

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS C. ALEXANDER, IN HIS)
OFFICIAL CAPACITY AS PRESIDENT)
OF THE SOUTH CAROLINA SENATE,)
ET AL.,)
Appellants,)
v.) No. 22-807
THE SOUTH CAROLINA STATE)
CONFERENCE OF THE NAACP, ET AL.,)
Appellees.)

Pages: 1 through 137
Place: Washington, D.C.
Date: October 11, 2023

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8 v.) No. 22-807
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10 CONFERENCE OF THE NAACP, ET AL.,)
11 Appellees.)
12 - - - - -

13
14 Washington, D.C.
15 Wednesday, October 11, 2023
16

17 The above-entitled matter came on for
18 oral argument before the Supreme Court of the
19 United States at 10:04 a.m.
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1 APPEARANCES:

2 JOHN M. GORE, ESQUIRE, Washington, D.C.; on behalf of
3 the Appellants.

4 LEAH C. ADEN, ESQUIRE, New York, New York; on behalf
5 of the Appellees.

6 CAROLINE A. FLYNN, Assistant to the Solicitor General,
7 Department of Justice, Washington, D.C.; for the
8 United States, as amicus curiae, supporting
9 neither party.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 22-807, Alexander versus the South Carolina State Conference of the NAACP.

Mr. Gore.

ORAL ARGUMENT OF JOHN M. GORE
ON BEHALF OF THE APPELLANTS

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

District 1 is not a racial gerrymander. Rather, the General Assembly largely preserved District 1 from the constitutional benchmark plan and made changes based on traditional criteria and politics. The panel acknowledged that the General Assembly pursued a political goal of increasing District 1's Republican vote share. It achieved that goal by moving Republicans into the district and Democrats out of the district. All of the direct evidence confirms that it used political data, not racial data, to identify Republicans and Democrats.

The panel declared District 1 a racial

1 gerrymander only by departing from this Court's
2 precedents and adopting sua sponte an erroneous
3 racial target theory.

4 First, the panel failed to enforce the
5 alternative map requirement. In a
6 circumstantial case like this, only such an
7 alternative can disentangle race and politics.

8 Second, the panel's racial target
9 theory hyper-entangled race and politics and
10 simply makes no sense. The panel believed the
11 General Assembly needed a racial target in
12 Charleston County to achieve its political goal
13 district-wide. But a 17 percent racial target
14 says nothing about voter turnout, says nothing
15 whatsoever about the predominant majority of
16 voters in predominantly white Charleston County,
17 and also is irreconcilable with District 1's
18 recent electoral history.

19 Moreover, even the panel agreed that
20 the General Assembly made political changes in
21 other parts of District 1 without using a racial
22 target. The General Assembly had no reason to
23 and did not use a racial target. It used
24 political data to pursue its political goals.

25 If left uncorrected, the decision

1 below will undermine this Court's holding that
2 partisan gerrymandering claims are not
3 justiciable. Partisan gerrymandering claims can
4 always be repackaged as racial gerrymandering
5 claims if all plaintiffs in lower courts have to
6 do is ignore direct evidence of intent, infer a
7 racial target from the correlation between race
8 and politics, and point to malleable expert
9 analysis.

10 This Court should reverse and not
11 allow its exacting precedents to be so easily
12 subverted.

13 I welcome the Court's questions.

14 JUSTICE THOMAS: Mr. Gore, we review
15 this for clear error. And the district court
16 credited the plaintiffs' expert and found your
17 experts non-credible. So how does that meet the
18 clear error standard?

19 MR. GORE: The Court will proceed to
20 clear error if it rejects our legal arguments,
21 but let me turn to Dr. Ragusa first. All three
22 of Dr. Ragusa's opinions raised in this appeal
23 contradict his own data and conclusions in his
24 initial report, which actually demonstrated that
25 race did not predominate in the enacted plan's

1 changes to District 1.

2 His own data showed that politics was
3 a stronger predictor than race of whether a VTD
4 was moved out of District 1. He also concluded
5 that there was no statistically significant
6 correlation between race and whether VTDs were
7 moved into District 1. That's at page 187 of
8 the Joint Appendix and page 514 of our
9 jurisdictional appendix.

10 So those facts alone establish that
11 Dr. Ragusa's three opinions at issue in this
12 appeal are unreliable and unprobative.

13 But there's even more. For each of
14 those three opinions, Dr. Ragusa committed other
15 errors. He did not control for VTD location or
16 proximity to the district line. He also did not
17 control for where in the district voters lived.

18 CHIEF JUSTICE ROBERTS: Well, I
19 thought -- I thought he said that as far as
20 geographic contiguity, that the -- the size of
21 the different districts was a adequate proxy for
22 that.

23 MR. GORE: He did say that traditional
24 principles were embedded in his analysis, but
25 whatever he meant by that, he did also admit on

1 cross-examination that he didn't test or control
2 for those principles and whether they explained
3 the decisions the General Assembly actually
4 made.

5 That's the same error that the experts
6 made in Allen that this Court set aside just
7 last term. His failure to consider the location
8 of VTDs and voters within the district is the
9 same error that was committed by the expert in
10 Cromartie II, where this Court reversed a
11 finding of racial gerrymandering under the clear
12 error standard.

13 JUSTICE KAGAN: Did your expert
14 present an alternative study which did control
15 for geography and reached a different result?

16 MR. GORE: He did not try to mirror
17 Dr. Ragusa's study --

18 JUSTICE KAGAN: Because that would
19 have been the easiest way to undermine the
20 theory. I mean, as I understand it, this was
21 hardly touched upon by -- by -- by -- by the
22 state below. And, certainly, the state did not
23 do what would seem to be the -- the normal thing
24 if you were really concerned about this, which
25 is to say: Look at our study. We controlled

1 for geography. The results are entirely
2 different.

3 MR. GORE: We did raise objections to
4 Dr. Ragusa's methodology, and as I was
5 explaining, it is a flawed methodology and not
6 reliable.

7 Moreover, the state presented direct
8 testimony from the map drawer to explain which
9 VTDs were chosen and why. That direct evidence
10 showed, like all the other direct evidence, that
11 decisions were made based on politics and
12 traditional principles and not using race at
13 all.

14 JUSTICE SOTOMAYOR: I think you end up
15 in a very poor starting point under clear error
16 arguing the substance of believability of one
17 expert over another, because credibility
18 findings under clear error standard must be
19 deferred to to the district court.

20 I understand your points about -- your
21 point about Dr. Ragusa, but I just point out
22 that other experts before the court and he
23 himself said that geography was very much
24 embedded as part of the structure of his
25 analysis.

1 You may disagree with that. It's
2 going to be very hard for you to show that no
3 fact finder could credit that understanding of
4 his testimony.

5 But I think what I'm really troubled
6 by is, going back to Justice Thomas's question,
7 what's the legal error and what's the clear
8 error? Just tick them off for me.

9 MR. GORE: There are several legal
10 errors, Justice Sotomayor.

11 JUSTICE SOTOMAYOR: Not facts. I want
12 legal errors or clear errors beyond -- under our
13 standard.

14 MR. GORE: The first legal error is a
15 failure to enforce the alternative map
16 requirement.

17 JUSTICE KAGAN: Okay. I'm going to
18 butt in. And I'm sorry, Justice Sotomayor.

19 JUSTICE SOTOMAYOR: Yes, you can --
20 you can start there.

21 JUSTICE KAGAN: The alternative map
22 requirement, I mean, doesn't exist. You know,
23 sometimes this Court, I think, holds things, and
24 then I go back to the opinion and I think:
25 Well, maybe we weren't as clear as we might have

1 been. Not here.

2 I'm just going to read from -- from
3 Cooper: A plaintiff's task is simply to
4 persuade the trial court, without any special
5 evidentiary prerequisite, that race, not
6 politics, was the predominant consideration. In
7 no area of our equal protection law have we
8 forced plaintiffs to submit one particular form
9 of proof to prevail, nor would it make sense to
10 do so here. An alternative map is merely an
11 evidentiary tool. Neither its presence nor its
12 absence can itself resolve a racial
13 gerrymandering claim.

14 I don't know how to more clearly say
15 that there is no alternative map requirement in
16 these kinds of cases.

17 MR. GORE: Cooper was directed -- was
18 addressing a case where there was direct
19 evidence of racial predominance. It also said
20 on page 322 in the majority opinion: In a case
21 like Cromartie II -- that is, one in which the
22 plaintiffs had meager direct evidence of a
23 racial gerrymander and needed to rely on
24 evidence of forgone alternatives -- only maps of
25 that kind could carry the day.

1 JUSTICE KAGAN: All we were saying
2 there, Mr. Gore, is that in a case with no other
3 evidence, you needed some evidence. So that is
4 not this case. Cromartie II was making a very
5 case-specific point, look at this case, there's
6 none -- none of this kind of evidence, there's
7 none of that kind of evidence, there's none of
8 the other kind of evidence. So, my gosh, in
9 that case, you needed a map.

10 But this is case by case, all we were
11 saying is that when you have no other evidence,
12 you better present a map. But that's not to say
13 that there's anything like an alternative map
14 requirement. If you make your case some other
15 way, that's good enough.

16 And, here, the Court found, again, on
17 a clear error standard, that the plaintiffs made
18 their case some other way.

19 MR. GORE: But even if that's the
20 correct reading of Cooper, Justice Kagan, there
21 were still other legal errors in how the panel
22 conducted its analysis.

23 JUSTICE ALITO: Well, Mr. Gore --

24 MR. GORE: One --

25 JUSTICE ALITO: -- I thought your

1 argument was that at least as a practical
2 matter, in a case in which there is no direct
3 evidence or virtually no direct evidence, there
4 is no way in which a plaintiff can disentangle
5 race and politics, except by providing an
6 alternative map. I thought that was your legal
7 argument.

8 MR. GORE: That is.

9 JUSTICE KAGAN: And that's exactly
10 what Cooper says is not the case.

11 JUSTICE ALITO: Well, one may read
12 Cooper a different way. Cooper was a case in
13 which there was a lot of direct evidence, was
14 there not?

15 MR. GORE: Yes.

16 JUSTICE JACKSON: Well, let me ask
17 you, how could there be direct evidence really
18 in this kind of case? So this is what I'm a
19 little concerned about because, to the extent
20 that this distinction's turning on whether or
21 not there is direct evidence, I wonder if it is
22 reasonable to require such evidence or -- or say
23 that such evidence would exist in a situation
24 that is not a majority/majority -- a
25 majority/minority district scenario.

1 You can see how there would be direct
2 evidence when the state's goal is to try to, in
3 its view, comply with the VRA, they're trying to
4 make a majority/minority district, so we're
5 going to have some evidence of people saying
6 that.

