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

2 (11:25 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 18-726, Lamone versus  
5 Benisek.

6 Mr. Sullivan.

7 ORAL ARGUMENT OF STEVEN M. SULLIVAN

8 ON BEHALF OF THE APPELLANTS

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

11 I'd like quickly to try to reorient  
12 the Court to Maryland's case and then, if I  
13 can, address some of the concerns that I heard  
14 in the argument that you just had.

15 In this case, the Court should reverse  
16 and vacate for three reasons. The First  
17 Amendment retaliation test that was adopted --  
18 a single test was used here -- fails to provide  
19 a manageable standard because it does not give  
20 courts and legislators the means to distinguish  
21 between excessive political considerations and  
22 those that have been deemed constitutionally  
23 acceptable.

24 JUSTICE KAGAN: Was -- was this an  
25 excessive political consideration?

1           MR. SULLIVAN: I don't think it was,  
2 Your Honor. Whether you -- the Court may like  
3 it or not, this is the norm. For states where  
4 one party receives more than 60 percent of the  
5 vote in congressional elections, those states  
6 have a line up and see --

7           JUSTICE KAGAN: Well, if that's right,  
8 then your defense is not really that we can't  
9 tell the difference between excessive and  
10 non-excessive because, under any measure, this  
11 is excessive, isn't it? I mean, you'd only  
12 need 10,000 votes to -- to do the -- the  
13 population measure that -- that Baker requires,  
14 and instead map makers moved 66,000 Republicans  
15 out of the district, 24,000 Democrats into the  
16 District, flips the composition of the district  
17 from 47 percent Republicans and 36 percent  
18 Democrats to, instead, 45 percent Democrats and  
19 34 percent Republicans, effectively ensuring  
20 that Republicans will never win this seat again  
21 and that -- and that Maryland, which has about  
22 35 percent Republicans, is going to have one  
23 Republican House member for the foreseeable  
24 future. How is that not excessive?

25           MR. SULLIVAN: There's a number of

1 things wrong with that, Your Honor,  
2 respectfully. One is it starts from the  
3 perspective that we take one district and we  
4 assume that it's the whole universe. It's like  
5 the famous New Yorker cartoon; all you see is  
6 New York buildings and not the rest of the  
7 country. Maps are formed piecing together  
8 parts of the entire state.

9 This one, the Sixth District, was  
10 heavily influenced by the decision that had  
11 nothing to do with partisan politics, and that  
12 was to remove a crossing across the Chesapeake  
13 Bay that was instituted --

14 JUSTICE KAVANAUGH: That -- the stated  
15 goal was seven/one.

16 MR. SULLIVAN: For some, it was. But  
17 it was a goal --

18 JUSTICE KAVANAUGH: The governor and  
19 others.

20 JUSTICE KAGAN: Well, for some, the  
21 governor, the speaker.

22 JUSTICE KAVANAUGH: I mean, I don't  
23 think you should run away from the obvious. I  
24 mean, the crossing the bay thing is not very  
25 persuasive, given all the evidence that this

1 was just seven/one. And, you -- you know,  
2 you've got Easton grouped in with Carroll  
3 County, Talbot County, Wicomico County grouped  
4 in with west of Baltimore. That's just -- as  
5 opposed to just crossing the bay, when  
6 everyone's saying we want seven/one. I don't  
7 -- I just don't know, in response to Justice  
8 Kagan's question, you should run away from the  
9 obvious.

10 MR. SULLIVAN: Well, I don't think  
11 it's running away to say that there were a lot  
12 of other factors that -- that had to do with  
13 this. The change in the First District that  
14 resulted from the bay crossing changed a  
15 competitive district that Democrats had  
16 actually been able to win to a heavily leaning  
17 Republican district that Democrats --

18 JUSTICE KAVANAUGH: Well, sure, to  
19 make the others all the other way, and to get  
20 from six/two to seven/one or from five/three or  
21 six/two to seven/one, you --

22 MR. SULLIVAN: Well --

23 JUSTICE KAVANAUGH: -- you get the  
24 Sixth and Eighth both Democratic, the first is  
25 going to be Republican for the foreseeable

1 future, as Justice Kagan says, but it's going  
2 to be seven/one. That's the stated goal.  
3 That's the goal that's effectuated.

4 MR. SULLIVAN: Well, to get to that,  
5 you have to discount other statements in the  
6 record, which you can't do on summary judgment,  
7 such as Governor O'Malley's statement that,  
8 given the population growth in the western part  
9 of the central part of the state -- Montgomery  
10 County, primarily, had the largest growth --  
11 you're going to see the most changes out the  
12 I-270 corridor. He also said that.

13 So you'd have to say, well, we're  
14 getting in the --

15 JUSTICE KAVANAUGH: And the I-270  
16 corridor is a community of interest?

17 MR. SULLIVAN: It is. That was  
18 established in this record. It's from  
19 independent sources that have nothing to do  
20 with --

21 JUSTICE SOTOMAYOR: Well, they should  
22 have put it in the Eighth District then.

23 MR. SULLIVAN: What's that?

24 JUSTICE SOTOMAYOR: If the idea was to  
25 unify the I-270 corridor, they could -- I look

1 at the map, and it's very simple, put it in the  
2 Eighth District.

3 MR. SULLIVAN: Well, that would be an  
4 injury according to Plaintiffs' own complaint,  
5 because they say packing is an injury that's  
6 remediable. And that would be packing the  
7 Democrats in -- that's a heavily Democratic  
8 area that had more growth than any of the  
9 surrounding areas in the entire state, the most  
10 growth right there.

11 And so it had to go somewhere, and  
12 north was a reasonable direction for it to go.

13 JUSTICE BREYER: Yes, but --

14 MR. SULLIVAN: Then the Eighth  
15 District went north.

16 JUSTICE BREYER: -- suppose,  
17 hypothetically, to get away from these facts,  
18 that what we had used the three-part test that  
19 you just heard. One, there are 42 bishops  
20 before whom they swear that they did this just  
21 to help the Democrats. Now we look at the map  
22 they used and the map, by the way, showed in  
23 state-wide elections, governor, the Republicans  
24 won. But 42 bishops say, they swore; in other  
25 words, it's indisputable.

1           Second, that this will, in fact, make  
2 a difference of who -- how many Republicans  
3 there are. And, third, that it's absolutely  
4 durable, and there we get the greatest  
5 staticians -- statisticians in the universe in  
6 there, okay?

7           Now imagine this is -- I've  
8 exaggerated enormously, but if that were true,  
9 then would you say this Court should intervene?

10           MR. SULLIVAN: I -- I'm not sure I  
11 understand all of that, and we may have an --

12           JUSTICE BREYER: In other words, if  
13 it's absolutely indisputed that there was a  
14 clear and absolute intent to do this just so  
15 the Democrats could get the district. Number  
16 two, it is indisputed this will have an effect  
17 of giving this district to the Democrats, and  
18 number three -- it's a big effect. And, number  
19 three, it will happen for the next 20 years.  
20 Okay? So we got all three parts, I think, if I  
21 understand it correctly.

22           On that assumption, would you say this  
23 Court should intervene?

24           MR. SULLIVAN: I don't know that I can  
25 because, Justice Breyer, you expressed the need

1 to limit it to the extreme circumstance.

2 JUSTICE BREYER: Well, I just pictured  
3 a --

4 MR. SULLIVAN: If you have that  
5 circumstance, then you're going to have to  
6 intervene in Arkansas, Kansas, Massachusetts,  
7 Oklahoma, Alabama, Kentucky, Tennessee, and  
8 Utah, all states where more than 60 percent of  
9 the votes are cast for one party. That's in  
10 the record at 871 and 1012. It was established  
11 and was unrebutted that in states that have a  
12 similar political makeup to Maryland, you end  
13 up with a congressional delegation that looks  
14 very similar to Maryland.

15 So, if you're concerned about limiting  
16 the Court's intervention to the extreme  
17 circumstance, at least under the current state  
18 of affairs in these United States, you would  
19 not be limiting it to extreme. You would be  
20 saying get ready, Arkansas, Kansas,  
21 Massachusetts, Oklahoma, Alabama, Kentucky,  
22 Tennessee.

23 JUSTICE KAGAN: Well, why -- why  
24 should we assume, Mr. Sullivan, that everything  
25 would stay the same? If the Court said that

1 something was unconstitutional, don't we  
2 usually assume that people change their  
3 behavior when the Court sets down a  
4 constitutional rule?

5 I mean, the reason why, in this case  
6 and in the case just before you, all these  
7 politicians are bragging about the amount of  
8 partisanship they can put into the maps is  
9 because they think it's perfectly legal to do  
10 so.

