to that of the respondents.

At page 173 of the Appendix in this Court appears a large map of the Borough of Brooklyn and its Assembly districts.

QUESTION: What is the page again?

MR. LEWIN: Page 173 of the Appendix.

QUESTION: Thank you.

MR. LEWIN: The area that we're concerned with in this litigation is the one that appears at the uppermost northern section of the districts marked 57 and 56, it's really a triangular area that runs just above the United States Navy Yard and is marked -- is divided under this 1974 reapportionment by the heavy black lines that divides lines 57 and 56. And it's in that area, that triangle, where the plaintiffs in this case reside.

Now, when that map is compared with the Assembly line map that appears at page 197 of the record, then it's quite plain what has happened by reason of the 1974 apportionment. Page 197 of the record contains the Assembly lines as they appeared under the 1972 reapportionment.

And the entire triangular section, on page 197, is all included within Assembly District No. 57. So that under the 1972 district, the map is headed Borough of Brooklyn, City of New York, 1971, it's marked Plaintiffs' Exhibit 4, but that was the 1972 reapportionment. That triangular section was all within the 57th Assembly District.

QUESTION: Would you point out, Mr. Lewin, what you're calling the triangular section?

MR. LEWIN: This section right there, Mr. Justice.

QUESTION: Thank you.

MR. LEWIN: Which is in the upper northeast corner of the 57th Assembly District under the 1972 reapportionment.

QUESTION: Yes.

MR. LEWIN: And appears split between the 56th and 57th Districts under the 1974 reapportionment.

I won't refer at this time to the corresponding Senate Districts, which appear at pages 174 and 198 of the record, but they do the same thing.

They do the same thing. In the 1972 reapportionment, that triangular section was all in the 17th Senate District, and in the 1974 apportionment it was divided by a line drawn approximately the same place as the Assembly line, between the 23rd and 25th Assembly Districts, -- Senate Districts, I'm sorry, 23rd and 25th Senate Districts.

What was the effect of that drawing of lines on the

population in those districts?

The Assembly Districts under the 1972 reapportionment, in which the plaintiffs have found themselves, was 38.5 percent white; in other words, 61.5 percent non-white according to the testimony below.

The plaintiffs were a minority, but a minority that was greater than 35 percent in their Assembly District under the 1972 apportionment.

In order to achieve compliance with what the Department of Justice thought was an inadequate racial distribution, they were split into two Assembly Districts, in one of which the white population was under 12 percent, 11.9 percent, and in the other one of which it was exactly 35 percent, precisely in order to meet -- and the testimony here in the record by the man who drew the lines was that he went block by block until he achieved precisely 35 -- or 65 percent non-white population. And that's why both Assembly Districts now, in which the plaintiffs find themselves, are 35 percent or less white.

They were, under the 1972 apportionment, in a Senate District that was approximately 65 percent white, that was the 17th Senate District; they are now, under the 1974 apportionment, in two Districts, one of which is 28.9 percent white, under 30 percent, the other one of which is approximately the same as the other, the earlier 17th Senate District, it's 65 percent white.

So they are now in two Senate Districts, one of which with a very small white population, again meeting that 65/35 standard, under 30 percent.

QUESTION: Mr. Lewin, isn't there some uncertainty in this record, who it was that told the draftsman of the '74 apportionment they should have 65 percent non-white?

MR. LEWIN: I think, Mr. Justice Brennan, that the record certainly contains no uncertainty. Mr. Scolaro testified that he had several meetings with representatives of the Department of Justice. He testified, I think, in some detail, as a matter of fact, as to the nature of the conversation. He said, "We had talked" -- I asked him what percentage is needed, and they said --

QUESTION: In other words, a choice of the 65. The suggestion in his testimony is. Was it really compelled by suggestions from the Justice Department?

MR. LEWIN: Yes, it was. And he says -- I said, "Is 70 percent all right?" This is at page 105 of the Appendix.

"I said how much higher do you have to go?"

His point was, one of these Districts is 61.5 percent non-white. "How much higher do you have to go?" "Is 70 percent all right?"

"They didn't say yes or no, but they indicated it is more in line with the way we think in order to effect the possibility of a minority candidate being elected within

that district.

"I suggested 65 percent. It came out at that time that is a figure used by the NAACP in numerous briefs and other documents."

So it was the product of his discussions.

At other portions of his testimony, he indicated that it was entirely as a result of those discussions, although he couldn't pinpoint a particular conversation, that he came away with the 65 percent figure.

Now, the Department of Justice, again I have to emphasize, was present at this hearing. There was an Assistant United States Attorney at the hearing. The United States Department of Justice had every opportunity to put on attorneys of the Department of Justice's Civil Rights Division if they made no such suggestion to Mr. Scolaro, and to refute their testimony. Mr. Scolaro was by no means a friendly witness. He was the man who had drawn the lines for the New York State Assembly.

There was only silence from the Department of Justice, and now, in the appellate stages, both in the Court of Appeals and in this Court, everyone is pointing the finger at everyone else! The Department of Justice says, well, no, the State people did it. We just said the old one was no good.

And the State people are saying, well, no, we thought the old reapportionment was fine, it was only those people at

the Department of Justice.

And then the plaintiffs are told, well, you can't sue the Attorney General, and you don't have any claim against the State officials, either, to remedy this dictated quota which somebody clearly imposed, because it was definitely used on a block-by-block basis --

QUESTION: Pardon me, Mr. Lewin, do you think quotas in every instance would be improper in reapportionment cases?

MR. LEWIN: We -- our initial argument, Mr. Justice Brennan, is yes; that in every instance racial quotas are improper in reapportionment cases.

It would be appropriate, and we try to point up an analogy to it in the employment situation, it would be appropriate, we think, for a Legislature to say we're drawing up a districting scheme, and we will look to see what effect that districting scheme has on racial distribution. And if it seems to have, as an employer might by looking at his work force say, Look, this seems to work a diminution of what should be minority voting; we have to make corrections.

And I think in those circumstances it may be a test, it may be looked to, it may be considered.

QUESTION: Which -- from what you've just said, I gather you're suggesting there might be appropriate justification, but that at least the burden would be upon the user of the quota to justify its use; is that it?

MR. LEWIN: Well, we've tried, frankly, Mr. Justice Brennan, --

QUESTION: No, but would you --

MR. LEWIN: -- to think of possibilities where there might be a justification, and I am hard-pressed, and I don't think the respondents have come up with any suggestion of a justification of something that might warrant a Legislature from saying, We will apply a quota in the voting area. Because we think --

QUESTION: Mr. Lewin, you don't -- do you think Section 5 is coterminus with the constitutional command?

MR. LEWIN: Well, Your Honor, I think --

QUESTION: Do you think every violation of Section 5 has to be a constitutional violation?

MR. LEWIN: Apparently, under this Court's decisions, certainly under Georgia v. United States, and the shift to the burden of proof that's authorized under it, Section 5 goes beyond that constitutional prohibition.

QUESTION: Well, suppose in the Beer case -- suppose in the Beer case, in order not to diminish -- not to diminish the black representation in that case, it was necessary as a statute to comply with Section 5, to take specific,draw lines specifically based on race, and yet no one would claim there was a constitutional violation.

Does that -- are you suggesting that Section 5 in those

applications is unconstitutional?

MR. LEWIN: No, I don't think -- I don't think we're suggesting that. I don't think we have to reach it in this case, Your Honor.

QUESTION: Well, you're saying -- you're saying your initial argument is that never are quotas permissible. That in that case, in the Beer case, it might be true that in order to comply with Section 5 you would have to draw the districts based on racial composition. Specifically, and with that purpose in mind.

MR. LEWIN: Well, the unusual cases, I think the annexation cases are another set of situations where it might be possible --

QUESTION: The Richmond case.

MR. LEWIN: Right. Richmond and the City of Petersburg, where it might be possible to think of a reason, an unusual situation where --

QUESTION: Well, the reason is the statute commands it, and -- as construed by the court -- and your suggestion is that, as construed, the statute is unconstitutional.