7 But, in a situation like this, where
8 that is not the case, where the state is saying
9 instead, we are trying to, you know, achieve a
10 partisan tilt, I guess I don't understand --
11 and, excuse me, we've also said that its, you
12 know, intent to use race is a very hard thing to
13 prove just on its own.

14 Are you asking that we have the
15 smoking gun in a situation like this?

16 MR. GORE: Not at all, Justice
17 Jackson. As you pointed out, of course, in
18 majority/minority district contexts, there's
19 often direct evidence of a use of race and even
20 of race predominating.

21 You could also have that in another
22 context if the map-drawer or some key legislator
23 admitted to using race as a proxy for politics
24 because they didn't have adequate election data
25 or --

1 JUSTICE JACKSON: But are you
2 requiring that? Could we ever -- could we ever
3 make this showing on circumstantial evidence
4 alone? There were some amicus briefs related to
5 computer drawings and that sort of thing that
6 they thought would be particularly helpful in
7 this context.

8 MR. GORE: The -- the alternative map
9 itself would perform that requirement because,
10 if race predominated over politics, then any
11 alternative map can be drawn that preserves the
12 political outcome the General Assembly was
13 seeking while removing the alleged racial
14 effect.

15 JUSTICE SOTOMAYOR: Putting that
16 aside, there were alternative maps here that
17 showed that if race wasn't used, the map would
18 not look like this. So it didn't show what
19 you're saying. But we go back, let's assume,
20 let's move back past the map because I think
21 Cooper was petulantly clear that you don't need
22 a smoking gun, and if you don't need a smoking
23 gun, you don't need direct evidence.

24 What are the other legal errors?

25 MR. GORE: Another legal error was the

1 panel's misconstruction of the Sell -- Shelby
2 County decision. It also failed to disentangle
3 race and politics, as this Court has directed it
4 to do. It ignored volumes of direct evidence on
5 the politics-versus-race question. It didn't
6 even --

7 JUSTICE SOTOMAYOR: It didn't --

8 MR. GORE: -- discuss that evidence --

9 JUSTICE SOTOMAYOR: -- it -- it --

10 MR. GORE: -- in its opinion.

11 JUSTICE SOTOMAYOR: -- it rejected --
12 the person who drew it was Mr. Roberts? Mr. --
13 and it disclaimed his credibility. So whatever
14 the legislature said in terms of their intent is
15 irrelevant. It's what he did, and the Court did
16 not believe that he didn't use race. It said
17 so.

18 MR. GORE: The Court did not accept
19 his version of events but didn't make a
20 credibility finding based on his demeanor or
21 testimony at trial. It simply credited other
22 evidence.

23 But, in conducting the sensitive
24 inquiry that Cooper requires, the Court was
25 required to look at all the evidence, direct and

1 circumstantial, of intent, and it simply didn't
2 do that here. Senator Campsen testified --

3 JUSTICE KAGAN: That's the legal
4 error, is that they didn't correctly weigh the
5 evidence?

6 MR. GORE: They didn't correctly
7 conduct the inquiry.

8 JUSTICE KAGAN: Because that sounds
9 like a factual error to me. I mean, your brief
10 basically, you know, says we have legal errors,
11 and then it says, well, the evidence didn't
12 show.

13 Those are factual errors. That's
14 subject to the clear error standard, going back
15 to Justice Thomas's question.

16 MR. GORE: To the extent we've also
17 made a clear error argument, I agree, but we've
18 pointed out that the district court failed to
19 properly apply the standards the district court
20 required in Cooper.

21 Cooper could not have been clearer on
22 that point that the district court is required
23 to weigh all the direct and circumstantial
24 evidence of intent to ensure that plaintiffs
25 have disentangled race and politics.

1 They also were required to presume the
2 good faith of the General Assembly and its
3 explanation for what it did in the lines that it
4 drew. But the panel failed to do both of those
5 things. There was mountains of direct and
6 circumstantial --

7 JUSTICE KAGAN: And that just sounds
8 to me as though you have a different view of the
9 evidence, that you think, well, the evidence
10 showed that we were just doing politics. And
11 the court said no, the evidence showed that you
12 were doing race as a proxy for politics.

13 And, surely, there were good reasons
14 to do race as a proxy for politics here. I
15 mean, if you look at what information the map-
16 drawers had on their computer, the information
17 the map-drawers had on their computer was a
18 single presidential election year voting data
19 and then lots of race data.

20 And everybody can tell you that if you
21 really want to draw a stable partisan
22 gerrymander, you do not rely on a single
23 presidential year election data. I mean, they
24 had not only the opportunity, it was sitting
25 there on their computers, but the clear

1 incentive to be looking at this race data, which
2 is certainly more predictive of future voting
3 behavior than a single presidential year
4 election in which President Trump was the
5 candidate, which further distorts voting
6 behavior.

7 MR. GORE: We -- we totally disagree
8 with that reading of the record. The panel
9 itself did not call into question the
10 reliability of the General Assembly's election
11 data. It, in fact, used that election -- very
12 election data to support its racial target
13 theory.

14 So, if that election data is
15 unreliable, the panel's entire line of reasoning
16 is unreliable. All of the unrebutted direct
17 evidence established that the map-drawing team
18 thought that that evidence was reliable and
19 actually used it to draw lines.

20 Now, on the question of whether racial
21 data --

22 JUSTICE KAGAN: There was evidence
23 that they looked at it. There was evidence that
24 it went into their analysis. But, I mean -- I
25 mean, look at it -- there was -- what the --

1 what the panel said was that there was also
2 plenty of evidence that they looked at the
3 voting record and not just as a legal check on
4 the back end. Nobody needs to have the voting
5 records on your computer as you draw the maps in
6 order to make a legal check.

7 What they were basically doing was to
8 make sure that the population of Blacks in each
9 precinct, in each district, you know, did not
10 rise above the -- the -- the -- the number which
11 would make the Republican gerrymander less
12 stable.

13 MR. GORE: That -- that's not what the
14 evidence was at trial. The evidence was that
15 the racial data is embedded in the software but
16 that the map-drawer would have to scroll over to
17 a different screen or down to the bottom in
18 order to be able to see it.

19 I'd also --

20 JUSTICE ALITO: Mr. Gore, is there --
21 is there anything suspicious about the fact that
22 a map-drawer knows the racial demographics of
23 the state or has available the racial
24 demographics of the state? Haven't we spoken
25 about that?

1 MR. GORE: Yes. Many times, this
2 Court has said that mere awareness or
3 consideration of race doesn't prove racial
4 predominance. And that would be particularly
5 true in a state like South Carolina --

6 JUSTICE KAGAN: Your defense --

7 MR. GORE: -- which has Voting
8 Rights Act issues.

9 JUSTICE KAGAN: -- was not something
10 along the lines of we looked at the racial data,
11 but it still -- we -- it -- it -- it didn't rise
12 to the level of predominance. Actually, your
13 defense was we didn't look to the racial data
14 for this purpose. And what the court --

15 MR. GORE: That's correct.

16 JUSTICE KAGAN: -- said was, I don't
17 believe that, made a credibility judgment, you
18 know, basically said your -- your map-maker gets
19 up on the stand and knows this racial data like
20 the back of his hand, and the court says, I just
21 don't believe that they were not looking at the
22 racial data that was right there in front of
23 them for the purpose of making their gerrymander
24 more secure.

25 MR. GORE: And that underscores the

1 district court's error in failing to look at all
2 the evidence. It's true the map-drawer knew the
3 racial composition of one precinct, one VTD. He
4 didn't know the racial composition of other VTDs
5 the district court asked him about, but he did
6 know the political composition of those VTDs and
7 testified to that at trial.

8 Moreover, racial data is not a good
9 predictor of partisan outcomes because racial
10 data doesn't measure turnout or voting behavior
11 --

12 JUSTICE KAGAN: You know --

13 MR. GORE: -- correlations.

14 JUSTICE KAGAN: -- to the contrary. A
15 presidential election is what doesn't measure
16 turnout in a non-presidential year correctly. I
17 mean, I'll just ask you this. There are two
18 maps, let's -- let's say you have before you,
19 that -- that -- where the election data says
20 these districts favored President Trump. One
21 has a 20 percent BVAP, and the other has a
22 17 percent BVAP.

23 Now doesn't any map-maker look and
24 say, you know, I would rather have the
25 17 percent BVAP in order to make sure that going

1 forward this continues to be a Republican
2 district?

3 MR. GORE: I don't believe that's true
4 at all, Justice Kagan. I think they'd look at
5 how much the areas favored President Trump by.
6 And in this particular hypothetical, if we use
7 Beaufort -- Berkeley County --

8 JUSTICE KAGAN: Holding that, you
9 know, constant --

10 MR. GORE: It would depend --

11 JUSTICE KAGAN: -- would you rather
12 have the 20 percent BVAP or the 17 percent BVAP?

13 MR. GORE: It would depend on other
14 factors, such as compliance with traditional
15 districting principles and other objectives the
16 map-drawer was trying to accomplish.

17 JUSTICE KAGAN: See, what this trial
18 court found on the facts, on the evidence, was
19 that the map-makers made a judgment that they
20 would rather have the 17 percent BVAP because
21 that -- you know, along with the election data,
22 they might -- they were -- they -- they looked
23 at this one year of the election data, but that
24 the 17 percent BVAP was what was, hey, if we go
25 above that, we're not sure we can hold this when

1 another election comes.

2 MR. GORE: The record did not support
3 that finding --

4 JUSTICE JACKSON: Well, let me ask
5 you, what's the --

6 MR. GORE: -- and it was infected by
7 legal error.

8 JUSTICE JACKSON: How do you explain
9 the consistency?

10 I mean, my understanding is that
11 thousands of people were moved in and out of
12 this district, and yet that line, the line
13 concerning the amount of, you know, Black
14 voter -- adult voter participation remained the
15 same. So, if that was not -- if -- if what the
16 court found here was not happening, how do you
17 explain the consistency of that line?

18 MR. GORE: We have a few explanations
19 for that, Justice Jackson.

20 So the first, to address Justice
21 Kagan's hypothetical, is that the BVAP in draft
22 plans -- through the drafting process actually
23 changed. In the Milk Plan, it was
24 15.48 percent. In the Staff Plan, it was
25 16 percent. The enacted plan is 16.72 percent.

1 The Staff Plan actually has a higher Republican
2 vote share than the Milk Plan. So it did change
3 --

4 JUSTICE JACKSON: Was it ever higher
5 than --

6 MR. GORE: -- over time.

7 JUSTICE JACKSON: -- was it ever
8 higher than the 17? People were being moved
9 around, and you would assume --

10 MR. GORE: They were.

11 JUSTICE JACKSON: -- that if it was --
12 if it was varying, it would do so in both
13 directions.

14 MR. GORE: People were being moved
15 around but not very many people. Remember that
16 District 1 retained 93 percent, almost
17 93 percent, of the district core, which explains
18 why the demographic --

19 JUSTICE JACKSON: But 80 percent of
20 the Black people were moved out. Am I wrong
21 about that?

22 MR. GORE: That -- that's not true
23 district-wide.

24 JUSTICE JACKSON: That's not right?

25 MR. GORE: That's not right

1 district-wide.