11 If the Court said it's not legal to do  
12 so, presumably, some actors would change their  
13 behavior. No?

14 MR. SULLIVAN: Yes, Your Honor. And  
15 we certainly would in Maryland because every  
16 time there's a redistricting, before the  
17 redistricting, the legislators and the governor  
18 are briefed on all the legal requirements, as  
19 happened here. And that would happen in  
20 Maryland and I'm sure in other states as well.

21 JUSTICE ALITO: What would be an  
22 example of a situation where a -- the drawing  
23 of a district would be impermissible, would  
24 constitute impermissible political  
25 gerrymandering in your opinion?

1           MR. SULLIVAN: Well, we've said in our  
2 brief, certainly, as indicated in the prior  
3 argument, where the minority vote getters  
4 dictate the results for the majority, that  
5 would be a situation where certainly the Court  
6 ought to be able to remedy that.

7           JUSTICE GINSBURG: How does the  
8 majority -- minority get to do that? I mean,  
9 they have to -- this has to start with a  
10 legislature, both houses being controlled by  
11 the same party. I don't understand how a  
12 minority could force its will.

13          MR. SULLIVAN: Well, if -- in  
14 Maryland, there's history for this. If the --  
15 if the people are upset with the way the  
16 redistricting happens, they can take it to  
17 referendum.

18                 And in 1962, a Democratic governor,  
19 legislature, both houses controlled by  
20 Democrats, adopted a redistricting plan and it  
21 was taken to referendum and the people of  
22 Maryland rejected it at referendum. And that's  
23 in our record.

24                 JUSTICE GINSBURG: And then what  
25 happened?

1           MR. SULLIVAN: Then a new map was  
2 drawn. Presumably, the people were happy with  
3 that.

4           Here, in this case, this map was also  
5 taken to referendum and the people  
6 overwhelmingly approved it, 1.5 million voters,  
7 including in counties where Republicans  
8 outnumbered Democrats.

9           JUSTICE GINSBURG: It has been  
10 suggested from reading what was on the ballot  
11 that most citizens wouldn't understand at all  
12 what they were voting for.

13           MR. SULLIVAN: Three things, Your  
14 Honor. First, that wasn't litigated in this  
15 case. It was not even mentioned by -- by the  
16 plaintiffs in their -- in their complaint or in  
17 their motion for summary judgment.

18           It was litigated in a court of  
19 competent jurisdiction in Maryland state court,  
20 and our intermediate appellate court determined  
21 that the language was sufficient, especially  
22 when read in light of the individual notices  
23 that each voter received before the election  
24 explaining the referendum question.

25           And in the Washington State Grains

1 case, this Court said that such notices  
2 eliminate any threat of voter confusion. So  
3 that's really just not a reason for --

4 JUSTICE KAVANAUGH: You -- you brought  
5 it up. You think most -- you're going to  
6 dispute Justice Ginsburg and say most voters  
7 knew what they were voting for there?

8 MR. SULLIVAN: I'm going to agree with  
9 our intermediate appellate court, which had a  
10 more full record before it than Justice  
11 Ginsburg does.

12 But, also, this Court has -- has not  
13 presumed that voters don't understand. In the  
14 Anderson case on which plaintiffs rely, the  
15 court said that people -- the court's going to  
16 presume that people are informed, that they  
17 read the paper.

18 And, here, you'll find at page 70 of  
19 Joint Appendix unrebutted testimony that The  
20 Washington Post ran three lead editorials  
21 urging the people of Maryland to reject this  
22 plan.

23 So it was not a secret ballot. It was  
24 -- it was simply a big issue in the state, and  
25 the people overwhelmingly approved it, and

1 we've heard --

2 JUSTICE BREYER: Well, what I read  
3 there is the exact words of the thing they  
4 voted for or against, that this referendum,  
5 petition, "establishes the boundaries for the  
6 state's eight United States congressional  
7 districts based on recent Census figures, as  
8 required by the United States Constitution."

9 MR. SULLIVAN: Right.

10 JUSTICE BREYER: All right? Now is  
11 that sufficient?

12 MR. SULLIVAN: If that were the only  
13 thing the voters knew, but this Court presumes  
14 that they read the paper, they watch TV, they  
15 talk to each other, they have forums, as were  
16 held here, they read through the notice.

17 JUSTICE BREYER: But if this were the  
18 only thing, if I thought that at least a large  
19 number of them, that this was the only thing  
20 they knew, which is what you just mentioned,  
21 then is it sufficient?

22 MR. SULLIVAN: No, it's not sufficient  
23 for this Court to conclude that there was a  
24 problem because its precedent says you have to  
25 have proof that there was actual confusion.

1 And we have no proof in this case because it  
2 was not litigated at all.

3 JUSTICE SOTOMAYOR: Am I understanding  
4 you to be saying that partisan gerrymandering  
5 is always non-justiciable?

6 MR. SULLIVAN: No. No, Your Honor,  
7 not at all. And as I started to outline what  
8 is at stake in this case, it's just the  
9 specific test that our court applied at  
10 plaintiffs' urging --

11 JUSTICE SOTOMAYOR: All right. So  
12 that you've heard the argument in the Rucho  
13 case. Are you saying that those tests are  
14 better, just this one's not? I'm not quite  
15 sure what your -- your -- your position is.

16 MR. SULLIVAN: They may be, but we --  
17 in our case, we've only had a chance to  
18 litigate and have an experience with the one  
19 test that our court used, so we don't really  
20 have that benefit of being able to tell you  
21 with the informed level of analysis that  
22 counsel did in the prior argument.

23 JUSTICE SOTOMAYOR: Well, but, you  
24 know, you've had time to --

25 MR. SULLIVAN: Yes.

1 JUSTICE SOTOMAYOR: And I'm assuming  
2 you would have. Are you okay with any of the  
3 Rucho tests?

4 MR. SULLIVAN: I -- I'm not going to  
5 take a position, Your Honor. It's -- it's not  
6 in our case. And, typically, what the Court  
7 has said in Vieth, it's the plaintiff's  
8 obligation to come up with the standard.  
9 Plaintiff came up with the standard that they  
10 wanted to use in our case and it was used by  
11 the district court.

12 And just we're here to argue that that  
13 was -- that standard is not manageable.

14 JUSTICE KAVANAUGH: You start your  
15 brief by saying that you agree partisan  
16 gerrymandering poses a threat to democracy.

17 MR. SULLIVAN: Yes. This Court has  
18 said that.

19 JUSTICE KAVANAUGH: So what -- what  
20 should we -- what should the test be then?

21 MR. SULLIVAN: Well, I -- again, I  
22 can't speak beyond what's in our record. I  
23 believe there are tests that can be -- can be  
24 adopted and this Court can come up with them.

25 JUSTICE KAGAN: What is the threat

1 that --

2 JUSTICE ALITO: Well, is it your -- is  
3 it your position that this -- what -- what was  
4 done in Maryland would be okay under any test,  
5 but you're not going to tell us which of the  
6 possible tests is the right test, or are you  
7 just saying the wrong test was done, was used  
8 here, so we should send it back to -- for the  
9 Court to find some other test which you're not  
10 going to identify and then apply that to the  
11 facts of your case?

12 MR. SULLIVAN: Well, it would be for  
13 --

14 JUSTICE ALITO: I -- I just don't  
15 understand what you're saying.

16 MR. SULLIVAN: -- it would be for  
17 plaintiff to identify it if you keep with the  
18 analysis in Vieth. But this Court in Davis v.  
19 Bandemer held that a -- an equal protection  
20 standard is justiciable.

21 And that was reaffirmed by a majority  
22 of the justices who spoke in Vieth, and  
23 reiterated in the Arizona state legislature  
24 case.

25 And in this very case, we wouldn't

1 still be here if the Court hadn't found in the  
2 first go-around that some form of First  
3 Amendment standard is not foreclosed by this  
4 Court's precedent; otherwise, the Court would  
5 have had to have affirmed dismissal.

6 JUSTICE KAVANAUGH: Well, I'll ask you  
7 the question that I asked Mr. Clement, which  
8 is, why can't the Constitution be interpreted  
9 to require something close to proportional  
10 representation in your view?

11 MR. SULLIVAN: Well, in my personal  
12 view, it could be, but I don't think you need  
13 to get that far to -- to say that you could use  
14 proportionality.

15 JUSTICE KAVANAUGH: It could be? You  
16 -- you -- you're saying the Constitution could  
17 be interpreted to require something close to  
18 proportional representation?