MR. LEWIN: I don't think we have to reach that case on these facts, Mr. Justice White. I think that the general rule is to bring forth and accept --

QUESTION: Well, then, sometimes, though, if you don't reach it, then you must concede that sometimes it's all

right and sometimes it isn't.

MR. LEWIN: We think there is certainly a very heavy burden against it.

QUESTION: Well, I know, but, Mr. Lewin, I take it you have a fallback position, anyway. Even if we don't agree with you on your absolute.

MR. LEWIN: That's right.

QUESTION: And suggest that perhaps in some cases it's appropriate, if justified. I gather your fallback position is that no one, neither the State nor the Attorney General has attempted to justify what was done here.

MR. LEWIN: That's true.

We think in this case the --

QUESTION: Well, the argument is at least made that we did this to try to comply with Section 5.

MR. LEWIN: Well, but the only thing that compliance with --

QUESTION: Well, wasn't that the argument?

MR. LEWIN: That's the argument. But the only thing that compliance with Section 5 required was that New York enact a statute which it could sustain, if not through the Attorney General, through a declaratory judgment action in a federal court.

The Attorney General made no finding that the earlier statute -- this is our second argument -- that the Attorney

General made no finding that the earlier statute did have the effect of discriminating on account of race.

QUESTION: If New York had litigated and the court had -- and if the effect of the court judgment was that either draw these districts this way or you will have violated Section 5, you would be making the same argument here, I take it?

MR. LEWIN: If the court had said, yes, you have to draw it on the basis of race with a 35 percent quota, yes, I would be.

QUESTION: Even though the Constitution wouldn't require it, only Section 5?

MR. LEWIN: Yes, then I would be making the same argument.

QUESTION: Section 5 as construed and applied would be unconstitutional?

MR. LEWIN: If the court so held in that case, yes, I would be arguing here that that would be unconstitutional.

But we think that the court would not have so held it. If Beer indicated anything, Beer indicated, we think, that the decision by the Attorney General in 1972 was erroneous. It was erroneous for a variety of reasons. There certainly was no suggestion in the Attorney General's letter, or the Assistant Attorney General's letter of April 1974 with regard to the 1972 apportionment, that it was worse than any prior apportionment, than the 1966 apportionment with respect to race.

Had the standard that has now been made clear by this Court, under the Beer case, applied at that time, the Assistant Attorney General's findings in the letter would have been totally irrelevant. They just don't relate to the issue that this Court has now said Section 5 applies to.

QUESTION: Mr. Lewin, do you think last term's decision in Washington and Davis has any relevancy to the issue here? Purpose and effect.

MR. LEWIN: Pardon?

QUESTION: Purpose and --

MR. LEWIN: The purpose -- well, we think, at the moment, Your Honor, the thing has skipped my mind; if I could look at it over the lunch recess, I will reply to you later.

QUESTION: It's in the District of Columbia.

QUESTION: That involved the local police department.

MR. LEWIN: I recall. But I'd like to be able to just read that opinion over again, over the lunch recess, if I could, and reply to it after lunch.

QUESTION: Sure. I'm just interested in whether you think it has any relevancy to the issue we have here.

QUESTION: Mr. Lewin, may I ask a question that you may also want to think about over the lunch hour?

I wonder if the existence of Section 5 has anything at all -- really changes the issues at all. The question I would ask is: Supposing the New York Legislature, independently

of Section 5, had concluded that there was an undue concentration of voters of one particular race in an area, could they, for their own, just to correct that situation, have done what they say they were more or less compelled to do by the United States here?

MR. LEWIN: Well, certainly, --

QUESTION: Would that be a different case than this?

MR. LEWIN: Our view is that they certainly could not, that this case -- that if that were true, then the argument that the respondents make, based on Gaffney v. Cummings, would be somewhat closer to this case. One distinction that we think exists between this case and this Court's opinion in Gaffney is that Gaffney was a determined legislative judgment to apportion in a certain manner. And this Court said it will not strike that down.

Now, of course, we have argued that Gaffney is distinguishable because Gaffney was apportionment based on political ideology rather than race. But if race were the factor, we think that would be impermissible.

As a matter of fact, we think that Your Honor's opinion dissenting in the Cousins case at 466 F. 2d, we think does demonstrate precisely that that's impermissible. Not only in regard to blacks, but with regard to other minorities, with regard to this white community of Williamsburgh, which was and is a racial minority in the district where it resides.

MR. CHIEF JUSTICE BURGER: We'll let you pursue that after lunch, Mr. Lewin.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Lewin, you may resume your argument.

ORAL ARGUMENT OF NATHAN LEWIN, ESQ.,

ON BEHALF OF THE PETITIONERS -- Resumed

MR. LEWIN: Thank you, Mr. Chief Justice.

Over the luncheon recess, I have done my homework, Mr. Justice Brennan, and read Washington vs. Davis, which, it appears to me, does affect this case in one major way, and in another subsidiary way.

The Court did hold, of course, in Washington vs. Davis that all statistical proof goes to the ultimate question of whether there has been purposeful discrimination, that that is the constitutional test.

And it would appear to me that the decision in Washington v. Davis, and the opinion is consistent in that regard with our position that it is really not necessary for the Court to consider the statistical impact of any particular apportionment if the record is as clear as it is here, on there being a discriminatory purpose.

In fact, at the end of the Court's opinion in the City of Richmond case, as well, the Court adverted in that opinion to the fact that even perfectly legal results, even statistics which would withstand analysis if examined to see what their

effect would be on racial minorities, would be impermissible if they are done for racially discriminatory purposes. And the Court viewed a racially discriminatory purpose as being, as it were, a gross racial slur which can have no credentials whatever. And in that regard quoted from the 1918 opinion that Acts generally lawful may become unlawful when done to accomplish an unlawful end.

QUESTION: Well, Mr. Lewin, is it that clear in this case that what was done was a purposeful racial slur?

MR. LEWIN: We think -- we think it is. We think, although it was done for the nine purposes, it was a diminution of the racial -- the effect of a particular racial group within the Williamsburgh --

QUESTION: Well, Washington v. Davis, I gather, gave us, if that principle is applicable, required not merely effect but also purpose, did it not?

MR. LEWIN: Yes.

QUESTION: And are you spelling purpose out of effect here?

MR. LEWIN: No, I'm saying purpose means that when you take a racial minority, such as the white community, overwhelmingly Jewish, Orthodox Jewish, in Williamsburgh is, and you view that minority in that neighborhood. In other words, I think Judge Frankel below, dissenting, pointed out that one can't look at an entire country or an entire city and say,

Well now, what is the racial minority there?

The question is, What is the racial minority in the Williamsburgh section of Brooklyn?

If, in fact, in order to diminish the voting power of the white citizens of the Williamsburgh section of Brooklyn, the New York Legislature decided that it was not going to give them more than 35 percent population in any one of those districts, Assembly Districts, then we think that has to come in --

QUESTION: Suppose one read this record, really, as that what was done was done only because otherwise there could not have been a Section 5 clearance from the Attorney General?

MR. LEWIN: Yes.

QUESTION: And that was the only reason for its being done.

MR. LEWIN: And we have not --

QUESTION: Suppose one read the record that way? You would still --

MR. LEWIN: We think that's impermissible. We have enjoined the Attorney General and the State officials, and we say you can't do that, you can't say that in order to pass muster under Section 5 you will take a racial minority -- in this case it's a white racial minority -- you will take a racial minority and say to them, You can't have more than a 35 percent in those districts. Because --

QUESTION: Well, actually, it was the other way around, wasn't it? If -- what we're told and what you read us earlier, what happened was, it isn't that you can have only 35 percent whites, it is that you must have at least 65 percent blacks.

MR. LEWIN: Well, no, that's -- again, the peculiar way of all of this --

QUESTION: And therefore you've got the blacks here, that we were including among blacks the Puerto Ricans, aren't we?

MR. LEWIN: Well, we're not only including Puerto Ricans, but, according to the New York State Legislature, we're including "others".

In other words, it's quite clear, from the submission of the NAACP -- and I think that's what is really most disturbing about this, is that it is a submission which argues that there is the white community and the rest of the world, the non-white community.