2 JUSTICE SOTOMAYOR: I'm sorry, you
3 said 93 percent? I thought it was 82.8 percent.

4 MR. GORE: It's -- it depends on the
5 method you use to measure, but the method that
6 was actually used by the General Assembly was
7 over 92 percent district-wide.

8 JUSTICE SOTOMAYOR: Well, that's not
9 what the district court found. I thought it was
10 82.8, which was the lowest core retention of any
11 other district.

12 MR. GORE: But it was the highest --

13 JUSTICE SOTOMAYOR: And so how do you
14 account for the fact that 68.9 percent of whites
15 go to CD1, but only 50.65 percent of Blacks do
16 that are Democrats? So you're controlling for
17 partisanship, and the numbers are that
18 disparate.

19 MR. GORE: Because, again, you have to
20 consider where in the district those voters
21 happen to live and where the lines are drawn.

22 JUSTICE SOTOMAYOR: So it's okay --

23 MR. GORE: It was --

24 JUSTICE SOTOMAYOR: -- for the
25 legislature to say, I was looking at

1 partisanship, but I'm not looking at whether
2 someone was white or Black, but I'm going to
3 separate CD1 so that it's a hundred miles apart
4 in one county and the only commonality is that
5 they live along I-26 a hundred miles apart? And
6 I'm going to join those two Black sections or
7 get rid of them and keep whites there, even
8 though they've got -- they're -- they're -- even
9 though the Democrats could have been moved?

10 MR. GORE: So this Court has been
11 clear that mere racial effects do not prove
12 racial predominance.

13 Moreover, the district court's
14 analysis --

15 JUSTICE SOTOMAYOR: No, but the
16 numbers are -- the numbers are incredible.

17 JUSTICE JACKSON: We're trying --
18 we're looking at intent here. So don't those
19 effects say something about the intent and
20 whether or not the court -- it was plausible --
21 I thought, you know, clear error standard was
22 plausible -- it was plausible for the district
23 court to believe or disbelieve the "we're not
24 looking at race" statement made by the person
25 who was putting this together?

1 MR. GORE: But the racial effects in
2 this plan are far less stark than the racial
3 effects in the Cromartie and Cromartie II plan,
4 where this Court reversed a finding of racial
5 gerrymandering. So, for example, in Cromartie
6 II, the line split a county and created a
7 72 percent BVAP area in one county and a
8 10 percent BVAP area in the other district.

9 JUSTICE GORSUCH: Counsel --

10 MR. GORE: And, here --

11 JUSTICE GORSUCH: -- counsel, I'm
12 sorry to interrupt, but we've been kind of
13 dancing around the -- the big question, which I
14 think is, to my mind, the district court's
15 finding that -- that your -- your clients had to
16 have looked at race data rather than politics
17 data because the politics data wasn't robust
18 enough.

19 Now you've given part of an answer.
20 I'd just like the full answer as to why you
21 think that is clearly erroneous. Tick it off
22 for me.

23 MR. GORE: Sure. So, as I said, the
24 panel itself relied on that data. The direct
25 evidence is that everyone relied on that data.

1 Racial data does not predict election outcomes
2 particularly effectively. The correlation
3 between race and politics only affects election
4 outcomes to the extent people turn out and vote.
5 But racial data doesn't measure that; only
6 election data measures that.

7 Their own expert, Dr. Duchin, agreed
8 with that. Dr. Duchin said that racial data
9 could not be used to predict election outcomes
10 because you have to know about turnout, you have
11 to know about crossover voting and other
12 factors.

13 Their own brief at page 10 concedes
14 that racial data would not predict voting
15 behavior turnout among white voters in the area
16 covered by District 1. The reason for that is
17 that white voters in that area split between
18 Trump and Biden in 2020, and that district and
19 even Charleston County are predominantly white.
20 So using a racial target in that area wouldn't
21 have told you about what the vast majority of
22 voters were going to do.

23 So it's not an effective way to
24 predict election outcomes there. The reason
25 they used the 2020 presidential election data is

1 that the absentee votes had been properly
2 allocated back to precincts --

3 JUSTICE GORSUCH: Well, there's some
4 expert that said -- and I'm sorry to interrupt
5 -- but there's some expert that said the
6 absentee -- a consultant said, I believe it was,
7 that the absentee ballots in the presidential
8 data weren't properly allocated. What's the
9 response to that?

10 MR. GORE: That that's completely
11 incorrect. They're citing testimony from Mr.
12 Oldham, who was involved in drawing the Senate
13 plan, not the congressional plan. He said that,
14 hypothetically, election data would be flawed if
15 it didn't do that, but he didn't know one way or
16 the other whether the General Assembly's
17 election data did do that.

18 And, in fact, the testimony,
19 un rebutted at trial, on the data itself shows
20 that the absent -- that the election data the
21 General Assembly used did properly allocate both
22 the absentee ballots back to the precincts and
23 other votes down to the census block level. So
24 it was reliable data. It was the best data
25 available because of the absentee ballot issue

1 from prior year data.

2 Moreover, even though 2020 is a
3 presidential election year, it's also a
4 congressional election year, and it was the most
5 recent congressional election that was available
6 to the map-drawer. It's not uncommon for map-
7 drawers to use one year's worth of election data
8 and to have it be the most recent year.

9 JUSTICE KAGAN: If I could just, you
10 know, summarize what you just said, you think
11 it's clear error on the court's part that it did
12 not accept the view -- clear error that it did
13 not accept the view that racial data would have
14 helped the mapmakers draw a more secure
15 Republican gerrymander?

16 MR. GORE: Yes, that is clear error on
17 this record for the reasons I've just explained.
18 Moreover, it demonstrates the panel's legal
19 error in failing to apply the correct standard
20 --

21 JUSTICE KAGAN: Thank you.

22 MR. GORE: -- which included its
23 failure to conduct a --

24 JUSTICE KAGAN: Thank you.

25 MR. GORE: -- predominance analysis.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Gore. If I could move to a 30,000-foot
3 perspective, how do you understand what we're
4 supposed to do in evaluating clear error?

5 I mean, we have just an appendices in
6 this case that is like that, and let's say there
7 are a hundred different factual determinations.
8 If we think 15 of them are wrong, do we reverse
9 for clear error in that -- in that situation?

10 MR. GORE: Well, we --

11 CHIEF JUSTICE ROBERTS: Or -- or does
12 it take more? We don't normally review -- other
13 than in these cases, we don't normally review a
14 record for factual findings, and I'm just
15 wondering how you think we should do that.

16 MR. GORE: Even one clear error can be
17 sufficient if it leaves the Court with a
18 definite and firm conviction that an error was
19 made below. And, here, we've pointed to many
20 errors in the district court's analysis, both
21 legal and factual, that establish the standard
22 has been met.

23 This Court did exactly this in
24 *Cromartie II*. In *Cromartie II*, the Court
25 reviewed the record and determined that clear

1 error had been committed and therefore reversed
2 a finding of a three-judge panel of racial
3 predominance.

4 CHIEF JUSTICE ROBERTS: So we just
5 give different degrees of the importance of
6 particular facts and weigh those --

7 MR. GORE: We --

8 CHIEF JUSTICE ROBERTS: -- in
9 reviewing the entire record?

10 MR. GORE: Yes, and we've -- we've
11 tried in our brief to show what we think are the
12 most important factual errors made by the
13 district court. There's no direct evidence of
14 any racial target. In fact, all the direct
15 evidence points the other way. And the panel
16 didn't even mention any of that.

17 There's also their own alternative
18 plans. Even if there's no alternative map
19 requirement in this particular case, their own
20 alternative maps fail to disentangle race and
21 politics because they all turn District 1 into a
22 majority Democratic district. That's actually
23 evidence that supports our case because it shows
24 that -- that race and politics can't be
25 disentangled and that they failed to carry their

1 burden.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas?

5 Justice Alito?

6 JUSTICE ALITO: Well, the clear error
7 standard, if that's the standard that we are
8 required to apply, is a very demanding standard,
9 but it is not an impossible standard, and it
10 doesn't mean that we simply rubber-stamp
11 findings by a district court, particularly in a
12 case like this, where we are the only court that
13 is going to be reviewing those findings and
14 particularly in a case in which the -- the basis
15 for a judgment in favor of the prevailing party
16 relies very heavily, if not entirely, on expert
17 reports, the methodology of which can be
18 examined.

19 So, in light of that, I want to ask
20 you about a -- an alleged flaw in Dr. Ragusa's
21 analysis that you mention on page 21 of your
22 reply brief, and Dr. Ragusa's expert report may
23 turn out to be crucial in this case because is
24 it not correct that all of the other experts
25 failed to control for partisanship?

1 MR. GORE: That is -- that is correct.

2 JUSTICE ALITO: All right. So you say
3 on page 31 that Dr. Ragusa's analysis is flawed
4 because it "used total numbers instead of
5 percentages for VTDs' racial and political
6 compositions."

7 That's what I understand you're
8 saying, is that in determining whether a VTD was
9 moved out or moved in for a political reason, as
10 opposed to -- for a racial reason, as opposed to
11 a political reason, Dr. Ragusa looked only to
12 the number of votes cast for President Biden in
13 those districts.

14 Is that -- is that the problem, rather
15 than the net Biden vote over the Trump vote?

16 MR. GORE: That -- that's one of the
17 problems, yes.

18 JUSTICE ALITO: Could you just explain
19 that problem?

20 MR. GORE: Yes. It was clear at trial
21 -- and the panel even relied upon this in its
22 discussion of Mr. Roberts' testimony -- that the
23 total number is not as relevant as the
24 percentage in determining the effect of moving a
25 VTD because VTDs are of different sizes. And

1 so, when you move a total number, it doesn't
2 tell you as much as the percent composition
3 either racially or politically in terms of how
4 that affects the total composition of a
5 district.

6 The other problem that we pointed out
7 in our brief with that particular analysis is it
8 contradicts Dr. Ragusa's own data from his
9 initial report. His own data in the initial
10 report showed that politics was a stronger
11 predictor than race as to whether VTDs were
12 moved out, and he also concluded that there was
13 no statistically significant correlation to race
14 in terms of VTDs being moved into District 1.

15 So he arrived at this contrary
16 conclusion only by jerry-rigging his analysis.
17 He didn't consider traditional districting
18 principles, he didn't consider VTD or voter
19 location, he committed this error about
20 percentages, and he also didn't consider VT --
21 he lumped these VTDs together in very broad
22 categories, and so they were dissimilar -- it
23 was a dissimilar apples-to-oranges comparison.