19 MR. SULLIVAN: Justice --

20 JUSTICE KAVANAUGH: Then you would  
21 lose, wouldn't you?

22 MR. SULLIVAN: No, if proportionality  
23 is interpreted in light of the reality that, as  
24 both experts testified in this case or have  
25 written at least, when one party gets a super

1 majority of votes, they tend to get a higher  
2 percentage of seats than they would get from  
3 the straight vote count.

4 And as Dr. McDonald, plaintiff's  
5 expert, has written, if there is any  
6 correspondence between those two, it's merely  
7 accidental because, typically, it's going to be  
8 a higher seat count.

9 So the Court has acknowledged that  
10 this can be justiciable, and I think the Court  
11 can come up with a standard.

12 CHIEF JUSTICE ROBERTS: It's -- it --  
13 I'd like to have you discuss the First  
14 Amendment argument a little bit. I mean, it  
15 does seem that this is a situation where the  
16 state is taking retaliatory action against  
17 Republicans who were in that district and had a  
18 more effective vote, and penalizing them for  
19 exercising their right to vote by moving them  
20 out to a different district.

21 What -- what's wrong with that  
22 argument?

23 MR. SULLIVAN: Well, as we've  
24 explained in our brief, retaliation, that whole  
25 analysis, has never been used in the

1 legislative realm.

2 And to say that legislation results  
3 because the party that had the more votes was  
4 retaliating against the other parties' views  
5 has -- is a position that's been repeatedly  
6 rejected in the cases we cited since the  
7 O'Brien case from this Court.

8 CHIEF JUSTICE ROBERTS: Well, you say  
9 we haven't done it in the past, but we're being  
10 asked to do a lot of things we haven't done in  
11 the past, and -- and it's because there's been  
12 a change in how redistricting has been done.

13 And I guess I don't understand. I  
14 mean, if you have, I don't know, any other kind  
15 of state employee and you don't like her  
16 exercise of First Amendment rights, and you  
17 fire her, there -- there's pretty well  
18 established analysis for approaching that case.  
19 And I don't know why the same wouldn't reply --  
20 apply here.

21 MR. SULLIVAN: Well, in the employment  
22 context, you can't really -- unless it's a  
23 policy-making employee, you can't take into  
24 account the employee's political views pretty  
25 much at all.

1           But, in legislating, political views  
2           have to be taken into account. People have to  
3           speak and have to express their political views  
4           in -- whenever there's a legislature enacting  
5           it or when the people of the state enacted it,  
6           as happened here.

7           So you're in two different contexts,  
8           one where -- where speech is prohibited to be a  
9           basis for action in the employment context, and  
10          legislation, where speech is inherent and  
11          necessary in order to reach the result.

12          CHIEF JUSTICE ROBERTS: Well -- well,  
13          but speech against other legislators or against  
14          voters? I mean, are -- are -- you think it's  
15          all right to retaliate against the Republicans  
16          from the district that were moved out because  
17          of how they voted?

18          MR. SULLIVAN: I -- I don't think  
19          that's a fair characterization of what  
20          legislators do. And, here, it's a question of  
21          about who are you retaliating against.

22          Washington County before the  
23          redistricting voted for the Republican, Mr.  
24          Bartlett, overwhelmingly.

25          The first election held after

1     redistricting, the same county, totally intact,  
2     presumably the same voters that had voted in  
3     2010, voted for the Democratic candidate.

4             So drawing those kind of distinctions  
5     in Maryland is very difficult. The evidence in  
6     the record of across -- across-the-aisle voting  
7     was very strong.

8             CHIEF JUSTICE ROBERTS: Are you  
9     suggesting that the redistricting here was --  
10    was not successful?

11            MR. SULLIVAN: Well, if -- if you say  
12    the intent was -- was a partisan intent, yes,  
13    it was successful, except you still have a  
14    district that's capable of voting Republican.

15            The Sixth District voted  
16    overwhelmingly for our Republican governor,  
17    Larry Hogan. So it's not a district that's  
18    locked in for Democrats.

19            JUSTICE KAVANAUGH: Well, that then --

20            JUSTICE BREYER: Why don't you improve  
21    that?

22            JUSTICE KAVANAUGH: You can't use the  
23    government.

24            JUSTICE BREYER: Why not say that  
25    would be a good defense? But -- but what you

1 can't do is, if a party uses a map for its  
2 district, which is a statewide map, you used a  
3 statewide map, the Republicans won two  
4 statewide elections for governor, and so even a  
5 party with 60 percent of the votes cannot  
6 intentionally -- they have to prove it, you  
7 know -- intentionally draw these maps just so  
8 they increase their majority beyond two-thirds  
9 of the seats.

10 I mean, I picked those numbers out.  
11 You can use other numbers if you want. But you  
12 get the idea.

13 MR. SULLIVAN: Right.

14 JUSTICE BREYER: The idea is looking  
15 into the minds of the legislators, which is  
16 difficult --

17 MR. SULLIVAN: Uh-huh.

18 JUSTICE BREYER: -- not impossible,  
19 and then applying it to extreme situations, and  
20 I just used numbers like two-thirds and so  
21 forth and majorities in order to show it's not  
22 impossible to generate analogous numbers from a  
23 constitution.

24 MR. SULLIVAN: Your Honor, the problem  
25 with using the intent as your guide, as here,

1 intent was the dominant factor that the Court  
2 relied on, is because, in -- in Davis versus  
3 Bandemer, the Court pointed out how easy it is  
4 to show partisan intent because that's the air  
5 that politicians breathe. It's how they get  
6 where they are.

7 And in Vieth, a majority of the  
8 justices agreed that some partisan effort to  
9 affect the vote through the redistricting is  
10 going to be present in every redistricting.

11 JUSTICE GINSBURG: But, when the  
12 legislature and the government, the legislative  
13 leaders and the governor, say we want seven to  
14 one, we want to shrink Republican  
15 representation by one, map makers, achieve that  
16 for us, I mean, is there any genuine doubt that  
17 that was the aim from the beginning, to shrink  
18 Republican districts by one?

19 MR. SULLIVAN: I think there is doubt.  
20 I think, if you read the entire record,  
21 including what Governor O'Malley said elsewhere  
22 in places not quoted by plaintiffs or the  
23 district court, where he said that what he  
24 wanted was for the constitution, the statutes,  
25 and all case law to be complied with, and after

1 all of that, he would hope that a Democrat  
2 would be elected in that district.

3 JUSTICE BREYER: So you may be able to  
4 prove it. I'm just saying what you'd have to  
5 prove. But it's not the case, in my mind, that  
6 every politician considers politics and so  
7 forth up in the air.

8 Of course, you're right, they do, but  
9 there's a classical reason that they should,  
10 and the classical reason is to produce  
11 stability in a legislature so that small shifts  
12 of voting behavior don't make big shifts in  
13 legislatures. But there's no -- if that's the  
14 reason, that doesn't apply in the case where  
15 one party already controls 60 percent of the  
16 seats.

17 MR. SULLIVAN: Well, we do have a fair  
18 amount of stability in Maryland or --

19 JUSTICE BREYER: Yes, I know. That's  
20 a problem because -- I'm not saying it's a  
21 solution. You have the stability. So your  
22 response was: Well, politicians will consider  
23 politics. Yeah. Of course.

24 But our problem is to say when that's  
25 too much and why isn't it too much.

1           MR. SULLIVAN: Well, I think in other  
2 areas of your First Amendment law that  
3 plaintiffs have cited for you, for example,  
4 Crawford versus Marion County Board of  
5 Elections, didn't really care very much, the  
6 Court didn't, about the intent. It's let's  
7 look at -- let's look at the burdens that are  
8 alleged, identify them, measure them, how much  
9 of a burden is on how many people, and then  
10 make the call whether the state's justification  
11 overcomes that.

12           We didn't have that analysis here.  
13 There was no measuring. It's any practical  
14 difference, is what the Court said, is  
15 sufficient to trigger invalidating a map. And  
16 any practical difference is going to happen to  
17 voters in every single redistricting. Somebody  
18 is going to have a difference because of the  
19 line change.

20           JUSTICE ALITO: Now you say that  
21 partisan gerrymandering is justiciable. Under  
22 which provision of the Constitution? First  
23 Amendment, the Equal Protection Clause, the  
24 Elections Clause, or something else?

25           MR. SULLIVAN: Well, I will say under

1 the Equal Protection Clause because that's this  
2 Court's precedent.

3 JUSTICE ALITO: That's the only one?

4 MR. SULLIVAN: And First Amendment is  
5 also present in this very case.

6 JUSTICE ALITO: So both of them?

7 MR. SULLIVAN: At least law of the  
8 case in this particular case.

9 JUSTICE ALITO: Both of them?

10 MR. SULLIVAN: What's that?

11 JUSTICE ALITO: Both of them? Your  
12 answer is both of them apply?

13 MR. SULLIVAN: Both -- both of them  
14 are potentially sources for a standard.

15 JUSTICE ALITO: And what is the test  
16 under -- let's go to the First Amendment.  
17 What's your test under the First Amendment?