To anybody, as Judge Frankel noted, who is familiar with New York, it's pure fiction to speak of the rest of that community, blacks and Puerto Ricans, as merged together, and others, as merged together in the non-white community.

Only if one looks at it as a means of reducing the possibility of electing white legislators -- and that, the interesting thing is that that emerges so clearly from the

NAACP submission to the Department of Justice, that they speak over and over again about the white incumbents, and the need to allow other than white incumbents in the Legislature in New York.

This was not a measure or a disapproval based on taking a particular racial minority, such as blacks, or a group such as Puerto Ricans, it was really the Department of Justice saying: whites are simply not covered by the Fifteenth Amendment or by the Voting Rights Act.

We're quoted in our Reply Brief what strikes us as an extraordinary passage out of the Department of Justice's memorandum justifying its approval of the 1974 lines, in which they say, in the clearest language, what --

QUESTION: What page?

MR. LEWIN: This appears at page 12 of our Reply Brief. Well, it's 11 and 12. It's at page 293 of the Appendix. In which the Department of Justice says clearly that in their view, the Fifteenth Amendment and the Voting Rights Act is not designed to protect Hasidic Jews, persons of Irish, Polish or Italian descent, none of those are within the special protections defined by the Congress in the Voting Rights Act, nor within the Fifteenth Amendment.

The entire memorandum focuses on the fact that the only people who are protected by the Voting Rights Act and the Fifteenth Amendment are blacks and Puerto Ricans.

QUESTION: But it's not the same thing to say that Irish and Hasidic Jews and so forth are not protected as a minority, and to say that whites as a minority are not protected. Is it?

MR. LEWIN: Well, the whites as a minority in a particular area may happen to be, as they are in this case, Hasidic Jews or Irish or Italian. It's true the Irish or Italian, as an entire group, may not be protected, but the white -- a white Irish community in a particular area which ends up being a minority is protected.

Just as in White v. Regester, the Mexican-Americans in Bexar County, I think this Court focused on the Mexican-Americans in that county, not Mexican-Americans in their entirety throughout the State, but those that were in the particular county, and said: As to those, they had been denied rights protected by the Fifteenth Amendment.

QUESTION: Mr. Lewin, you perhaps think it's your strongest case to say that there was a purpose to discriminate against, or to disentitle or to diminish the rights of a white -- of the whites; but wouldn't you be making the same arguments if the purpose was to, on a racial basis, to improve the situation of Negroes or --

MR. LEWIN: Well, we have never challenged the bona fides and the good intentions of the Department of Justice and the State officials. So we grant --

QUESTION: Well, constitutionally, and let's suppose the express purpose of the Legislature was to increase the likelihood of Negroes getting to be elected and getting to be candidates, and so they said, Let's make it 65 percent non-white, or let's assume it was 65 percent black, in as many districts as possible?

MR. LEWIN: We think it's two sides of the same coin. You can't separate --

QUESTION: So you would be making the same argument?

MR. LEWIN: Of course, because that --

QUESTION: Yes. All right.

MR. LEWIN: -- necessarily follows, you can't separate those.

And the evils of that -- yes?

QUESTION: Mr. Lewin, would this have any unfortunate or marked tendency to cut against the whole efforts to have an integrated society?

MR. LEWIN: We think, Mr. Chief Justice, it most definitely does. And we've expanded in more length than I suppose I have time now, to go into, on the harms we think it does.

What it does is it caters to the notion that there is racial polarization in voting. Again, the NAACP --

QUESTION: Well, it does more than that, it urges -- it presses people to move into blocks where they have other

Chicanos or other Puerto Ricans or other Negroes, or any other minority group, or group that regards itself as a minority.

MR. LEWIN: It encourages them to move into that area, it encourages voting on the basis of race in the ballot box. It's exactly what this Court said in Anderson v. Martin would not be permitted. If you can have a racial designation on a ballot in order to get the black community to vote for black candidates, one would think that might very well help the election of blacks.

And yet this Court has said the State may not make that an element in the electoral process.

In fact, the interesting thing is -- and the statistics that emerge from the NAACP brief, they are not in the record because this happened after the case below; but the NAACP has in its brief the statistics regarding the consequences of the vote in 1974. And it says in 1974, after this apportionment, there were non-whites elected in the three Senatorial Districts -- this appears at pages 26 and 27 in the NAACP brief -- in the three Senatorial Districts which were made overwhelmingly non-white, and in the seven Assembly Districts, all of which were made overwhelmingly non-white.

That gave blacks, really, 43 percent of the representation of Kings County, substantially over the 24 percent black population.

But the interesting thing is that, according to the

footnote, that happened in 1974, but it did not happen since. In other words, in the subsequent election, according to the NAACP, whites now represent also two of the Assembly Districts which are overwhelmingly black and two of the Senate Districts. Although originally, I think precisely because this emphasis was placed on getting black or non-white districts, voters were being encouraged to go into that ballot box and vote on the basis of race.

And that is, we think, squarely contrary to what the Fifteenth Amendment and the Fourteenth Amendment are designed to encourage. They're designed to encourage voting on the basis of individual merits of candidates and not things such as race.

And that distinguishes Gaffney v. Cummings as well. Gaffney v. Cummings was a deliberate apportionment, according to Democratic -- the candidates, Democratic and Republican candidates. Whether a candidate is a Democrat or a Republican appears on the ballot. The State encourages voting on the basis of political affiliation. That's part of our political process.

Anderson v. Martin has said you can't put on the ballot the race of a candidate, you can't put on a ballot the ethnic identification of a candidate. Obviously those are things which will be encouraging voters to vote on the basis of criteria which the Fourteenth and Fifteenth Amendments were

designed to override. And yet, the Solicitor General and the State and the Intervenors here are arguing that a racial fairness formula is perfectly appropriate.

QUESTION: Mr. Lewin, would it be a valid objection to a reapportionment scheme for a legislator to be concerned that a new line would split the clients you represent into two different groups?

MR. LEWIN: We think it would be a valid criteria. We think that that's one of the criteria that always apply, Mr. Justice Stevens, by people who draw the lines. They decide where are the communities, what have been traditional boundaries, that kind of thing has been used in the past, and we think it is a permissible criteria.

So we think a Legislature could use that.

But I think we have to --

QUESTION: In other words, they should seek to preserve existing groups that presumably vote as a block, but that they should not create any new blocks; is that it?

MR. LEWIN: Well, I think they should preserve existing groups, irrespective of whether they vote as a block. I think neighborhoods --

QUESTION: But if they're not assumed to vote as a block, what is the interest in trying to preserve them cohesively?

MR. LEWIN: Well, I think there are various interests.

One interest one can think of is simply that in the electoral process there are ways that candidates have of reaching voters through their community groups. In other words, a candidate goes in and says, Well now, I will speak -- it may be in a synagogue, it may be in a hall or a lodge that -- or an ethnic center of some kind; and that's traditionally done by candidates. So it makes sense from a totally neutral legislative standpoint to say we would like to preserve that, so that the candidates can get their message through to the voters, even if they don't vote as a block.

But that all the candidates hsould be able to get through to the voters through these various community groups.

QUESTION: Well, taking it one step further, if you started with your group being broken into two districts, could the Legislature permissibly decide, for the reasons you've just stated, they would like to put this entire group in one district?

MR. LEWIN: I think it could. But we are not arguing that it must. In other -- well, I think one thing that would be --

QUESTION: That could be because it may, yes.

MR. LEWIN: I think it may. I think it may, because of perfectly neutral reasons that have to do simply with candidates and their availability or accessibility to the voters. And with, I think, traditional reapportionment

standards. I think a Legislature may say various elements and criteria enter into apportionment, and this Court noted in Gaffney that is not a mindless process. Obviously, legislators and those who make determinations make these judgments on the basis of a wide variety of factors. And they could and should consider communities as well as other factors.

Now, our --

QUESTION: Well, suppose the Legislature Districts expressly and explicitly for the purpose of maximizing the number of Republican Districts or the maximum number of Democratic Districts, in order to, as they say, approach by districting as near as possible proportional representation?