24 JUSTICE ALITO: Okay. Can I ask you
25 one more question, and that concerns Mr. Roberts

1 and his job and his background.

2 Am I correct that he is -- he is
3 employed by the legislature?

4 MR. GORE: That's correct.

5 JUSTICE ALITO: And has been employed
6 by the legislature for some period of time?

7 MR. GORE: That's correct.

8 JUSTICE ALITO: And he draws maps for
9 both Republicans and Democrats?

10 MR. GORE: Yes, he did.

11 JUSTICE ALITO: Thank you.

12 MR. GORE: And let me correct one
13 thing that I said. I believe Dr. Liu also
14 claimed to be controlling for partisanship. But
15 Dr. Liu used a flawed VTD data set in his
16 analysis, so his analysis of the enacted plan's
17 VTD moves is also flawed.

18 The -- the Joint Appendix at 142 to
19 144 illustrates the magnitude of that flaw. He
20 thought there were -- his data set told him
21 there were 91 split VTDs in the enacted plan.
22 That's seven times more than there actually
23 were, which is 13.

24 JUSTICE ALITO: All right. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: You know, on each
3 expert, you take potshots and say they failed to
4 do this, they failed to do that. But we've
5 never required one perfect expert to testify to
6 all aspects of a case, but I worry that your
7 methodology is going to suggest that what we do
8 now is do exactly that and instead of looking at
9 the gestalt, which is what the district court
10 did, not the gestalt, but the whole picture.

11 So you discount all four of the
12 plaintiffs' experts, Dr. Ragusa, but there were
13 three others. Two of the experts accounted for
14 partisanship but not geography, and two others
15 accounted for geography but not partisanship.
16 There's no rule that requires one expert to do
17 all of it.

18 And even with Dr. Ragusa, his purpose
19 for his choices were not your purposes. His
20 purposes for his choices were to show that VTDs
21 with a particular percentage of Blacks were
22 going to be selected over white districts, and
23 that proof he made.

24 So I'm wondering, where would the
25 clear error standard come in for us to be doing

1 what Justice Alito did in picking one factor and
2 saying this is a critical flaw that can't be
3 made up by the circumstantial evidence around it
4 from all other three experts?

5 MR. GORE: Two responses on that.
6 Actually, three maybe, Justice Sotomayor.

7 The first is that this is supposed to
8 be a demanding burden for plaintiffs, and so
9 this kind of analysis of the evidence they
10 actually put forward is exactly what this Court
11 did in *Cromartie II* when it recognized that the
12 clear error standard is informed by the
13 demanding burden of proof that the plaintiffs
14 bore below.

15 And in *Cromartie II*, the Court
16 rejected an --

17 JUSTICE SOTOMAYOR: But that doesn't
18 change the clear -- clear error standard. That
19 doesn't make it harsher.

20 MR. GORE: Under -- under any proper
21 formulation of the clear error standard,
22 however, the Court has to ensure that what the
23 district court relied on was actually reliable
24 evidence. And this Court's already did that in
25 *Cromartie II* when it rejected an expert analysis

1 --

2 JUSTICE SOTOMAYOR: So, if I come away
3 from this looking at all four experts and
4 looking at other cases where we accepted that
5 expert testimony even with the pointed-out
6 flaws, does that defeat your argument?

7 MR. GORE: No, I don't think it does
8 because what I think you'll find is that in
9 Allen, the Court rejected the analysis of two of
10 the four experts that they put forward in this
11 case. That's Dr. Duchin and Dr. Imai.

12 JUSTICE SOTOMAYOR: But it didn't in
13 others?

14 MR. GORE: Don't know that those
15 particular experts came before the Court, but
16 they made exactly the same error -- committed
17 exactly the same errors in this case that they
18 committed in Allen that led this Court to set
19 aside their analyses, in particular and -- and
20 even more so here because they failed to
21 consider politics in their simulation and
22 ensemble analyses, so they say nothing on the
23 disentanglement question.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: And just to continue

1 in Justice Sotomayor's line of questioning, you
2 have two experts here, Ragusa and Liu, who
3 answer the exact question that is supposed to be
4 answered in such a case. In other words, is
5 this gerrymander based on politics, or is it a
6 way to get to an ultimate goal, an ultimate
7 political goal, but the gerrymandering is based
8 on race?

9 And what the two of them do is that
10 they show that Black Democrats are excluded from
11 District 1 at a far greater percentage than
12 white Democrats are.

13 So, you know, Liu says, what is it,
14 61 percent -- now I'm going to lose it --
15 69 percent of white Democrats were -- were --
16 remained in the district, whereas only
17 51 percent of Black Democrats did. Ragusa's
18 analysis, similarly clear, a little bit harder
19 to state in one sentence.

20 But -- but both experts essentially
21 said: Look, we've done these regressions, and
22 we can show you that Black Democrats and white
23 Democrats are not being treated the same way,
24 that Black Democrats are being excluded for the
25 district at a far greater proportion.

1 So, you know, every regression
2 analysis has things that you can poke holes in,
3 but you didn't give anything in response to
4 that. It's not like you said: We have a better
5 regression analysis. We controlled for more
6 things and we can show you that the -- that the
7 effect disappears.

8 You're saying that it was clear error
9 to credit the plaintiffs' experts dealing with
10 the exact question under review and finding
11 statistically significant results, to credit
12 those experts over your nothing.

13 MR. GORE: Over our direct evidence,
14 which the panel didn't even mention. Those
15 experts had flawed methodology. I already
16 talked about Dr. Liu's VTD data set. The panel
17 didn't even cite to Dr. Liu in its opinion
18 because the glaring error and glaring flaw in
19 his VTD set became so clear on
20 cross-examination. So Dr. Liu's completely out
21 of the case because his VTD data set was
22 worthless. And the district court knew that and
23 didn't even cite to Dr. Liu in the opinion.

24 Dr. Ragusa's regression analysis at
25 one point also used an inapt political number

1 because he used an average Democratic vote
2 number rather than the actual number, and he
3 compared that to the actual African American
4 number. That's at pages 506 and 509 of the
5 Joint Appendix.

6 So, yes, it was clear error to rely on
7 clearly erroneous and unreliable expert
8 testimony and to use that to override a mountain
9 of direct evidence, both looking at Charleston
10 County and district-wide, that established that
11 the plan achieved the General Assembly's
12 political goal uniquely among all the plans
13 presented at trial and that it complied with
14 traditional districting principles both in
15 Charleston County and in District 1
16 district-wide, again, uniquely among all the
17 alternatives presented at trial.

18 That -- that's the -- if that's not
19 the definition of clear error, then I don't know
20 what is. And if that's not the definition of
21 departing from the presumption of good faith and
22 the requirement of extraordinary caution, then
23 plaintiffs no longer face a demanding burden in
24 these cases.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: I want to make
4 sure you have a chance to summarize the evidence
5 as you see it of why Charleston County was split
6 the way it was split.

7 MR. GORE: Thank -- thank you, Justice
8 Kavanaugh.

9 So, first of all, it was done for
10 political reasons because, of course, it was
11 part and parcel of achieving the district -- the
12 goal, the political goal, district-wide. The
13 big -- the most significant move that the
14 enacted plan made was in Charleston County. It
15 moved the West Ashley neighborhood from District
16 1 to District 6.

17 That was over 80,000 of the 140,000
18 people that were moved from District 1 to
19 District 6. West Ashley is a close-in suburb of
20 Charleston. It is majority Democratic but also
21 predominantly white. We've given the figures in
22 our brief that show that that move in particular
23 had a much greater impact on the political
24 composition of District 1 than its racial
25 composition. So that move, which is over half

1 of the people involved, is itself more easily
2 explained by politics than by race.

3 The line in Charleston County actually
4 improved compliance with traditional districting
5 principles compared to the benchmark plan. The
6 benchmark plan had five split VTDs in Charleston
7 County. The enacted plan fixed all of those.
8 The enacted plan also followed natural
9 geographic boundaries in Charleston County, such
10 as rivers, which are very significant methods of
11 transportation and commerce in a -- in a county
12 like Charleston that's coastal.

13 It also achieved Senator Campsen's
14 policy goal, which was to keep two
15 representatives in Charleston County to
16 represent the county's interests here in
17 Washington, D.C.

18 JUSTICE KAVANAUGH: And why don't you
19 explain that a little more.

20 MR. GORE: So Senator Campsen
21 testified on direct that he loves having Jim
22 Clyburn represent Charles -- a portion of
23 Charleston County because Congressman Clyburn is
24 one of the most powerful Democrats in the
25 Congress, and what Senator Campsen explained is

1 that Joe Biden wouldn't be president if it
2 weren't for Congressman Clyburn. So, of course,
3 he wants Congressman Clyburn representing the
4 interests of his home county of Charleston. But
5 he also wanted to keep a Republican
6 representative there too in case there's a
7 change in administration here in Washington.

8 Congressman Clyburn's own draft map
9 kept a split in Charleston County because he
10 wanted to keep a portion of Charleston County in
11 his district as well.

12 JUSTICE KAVANAUGH: What was the Black
13 voting population in District 1 in that map?

14 MR. GORE: It was only 15.48 percent,
15 which is lower than where it ended up under the
16 enacted plan by more than a point.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 JUSTICE BARRETT: I have a question
20 about Dr. Ragusa's expert report. I just want
21 to make sure that I understand, because the
22 circumstantial evidence is what the plaintiffs
23 relied on, and the whole issue is disentangling
24 race and partisanship.

25 I understood your brief to say, but

1 you haven't said this yet that I heard, so I
2 want to make sure I understand it correctly,
3 that he did not take into account factors like
4 contiguousness and compactness, and so he was
5 assuming that you could have essentially kind of
6 an island cut off in the middle of the district
7 that would have more Black voters, which would
8 obviously then not be contiguous.

9 Am I misunderstanding that?

10 MR. GORE: That -- that's correct for
11 his county envelope analysis, yes.

12 JUSTICE BARRETT: Okay.

13 MR. GORE: And what he also didn't do
14 is the other piece of that, is control or test
15 for traditional principles. That's on page 197
16 of the Joint Appendix.

17 And what we mean by that is it would
18 be possible to draw different lines for District
19 1 in a county, take Charleston County or
20 Dorchester, which are both split. But, if you
21 want to go out and grab that other VTD, you have
22 to make tradeoffs elsewhere because, if you're
23 changing the shape of the district or picking up
24 additional population from other VTDs, you have
25 to offset that somewhere else.

1 And so what a properly done analysis
2 does, as this Court recognized in Allen, would
3 test whether the decisions that were made are
4 more or less consistent with traditional
5 principles than the decisions the expert is
6 proposing. And Dr. Ragusa doesn't do that here
7 because he doesn't control for traditional
8 principles like contiguity.