18 MR. SULLIVAN: I don't have a specific  
19 test to propose, but, as I indicated in my  
20 answer to Justice Breyer, I think anything the  
21 Court can do to get away from an intent-based  
22 standard where you have a realm, politics,  
23 where political aims are just endemic.

24 JUSTICE ALITO: Do you think the First  
25 Amendment and equal protection dictate the same

1 standard or different standards?

2 MR. SULLIVAN: I -- I would imagine  
3 they would have to be different in some --  
4 because you have completely different bodies of  
5 -- of case law that the Court has developed in  
6 those two, so I would imagine there would have  
7 to be some difference between the two.

8 JUSTICE ALITO: Okay.

9 JUSTICE KAVANAUGH: You don't --

10 JUSTICE ALITO: And what -- what's the  
11 test under the -- you can't tell me what the  
12 test is under the First Amendment. What is the  
13 test under the Equal Protection Clause?

14 MR. SULLIVAN: It's intent, effects,  
15 and injure -- intent and effects.

16 JUSTICE ALITO: What -- what degree of  
17 intent?

18 MR. SULLIVAN: Well, I tried listening  
19 to the prior argument, but I -- I -- I lost  
20 count of the tally of what -- where it came  
21 out. But, in racial gerrymandering, it's a --  
22 it has to be a preponderance.

23 JUSTICE ALITO: But, if you're back  
24 before the district court, what are you going  
25 to tell the district court? We should win, but

1 are you going to try to explain to the district  
2 court why you should win?

3 MR. SULLIVAN: Well, first of all, the  
4 other arguments -- one of the other arguments  
5 we make is how -- given the plaintiffs' delay,  
6 which this Court found last time, puts us in a  
7 category of cases that we've cited where courts  
8 have determined that where there is delay and  
9 you're this close to the census, it's not  
10 equitable and it's no longer in the public  
11 interest to redraw the map because the same  
12 kind of disruption that plaintiffs compare --  
13 complain about, you redraw the lines, you  
14 change all our associational interests, you  
15 affect our representation. That's going to  
16 happen with redrawing the map, and then you're  
17 going to have redraw the map again in -- within  
18 a two-year span. So we would --

19 JUSTICE ALITO: You think there's  
20 going to be a different map drawn after the  
21 2020 census?

22 MR. SULLIVAN: There will be a  
23 different map. Our laws require it.

24 I would like to reserve whatever time  
25 I have left. Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Mr. Kimberly.

4 ORAL ARGUMENT OF MICHAEL B. KIMBERLY  
5 ON BEHALF OF THE APPELLEES

6 MR. KIMBERLY: Thank you, Mr. Chief  
7 Justice, and may it please the Court:

8 I'd like to begin with just a very  
9 succinct statement of what our claim is and  
10 what our theory is.

11 When state officials use redistricting  
12 to burden a particular group of voters because  
13 of their political views, with the express goal  
14 of making it harder for those -- for that group  
15 of voters to win elections, and when that goal  
16 is achieved so that group of voters is  
17 ordinarily doomed to usual electoral defeat  
18 under the map, and when the state cannot come  
19 forward with a legitimate governmental interest  
20 to justify the burdens imposed, the map has to  
21 be neutrally redrawn.

22 That, in a nutshell, is our claim.  
23 And all of the evidence in our case proves that  
24 the 2011 redistricting in Maryland violated  
25 that theory.

1                   CHIEF JUSTICE ROBERTS:  It's -- it's a  
2                   -- it's a test that would be met in every  
3                   particular, except for the one about durability  
4                   that you mentioned.  In every redistricting,  
5                   partisanship is going to play a significant  
6                   role, and because you can always do it to one  
7                   degree or another, it is always going to have  
8                   an effect.

9                   It seems to me that your focus is  
10                  entirely on durability.

11                  MR. KIMBERLY:  Well, I -- I do think  
12                  all that the Court needs to say in this case is  
13                  that dooming the targeted voters to electoral  
14                  failure is enough to state a claim.

15                  I -- I think what's helpful, Your  
16                  Honor, is that coupling that burden with intent  
17                  makes sense because that is the intent that all  
18                  map drawers who set out to gerrymander harbor.  
19                  They -- gerrymanderers don't set out to fiddle  
20                  at the margins; they set out to fix electoral  
21                  outcomes.

22                  And that is exactly what the evidence  
23                  in this case shows.  They don't set out to make  
24                  it slightly easier for their candidates to win  
25                  or slightly more difficult for their opponents

1 to win. They set out to change the electoral  
2 outcomes.

3 And using metrics like the Democratic  
4 performance index in this case and the partisan  
5 voter index under the Cook Political Report,  
6 all of the evidence is that, as of the time  
7 that the map was enacted, the map drawers  
8 understood that this previously safe Republican  
9 district would become a safe Democratic  
10 district.

11 JUSTICE SOTOMAYOR: How do you see  
12 your test? I mean, you introduced the Gingle  
13 factors, which the district court didn't rely  
14 on here. You say implicitly it did, but it  
15 really doesn't anywhere mention Gingle --  
16 Gingles.

17 How does your test differ from the  
18 Rucho test? From either the Women League or  
19 the Common Cause?

20 MR. KIMBERLY: Well, I actually don't  
21 see a whole lot of daylight between our test  
22 and the tests that are presented in those  
23 cases. I'll take --

24 JUSTICE SOTOMAYOR: Except that your  
25 test doesn't look at durability at all.

1           MR. KIMBERLY: Well, it doesn't look  
2 at durability as such, but the -- the focus  
3 last term was on the difference between vote  
4 dilution that would make a practical difference  
5 versus vote dilution that would result in a de  
6 minimis impact.

7           And I think what would be more helpful  
8 to focus on, rather than what counts as de  
9 minimis, is to what -- is to focus on what  
10 counts as a practical burden. And we think the  
11 great range of cases in which practical burdens  
12 that would be actionable arise, it's going to  
13 be the situation that I was just explaining to  
14 the Chief Justice, that it's where the map  
15 drawers set out to doom the targeted voters  
16 because of their politics to usual electoral  
17 failure under the map as drawn.

18           That is, I think, in -- in essence,  
19 the -- the range of cases in which a practical  
20 difference will be made. And I think it  
21 overlaps substantively with the League of Women  
22 Voters' approach towards durability. And --

23           JUSTICE ALITO: If your -- if your  
24 claim is based on the First Amendment, doesn't  
25 that necessarily mean that partisanship cannot

1 be taken into account at all, not one iota?

2 MR. KIMBERLY: No, I don't think so,  
3 Your Honor.

4 JUSTICE ALITO: Why is that -- why is  
5 that -- that not so? Have we ever said that  
6 there's such a thing as benign viewpoint  
7 discrimination under the First Amendment?

8 MR. KIMBERLY: I -- I --

9 JUSTICE ALITO: Where, you know, you  
10 can discriminate on the basis of viewpoint, but  
11 it just has to be small?

12 MR. KIMBERLY: I -- I think most of  
13 this work is done at the -- at the  
14 justification stage. And this might mirror  
15 something like Anderson/Burdick balancing. It  
16 doesn't have to.

17 But our view is, as long as  
18 consideration of -- of the way that people have  
19 voted in the past and intent to make it more  
20 difficult for those voters to achieve electoral  
21 success is in service of a legitimate  
22 government interest, then it would be  
23 permissible.

24 JUSTICE ALITO: And what would be a  
25 potentially legitimate government interest?

1           MR. KIMBERLY: I think it would be  
2           pursuit of balanced maps, as the Court said in  
3           Gaffney against Cummings. I think it would be  
4           pursuit of competitive districts. I think  
5           there are a range of circumstances where --

6           JUSTICE ALITO: Okay. What does a --  
7           what is a balanced map? What does that mean?

8           MR. KIMBERLY: Well, I think balanced  
9           map in the Gaffney sense, which is the sense  
10          that I mean it, is proportino -- is a  
11          proportional map. So, in this case, it might  
12          be a six/two delegation or a five/three  
13          delegation.

14          JUSTICE KAVANAUGH: But, if you -- if  
15          you set out to draw a five/three here, say we  
16          want to be proportional, we want to be fair, so  
17          we're going to have five Democratic districts  
18          and three Republican districts, the Democrats,  
19          individual Democrats that you sort into the  
20          Republican districts are going to be able to  
21          say we're being deprived of our ability to be  
22          treated without reference to our partisan  
23          affiliation, our political affiliation, right?