MR. LEWIN: That, this Court has sustained it in Gaffney, and we certainly don't challenge it.

QUESTION: But expressly they draw the lines on a --

MR. LEWIN: Expressly, yes. We think politics is part of the political process. Race is not part of the political process. Race is an impermissible standard, except when it is being used -- it can be struck down -- when it's being used to reduce the voting effectiveness of voters. And that relates to another factor, which is that everybody, the Intervenors in the case and I think the majority below, kind of assumed that there is a necessary relation between the voting power of non-whites and the race of the candidates who are elected.

We think that that's just not -- that's just not true,

and that also is impermissible under our standards. We think blacks or non-whites may have, and should have, voting power, but that doesn't mean that that's tested by seeing how many there are in --

QUESTION: So that your submission is that if a Legislature concludes that whites and blacks, or whites and non-whites tend to vote in blocks and we would like, by districting, to come as near as possible to have the non-white strength in the community reflected in the Legislature, that that would be bad. That would be unconstitutional if they go around -- because they expressly intend to district on the basis of race.

MR. LEWIN: We think that that would be bad. The court below -- the majority below said in a footnote -- this is at page 27a of our Petition, footnote 20: Thankfully, said the majority, in a sort of wistful footnote, more and more we are coming to the day when the American votes vote person or party or issue and not color or race or sex. Until that idyllic day all voters do this, however, a Voting Rights Act of Fifteenth Amendment will be necessary.

Until that idyllic day. We submit that the way to get to that idyllic day is to say the State may not encourage it.

QUESTION: What if the New York Legislature had been proceeding on the general Gaffney v. Cummings approach, but one

of their sub-hypotheses was that blacks and Puerto Ricans in Brooklyn tend to vote Democratic, and therefore we're going to create a couple of Democratic Districts here, and the way we will do this is to include 65 percent of blacks, Puerto Ricans and others; would there be anything wrong with that?

MR. LEWIN: If the Legislature's objective is political, we think that's permissible under Gaffney v. Cummings, even though they may use racial criteria in determining how the political affiliation is arrived at.

Now, I think there are other -- I mean, as I think of the hypothesis that you put forward, Mr. Justice Rehnquist, I suppose since the Legislature has other ways of determining Democratic and Republican affiliation, such as registration statistics, it might be an impermissible way of getting what is really registration statistics.

But I would think initially, if the Legislature is saying, what we're doing is looking to make a political distribution, that's a permissible distribution.

QUESTION: Mr. Lewin, just so I know what the facts are in the case, isn't it true that after this districting, this reapportionment occurred, the white community in general had not been disenfranchised, or its representation hadn't been diminished?

MR. LEWIN: Well, I don't know how you define it.

QUESTION: In the over-all representation.

MR. LEWIN: Well, I think from the statistics that I see in the NAACP brief, there were 43 percent --

QUESTION: Well, let me put it this way -- which is a different question, I can see, but I guess it's really the one I intend -- was the white representation any less than its proportional number in the community?

MR. LEWIN: I think in Kings County it was, as a matter of fact. I think it was 43 percent, as my statistics work it out, for black --

QUESTION: Well, how do you mean that, Mr. Lewin, there are X number of Assemblymen, --

MR. LEWIN: Yes.

QUESTION: -- X number of Senators in Kings County. That's the whole of Brooklyn.

MR. LEWIN: Yes. Yes.

QUESTION: And that the number of black Senators and the number of black Assemblymen --

MR. LEWIN: Yes.

QUESTION: -- was the higher percentage than the total number of blacks in the county; is that it?

MR. LEWIN: Yes. The total number of blacks was 24 percent, and, as I read it from the statistics, it appears to be 43 percent black representatives from those -- from that --

QUESTION: What you're saying is that after this reapportionment the representation of the whites had (a) been

diminished and (b) been diminished below their proportional number in the community.

MR. LEWIN: That's the conclusion I can come to from that footnote, Mr. Justice White, but that's not what our case turns on. We don't say that it depends on whether that is shown or not.

QUESTION: Well, I know, but --

MR. LEWIN: And really, what we say; you have to focus on is not what the total was in the community, you've got to focus on this community in Williamsburgh, this white community.

QUESTION: I understand your position, but somebody else might think it's important.

MR. LEWIN: Yes. All right.

QUESTION: I was just wondering what you thought the fact was.

MR. LEWIN: I would like to reserve the remainder of my time, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Pollak.

ORAL ARGUMENT OF LOUIS H. POLLAK, ESQ.,

ON BEHALF OF INTERVENORS NAACP, ET AL.

MR. POLLAK: Mr. Chief Justice, may it please the Court:

Together with my colleagues, Messrs. Greenberg and

Schnapper, I represent the NAACP, which intervened in the district court in this case, to oppose Petitioners' claim that the lines adopted by the New York Legislature in 1974 to delineate the Assembly and Senate Districts in the County of Brooklyn unconstitutionally abridged the franchise of Petitioners and other whites resident in that county.

In the short time available to me, I will attempt to advance two linked propositions, namely that the 1974 lines are constitutionally proper both as to purpose and as to effect.

But before advancing these propositions, I will, with the Court's permission, try to address a few preliminary words to two critical aspects of this case.

The first has to do with the anomalous nature of Petitioners' constitutional claim; the second goes to the peculiar procedural posture of this case, a case which comes here, if the Court please, not after a full trial but after a very brief hearing on Petitioners' motion for preliminary injunction, I submit, a far too truncated record to begin to sustain Petitioners' extraordinary claim of proof that the State of New York and the Attorney General of the United States hae collaborated to abridge Petitioners' constitutional rights.

Now, in saying that Petitioners' claim is anomalous, I have in mind two aspects.

To the extent that Petitioners are in effect asserting a constitutional entitlement to have their Hasidic community

remain forever in a single voting district, I submit that they are arguing for a preference, whether it be denominated in ethnic or religious or, indeed, a political preference which is unknown to the Constitution.

QUESTION: Well, does that mean -- does that require an assumption that that's the way it was constructed in the first place?

MR. POLLAK: No, Your Honor. I submit that on whatever basis those persons have come together, they are no more entitled than any others in the American population to remain a discreet voting district.

QUESTION: But they claim, their claim is that you can't cut them up for a non-neutral purpose; isn't that their claim?

MR. POLLAK: I believe that is correct, Your Honor, and I was just about to go on, Mr. Chief Justice, to the proviso.

QUESTION: Well, before you do, I thought Mr. Lewin told us he was not arguing this case on any basis that this was a Hasidic community, but, rather, that this was a discrimination against whites as whites.

MR. POLLAK: Well, I have heard that, and I believe that is the alternative claim.

QUESTION: Alternative? I thought it was the basic one.

MR. POLLAK: Well, I hope that is the basic one, because I, myself, Mr. Justice Brennan, have been trying fully to understand where Mr. Lewin claim lies.

QUESTION: Well, I can understand that you wish it were his claim. But that didn't sound like what his claim was.

MR. POLLAK: There have been enough references to the importance and integrity of the community as such to lead me to believe that we at least ought to establish that that could not be the basis for a constitutional claim in this Court.

Unless, of course, Mr. Chief Justice, action were taken hostile to that community because of their race or religion, but there is not a word in this record to suggest hostility to the Hasidim as such.

In that connection I would call the Court's attention -- as Mr. Lewin already has -- to Mr. Justice Stevens' very instructive opinion in the Cousins case, before his elevation to this Court, the opinion in 466 Fed 2d.

QUESTION: That was a dissenting opinion.

MR. POLLAK: That was a dissenting opinion, Mr. Justice Stewart.

[Laughter.]

MR. POLLAK: Though I believe you will find that, as the case ultimately --

QUESTION: Actually, it would have been binding even if it had been a majority opinion, wouldn't it?

[Laughter.]

MR. POLLAK: I think Judge Fairchild would conclude that ultimately he and Judge Stevens, as he then was, were on the same side.

Now, if, in the alternative, and I think this is the alternative we must proceed on, Mr. Lewin is claiming that the discrimination here is against his clients as whites, then I must submit to this Court that any claim that Brooklyn is a county in which whites are politically disadvantaged by virtue of the 1974 districting lines, is, with all respect, an affront to common sense.