9 And his analysis is different than the
10 analysis that was done and this Court credited
11 in Cooper because of the thing I mentioned
12 before about his regression analysis using only
13 an average political number rather than the
14 actual political number in each VTD.

15 JUSTICE BARRETT: And how much of a
16 point did you make of that in the district
17 court?

18 MR. GORE: We -- we raised many -- we
19 raised a lot of objections to Dr. Ragusa and his
20 methodology in the district court.

21 JUSTICE BARRETT: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Jackson?

24 JUSTICE JACKSON: Yeah, can I drill
25 down on that a little bit? Because I think

1 that's at the heart of one of my concerns about
2 the burdens and some of the questions that we've
3 heard.

4 So you put on Mr. Trende at the
5 district court, and my understanding was that
6 Mr. Trende did not really, as an expert,
7 undercut the methodologies of Ragusa and the
8 other experts. Is that -- is that correct? I
9 mean, he didn't put forward an alternative or do
10 a kind of methodological analysis of Ragusa, did
11 he?

12 MR. GORE: He did point out some of
13 the flaws in -- in his expert reports, including
14 this use of total numbers instead of
15 percentages. He also talked about the
16 contiguity issue in the county envelope analysis
17 I was just discussing with Justice Barrett.

18 JUSTICE JACKSON: But you --

19 MR. GORE: He did --

20 JUSTICE JACKSON: Oh, sorry. So he
21 did?

22 MR. GORE: He did point out some of
23 these methodological flaws. And we pointed them
24 out also to the district court.

25 JUSTICE JACKSON: And what if the

1 district court disagreed? I mean, the district
2 court ultimately relies on Ragusa's expert --
3 expertise, and you say that you challenged,
4 although you did not really bring an expert
5 report that met Ragusa at the same level, but
6 you -- you raised the objections, and the
7 district court disagreed apparently, right?

8 MR. GORE: That's correct.

9 JUSTICE JACKSON: Okay. So I guess
10 what I'm concerned about is that I kind of hear
11 you wanting us to do a de novo review, as
12 opposed to a clear error review, because, to the
13 extent that you're now asking us to look at the
14 flaws in Ragusa's testimony and I guess disagree
15 with the district court's crediting that -- that
16 -- that report, that sounds to me like de novo.

17 I understood from Cooper that the
18 clear error standard -- and I had it here a
19 second ago -- is a highly deferential standard,
20 that the Court may not reverse just because it
21 would have decided the matter differently. A
22 finding that is plausible in light of the full
23 record, even if another is equally or more so,
24 must govern.

25 So to what extent do we have to credit

1 the district court's disagreement with your
2 objections to Ragusa's report?

3 MR. GORE: That's a great question.
4 Let me give a couple of responses.

5 First of all, as you just read from
6 Cooper, the court has to consider whether it's
7 plausible in light of the entire record and all
8 of the evidence. And, here, the district court
9 just ignored other evidence that was put
10 forward.

11 What we are asking the Court to do is
12 exactly what it did in Cromartie II. In
13 Cromartie II, there was a plaintiff's expert who
14 did an analysis of VTDs moved in or moved out or
15 potentially available to the district. The
16 state also put forward an expert to give the
17 contradictory interpretation of that evidence,
18 but the district court excluded that expert.

19 JUSTICE JACKSON: Yes --

20 MR. GORE: Once the case --

21 JUSTICE JACKSON: -- but wasn't there
22 other -- I'm sorry. Wasn't Cromartie II a
23 majority/minority district scenario?

24 MR. GORE: Sure, which, again, is all
25 the more reason why the racial target theory in

1 this case just makes no sense, because there's
2 no motive -- clear motivation to --

3 JUSTICE JACKSON: No, I understand.
4 You're sort of shifting. I guess I'm just
5 trying -- so keep going.

6 MR. GORE: But -- but -- yes.

7 JUSTICE JACKSON: Cromartie II --

8 MR. GORE: So Cromartie II --

9 JUSTICE JACKSON: -- you're asking us
10 to do the same thing?

11 MR. GORE: -- we had exactly the same
12 situation with the experts. The district court
13 had excluded the defense expert, so that expert
14 wasn't really considered by this Court on
15 review, but this Court went through as part of
16 clear error to ensure that the district court
17 had not relied on -- relied on clearly erroneous
18 expert testimony and a bad methodology. That's
19 what most of Cromartie II found.

20 JUSTICE JACKSON: But how does clear
21 error work in that? Like, I understood the
22 standard now, post-Cooper, to be is it plausible
23 that the district court could have relied on
24 Ragusa's testimony and could have found it to be
25 reliable. And in the absence of a defense

1 expert that's actually poking methodological
2 holes in it, I think you have a hard time, you
3 know, if our burden is just to say was it
4 plausible that the district court got it right
5 in terms of the -- of the crediting of Ragusa's
6 report?

7 MR. GORE: I don't think that's what
8 the -- exactly what the clear error standard
9 requires.

10 JUSTICE JACKSON: All right. So tell
11 me what it requires.

12 MR. GORE: It says: Is the district
13 court's finding of predominance as -- as a
14 finding plausible in light of the whole record?

15 JUSTICE JACKSON: And that --

16 MR. GORE: It doesn't mean --

17 JUSTICE JACKSON: -- includes both the
18 expertise and also the district court's
19 credibility findings? Which is another sort of
20 aspect of this that I really wanted to pin down.

21 You say the district court ignored
22 other evidence. But it did have a trial, and it
23 had the actual person who drew the maps come in,
24 and there's testimony in the record where the
25 court itself is questioning directly, not

1 relying on the attorneys, but actually putting
2 questions to that -- that map-drawer. And I'm
3 just wondering how we are to assess the court's
4 determination that it disagreed with or didn't
5 believe the expert when he said, I was looking
6 at -- at partisanship and not race.

7 MR. GORE: There was -- it was not a
8 credibility determination because the court
9 never based that on his demeanor on the witness
10 stand or at trial. The court credited other
11 evidence, but there was also other evidence the
12 court didn't even discuss, such as the direct --

13 JUSTICE JACKSON: So are you saying
14 the court could not have disagreed -- I mean,
15 they asked him the question, moving that line up
16 into the African American areas of North
17 Charleston you would say was for a partisan
18 lean, correct? And the witness says yes. And
19 they ultimately find that that's not so.

20 So why isn't that a -- a -- a finding,
21 I disagree, I don't believe you?

22 MR. GORE: A credibility
23 determination, as we pointed out in our reply
24 brief, requires a determination about the
25 demeanor of the witness on the stand.

1 Otherwise, district courts could always wrap
2 their fact findings in credibility
3 determinations in an -- in an attempt to avoid
4 review. They didn't even do that here. There
5 isn't that kind of classic credibility
6 determination.

7 But even setting that aside, there was
8 all kinds of direct testimony from Senator
9 Campsen, who was the sponsor of the bill, from
10 Senator Massey, who was the Senate Majority
11 Leader, from Representative Jordan, who also
12 testified about text messages in the record.

13 JUSTICE JACKSON: So what would a
14 plaintiff have needed -- and this is my final
15 question. I'm short on time. What would a
16 plaintiff have need -- have needed in your view,
17 direct evidence, a statement that says we are
18 using race and not partisanship in this
19 particular area?

20 MR. GORE: That, or an alternative map
21 that disentangled the two, or, if you think the
22 alternative map's not required, a full
23 evidentiary picture that showed that traditional
24 principles actually were subordinated to race.
25 And, here, there's been no showing for the

1 reasons I just discussed with Justice Kavanaugh

2 --

3 JUSTICE JACKSON: Thank you.

4 MR. GORE: -- a line in Charleston
5 County complies with traditional principles.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Ms. Aden.

10 ORAL ARGUMENT OF LEAH C. ADEN

11 ON BEHALF OF THE APPELLEES

12 MS. ADEN: Mr. Chief Justice, and may
13 it please the Court:

14 No party disputes Cooper's basic legal
15 rule that absent a compelling interest, race
16 cannot predominate in line drawing, even as a
17 means to achieve a partisan goal. Here, the
18 panel properly concluded that race predominated
19 over partisanship in CD1's design based on
20 strong factual findings, including that after
21 map-drawers moved more than 193,000 people in
22 and out of CD1, its BVAP remained identical as
23 in the 2011 map.

24 In so doing, mapmakers sorted more
25 than 30,000 Black Charlestonians based on their

1 race, removing 11 of the 12 precincts with the
2 highest Black Voting-Age Populations. This
3 massive movement disregarded the least change
4 approach that the state applied statewide and
5 that map-makers admitted they abandoned only in
6 Charleston County, which had been CD1's
7 historical anchor.

8 Disentangling race and party
9 affiliation using the very methods this Court
10 accepted in Cooper, the panel credited the
11 un rebutted expert testimony that race was a
12 better predictor than partisan affiliation for
13 the design of CD1.

14 Under the clear error review standard,
15 this Court should affirm the panel's factual --
16 racial gerrymandering factual finding because it
17 is more than plausible in light of the total of
18 the record. Appellants also cannot show that
19 the panel committed a legal error, particularly
20 in its rejection of the alternative map
21 requirement.

22 Finally, the record here is indeed the
23 inverse of Cromartie II, where a majority of
24 this Court determined that mapmakers designed a
25 district using political voting behavior over

1 time, rather than relying upon racial
2 stereotypes.

3 Here, by contrast, the panel found
4 non-credible the Appellants' assertion that they
5 relied on merely 2020 partisan performance data
6 for CD1's design.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Counsel, we normally
9 have an alternate map in these redistricting
10 cases, and, of course, we don't have one here.
11 In these instances where you have a high
12 correlation between race and political
13 affiliation, how would you constitutionally
14 disentangle them?

15 MS. ADEN: We have something we
16 believe that was better, if not comparable, to
17 an alternative map. We have this unrebutted
18 testimony of Dr. Ragusa. That testimony is
19 corroborated by the testimony of Dr. Liu.

20 If you look at the amici briefs of the
21 political scientists who performed the analysis
22 in Cooper, they validate that the methods that
23 Dr. Ragusa and Dr. Liu used are the same as in
24 Cooper. All of the potshots that are made by
25 the defendants in their brief about Dr. Ragusa's

1 analyses and Dr. Liu's, almost all of them,
2 nearly all of them, and I can walk you through
3 them, were made during either discovery or
4 during Daubert motions or at trial, and the
5 court simply didn't reject them.

6 It is unrebutted evidence
7 disentangling race and party, which is a form of
8 circumstantial evidence, but akin to an
9 alternative map. If you look at Dr. Ragusa's
10 rebuttal report, Figure 1, he charts out all the
11 VTDs in CD1, and he looks at the -- whether the
12 racial part -- composition or the political
13 composition determined their placement in the
14 map. And you can see that four of the five
15 heaviest Black precincts were moved out of CD1.
16 By contrast, only five of the 17 majority white
17 precincts were removed from CD1.