24          MR. KIMBERLY: Well, I -- yes. And I  
25          think that's how the --

1 JUSTICE KAVANAUGH: So doesn't that  
2 show that your test -- but you said doing a  
3 five/three would be okay.

4 MR. KIMBERLY: No, no, that's right.  
5 So they would --

6 JUSTICE KAVANAUGH: Despite the fact  
7 it would still treat individual voters, it  
8 would penalize them because of their political  
9 affiliation.

10 MR. KIMBERLY: But, Your Honor, that  
11 is exactly the approach this Court takes in --  
12 in its ballot access cases. As long as -- so,  
13 in the -- in the hypothetical that you've  
14 described, I think Democratic voters may well  
15 have stated a prima facie case under the first  
16 two prongs, but, under the justification prong,  
17 the state comes back and says, although true,  
18 maybe they admit it, maybe they don't, but,  
19 although true, we were --

20 JUSTICE KAVANAUGH: That --

21 MR. KIMBERLY: -- considering voting  
22 --

23 JUSTICE KAVANAUGH: -- that shows --  
24 I'm sorry to interrupt -- that shows what the  
25 driver, I think, of your test, though, the

1 overwhelming driver is proportional  
2 representation. And I guess I'll ask you the  
3 question I've asked others.

4 Do you think the Constitution requires  
5 proportional representation or something close  
6 to proportional representation?

7 MR. KIMBERLY: I don't think it does  
8 require it, Your Honor, and I do not think it  
9 drives our request at all.

10 JUSTICE KAVANAUGH: Why don't you  
11 think it requires it?

12 MR. KIMBERLY: Well, I -- I -- I don't  
13 see a textual indication in -- in the  
14 Constitution itself that suggests it.

15 JUSTICE KAVANAUGH: Equal Protection  
16 Clause does not suggest to you something where  
17 political groups are treated roughly equally?

18 MR. KIMBERLY: I -- Your Honor, if  
19 that's the way that you're inclined to think  
20 about it, I'm certainly --

21 JUSTICE KAVANAUGH: No, I'm just  
22 asking --

23 MR. KIMBERLY: -- happy to have you --  
24 have you rule that way.

25 JUSTICE KAVANAUGH: -- I'm asking why

1 --

2 (Laughter.)

3 JUSTICE KAVANAUGH: I'm asking --  
4 everyone seems to be running away from --

5 MR. KIMBERLY: Well, I --

6 JUSTICE KAVANAUGH: -- challenging the  
7 maps but running away from proportional  
8 representation, even though, as you can tell  
9 from the questions, there's a suggestion that  
10 really it all comes back to proportional  
11 representation in some respects.

12 MR. KIMBERLY: Your Honor, I guess  
13 I'll -- I'll -- I'll answer the question this  
14 way. One, I think -- I think the First  
15 Amendment is probably the better approach for  
16 explaining why it might favor proportional  
17 representation. But, of course, there are a  
18 range of factors having nothing to do with  
19 discrimination against groups of voters on the  
20 basis of their political views that might yield  
21 a non-proportional map. And so I --

22 JUSTICE ALITO: You think the First  
23 Amendment might require or even tolerate the  
24 regulation of speech, and in this instance, the  
25 speech is the votes, for the purpose of

1 providing a proportional representation of  
2 viewpoints?

3 MR. KIMBERLY: So, as I was about to  
4 say, I think not. I don't think it requires  
5 it. I think --

6 JUSTICE ALITO: Does it tolerate it?

7 MR. KIMBERLY: I -- I think -- yes, I  
8 think that's the inevitable conclusion of  
9 Gaffney against Cummings.

10 JUSTICE ALITO: So if -- if there is a  
11 -- a place in a public park, to get back to the  
12 classic example where -- that is open to  
13 speakers, the -- the -- the city that controls  
14 that could say we want to make sure we have  
15 equal speakers on both sides of this question,  
16 so we're going to -- you know, we're going to  
17 -- we're going to balance the speakers? They  
18 can do that?

19 MR. KIMBERLY: Your Honor, I don't  
20 think ruling in our favor requires the Court to  
21 say that in the least. What we're saying is --

22 JUSTICE ALITO: Well, you're saying  
23 this is -- this is a free speech case, right?  
24 And you're saying it's okay to regulate speech  
25 for the purpose of providing proportionality in

1 some sense?

2 MR. KIMBERLY: No, Your Honor, what  
3 I'm suggesting is, after this Court's decision  
4 in Gaffney against Cummings, we accept as given  
5 that it is a legitimate state interest to  
6 pursue proportional representation in  
7 redistricting.

8 If you take that as a given, then the  
9 sort of claim that Justice Kavanaugh was  
10 describing would, in fact, be justified under  
11 the third prong. But let me emphasize our  
12 claim is not an ends-oriented claim. It is a  
13 process-oriented claim.

14 Our view is, under -- under the facts  
15 as we've proven them, we are entitled to a  
16 neutrally-redrawn map in which the map -- in  
17 which the legislature does not use this kind of  
18 data with an intent to burden particular groups  
19 of voters because of their political views.

20 JUSTICE GORSUCH: Counsel --

21 CHIEF JUSTICE ROBERTS: You would  
22 think it would be -- you'd agree that if you  
23 had a partisan-free map, you said is required,  
24 that would be the first time in history, right?

25 MR. KIMBERLY: A neutrally-drawn map,

1 you mean?

2 CHIEF JUSTICE ROBERTS: Yes, neutrally  
3 drawn, without -- without regard to partisan --  
4 partisanship at all.

5 MR. KIMBERLY: I can't say for certain  
6 whether as a matter of fact it would be the  
7 first time in history. I would accept that  
8 today the accepted approach does not require  
9 neutrality, but I think that's precisely the  
10 problem.

11 So just -- I think just to finish the  
12 point, we don't -- our position is not, having  
13 proved our claim, we're entitled to a redrawing  
14 of the Sixth Congressional District so that it  
15 favors Republicans.

16 Our point is that we are entitled to a  
17 redrawing of the Sixth Congressional District  
18 in a manner that does not select a map that  
19 disfavors them because of their political  
20 views. It may --

21 JUSTICE BREYER: Well, that's -- look,  
22 there is a classical political science view.  
23 It's very easy, draw state districts and  
24 imagine populations such as the state's 42  
25 percent -- 48 percent Republican, 52 percent

1 Democrat. All right?

2 Now, suddenly, three percent change,  
3 2.1 percent change. Now, if there's no  
4 politics involved whatsoever, I think you can  
5 show that that means 100 percent change in the  
6 legislature, depending.

7 Now that cannot be a recipe for  
8 American government. I mean, if you believe it  
9 can, fine, but you'd have to show that to me.  
10 And, therefore, people resist to a degree your  
11 statement that, well, no consideration, call it  
12 a stability consideration, but it's still the  
13 same consideration.

14 So I think many people's problems and  
15 what we're searching -- what I'm searching for  
16 anyway, is for you to say, okay, I see a  
17 stability interest there, but how much is too  
18 much?

19 And now we've heard from one side that  
20 said: Here is how you find out. You find out  
21 by looking at the intent of the legislature  
22 about what the effect is and about whether it's  
23 durable.

24 MR. KIMBERLY: Right.

25 JUSTICE BREYER: Do you -- do you want

1 to just say that's it and it's the same  
2 argument? That might work.

3 MR. KIMBERLY: I think it is  
4 effectively the same argument, Your Honor. And  
5 -- and just to draw a -- a counterdistinction,  
6 the vote dilution in degree that took place in  
7 the Eighth Congressional District was roughly  
8 the same as the vote dilution in degree that  
9 took place in the Sixth Congressional District.

10 The vote dilution in the Sixth  
11 Congressional District resulted in a map drawn  
12 such that Republicans were -- in the Sixth  
13 Congressional District, were doomed to usual  
14 electoral failure. Not so in the -- it's the  
15 inverse. It's Democrats in the Eighth  
16 Congressional District. Not so in the Eighth  
17 Congressional District.

18 JUSTICE GORSUCH: What -- what do we  
19 --

20 MR. KIMBERLY: So, yes, I think -- I  
21 think, as a practical matter, this -- the  
22 distinction that the district court below drew  
23 between vote -- deliberate vote dilution that  
24 makes a practical difference and doesn't is in  
25 effect the same.

1           And we would be perfectly comfortable  
2 with the Court saying that the way that we know  
3 it's too much is if it results in a durable  
4 partisan gerrymander that will resist changes  
5 in politics over the coming decade. That is,  
6 of course, exactly what is borne out in the  
7 evidence in this case.