And here I must disagree with my brother Lewin's understanding of the statistics we tried to set forth, apparently unsuccessfully, in our brief, supplemented by a letter from my colleague, Mr. Schnapper, which I believe has now come to the Court's attention.

Whites constitute less than 65 percent of Brooklyn's population, but they are the majority race in 15 out of Brooklyn's 22 Assembly Districts, and 7 of Brooklyn's 10 Senate Districts.

Moreover, and this goes directly to Mr. Lewin's, I'm afraid, misunderstanding of the statistics we tried to set forth, white legislators sit in 17 of the 22 Assembly Districts, and 8 of the 10 Senate seats. They did this as a result of the 1974 election. That is to say, they hold all white majority

districts and additional non-white majority districts; 17 out of 22 Assembly Districts in Brooklyn, 8 out of 10 Senate seats, and last month's primaries indicate that exactly that pattern will continue in the general -- as a result of the general election next month.

QUESTION: Mr. Pollak, does the constitutional stature of the claim turn on the racial makeup of a county?

MR. POLLAK: Your Honor, only in this sense. What this goes to is that the effect of what has been done here is certainly not to disadvantage,politically to disadvantage whites in the County of Brooklyn. Mr. Lewin --

QUESTION: Well, whites, you know, it all depends on what statistics you use, I suppose, but what about the two Assembly Districts in questions?

MR. POLLAK: I am in agreement, if Your Honor please, with Mr. Lewin, who suggested that one looks at Bexar County --

QUESTION: "Behar" it is.

MR. POLLAK: One looks at it, and hopefully one learns to pronounce it correctly, Your Honor.

And here, sir, we look at Brooklyn as the political entity, which is subject to the Voting Rights Act. And looking at Brooklyn as that total entity, in which Petitioners base their constitutional claim as disadvantaged whites, it seems to me almost frivolous to assert that disadvantage has been worked on the white community.

QUESTION: Well, why would you single out just one county, if you're going at it, why not the whole State?

MR. POLLAK: Because, Your Honor, the Voting Rights Act of 1965 is invoked county by county.

QUESTION: Yes. County by county. But as components of what? Of a State.

MR. POLLAK: Well, if, Mr. Chief Justice, we were to look at the State of New York as a whole, although I have not been that ambitious to survey the entire Empire State, we would, I submit, get a far more sweeping demonstration that the State of New York is, like Brooklyn itself, safely in white political hands.

QUESTION: But in White vs. Regester, Mr. Pollak, the question was at-large districts for a county. Wasn't that the reason why the analysis was confined to Bexar County? Here you don't have districts at-large, you have single-member districts.

MR. POLLAK: But what you have, Mr. Justice Rehnquist, is the New York Legislature attempting to redistrict following the 1970 Census. Peraps it bears remembering that the New York Legislature was not simply attempting, as Mr. Lewin seems to have suggested, to address itself to the particular purpose of disenfranchising his clients.

It was required, under the New York Constitution, to redistrict the State following the 1970 Census. The 1972 lines

disapproved were addressed to that purpose. The 1974 lines replaced the disapproved 1972 lines. And the meeting of the objections of the Attorney General of the United States with respect to particular disadvantage in non-compliance with the Voting Rights Act of 1965, as it applied to Brooklyn, was simply one of modest purposes of the Legislature of the State of New York; but that was the purpose which was addressed to the County of Brooklyn as such, because it was that county which, I submit, the Attorney General was directing New York's attention to in disapproving the 1972 lines.

So I don't think we can, in fairness, reduce for the purposes of enlaring the claim of Mr. Lewin's white clients, reduce the focus of this case beyond the general confines of the County of Brooklyn, in which whites,and the memory of man runneth not to the contry, have been overwhelmingly the dominant group.

All four countywide officers, Borough President, District Attorney, two City Councilmen are white; five of Brooklyn's six Congresspersons are white. It is hard to see --

QUESTION: Mr. Pollak, would you tell me whether you think the issues, the constitutional issues in the case, would be any different if there had been no voting rights problem at all, but these decisions had all been made independently by the New York Legislature, just to correct what it conceived to be an improper set of district lines?

MR. POLLAK: It is my feeling, Mr. Justice Stevens, that the Solicitor General has persuasively demonstrated, to me at least, that building on the doctrine of Gaffney v. Cummings, New York would be entitled to undertake, in furtherance of the Fourteenth and Fifteenth Amendments, to undertake to create the possibility of effectiveness political action -- by no means a guarantee of it; and certainly this was not accomplished here, where many whites were elected in minority --in black/Puerto Rican majority districts -- to create the possibility of effective political action for groups which are not simply the Democratic or Republican groups identified in Gaffney v. Cummings, but other groupings of a kind which are linked politically in the very way suggested in your opinion, Mr. Justice Stevens, which I, with all apologies, refer to again, even though it was a dissenting opinion.

So I think Gaffney v. Cummings would independently support New York's action, had New York acted unprodded by the Voting Rights Act.

But, of course, the reality of this case is that New York moved because the Attorney General had disapproved the 1972 lines. And with respect to the constitutionality of New York's using race as an index of how to correct the imbalances which the Attorney General had discerned in the 1972 lines, I submit, if the Court please, that there can be no question that New York not only was entitled but indeed

obliged to look to race to make, to remedy what had been, after all, racial abuses.

In that connection, --

QUESTION: But are you entitled to rely simply on the Attorney General's finding as to 1972 in this lawsuit, or are you required to make some showing that in fact what he found was justified under the law?

MR. POLLAK: Mr. Justice Rehnquist, were there time enough, I would be glad to try to demonstrate that the Attorney General was right, but I don't think that is our burden or any respondents' burden in this case, the determination was made by the Attorney General, it was reviewable,had the State of New York sought to review it, in the District Court for the District of Columbia, when the political entity which is New York chose not to do so, the Attorney General's disposition became a final one, not, I think, to be collaterally reviewed here.

QUESTION: Tell me, Mr. Pollak, does what the New York Legislature do, accepting your submission in that respect, raise any DeFunis type problem?

MR. POLLAK: It does not, in my view, raise any such problem, Mr. Justice Brennan, assuming I were sure, from the Court's silence, what a DeFunis type problem is.

QUESTION: You don't know what the problem is --

[Laughter.]

QUESTION: -- but you know the answer.

MR. POLLAK: No, if the Court please, I don't. And specifically, if I may say, the fact which is the predicate of this case, that there was disapproval by the Attorney General under the Voting Rights Act, puts this case in a position where, a fortiori, the State of New York was not merely empowered but obliged to proceed with the race of voting districts in mind.

Directly as to DeFunis, this is not a case in which a preference was given to one assertedly at the expense of another. This was a case in which all that was attempted, as I understand it, taking Mr. Lewin's case at its strongest, all that was attempted was to create a viable opportunity for blacks and Puerto Ricans to organize themselves politically. And that --

QUESTION: But you might have a different answer to that question if the white community had been disenfranchised to some extent.

MR. POLLAK: I think we -- that certainly would bear on the question of effect.

But even as to purpose, the validity of a purpose to improve the possibility of minority political action, the constitutional validity of such a purpose was, I think, portended, Mr. Justice White, not merely by your question to Mr. Lewin as to the applicability of the Voting Rights Act, but, indeed, as my colleague, Mr. Schnapper, has pointed out to me, exactly what

was illustrated by your hypothetical question, was of record in the Beer case, decided by this Court last year.

Mr. Schnapper has pointed me to pages 341 to 2 of the record in the Beer case, in which it turns out that the lines which this Court felt the Attorney General should not have disapproved, those lines were in part constructed, the record makes it absolutely plain, in order to effect some deliberate marginal improvement of the opportunity of black voters in New Orleans to vote.

QUESTION: Without any constitutional compulsion.

MR. POLLAK: And without any constitutional compulsion. The Voting Rights Act, Your Honor, I agree, goes beyond the mandate of the Constitution of the United States.