18 And this is, again, unrebutted
19 testimony, and it serves the purpose of an
20 alternative map because this Court unanimously
21 in Desert Palace said that there is no
22 particular form of proof a plaintiff needs to
23 show in an equal protection case.

24 CHIEF JUSTICE ROBERTS: Counsel, we
25 have said that the burden that you're assuming

1 of disentangling race and politics in a
2 situation like this is very, very difficult.
3 But it is your burden, right?

4 MS. ADEN: Yes, Your Honor.

5 CHIEF JUSTICE ROBERTS: And -- and
6 you're trying to -- to carry it without any
7 direct evidence, with no alternative map, with
8 no odd-shaped districts, which we often get in
9 gerrymandering cases, and with a wealth of
10 political data that you're suggesting your
11 friends on the other side would ignore in favor
12 of racial data.

13 Have we ever had a case like that with
14 that combination? We usually are looking for
15 those sorts of things and we have those. Have
16 we ever had a case before where all it is is
17 circumstantial evidence?

18 MS. ADEN: I -- I wracked my mind and
19 I think the closest we might come to it is a
20 case like Gomillion, where plaintiffs would have
21 lost there if they had been required to have
22 proved by direct evidence where the
23 circumstantial evidence was overwhelming.

24 But, here, if you're asking whether
25 there is direct evidence that the legislature

1 admitted in the 21st Century that they sorted
2 voters on the basis of race as a means to
3 achieve their political goal, no, we do not have
4 that.

5 But what we do have is a factual
6 finding that the map-makers had Maptitude data
7 with race data --

8 CHIEF JUSTICE ROBERTS: I understand
9 that, and there's a lot of back-and-forth on it,
10 and you certainly have the clear error standard
11 in reviewing that.

12 But we've never had a case where
13 there's been no direct evidence, no map, no
14 strangely configured districts, a very large
15 amount of political evidence, whether the
16 district court chose to credit it or not, and,
17 instead, it all resting on circumstantial
18 evidence.

19 Circumstantial evidence to -- to
20 determine what we held as recently as in Allen
21 last year is something that is peculiarly in the
22 province of the states in drawing the districts.

23 I -- I'm not saying you can't get
24 there, but -- but it does seem that this is the
25 -- this would be breaking new ground in our

1 voting rights jurisprudence.

2 MS. ADEN: Respectfully, I disagree.
3 I mean, we have strong -- this is not Cromartie.
4 We have strong circumstantial evidence where
5 we're not relying upon -- the Court did not rely
6 upon forgone alternatives or conclusions about
7 what happened.

8 We have a racial target that the fact
9 that the Senate was proposing various maps over
10 the legislative process and moving 193,000
11 people around and they can only explain it as
12 being by coincidence, the fact that the question
13 in the Shaw case is whether there was a
14 significant sorting of Black voters on the basis
15 -- of -- of voters on the basis of race.

16 We have 30,000 Charlestonians moved
17 out of CD1, out of their home county. It cannot
18 be explained by least change, the priority
19 principle that they said was guiding their map
20 for much --

21 CHIEF JUSTICE ROBERTS: But just to --

22 MS. ADEN: -- of the legislative
23 process.

24 CHIEF JUSTICE ROBERTS: Sorry to
25 interrupt. And that is to change the voting

1 percentage in the district by how much?

2 MS. ADEN: Ultimately, it was by
3 1.36 percent, and Senator Campsen used that
4 1.36 percent, the lead sponsor, to disclaim that
5 this was a partisan gerrymander during the
6 legislative process.

7 So the court accepted that they had a
8 legitimate means to achieve this political goal.
9 We don't dispute that. The court accepted that
10 they had this preference to bring in political
11 counties. But what the court acknowledged is
12 that when bring -- they brought in those
13 counties, there were Black people brought in
14 alongside with them.

15 That then led to an increased BVAP in
16 CD1 that became too politically risky. And for
17 the Black people they brought in, they offset
18 the Black people by --

19 CHIEF JUSTICE ROBERTS: This is --

20 MS. ADEN: -- by expelling them from
21 Charleston County. And that goes to the heart
22 of this Court's jurisprudence of using race as a
23 means, even for a legitimate political goal, as
24 --

25 CHIEF JUSTICE ROBERTS: Well, it's

1 not -- just so I understand correctly, this is
2 not a voting rights case, right?

3 MS. ADEN: This is a --

4 CHIEF JUSTICE ROBERTS: It's not --
5 it's a gerrymandering case, right? And they did
6 all of these things to increase the percentage
7 of the voters they wanted in that district by
8 1.6 percent?

9 MS. ADEN: 1.36 percent.

10 CHIEF JUSTICE ROBERTS: 1.3 percent.

11 MS. ADEN: Mm-hmm. Yeah. Close
12 enough. But --

13 JUSTICE ALITO: You had --

14 MS. ADEN: -- whether --

15 JUSTICE ALITO: I'm sorry.

16 MS. ADEN: Yes.

17 JUSTICE ALITO: You had four
18 sophisticated experts, right?

19 MS. ADEN: Yes.

20 JUSTICE ALITO: Is there any reason
21 why one or more of them could not have drawn up
22 an alternative map that met the legislature's
23 stated partisan goal but had a different effect
24 on the racial composition?

25 MS. ADEN: Because, once again, we

1 think that we proffered evidence that was as
2 good as, if not comparable to, an alternative
3 map. You can --

4 JUSTICE ALITO: But you admit they
5 could have done that? It wouldn't have been a
6 big burden for them to do that?

7 MS. ADEN: Well, I would submit --

8 JUSTICE ALITO: And they didn't do it?

9 MS. ADEN: -- that the legislative
10 record reflects that the partisan justifications
11 did not become clear until midway through trial.
12 For most of the legislative session, most of
13 discovery in the case, the map -- enacted map
14 was defended as being compliant with traditional
15 redistricting principles.

16 JUSTICE ALITO: I mean, this whole
17 case --

18 MS. ADEN: It only --

19 JUSTICE ALITO: -- this whole case is
20 about -- is about disentangling race and
21 politics, right? That's what the whole case is
22 about.

23 MS. ADEN: But the justification for
24 the map was largely based upon traditional
25 redistricting principles until trial. Then, at

1 trial, the lead counsel says this was about
2 partisanship, this was about -- and the map --
3 map creator says, I was instructed to make this
4 a Republican-leaning district.

5 JUSTICE ALITO: And until --

6 MS. ADEN: -- and, alternatively, it's
7 traditional redistricting principles --

8 JUSTICE ALITO: I'm sorry, I didn't
9 mean to interrupt. Until trial, you thought
10 that the state was going to defend this without
11 making the argument that this was done to
12 increase Republican chances in District 1?

13 MS. ADEN: Yes, because it was not --

14 JUSTICE ALITO: Really?

15 MS. ADEN: -- because it was not in
16 the guidelines for the legislature that they
17 were achieving a political goal. There are
18 statements that we have included in our brief
19 that outline that people were disclaiming that
20 this was about partisanship and this was about
21 -- but even if -- even if --

22 JUSTICE ALITO: You didn't see that in
23 the discovery? You had very extensive
24 discovery.

25 MS. ADEN: There was people -- during

1 -- it looked --

2 JUSTICE ALITO: They didn't say the
3 discovery doesn't -- the -- the -- the members
4 of the legislature in the discovery didn't say
5 this is what our aim was?

6 MS. ADEN: If you look to the
7 testimony of people like Mr. Fiffick, Mr.
8 Terreni, these were counsel for the staff, they
9 were all disclaiming in the lead-up to trial
10 that this was about partisanship.

11 JUSTICE JACKSON: And, in fact --

12 JUSTICE ALITO: Let me come back to
13 Doctor --

14 JUSTICE KAGAN: I mean, you know the
15 -- the -- the record better than I do, but is it
16 a particular surprise that people did not brag
17 about the fact that they were doing a partisan
18 gerrymander?

19 MS. ADEN: And the court acknowledged
20 that in its opinion, that --

21 JUSTICE KAGAN: Is it a surprise that,
22 instead, they disclaimed that they were doing a
23 partisan gerrymander until it got to the point
24 where they thought we better make a case?

25 MS. ADEN: And we know that they were,

1 notwithstanding looking at BVAP throughout the
2 legislative process, they were running BVAP
3 reports for every map and they were looking at
4 the connection between racial data and political
5 data, and because they believed, whether they
6 were right or wrong, whether they should have
7 relied upon one piece of partisan data or not,
8 they were relying upon race consistently to
9 understand the ramifications politically for
10 their map drawing.

11 JUSTICE BARRETT: But didn't they --

12 JUSTICE ALITO: But you have no --

13 JUSTICE BARRETT: -- note some reasons

14 --

15 JUSTICE ALITO: -- do you have -- do
16 you have evidence of that, that they were
17 relying extensively on race?

18 MS. ADEN: Yes. We know that, again,
19 they were looking at race as they -- on the
20 screen seeing how it --

21 JUSTICE ALITO: Well, they had --

22 MS. ADEN: -- factored into the data

23 --

24 JUSTICE ALITO: -- the racial data.

25 MS. ADEN: -- and seeing how it

1 affected the --

2 JUSTICE ALITO: Is there anything
3 surprising that?

4 MS. ADEN: And we don't -- we don't
5 have a problem with them ignore -- looking at
6 race data or being race-conscious. But they had
7 no good reason to do it, and, again, they were
8 disclaiming it.

9 JUSTICE BARRETT: But I thought
10 counsel that needed to ensure compliance with
11 the Voting Rights Act was asking Mr. Roberts for
12 the racial data.

13 MS. ADEN: There was no -- there's
14 never been a defense that they were trying to
15 draw CD1 in order to comply with the Voting
16 Rights Act. They disclaimed that they were
17 looking at race at all. And the court found
18 non-credible that they were not looking at race.

19 In fact, the experts tested, do the
20 maps -- are they more predictive based upon
21 racial data and BVAP data than they are partisan
22 data? They used the 2020 political data that
23 the state said they only used. And Dr. Ragusa,
24 corroborated by Dr. Imai, demonstrate that race
25 was a better predictor than the only -- the only

1 single piece of data that they had that their
2 consultant for the Senate was telling them was
3 unreliable for predicting political behavior
4 over time. These are all factual findings --

5 JUSTICE ALITO: Dr. Imai ran --

6 MS. ADEN: -- they had that were
7 provided in the record.

8 JUSTICE KAGAN: Why -- why -- why did
9 they have so little electoral data?

10 MS. ADEN: We don't --

11 JUSTICE KAGAN: Because, I mean, it
12 strikes me as, like, if -- if you were really
13 using electoral data, why wouldn't you have more
14 of it?