8           JUSTICE GORSUCH: What do we do about  
9 the referendum? The whole of the people had a  
10 chance to speak. Now I -- I understand that  
11 there are questions about how good a referendum  
12 that was.

13           But would your test require this Court  
14 to declare unconstitutional gerrymanders that  
15 have been approved by the people through  
16 referendum themselves? And could this  
17 referendum process be used otherwise too?

18           MR. KIMBERLY: I don't think so, Your  
19 Honor. In -- in my view, the referendum is a  
20 red herring. This could not -- if this had  
21 been a racial gerrymander and it had been put  
22 to popular vote and that popular vote had  
23 approved this map as drawn, it would still be a  
24 racial gerrymander.

25           JUSTICE GORSUCH: I -- I completely

1 accept that answer, right? So -- so, in  
2 effect, you are asking the Court, no matter how  
3 good the referendum might be, no matter how  
4 much the people themselves might approve these  
5 lines, this Court has to tell them it -- it's  
6 unconstitutional?

7 MR. KIMBERLY: On the facts of this  
8 case, yes, I think that's correct.

9 I want to come back to the question --

10 JUSTICE SOTOMAYOR: I'm sorry.

11 MR. KIMBERLY: -- of justiciability --  
12 I'm sorry?

13 JUSTICE SOTOMAYOR: What do you see as  
14 -- on the facts of this case? What makes it so  
15 here?

16 MR. KIMBERLY: Well, I -- for one, it  
17 was -- the intent that led to the adoption of  
18 this map in particular is undisputed. This is  
19 not a circumstance where you have a -- you  
20 know, a menu of maps put to the public vote and  
21 the public are being asked to exercise their  
22 independent discretion on which map to choose.

23 It isn't the public in the place of  
24 the legislature. The legislature has acted.  
25 It has done so in an unconstitutional way.

1 That --

2 JUSTICE SOTOMAYOR: Well --

3 MR. KIMBERLY: -- that Democrats and --

4 JUSTICE SOTOMAYOR: -- I -- I --

5 because of the uniqueness of this. This is --

6 MR. KIMBERLY: Yes. No, that's right.

7 I'm just saying on the facts of this case.

8 That's right.

9 JUSTICE SOTOMAYOR: On the facts of  
10 this case, whatever the public maps might have  
11 been in an open situation were different than  
12 what happened here?

13 MR. KIMBERLY: That's right. That  
14 would be a --

15 JUSTICE SOTOMAYOR: That's what you're  
16 saying?

17 MR. KIMBERLY: -- that would a very  
18 different case, Your Honor.

19 JUSTICE GORSUCH: Well, but -- but  
20 just to clarify, I -- and I just want to make  
21 sure I understand your position, I'm supposing  
22 that the people fully understood the -- the  
23 gerrymander that took place and fully  
24 understood that there was an alternative of  
25 pure proportional representation, and it would

1 be great, all right. And they rejected it in  
2 favor of gerrymander. Now you may say that  
3 that's outlandish and that isn't what happened  
4 in Maryland, but let's just suppose it is.

5 You -- it would still be incumbent, in  
6 your view, on a court to declare that -- the  
7 gerrymander unconstitutional?

8 MR. KIMBERLY: I want to be clear that  
9 I understand the hypothetical. The electorate  
10 are being presented with an option, you -- you  
11 get proportional representation or you get this  
12 map; which do you choose?

13 JUSTICE GORSUCH: Yeah.

14 MR. KIMBERLY: And -- and a majority  
15 of Democrats who do better under this map  
16 choose this map?

17 JUSTICE GORSUCH: Right.

18 MR. KIMBERLY: I think that's --

19 JUSTICE GORSUCH: Unconstitutional --

20 MR. KIMBERLY: -- unconstitutional.

21 JUSTICE GORSUCH: -- and we must say  
22 so, yeah.

23 MR. KIMBERLY: And I -- I don't think  
24 the Court should -- should feel especially  
25 troubled about that, for exactly the reason

1 that the map itself here --

2 JUSTICE GORSUCH: Sure.

3 MR. KIMBERLY: -- I think, is  
4 unconstitutional.

5 I want to come back to the question of  
6 justiciability. I think the question here is  
7 not just whether there is a potential political  
8 solution. That doesn't answer the question  
9 whether this Court bears an obligation to  
10 enforce the First Amendment in these  
11 circumstances.

12 The question here is whether the  
13 theory that we have put forward before the  
14 Court as applied in these circumstances  
15 entirely defies judicial judgment so that it  
16 cannot be called a legal question at all.

17 And with respect to my friends on the  
18 other side, I just don't think there's any  
19 basis for saying that. We have this Court's  
20 opinions in its racial gerrymandering cases, in  
21 its racial vote dilution cases, in its ballot  
22 access cases, its First Amendment retaliation  
23 cases, and its political patronage cases. In  
24 all of those contexts, this Court finds  
25 consistently reliable, justiciable standards

1 for deciding exactly the kinds of burdens that  
2 are being imposed here.

3 And if they are manageable in that  
4 context, they are manageable in this context.

5 JUSTICE ALITO: Does your test --

6 JUSTICE KAGAN: Am I not --

7 JUSTICE ALITO: -- apply only to  
8 districts that are drawn for a partisan -- to  
9 -- to favor one political party over another,  
10 or could it apply to retaliation for some other  
11 reason?

12 For example, suppose the objection of  
13 the map makers -- map makers is not that a  
14 particular -- that this district had voted  
15 Republican, but it was that the particular  
16 person in a district, the representative in  
17 that district, was a pain in the rear and so  
18 they wanted to get rid of that person.

19 Would -- would that be prohibited by  
20 the First Amendment?

21 MR. KIMBERLY: Not under the theory  
22 that -- that we've put forward. I --

23 JUSTICE ALITO: Well, how could you  
24 square that with your retaliation theory?

25 MR. KIMBERLY: Well, I want to be

1 clear --

2 JUSTICE ALITO: So I vote for this  
3 person because this guy is -- this is the  
4 person that I want. And the map makers say we  
5 want this person out of the House, so we're  
6 going to draw the map so that person is  
7 excluded. The -- they're --

8 MR. KIMBERLY: So that --

9 JUSTICE ALITO: -- diluting my -- my  
10 -- I want to vote for this -- for my  
11 representative and they're diluting my vote.  
12 They're taking away my opportunity to elect the  
13 person that I want.

14 MR. KIMBERLY: I -- so, to begin with,  
15 the First Amendment retaliation framework that  
16 we've referenced in our briefing is just that;  
17 it's a framework. We don't think there's any  
18 particular magic in the word "retaliation"  
19 itself.

20 The question presented in this context  
21 by the First Amendment is whether the state  
22 officials are deliberately burdening particular  
23 groups of voters because of the way those  
24 voters have expressed themselves. That does  
25 not to me sound -- sound like the scenario that

1 you're describing where the -- the concern in  
2 the cases, the behavior of a particular  
3 individual -- and -- and I might add, in  
4 addition, that drawing an individual out of a  
5 district does not prevent that individual from  
6 continuing to run as a candidate in that  
7 district.

8 So I'm -- I'm just not sure that  
9 the --

10 JUSTICE KAGAN: Mr. Kimberly --

11 JUSTICE KAVANAUGH: How much does --  
12 go ahead.

13 JUSTICE KAGAN: -- Kimberly, I'm  
14 wondering how easy it would be for plaintiffs  
15 to prevail under your standard in the future?  
16 Suppose we accepted your test and we made clear  
17 that this kind of behavior was  
18 unconstitutional, so you didn't have all these  
19 people bragging about how much partisan  
20 gerrymandering they were doing, right?

21 What makes your case so easy is that  
22 everybody was completely upfront about what  
23 they were doing, as they were in the North  
24 Carolina case as well, because they think it's  
25 legal, so let's say what we're doing.

1                   But if we say it's not legal and that  
2                   kind of intent evidence just disappears because  
3                   you don't find silver bullets like that very  
4                   often, then what kind of effects evidence would  
5                   you need to prove your claim?

6                   MR. KIMBERLY:   Well, the --

7                   JUSTICE KAGAN:   Now you have all that  
8                   intent evidence; don't worry.  This is not  
9                   affecting your case.

10                  MR. KIMBERLY:   Yeah.

11                  (Laughter.)

12                  JUSTICE KAGAN:   But, you know, suppose  
13                  people act like normal people and they just  
14                  stop saying all these things, and the next case  
15                  comes along.  What would you need to show  
16                  intent and effects and causation?