Mr. Lewin's entire case, with respect to the invidious purpose of the State of New York rests not on proof of what legislators intended, it rests on testimony of what one staff assistant to a legislator said. And, indeed, the allegations of Mr. Lewin's complaint do not directly link the Legislature of New York, except vicariously, with that attributed quota.

And again I repeat, the entire proof comes up on a motion for a preliminary injunction, and surely this truncated record could not be a responsible basis for this Court making a deliberate adjudication of a case which purports to challenge the constitutionality of action taken by the sovereign Legislature of New York and the Attorney General of the United States.

I would not like to conduct the trial portended by Mr. Justice Rehnquist's question to Mr. Lewin, in which legislators of New York are called to the witness stand to testify as to what their purpose was in enacting these laws. Suffice it to say, there is no such testimony here, and it has, I think, been this Court's unbroken and understandable wish ever since Fletcher vs. Peck to avoid inquiries of that kind, and yet they would be necessary were this case to be pursued.

QUESTION: Even if it appeared on the face of the record without calling any legislators that that was the purpose?

MR. POLLAK: Mr. Chief Justice, I think all we can say, and I do call attention to the details of Mr. Lewin's complaint, I think all we can say is that even Mr. Lewin in his complaint only asserts that the 65 percent quota was an opinion communicated to employees of the Joint Committee.

I am referring to paragraph 22 through 24 of Mr. Lewin's complaint. The attribution to the Legislature as such is not, I think, made by the record before this Court.

MR. CHIEF JUSTICE BURGER: Mr. Pollak, you are now on the Solicitor General's time. If he acquiesces, that's up to him.

MR. POLLAK: Well, if I may --

MR. CHIEF JUSTICE BURGER: I see no signs of acquiescence.

[Laughter.]

MR. POLLAK: If I -- I am chary of trespassing on my friend, the Solicitor General's time, but I will simply take closing seconds to submit that this is a case, if the Court please, which cannot be decided in Mr. Lewin's favor on this foreshortened record. It is my own belief that if the Court sees substantial constitutional claims left, which I do not see, it must follow the path of remand.

For our part, we think the complaint was properly dismissed, because there is not even prima facie a showing of invalid purpose or invalid effect.

This would be true if New York had been acting unprodded by the Attorney General. It is true, a fortiori, where what New York Did was to legislate to achieve compliance with a congressional mandate in furtherance of Congress' awesome power, to enforce the Fourteenth and Fifteenth Amendments.

In conclusion, Mr. Chief Justice, I would urge that, in this Bicentennial Year, fidelity to the Declaration and the Constitution, those instruments of government honored in this Court, not ceremonially and not at intervals, but emphatically and every day, requires affirmance of the judgment below.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE UNITED STATES

MR. BORK: Mr. Chief Justice, may it please the Court:

I would like, in the brief time available, to concentrate upon the merits of Petitioners' claims and leave the question of the Attorney General's position as a party in this case to our brief.

I think the question of the claim under the Voting Rights Act, which is made in the complaint, is also taken care of by the brief. It has not been very clarified that there is no claim made that there is discrimination against the Hasidim as such.

QUESTION: What's the government's interest in the merits of the plaintiffs' constitutional claim if the status of the Attorney General as a party is put to one side?

MR. BORK: The government's interest becomes then, Mr. Justice Rehnquist, preserving the Voting Rights Act of 1965 from a ruling which I think would effectively destroy its application to apportionment.

The case turns upon Petitioners' claims as members of the white race, and I think I can show rather quickly that analysis demonstrates that they have no valid claim of unconstitutional discrimination on the basis of that. And, for purposes of clarity, I would like to discuss first the general

constitutional issue, and second I will examine the question of whether the Attorney General's involvement in the facts, in the redistricting process, alters that conclusion in any way.

Petitioners' central contention appears to be the redistricting may not be done so as to produce any particular racial composition in a voting district. And I think acceptance of that contention would have two results, each of which is completely foreclosed by constitutional law.

The first would be the effective destruction of the application of Section 5 of the Voting Rights Act, to reapportionments.

The second, which seems to me equally bizarre, would be that districting itself would be made unconstitutional unless done by a person who can be proved to have no idea of the ethnic or racial composition of the community he was dealing with, or preferably done by a computer that was not programmed to have any such information.

QUESTION: How was districting done before all these problems arose, let us say, 100 or 150 years ago?

MR. BORK: It was done by Legislatures.

QUESTION: Yes, but what guidelines? Geographical, largely?

MR. BORK: I think, Mr. Chief Justice, the guidelines, as history shows, were racial, political, geographical, preservation of communities, all this --

QUESTION: Well, it certainl shows that they were often political.

MR. BORK: I think that's true, Mr. Chief Justice. But that's why I say that acceptance of their argument, I think -- well, for the reason, I'll state this: You can't do redistricting without having racial considerations in mind, unless you're willing to forget about the Voting Rights Act of 1965.

It's impossible to be sure that there's no effect of abridging anybody's voting right on account of his race, of a racial group, if there hasn't been retrogression, unless the persons who draw the district lines know the impact they are having upon a racial group.

Now, there has been great play here upon the word "quotas", and it's a word I don't greatly care for in most contexts, but it must be said that the Fifteenth Amendment, implemented by the Voting Rights Act, and under either the majority or the minority position in Beer, somebody has to decide whether a racial group has been dropped below a certain position in a voting district.

Now, Mr. Lewin can call that a quota, if he wants to, and get whatever emotional connotations there are in that word, but that happens to be the result of the Fifteenth Amendment as it worked out to date.

Thus, it seems to me the Petitioners' claim is

necessarily that the Voting Rights Act itself is unconstitutional and that claim has been decisively rejected by this Court, beginning with South Carolina v. Katzenbach.

And let me say one other thing that Petitioners, I think, have confused here. The 1972 plan devised by the State of New York served many purposes, the redistricting, as it always does, served many purposes. It was revised after the Attorney General objected in a very minor -- in one area to its racial impact, and only the revision had a racial purpose to it, but other purposes would continue to be served by the redistricting.

So it is not true that this is a districting which is entirely racial in any way.

And if we're going to litigate every modification of a plan made under -- by a Legislature, it will be endless.

But Petitioners' argument is worse than destroying the Voting Rights Act, I think. They are really saying that any redistricting of New York by its Legislature would be unconstitutional, for it is perfectly clear that politicians are aware of the racial and ethnic makeup of neighborhoods, not only of their own constituencies but of other constituencies, and it's perfectly clear that how the lines are drawn is going to affect the outcome of elections.

To tell a politician, who knows that, that he must not think about it, is about as effective as telling a lawyer

he must not think about which argument is likely to prevail on a court when he has a case to try.

It is about as effective as telling somebody that for the next three seconds he must not think about the word "hippopotamus".

[After a pause] I have waited three seconds, I will --

[Laughter.]

MR. BORK: That means that Petitioners' constitutional theory cannot be carried out unless the function of redistricting is taken away from Legislatures altogether and consigned to courts or to computers, which is not what the Constitution requires.

As Gaffney v. Cummings says, the apportionment task, dealing as it must with fundamental choices about the nature of representation, is primarily a political and a legislative process.

Now, I think those two points, that Petitioners' argument requires both the unconstitutionality of the Voting Rights Act, as it applies to apportionment, and the unconstitutionality of districting done by Legislatures are enough to dispose of this case.

But I want to deal with a suggestion made that somehow this case did not involve such a result, because it is unique, and it is unique because the Attorney General is involved

in the case, in the process.

That factor does not alter the analysis one whit. I will put Petitioners' basic contention on this score as strongly as I can, in order to show that there is nothing to it.

The argument runs that the Attorney General disapproved of the 1972 plan, and in the process of discussion with members of the Department afterwards, the staff assistant from New York got the idea, he wasn't told, he got the idea indirectly that he'd have to come up with a 65 percent minimum proportion of non-whites in order to get approval.

Now, it is said, also, that the Attorney General's refusal to approve the 1972 plan was subsequently shown to be wrong by this Court's Beer decision, because proportional representation is not required by the Act, and that the State was thus forced into a position of redistricting in a way it would not otherwise have chosen.