15 MS. ADEN: Well, they had more. They
16 had -- they -- in addition to the 2020 political
17 data, they got the 2020 -- I mean, in the 2020
18 presidential data, they had the 2020 Senate
19 data, but they never advanced that they used
20 that. The State Elections Commission is a
21 defendant in this case, and they have tons of
22 data, but they did not use it.

23 And what the record reflects is that
24 they were consistently looking at race because
25 they had an expectation that race was a

1 predictor for how political outcomes would
2 perform. This is shown in the closing argument
3 of counsel, my friend, who showed the connection
4 between race and party in his closing. But he
5 was relying upon racial reports and some
6 partisan reports that were being generated
7 during the legislative process.

8 And, once again, it is more than
9 plausible that the court said in the total of
10 evidence that the fact that there was this
11 consistency in the BVAP, despite the fact that
12 maps were changing over time, the House even
13 tried to propose a map that was 20 percent BVAP,
14 and Senator Campsen intervened, and then the
15 House ultimately adopted a map with the BVAP.
16 The National Republican Redistricting Trust was
17 proposing maps around 17 percent.

18 In the colloquy with Mr. Roberts, the
19 court asked: What would happen if you bring in
20 VTDs or counties that maybe are not majority
21 Black but are below majority Black? Would that
22 affect the overall BVAP of your district? And
23 he acknowledged that it would. So --

24 JUSTICE ALITO: Well, when race and --
25 when race and partisanship are so closely

1 aligned, as they are in fact, why is it
2 surprising that a legislature that is pursuing a
3 partisan goal would favor a map that turns out
4 consistently to have the same BVAP?

5 MS. ADEN: Because, if they're using
6 race as the means to get there, this Court last
7 term said that a legitimate interest cannot be
8 achieved --

9 JUSTICE ALITO: Yeah.

10 MS. ADEN: -- with illegitimate ends.

11 JUSTICE ALITO: Yeah, if they're -- if
12 that's what they're using. But, if they are
13 disregarding race entirely and looking only at
14 politics, where race and politics are so closely
15 aligned, it isn't surprising that when you want
16 to get a district that has a certain Republican
17 percentage, you're going to get a district that
18 has a -- a -- a steady BVAP.

19 MS. ADEN: Two responses to that.
20 Even if the map-maker wasn't just looking at
21 race in the actual documents, the court credited
22 that it was in his mind and that all the
23 evidence reflects that they were looking at
24 race. The fact that they were trying to keep it
25 at 17 percent reflects that it had worked at

1 17 percent prior to 2018. It worked at
2 17 percent after 2018. They were defending this
3 map as being least change, a map that had
4 pre-cleared the Department of Justice, that had
5 survived a constitutional challenge. And,
6 again, the lead sponsor said we only wanted to
7 make this a little bit more Republican-leaning
8 at trial.

9 So they served their purpose, but at
10 the heart of this, they served their purpose by
11 focusing on the -- the precincts with the
12 highest BVAPs, leaving alone white precincts
13 with -- in -- in Charleston and moving out Black
14 precincts and pushing them --

15 JUSTICE KAVANAUGH: What about West
16 Ashley? Your opposing counsel mentioned West
17 Ash -- West Ashley was moved out. So just give
18 you a chance to respond to that.

19 MS. ADEN: West Ashley is cited by the
20 court. This is a historic community that has a
21 lot of mixed precincts, but what we see is that
22 the entirety of --

23 JUSTICE KAVANAUGH: It's predominantly
24 white, isn't it?

25 MS. ADEN: It's predominantly white,

1 but the precincts with the highest and most
2 significant Black populations, those were
3 targeted for movement. And the court recognized
4 that, yes, white voters may be overall impacted
5 by this map, but because this is a White versus
6 Regester reality on the ground look by this
7 three-judge panel, they recognized that there
8 were some mixed precincts. There were white
9 voters impacted.

10 But the unrebutted expert evidence is
11 that race was a better predictor for movement
12 and that Black Democrat -- Black voters were
13 significantly and disproportionately targeted
14 for movement.

15 And that is unrebutted by the state.
16 The district court says they cannot explain the
17 30,000 Charlestonians moved out of CD1. They've
18 never been able to explain that --

19 JUSTICE ALITO: Well, this -- I'm
20 sorry. Did you want to finish your sentence?

21 MS. ADEN: They've never been able to
22 explain that significant sorting, which complies
23 with the question in Shaw.

24 JUSTICE ALITO: Yeah, I think this
25 goes to what Mr. Gore claims is a very serious

1 flaw in Dr. Ragusa's methodology, and I want you
2 to talk about that. Maybe you have a good
3 answer to his argument.

4 So let's say the Republican
5 legislature is intent on ensuring that District
6 1 has a Republican lead. Then, all else being
7 equal, which of the following two precincts
8 would they rather include in District 1: a
9 district with -- a precinct with 3,000 residents
10 that went 900 to 800 for Trump, 900 votes for
11 President Trump, 800 votes for President Biden,
12 or a precinct with the same number of residents,
13 3,000, that went 700 to 600 for Biden, 700,
14 okay, 700 votes for President Biden, 600 for
15 Trump? Which one would you rather include if
16 you're a Republican legislature that wants to
17 produce a Republican-leaning district?

18 MS. ADEN: I would like to know two
19 things with respect to the racial makeup of
20 those precincts because, here, we know that the
21 legislature knew not only the partisan
22 performance based upon the 2020 data, but they
23 knew the racial makeup that they --

24 JUSTICE ALITO: Well, suppose you
25 don't know anything -- you don't know anything

1 about race, which is what they claim, not that
2 they know -- they didn't take race into account
3 at all. All you had before you were those
4 statistics: 900 to 800 for Trump, 700 to 600
5 for Biden. You want to make it a Republican
6 district. Which one do you want to keep in?

7 MS. ADEN: The former. But, if it --
8 this case would be more like Cromartie if they
9 were actually looking at pure partisan data and
10 they were looking at partisan data voting
11 behavior over time to make predictions.

12 JUSTICE JACKSON: Ms. -- Ms. Aden --

13 JUSTICE ALITO: Yeah. But that's the
14 problem with --

15 MS. ADEN: But that's not this case.

16 JUSTICE ALITO: If I could just follow
17 up.

18 That is the problem they claim with
19 Dr. Ragusa's methodology, because he says no,
20 you're going to -- the one you want to keep is
21 the one with the greater number of votes for
22 President Biden.

23 So you'd rather keep the -- the
24 district that went 900 to 800 for Trump because
25 there are 800 Biden votes there, as opposed to

1 the one that went 600 -- 700 to 600 for Biden
2 because there are fewer Biden votes there.

3 MS. ADEN: But Dr. Ragusa --

4 JUSTICE ALITO: I'm sorry -- yeah?

5 MS. ADEN: -- in his rebuttal report,
6 I think pages 3 through 4, controls for the
7 precinct size and, notwithstanding controlling
8 for that, in his analysis determines that Black
9 voters were moved out, white voters were kept in
10 or moved in. And that is unrebutted data. So
11 he controlled for this.

12 JUSTICE ALITO: But what I just said
13 is his methodology, is it not? He looked at the
14 absolute number of votes for President Biden,
15 not the percentage, not the net votes.

16 MS. ADEN: And Dr. Ragusa testified
17 about why looking at the total net was the
18 better methodology than the percentages, and
19 this was tested below, and the district court
20 did not accept these arguments.

21 And so this goes to, are we retrying
22 expert testimony on appeal? Or do three judges,
23 consistent with *White v. Regester*, consistent
24 with *Cooper*, do -- are their findings of fact
25 and credibility determines given the deference

1 that an appellate court is to give a unanimous
2 opinion, where, in light of the total record, it
3 reflects that there was a racial target. It
4 reflects that there was a significant sorting of
5 Black people. It reflects unrebutted expert
6 evidence of race rather than party explaining
7 the assignment of voters. It reflects a
8 disregard of traditional redistricting
9 principles.

10 And all of that evidence in total is
11 more than plausible in the record for the using
12 race as a means to harm individual plaintiffs,
13 Mr. Tai Scott and members of the --

14 CHIEF JUSTICE ROBERTS: Thank you.

15 MS. ADEN: -- South Carolina NAACP.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 MS. ADEN: Thank you, Your Honor.

19 CHIEF JUSTICE ROBERTS: Justice
20 Thomas?

21 Justice Alito?

22 JUSTICE ALITO: Yeah, I -- I'm
23 concerned about what has been said here earlier
24 about Mr. Roberts. And as I -- I asked Mr. Gore
25 about that. Is it not true that he has a long

1 record working for the legislature and he's
2 drawn maps for both Republicans and Democrats?

3 MS. ADEN: The panel -- yes. The
4 panel acknowledged he has two decades of
5 experience in which he used race every time he
6 was drawing maps in the past but denied doing so
7 in this case.

8 JUSTICE ALITO: I mean, at trial,
9 Judge Gergel -- is that the correct
10 pronunciation of his name, Gergel?

11 MS. ADEN: It is Judge Gergel, yes.

12 JUSTICE ALITO: Yeah. Judge Gergel
13 had complimentary things to say about him. He
14 said, I mean, I know Mr. Roberts. He's a very
15 precise guy. What I want is -- is, if that
16 report -- he's talking about a particular report
17 -- isn't accurate, and I'm persuaded, if he
18 tells me it's not, that's good enough for me.

19 MS. ADEN: The -- and that --

20 JUSTICE ALITO: He's complimentary of
21 his -- of his honesty, right?

22 MS. ADEN: Yes, and also his honesty
23 in Footnote 9, I believe, where he recognized
24 that a year after trial, Mr. Roberts was able to
25 cite with specificity the racial makeup of VTDs,

1 which was completely inconsistent with his
2 non-credible denials that he did not look at
3 race.

4 JUSTICE ALITO: Okay. So then the
5 district court turns around in its opinion and
6 says that his testimony rings hollow. So that's
7 a nice way of saying that he lied, right?

8 MS. ADEN: Yes. And that's what this
9 Court acknowledged was the case --

10 JUSTICE ALITO: Okay.

11 MS. ADEN: -- in Cooper with the --

12 JUSTICE ALITO: It -- it gave three
13 reasons for it, and I want you to tell me which
14 one of these is defensible.

15 The third one is what you just
16 mentioned, his in-depth knowledge of the racial
17 demographics of South Carolina. Is that
18 damning?