17                  MR. KIMBERLY:   Well, I think, to show  
18                  intent, it would be the same sort of evidence  
19                  that you would need in racial gerrymandering  
20                  cases.  This Court deals with that question all  
21                  the time.  I think that -- that part of the  
22                  test would --

23                  JUSTICE KAGAN:   I mean, it would  
24                  really raise the bar, wouldn't it?

25                  MR. KIMBERLY:   It -- it would, Your

1 Honor. It would --

2 JUSTICE KAGAN: I mean, you would have  
3 to show really dramatic effects to be able to  
4 infer intent, wouldn't you?

5 MR. KIMBERLY: Yes, I think that's  
6 right.

7 JUSTICE KAGAN: So, in fact, this  
8 would be the outlier cases.

9 MR. KIMBERLY: I -- I think --

10 JUSTICE KAGAN: This is not --

11 MR. KIMBERLY: -- as a practical  
12 matter --

13 JUSTICE KAGAN: -- in every case in  
14 the universe, every district in the universe.

15 MR. KIMBERLY: Not -- not at all, Your  
16 Honor, and --

17 CHIEF JUSTICE ROBERTS: Well, why just  
18 -- why would you have to show dramatic evidence  
19 of effects before you can infer intent?

20 MR. KIMBERLY: Well, I -- I think, as  
21 a general matter, showing intent when you're  
22 talking about specific intent rather than  
23 general intent, which is the standard that the  
24 district court below applied and we think is  
25 the correct standard, I think raises the bar

1 very high when you don't have direct evidence  
2 of -- such as the admissions that we have on  
3 our record here. You've got to show --

4 CHIEF JUSTICE ROBERTS: So you think  
5 if you have the redistricting controlled by one  
6 political party and it comes out that the  
7 districts reflect a significant benefit for  
8 that particular party, that's not enough to  
9 infer an intent to draw the districts with an  
10 eye to the partisan effect?

11 MR. KIMBERLY: Well, I think here,  
12 Your Honor, that -- that may or may not be so.  
13 I think here, though, the question of intent  
14 dovetails with the question of justification.

15 If in any of those -- if in a  
16 circumstance where you have a single-party  
17 control of the government and you have a badly  
18 imbalanced map that might suggest improper  
19 intent, as long as the state can come forward  
20 with some legitimate justification for the  
21 imbalance as it's drawn, and as the Court has  
22 said in its racial gerrymandering cases, the  
23 sorts of political considerations in -- in map  
24 drawing are myriad and malleable and they  
25 involve a delicate balancing of all of these

1 factors, all the state has to come forward with  
2 is some explanation for the map as it's drawn  
3 and the burdens imposed identified by the  
4 plaintiffs --

5 JUSTICE KAVANAUGH: So, if you have  
6 the same -- if you have the record here with no  
7 intent evidence, to pick up on Justice Kagan's  
8 question, and it was five/three, any chance of  
9 prevailing on that?

10 MR. KIMBERLY: We don't have evidence  
11 of intent and it's a five/three map, I think  
12 that's a very difficult case.

13 JUSTICE KAVANAUGH: How about six/two?

14 MR. KIMBERLY: I think that's also  
15 very difficult.

16 JUSTICE KAVANAUGH: How about  
17 seven/one?

18 MR. KIMBERLY: I think, seven/one, it  
19 becomes easier to prove intent. There's no  
20 question that the -- that the results of --

21 JUSTICE KAVANAUGH: And that's because  
22 it deviates from proportional?

23 MR. KIMBERLY: It deviates for -- from  
24 -- from proportional, but I -- I think the  
25 question also, as I was saying about the third

1 prong, is whether there are neutral  
2 justifications, and they might be things like  
3 geography. Here, obviously, Maryland's  
4 geography has a very --

5 JUSTICE KAVANAUGH: That's to justify  
6 it, but it would be a problem? The seven/one  
7 is a problem. The five/three almost certainly  
8 not a problem. Which I think has got to be  
9 right.

10 MR. KIMBERLY: Well, I think that's  
11 right, but, to be clear, that isn't to say that  
12 our test tends towards proportionality. It's  
13 just to say what --

14 JUSTICE KAVANAUGH: Well, I -- I think  
15 if Justice -- to play out Justice Kagan's  
16 hypothetical, which I think is a good one,  
17 there would be no intent evidence in the  
18 future, or at least it would be hidden. It  
19 would be harder to discover.

20 So then it would be a lot on effects,  
21 and five/three, it would be hard to prove.  
22 Seven/one is easy to prove. Well, that sounds  
23 like something where something that's balanced,  
24 to use your words, which is the word you used,  
25 five/three would be okay, because it's close to

1 the proportion of Democrats and Republicans in  
2 the state.

3 MR. KIMBERLY: Yeah.

4 JUSTICE KAVANAUGH: Something that's  
5 really extreme, to use Justice Kagan's words,  
6 would not be okay, seven/one, because it  
7 deviates so far from the proportion of --

8 MR. KIMBERLY: Right, it's just --

9 JUSTICE KAVANAUGH: -- Democrats and  
10 Republicans.

11 MR. KIMBERLY: -- to say that where  
12 there's smoke, you're probably going to find  
13 fire. And if you don't see smoke, you're  
14 probably not going --

15 JUSTICE GORSUCH: Is another way --

16 MR. KIMBERLY: -- to find fire.

17 JUSTICE GORSUCH: -- of putting the  
18 test: I know it when I see it?

19 (Laughter.)

20 MR. KIMBERLY: Certainly not, Your  
21 Honor.

22 JUSTICE KAVANAUGH: Now your test here  
23 --

24 CHIEF JUSTICE ROBERTS: So it sounds  
25 like you might be comfortable with Justice

1 Breyer's two-thirds limit? Five/three is  
2 probably okay. Seven/one is not. I mean, that  
3 suggests some sort of, you know, rough  
4 mathematical threshold.

5 MR. KIMBERLY: Your Honor, I don't  
6 think a mathematical threshold is -- is  
7 probably the way to go about it, in large part  
8 because every state is different and, you know,  
9 how the geography plays out in every state is  
10 different.

11 And what other sorts of justifications  
12 there may be, I'm sure will vary. As I said,  
13 the Court has recognized --

14 JUSTICE KAGAN: It just seems, Mr.  
15 Kimberly, that what you're saying is that once  
16 people stop putting these statements on the  
17 record, which they will, that what your test  
18 will deliver is a way of going after the worst  
19 of the worst. And this happens to be one of  
20 them.

21 MR. KIMBERLY: I -- I think that's  
22 right, Your Honor. And if I may also come back  
23 to -- to a -- to a point that you raised  
24 earlier. I think we have to give legislators  
25 due credit.

1           If this Court says that this kind of  
2     discrimination against groups of voters is  
3     unlawful, I have faith certainly that most  
4     legislators will listen and abide this Court's  
5     teachings.

6           And so the -- there is not enough time  
7     in between now and the 2020 Census to litigate  
8     any new cases. And so the next round of  
9     litigation that this Court sees after adopting  
10    a standard in this case or in North Carolina  
11    will be after the 2020 redistricting.

12           And presuming that state legislators  
13    abide this Court's teachings, there's every  
14    reason to think that the incidents of extreme  
15    partisan gerrymandering will be significantly  
16    reduced.

17           The only reason we see it as often as  
18    we do today in what is extreme, seems less  
19    extreme, is only because this Court has not  
20    identified a -- a standard to rein in the  
21    practice.

22           JUSTICE KAVANAUGH: Can I isolate the  
23    role of geography with this question?

24           MR. KIMBERLY: Certainly.

25           JUSTICE KAVANAUGH: Suppose you have

1 crazy line drawing, something similar to what  
2 -- what is in Maryland, but it ends up in  
3 five/three districts. Any problem there? No  
4 partisan intent on the record, but it's -- the  
5 lines are really misshaped, but it's  
6 five/three.

7 MR. KIMBERLY: Well, it wouldn't be a  
8 First Amendment problem. It wouldn't be a  
9 problem under our test. And, indeed, what the  
10 evidence shows is there are a lot of reasons to  
11 think you might still see that.

12 JUSTICE KAVANAUGH: Okay. And if it  
13 ends up seven/one, I think the way -- and I'm  
14 just trying to understand your test -- if it  
15 ends up seven/one, the state's in trouble,  
16 unless the state could show actually this fits  
17 with county boundaries and town boundaries and  
18 city boundaries and actually the geography  
19 makes sense and we don't want to divide the bay  
20 and all kinds of things like that, right?

21 MR. KIMBERLY: Yeah. I mean, I -- to  
22 be clear, I don't think there are actually any  
23 such justifications in this case.