That, it is said, requires reversal of the Court of Appeals. I think it does not.

I think there are two answers to that argument.

The first and less important, perhaps, is that the Attorney General could not and did not compel the 1974 plan. He didn't require it. New York could have tried to convince him that the proper test was whether the 1972 plan was ameliorative or retrogressive. They did not try to convince him of that.

They did not present him with evidence from which he could have made that determination.

QUESTION: Let's assume that the State of New York was proceeding on this erroneous assumption, as you describe it, what does that do to the case, the basic issues of the case?

MR. BORK: I think nothing whatsoever, Mr. Chief Justice. I think this case has to be analyzed as if the State of New York could have chosen to do this on their own. And this, for that reason.

My second answer --

QUESTION: Well, could they do it for the reason that this assistant staff member's thought was --

MR. BORK: Indeed. I am willing to accept, for the purposes of answering your question, Mr. Chief Justice, in answering Mr. Lewin's contentions, I am willing to accept the hypothesis which is contrary to fact, that the Attorney General told them he would only approve a 65 percent plan. I will accept that for the purposes of argument, but I think it makes no difference.

Now, I say that for this reason: There was nothing whatsoever improper about the Attorney General's involvement in this process. There's some overtone of that in this argument. The fact is that the Fifteenth Amendment permanently shifted federal-state balance in this particular area, and the Voting Rights Act, which implements the Fifteenth Amendment, puts the

Attorney General into the redistricting process when a covered jurisdiction comes to him rather than going to court.

And in that sense, in that constitutional sense, the Attorney General is as much a part of this process, but with a different role to play, but a part of this process legitimately as is the Legislature of the State of New York, as is the Governor of New York, or anybody else that plays a part in it.

Now, --

QUESTION: Well, does that mean, Mr. Solicitor General, that in effect the Attorney General can take a particular situation and draw the plan and tell the State, this must be it or none other?

MR. BORK: No, that -- I suppose you could come to the same conclusion, realistically, by sitting there rejecting plans forever until they come to the one he wants; but he doesn't do that.

His only function under the statute -- yes?

QUESTION: Well, the State doesn't need to take it, they can litigate.

MR. BORK: The State can go to the three-judge court in the District of Columbia and litigate, they don't have to come to the Attorney General at all; and if they do go to the court, a prior adverse decision by the Attorney General is entitled to no legal weight in that proceeding.

But the fact -- what he did here was his legitimate

role, and a role given to him under the Fifteenth Amendment by the Voting Rights Act. So that what Petitioners are doing is bringing back, in a kind of disguised form, the Federalism objection that was made to the Voting Rights Act, and decisively rejected in South Carolina v. Katzenbach.

QUESTION: Is it true that the Attorney General, in order to object to a plan, such as he objected to in this case, would have to make his own judgment as to whether or not there is block racial voting?

MR. BORK: He takes the position, Mr. Justice White, which was upheld by this Court, that he has to be persuaded, the State must carry the burden of proof with him, that there is no denial or abridgement, just as it must before the court.

QUESTION: Well, I understand that, but I take it that there must be some assumption that there's going to be some block racial voting, or the chances of discrimination would be considerably less.

MR. BORK: Well, I think that whether there is block racial voting is one of the questions that he addresses himself to when he asks them to tell him about it.

Of course, if there is no block racial voting, or very little, the problem becomes much less.

But the other part of this matter is, it is suggested that the Attorney General made a mistake when he refused to approve the 1972 plan, because he was using the theory that the

minority of this Court took in Beer. And he should have been taking the position the majority took.

Of course, this was before Beer was decided, and the Attorney General was acting in the light of the lower court's decision in Beer.

But the Attorney General must often decide before an issue is clarified by law, and it's no different than if New York had gone to the three-judge court and got an erroneous decision, which it didn't appeal, or if the Legislature had made a mistake of law and put in a plan it didn't have to under the Voting Rights Act. It's no different than if the Governor, with a mistaken view of what this Court would ultimately say about the Voting Rights Act, had kept vetoing legislation by the Legislature, until he forced them to the 1974 plan or some analogous plan.

So that in all of these cases the issue is not whether somebody who is legitimately in the process, as the Attorney General most certainly was, may have made a miscalculation about the future course of the law; the question in all of these hypothesized cases, as well as in this case, is whether the resulting redistricting violated a constitutional right.

And it seems to me that this case must be analyzed just as if there were no Voting Rights Act, and just as if there were no Attorney General in it. That means it comes down to the question of whether a State or local government can take

race into account and choose to redistrict so that there is racial proportional representation from an area.

That may be a good idea or it may be a bad idea, but I think that's a legislative question, because I don't think there's the slightest doubt that as a constitutional matter a State can do that.

And I don't really think there's the slightest doubt that that is effectively what Gaffney v. Cummings held. I don't think it's distinguishable.

I was quite surprised --

QUESTION: But there's a limit, isn't there?

MR. BORK: Oh, there certainly is a limit, Mr. --

QUESTION: In Gomillion v. Lightfoot, it certainly is --

MR. BORK: Oh, I was speaking, Mr. Justice Stewart, of a taking of race into account in order to achieve a rough proportionality. I was not speaking of a case in which you are attacking a race and fencing it out, as was true in Gomillion v. Lightfoot. And I don't think --

QUESTION: Yes. But your broad statement, though, would include that. And perhaps I misunderstood your statement.

MR. BORK: I did not mean to say that, I meant to talk about viewing race as party was in Gaffney v. Cummings.

QUESTION: Yes.

QUESTION: When you say to achieve rough proportionality,

what does that mean?

MR. BORK: Well, a State, I think, could say that because race is a political issue and because groups in its area do vote somewhat along racial lines, that it is going to construct districts which are otherwise reasonably compact or contiguous and so forth, as these districts are here, which give a chance for something like proportional representation of the group in the Legislature.

And I was astounded when Mr. Lewin said that race is not a part of our political process. Race has been the political issue in this nation since it was founded.

And we may regret that that is a political reality, but it is a reality, that's what the Fifteenth Amendment is about, what the Civil War was about, it's what the Constitution was in part about, and it is a subject we struggle with politically today. And I think the suggestion that we ignore race in order to discourage block voting is really a suggestion that we allow the dilution of minority votes, the abridgement of minority votes so that they will not be encouraged to vote together.

QUESTION: Mr. Solicitor General, I wonder, are you saying to us that constitutionally proportionality, so long as that's legitimately and honestly the reason for doing what was done with these districts in Brooklyn, it's appropriate; but if what was done was done to fence out the white community,

then it would be inappropriate?

MR. BORK: Yes. If what was done was done with the intention of harming the white community politically, of course it is true in --

QUESTION: But if it's done for the purpose of giving a fair representation to the black community, even though it has the effect of diluting the representation of the white community?

MR. BORK: Yes, but I think the white community, Mr. Justice Brennan, cannot have a claim to more, a constitutional claim to more voting -- representative strength than it has voting strength in the population.

QUESTION: Yes.

MR. BORK: Furthermore, throughout our history, people have recognized economic interests, ethnic interests, all kinds -- religious interests, all kinds of interests in redistricting. So it would be very strange if blacks were the only group who could not be recognized.

QUESTION: Well, accepting all that, then my question is: Does this record really tell us why this was done?

MR. BORK: Well, it tells us that the Attorney General objected because he thought that there was a dilution. It tell us that New York State got the impression that they ought to go to 65 percent -- by the way, it's 63 percent, the Attorney General thought, unless you include Chinese.

And apparently that's as much as we know.

But I don't think there is a constitutional claim, and for that reason we ask that the judgment of the Court of Appeals be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor general.

Mr. Zuckerman.

ORAL ARGUMENT OF GEORGE D. ZUCKERMAN, ESQ.,
ON BEHALF OF CARY, ET AL.

MR. ZUCKERMAN: Mr. Chief Justice, may it please the Court:

There is no dispute that the State of New York utilized racial statistics in drawing the 1974 redistricting plan that is challenged by Petitioners. But it is alsoclear that the use of racial considerations in the preparation of the 1974 plan was not for any invidious discriminatory purpose, but was designed as a remedial measure to overcome the objections that the Attorney General of the United States had raised in refusing to approve New York's 1972 reapportionment statute with respect to New York and Kings Counties.