24 JUSTICE KAVANAUGH: Right. I --

25 MR. KIMBERLY: Yeah.

1 JUSTICE KAVANAUGH: -- I take your  
2 point on that. They also made a -- so that's  
3 helpful on the geography. They made a point --  
4 I just wanted to give you a chance to respond  
5 -- on the Sixth District not being durable  
6 because Governor Hogan won. Can you respond to  
7 that?

8 MR. KIMBERLY: Yes. It's the  
9 difference between what the experts call  
10 endemic elections and exogenous elections.

11 What map drawers look at is the way  
12 that voters vote in congressional elections  
13 when they're looking to rig congressional  
14 elections.

15 There -- on a number of occasions,  
16 there have been suggestions that legislatures  
17 are going to act as legislatures. And the  
18 framers of the Constitution, having committed  
19 the Elections Clause to legislatures, we have  
20 to expect they will act that way.

21 That would be a reason to overturn  
22 this Court's ballot access cases. In -- in  
23 devising access to ballots and how ballots are  
24 comprised, there's no reason to think that --  
25 that those in power wouldn't be expected to use

1 that authority to regulate elections to their  
2 own partisan ends. And yet we do not accept  
3 that they may. That is the upshot of this  
4 Court's ballot access cases.

5 CHIEF JUSTICE ROBERTS: Well, I mean,  
6 history has a little bit of, perhaps,  
7 significance there. Gerrymandering has been  
8 part of American history from the beginning, as  
9 was pointed out in the previous case.

10 I'm not sure, maybe it has been, I  
11 don't know that interference with ballot access  
12 is on the same level of the air they breathe,  
13 as -- as your friend on the other side put it.

14 MR. KIMBERLY: Your Honor, that may be  
15 true, but since the beginning of the Republic,  
16 gerrymandering has been recognized also as a  
17 constitutional offense. Indeed, the 1812  
18 editorial coining the term "gerrymander" called  
19 it a constitutional offense.

20 I think everybody has understood that  
21 it is a constitutional violation --

22 CHIEF JUSTICE ROBERTS: Well --

23 MR. KIMBERLY: -- from the beginning.

24 CHIEF JUSTICE ROBERTS: -- your best  
25 authority is a newspaper editorial?

1 (Laughter.)

2 MR. KIMBERLY: Well, certainly --  
3 certainly not, Your Honor. The -- the legal  
4 tools for this Court to -- this Court and  
5 Article III courts generally to address this  
6 problem haven't emerged until modern times.

7 The incorporation of the First  
8 Amendment of the states happened in the 1940s.  
9 This Court's ballot access and political  
10 patronage cases were decided in the '60s and  
11 '70s.

12 I don't think it's any answer to those  
13 --

14 JUSTICE ALITO: What does  
15 incorporation have --

16 MR. KIMBERLY: -- cases to say that  
17 they're ahistorical.

18 JUSTICE ALITO: -- to do with  
19 congressional districts?

20 MR. KIMBERLY: I'm sorry?

21 JUSTICE ALITO: What does  
22 incorporation have to do with congressional  
23 districts?

24 MR. KIMBERLY: Well, congressional  
25 districting is an act by state legislatures.

1 If state legislatures are cabined by the First  
2 Amendment in how they exercise that authority,  
3 the First Amendment has to be a limit on their  
4 authority.

5 JUSTICE KAVANAUGH: You -- you --

6 MR. KIMBERLY: And that wasn't  
7 recognized by this Court until the 1940s.

8 JUSTICE KAVANAUGH: You said  
9 gerrymandering has been recognized as  
10 unconstitutional.

11 But are you defining -- if -- if  
12 gerrymandering is defined as deviation from  
13 what you would otherwise get with proportional,  
14 Justice O'Connor and Justice Kennedy have made  
15 very clear in various opinions that the  
16 Constitution contains no such guarantee.

17 MR. KIMBERLY: Your Honor, what we  
18 take to be partisan gerrymandering is the  
19 singling out of groups of voters for disfavored  
20 treatment in redistricting and using  
21 redistricting in turn to make it -- to doom  
22 those voters to usual electoral defeat.

23 That is the original understanding of  
24 what gerrymandering was in 1812 and in the 18th  
25 Century before that. And we think that is a

1 clear violation of the First Amendment.

2 I --I'll just say very briefly, the  
3 other explanations that General Sullivan has  
4 put before the Court explaining the -- the  
5 shape of the Sixth District are all flatly  
6 disproved by our alternative map, which is  
7 reproduced at JA 787.

8 That map respects all of the political  
9 considerations elsewhere throughout the state  
10 and does not result in flipping the district to  
11 Democratic control.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Five minutes, Mr. Sullivan.

16 REBUTTAL ARGUMENT OF STEVEN M.

17 SULLIVAN ON BEHALF OF THE APPELLANTS

18 MR. SULLIVAN: Thank you. I hope not  
19 to take all of that time.

20 I think what we've heard, if nothing  
21 else, confirms that the plaintiffs' test and  
22 the district court's test does not provide the  
23 answer the Court is looking for, a test that  
24 can tell us when the redistricting has gone too  
25 far, and -- and --

1 JUSTICE GINSBURG: Why not? You have  
2 intent, which on this case they -- all the  
3 leaders said, yeah, that's what we want to do,  
4 reduce the Republican representation by one.

5 And then they tell the map makers to  
6 achieve that result. The result is achieved.  
7 And, as a result of the map, this will continue  
8 into the future.

9 Why isn't that --

10 MR. SULLIVAN: Well, there's a number  
11 of things wrong with that. The -- into the  
12 future is not proven at all. The map that was  
13 developed, the expert testimony agreed that it  
14 was a competitive map. Independent sources  
15 said it was a plus two Democratic.

16 And in 2010, the last election before  
17 the redistricting, Democrats across the country  
18 won 52 congressional seats in districts that  
19 were more Democratic than the Sixth District in  
20 Maryland.

21 So what these legislators were looking  
22 at was not a map that was a lock for a future  
23 domination by Democrats in the Sixth District.  
24 It was a very vulnerable map, if you look at  
25 the results of the 2010 elections, where

1       Republicans swept to victory in district after  
2       district with more Democratic components than  
3       the Sixth District.

4                But the reason that this test doesn't  
5       work, as counsel revealed, is that it abandons  
6       what this Court or members of this Court,  
7       including Justice Kagan in her Gill  
8       concurrency, have identified as an essential  
9       evil of gerrymandering, which is the  
10      politicians getting one over on the people and  
11      not letting the people's will control what the  
12      map is going to be.

13               In this case, the people's will was --  
14      was expressed in a referendum overwhelmingly  
15      favoring the map. And counsel says this Court  
16      needs to invalidate that result, which would be  
17      directly contrary to what this Court has said  
18      it's trying to get at in gerrymandering, which  
19      is the polls deciding where their district  
20      lines are going to be and not the people  
21      deciding who they get to vote for.

22               JUSTICE ALITO: You mean if there's a  
23      referendum on a map that is -- that heavily  
24      favors one party, and the campaign -- and --  
25      and this is a state in which that party is the

1 majority party -- and the campaign in favor of  
2 the referendum has approved this map because  
3 this will really favor the party that you like,  
4 and the majority votes for that, that would not  
5 be -- that would be different from the  
6 legislature doing it?

7 MR. SULLIVAN: Well, in the rhetoric,  
8 the discord as used in the gerrymandering area,  
9 yes, it would, because it's the people's will  
10 being expressed, which is the harm that  
11 politicians who gerrymander are subordinating  
12 the people's will. That didn't happen here.

13 JUSTICE ALITO: So, when the  
14 legislature does it and the -- the members of  
15 which are elected by the people, that's one  
16 thing, but, when people do it directly, it's a  
17 different thing?

18 MR. SULLIVAN: It is a different  
19 thing. Now I'm not saying that the result can  
20 always be constitutional. This Court has held  
21 that, for example, the people could not approve  
22 a map with unequal population. That -- that's  
23 one of this Court's precedents.

24 But where the -- where the debate is  
25 whose First Amendment rights are going to

1 prevail, these seven plaintiffs -- it's not a  
2 class action -- or the 1.5 million Marylanders  
3 who voted to approve this plan, I think that's  
4 a much more difficult question that was even --  
5 that even attempted to a -- for an answer to be  
6 provided in this case.

7           There was no attempt by the Court  
8 below to consider the referendum or its impact  
9 whatsoever. And so this test cannot be the  
10 answer to how do we protect the people and  
11 their ability to ensure that politicians do not  
12 draw the districts to serve the politicians  
13 instead of the people.

14           Unless there are any further  
15 questions, thank you.

16           CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel. The case is submitted.

18           (Whereupon, at 12:24 p.m., the case  
19 was submitted.)

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## Official - Subject to Final Review

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