While this --

QUESTION: Do you think anything that was done by New York in response to the Attorney General's recommendation would automatically be entitled to the word "remedial" rather

than "invidious" or "discriminatory"?

MR. ZUCKERMAN: Not anything, Mr. Justice Rehnquist. I think any fair response, reasonable in terms of proportionality. But if you reach a Gomillion situation, then I think it could be fairly attacked.

The State of New York does not agree with the April 1, 1974 determination of the Department of Justice, which rejected New York's 1972 lines. And, indeed, the State believes that the recent decision of this Court in Beer vs. United States clearly indicates that that determination of the Department of Justice was based on an erroneous application of the Voting Rights Act.

However, the fact remains that due to the pressures of time brought on by the imminence of the 1974 primary, the State chose not to challenge the Justice Department's determination. As such, the State was required to enact new legislation immediately to satisfy the objections of the Department of Justice.

Now, in attempting to satisfy these objections, it may be remembered that the Department of Justice had complained that the 1972 districts contained an over-concentration of non-whites in the 18th Senate District and in the 53rd through 56th Assembly Districts. So, to overcome these objections, it was obviously necessary for the State to consider the racial composition of individual city blocks, to transfer non-white

voters from these allegedly over-concentrated districts into the adjoining districts of allegedly under-concentrated minority voters.

While racial considerations are generally constitutionally suspect, where such considerations have been taken in support of a remedial measure to further integration, as was done in this case, the use of racial considerations has been sustained.

We point out, at pages 19 and 20 of our brief, many of the cases in which the conscious use of racial considerations by public officials has been sustained when taken through further integration in the areas of education, in employment, and in promoting integrated housing.

QUESTION: What case do you think, in this Court, supports that statement, "outside the area or remedy for a constitutional violation"?

MR. ZUCKERMAN: Well, in Swann vs. Charlotte-Mecklenburg Board of Education.

QUESTION: It was remedy, though, wasn't it?

MR. ZUCKERMAN: Well, no --

QUESTION: But that wasn't the whole thing -- that wasn't the whole thing, was it?

MR. ZUCKERMAN: Right. Mr. Justice White, I would say, in candor, there has been no holding of this Court, that I'm aware of, that would --

QUESTION: Just dictum in Swann?

MR. ZUCKERMAN: Possibly. There have been, we cite in our brief, some lower federal cases, in which -- the Nichowsky? case, for one, and --

QUESTION: But nothing here you can cite, except Swann, the dictum in Swann?

MR. ZUCKERMAN: Not that I'm aware of. That would -- to specifically answer this question, as to where there has been no finding of past discrimination.

QUESTION: Well, what about Beer?

MR. ZUCKERMAN: Well, in Beer, the holding that was in Beer would be inapposite to this situation.

QUESTION: Why is that?

MR. ZUCKERMAN: Because they say that where a redistricting plan constitutes an improvement over the prior lines, this would not be a violation of the Voting Rights Act.

QUESTION: Yes.

MR. ZUCKERMAN: And we believe, under the facts of the New York situation, the 1972 lines which were rejected by the Department of Justice were definitely improvement over the prior district lines that had been drawn in 1966.

QUESTION: Well, do you suppose Beer would -- you could imply from Beer, infer from Bear that if there was not -- if the plan was disadvantageous to the black community, that there must be some lines, the lines must be changed even if there wasn't a

constitutional issue?

MR. ZUCKERMAN: Yes, I would agree with that.

QUESTION: You'd have to do a fair amount of implying, wouldn't you?

MR. ZUCKERMAN: Yes, in those circumstances.

We further submit that it is unrealistic to condemn a reapportionment plan solely on the ground that it employed racial considerations, where such considerations were utilized to produce a racially fair result.

And here we believe that the opinion of this Court in Gaffney vs. Cummings is instructive, just as politically mindless redistricting might produce a gerrymandered result.

We believe that a completely color-blind approach to redistricting might also produce an unintended discriminatory result.

Now, in the Appendix to our brief, we have included maps of the black and Puerto Rican population in Kings County, and it will be noted that the black population is concentrated in the interior of Kings County, and, to a lesser extent, so is the Puerto Rican population.

The southern half of Kings County is almost completely barren of blacks and Puerto Ricans.

Therefore, it would be possible, applying a color-blind approach, to draw equal districts starting at the peripheries of the county and working towards the center, which

would produce a result in which minorities would have far fewer districts than their population would appear to entitle them to.

We submit that in its attempt to prevent this unintended discriminatory effect, the State may consider racial considerations.

Now, we believe the basic flaw in the Petitioners' approach is that they can point to no injury of constitutional dimension. While we can appreciate their desire, as a closely knit religious group, to be confined within a single Assembly or Senate District, there is no constitutional right for ethnic or religious groups to be included within an electoral district that is favorable to the interests of their group.

Obviously, in Kings County, with all the many, multi-ethnic and racial and religious groups, it would be impossible to satisfy all their demands and still draw districts that were equal in population to satisfy the one-person/one-vote constitutional requirement.

Finally, even as white voters, we believe they have failed to show any constitutional injury, since whites, with approximately 65 percent of the population in Kings County, are in a majority in 68.6 percent of the Assembly Districts and 70 percent of the Senate Districts.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Lewin?

REBUTTAL ARGUMENT OF NATHAN LEWIN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. LEWIN: If I might just take a moment, just on three points, I think, that came up, Mr. Chief Justice, in the course of the respondents' argument.

First, on re-reading the NAACP's brief and its footnote, I have to apologize to the Court, I did misunderstand the words "succeeding election" that appeared in that brief, and read it to assume that there was an election since, which of course I should have realized there was not.

In fact, therefore, the statement I made to the Court about the election of black candidates was in error and is not what the NAACP brief indicates, and I'd just like to withdraw that.

But I think those statistics do indicate that if the overwhelmingly non-white districts had in fact voted the way the NAACP suggested, there would have been overwhelmingly disproportionate, I believe, black representation.

Let me make just a brief response to Mr. Pollak's point regarding the inadequacy of the record.

We made a motion for summary judgment below, and our statement as to points, as to which there is no genuine issue, appears at 259 in the record. The State respondents did not put in any of those questions in issue. The NAACP put some of them

in issue, but we think not those really that would dispose of this case.

We believe our motion for summary judgment on the undisputed facts should have and could have been granted. It is simply not true that this record in its present posture requires any remand for any further hearing, if those points are read, and if the complaint and the State answer, which appears in the Appendix, are both read.

And, finally, --

QUESTION: Was the motion for summary judgment as to a permanent injunction?

MR. LEWIN: Yes, Your Honor. We moved, on the basis of the record made on the motion for preliminary injunction, we move thereafter for a summary judgment.

There was a response to it filed by the NAACP, none, to my recollection, filed by the State. The court denied the motion for summary judgment. We appealed. We asked, as part of our appeal, that the Court of Appeals grant our motion for summary judgment.

The record is in posture, where we think we're entitled to summary judgment, based on the undisputed testimony at that hearing, where there was ample notice -- it was not a hearing that was called without notice. I think there were several days. Our witnesses testified, and they called no witnesses.

QUESTION: So the posture in the Court of Appeals was

not simply appeal from a preliminary injunction, but an appeal from the denial of a permanent injunction?

MR. LEWIN: It was a dismissal, an appeal from the dismissal of the complaint.

QUESTION: Right.

MR. LEWIN: The cross-motion, the motion for dismissal of the complaint was granted.

And, finally, I think the Solicitor General has very much overstated our position by saying that we urged that the Voting Rights Act be overruled, and that race be ignored.

We made no such argument, we simply -- we said clearly, as in employment cases, it's proper for a State to look at race to decide what its apportionment has done. It is not proper to make race the criterion, which is really -- and it's clear from the legislative record, that was the standard that was used here by the New York Legislature.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:10 p.m., the case in the above-entitled matter was submitted.]

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