19 MS. ADEN: No, not in and of itself,
20 because race consciousness is not the problem.
21 It's the incredible denial, despite all of the
22 evidence, including his testimony, but also what
23 the experts demonstrate and also what the
24 movement of so many people and just the
25 coincidence that they land on the exact same

1 BVAP.

2 JUSTICE ALITO: All right. That's
3 one.

4 The second one is Roberts failed to
5 provide the court with any plausible explanation
6 for the abandonment of his least change approach
7 in drawing the Charleston County portions of
8 Congressional District Numbers 1 and 6 or the
9 subordination of traditional districting
10 principles, including maintenance of
11 constituencies, minimizing divisions of
12 counties, and avoidance of racial
13 gerrymandering.

14 So they say he gave no plausible
15 explanation for that?

16 MS. ADEN: That's correct. In fact,
17 Mr. Roberts admitted he abandoned the core
18 priority of least change in CD1.

19 JUSTICE ALITO: Didn't -- didn't he
20 say that his -- he was aiming to produce a
21 Republican district?

22 MS. ADEN: They -- the Court
23 ultimately accepted that legitimate goal, Your
24 Honor, but the Court recognized in Cooper that
25 using race as a means to get there is

1 constitutionally suspect.

2 JUSTICE ALITO: Yeah. But -- but
3 isn't that a plausible explanation for all of
4 those things?

5 MS. ADEN: The court heard the
6 testimony, and that testimony was not as
7 persuasive as the racial movements, as the
8 expert testimony that, again, they had the
9 opportunity --

10 JUSTICE ALITO: No, but the question
11 is --

12 MS. ADEN: -- to rebut.

13 JUSTICE ALITO: -- is it a -- is it a
14 plausible reason? I mean, did they say, we
15 don't believe Mr. Roberts because, you know, he
16 had a shifty look on the stand and this is a guy
17 with a partisan background? Did they say
18 anything like that? They gave three reasons.

19 MS. ADEN: No, Your Honor. It's --
20 it's plausible, but this Court is not asked to
21 look anew at the record but to look at whether
22 or not in no circumstance would it be plausible
23 that the -- the outcome be what it is, and as a
24 finding of fact, the court was correct.

25 JUSTICE ALITO: All right. So, in --

1 and the last one is he admitted that his
2 movement of nearly 17,000 African Americans was
3 inconsistent with the Clyburn staff plan for
4 Charleston County that he claimed to be
5 faithfully following, right?

6 Did he ever say, we followed exactly
7 what -- what Congressman Clyburn asked us to do?
8 Did he ever say that?

9 MS. ADEN: The state makes a big
10 defense that their map is consistent with what
11 Senator Clyburn or Representative Clyburn was
12 seeking. The amicus brief shows that that is
13 not what the record actually reflects.

14 And, more importantly, what the Court
15 found was that Representative Clyburn's partial
16 map did not treat the area of West Ashley, which
17 was so critical to the VTDs that were moved out
18 that sorted voters on the basis of race -- the
19 partial map that Representative Clyburn put
20 forward did not harm West Ashley in the same
21 way.

22 JUSTICE ALITO: Let me come back to
23 the question I asked about why your experts did
24 not produce an alternative map.

25 Dr. Imai produced 10,000 maps, right?

1 MS. ADEN: Correct, for one
2 simulation.

3 JUSTICE ALITO: Yeah, he ran a
4 simulation with 10,000 maps. He never
5 considered politics?

6 MS. ADEN: As Dr. Imai's testimony
7 reflects, that he tested for the criteria that
8 the state was saying they were using in their
9 guidelines, the objective criteria, and Dr. Imai
10 and Dr. Duchin's methods are merely useful in
11 this case as further support, as the district
12 court recognized, to show that race was a
13 significant factor in the design.

14 JUSTICE ALITO: Well, in a -- in a
15 case that's all about disentangling race and
16 politics, how can we possibly give any weight to
17 an expert report that did not take politics into
18 account at all purportedly?

19 MS. ADEN: The district court was
20 confronted with that question and relied upon
21 Dr. Imai's testimony for the findings that it
22 thought were probative or not of the issue, but
23 we do have the Dr. Ragusa and the Dr. Liu
24 un rebutted testimony that did disentangle race.

25 And that served the purpose of an

1 alternative map because we can look at Figure 1
2 in the rebuttal report that Dr. Ragusa includes
3 and look at the VTDs that were available to be
4 moved in in a white -- heavily white precincts
5 that were available to be moved in and those
6 simply were not moved in.

7 So they served the same purpose as an
8 alternative --

9 JUSTICE ALITO: The defense expert,
10 Sean Trende or Trende, evaluated Dr. Ragusa's
11 maps and found that Democrats would win District
12 1 in over 90 percent of the maps that Dr. Ragusa
13 produced.

14 Did Dr. Imai run a simulation using
15 the political data as well but then decide to
16 shelve it when the results were not favorable to
17 your client?

18 MS. ADEN: That is not what I believe
19 the record reflects, Your Honor.

20 JUSTICE ALITO: It just never occurred
21 to him that politics might have something to do
22 with this?

23 MS. ADEN: Every expert, as I believe
24 Justice Kagan said, is being tasked with
25 particular questions. Not every -- I do not

1 believe that there's any requirement that every
2 expert look at every decision that one might go
3 into a map.

4 Each expert looks at different things.
5 Dr. Ragusa and Dr. Imai -- I mean Dr. Ragusa and
6 Dr. Liu served the purpose of disentangling and
7 showing that race was more predictive than party
8 affiliation.

9 Dr. Imai and Dr. Duchin helped counter
10 this narrative that this was a race-blind draw
11 when all of the evidence demonstrates otherwise.
12 And, frankly, Dr. Duchin's testimony looked at
13 all of the traditional redistricting principles.

14 And I would submit that these were all
15 raised pre-trial, and this is the type of --
16 this is what trial courts are given the
17 authority to do, not to have what is happening
18 here, but as relitigating the validity of expert
19 testimony that the court accepted.

20 JUSTICE ALITO: All right. Dr. Imai
21 did not control for politics. Did the district
22 court rely on Dr. Liu?

23 MS. ADEN: The court did not
24 specifically rely upon Dr. Liu, but his
25 analyses, as the amici of the political

1 scientists who did the work in Cooper,
2 corroborate that he used the same methods that
3 were faithful to Cooper, and his analyses
4 substantiate Dr. Ragusa's and point in the same
5 direction --

6 JUSTICE ALITO: Did Doctor --

7 MS. ADEN: -- that race was a better
8 predictor than partisanship.

9 JUSTICE ALITO: I'm sorry. Did
10 Dr. Duchin control for politics?

11 MS. ADEN: She did in some of her
12 analyses. If you look at one of her
13 supplemental reports, she looked at how the maps
14 were fair when you put particularly the
15 candidates of choice of Black voters on the map,
16 and she determined that Black candidates
17 performed worse in the enacted map than generic
18 partisan races, which were essentially white-on-
19 white races. So that is one way that she looked
20 at partisanship.

21 But she did not do a disentangling
22 method if that is what you're getting at.

23 JUSTICE ALITO: Okay. Last question.
24 I'm sorry to go on for so long. Did Dr. Liu and
25 Dr. Ragusa use the county envelope method?

1 MS. ADEN: They both did, correct.

2 JUSTICE ALITO: Is that -- is that a
3 sound method?

4 MS. ADEN: It is. It's what
5 Dr. Ansolabehere and Dr. Max Palmer used in
6 Cooper and Bethune-Hill, respectively.

7 JUSTICE ALITO: Under that method, if
8 there are two people who live in the same
9 apartment building, under the county envelope
10 method, could one -- does the analysis take into
11 -- presume that one can be moved and the other
12 can't?

13 MS. ADEN: I believe --

14 JUSTICE ALITO: One could stay in --
15 in -- in a district and the other could move?

16 MS. ADEN: I do not believe that's the
17 case because he's looking -- the county envelope
18 method is relying upon precincts, and so it
19 would not be at that level of detail.

20 JUSTICE ALITO: Does it assume that a
21 -- that all precincts could be moved, regardless
22 of their location?

23 MS. ADEN: Only those within the
24 county envelope, which is reflective of the fact
25 that a county like Berkeley or a county like

1 Beaufort was wholly moved into CD1, so it was
2 fair for Dr. Ragusa and Dr. Imai to assume that
3 any VTD in those counties could have been moved
4 into CD1. And where we saw that they were not
5 is where Black voters were at issue.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 JUSTICE SOTOMAYOR: I understood the
10 record the way you did, but I understood that
11 Dr. Liu was asked to produce maps that were
12 consistent with the traditional criteria that
13 the state indicated it had used, correct?

14 MS. ADEN: That is correct, Your
15 Honor.

16 JUSTICE SOTOMAYOR: So he never looked
17 at partisanship because that wasn't one of the
18 criteria that it at first said it had used,
19 correct?

20 MS. ADEN: That is correct, Your
21 Honor.

22 JUSTICE SOTOMAYOR: So I know it seems
23 strange, but as I understood the record -- and I
24 know Justice Alito thinks that it should have
25 been assumed that partisanship would be the

1 defense -- do you know if the answer in this
2 case raised partisanship as a defense?

3 MS. ADEN: I do not believe so.
4 Again, the legislature almost entirely
5 predicated their line drawing during the
6 legislative process on traditional redistricting
7 principles.

8 JUSTICE SOTOMAYOR: So you were
9 relying on what they said during the process?

10 MS. ADEN: What they said. And this
11 Court has been skeptical when legislatures have
12 come up with post-hoc justifications. But
13 what's important here is that the legislature --
14 the court -- the panel accepted their
15 justification, presumed that they would not
16 admit it and then still allow plaintiffs to test
17 whether that was the true reason behind the line
18 drawing and found that it was not. It was less
19 of a predictable case.

20 JUSTICE SOTOMAYOR: So what your
21 experts showed was that everything they said
22 during the legislative process had to be
23 race-based in some way because that's what the
24 evidence showed. They couldn't explain the
25 large movement of Blacks as opposed to whites,

1 Blacks as opposed to -- or Democrat --
2 Democratic whites and Black. So they had to
3 come up with a different reason for why they did
4 what they did, correct?

5 MS. ADEN: There were indeed shifting
6 reasons, and race as a means for a political
7 goal is constitutionally suspect.

8 JUSTICE SOTOMAYOR: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?
10 Justice Gorsuch?

11 Justice Kavanaugh?

12 JUSTICE KAVANAUGH: On the least
13 change point that you mentioned, my
14 understanding, but I want to get your
15 understanding of the record, was that Senator
16 Campsen wanted Beaufort and Berkeley Counties to
17 be kept whole, he wanted a stronger Republican
18 tilt, and he wanted Representative Clyburn to
19 represent some of Charleston County because of
20 Representative Clyburn's clout in the -- in the
21 Congress and with the administration.

22 So, if you -- if those things are
23 accurate -- and I just want your understanding
24 of the record -- then doesn't that mean you
25 couldn't draw the first district without some

1 significant changes?

2 MS. ADEN: Those are generally the
3 findings of the court, but the court recognized
4 and detailed in its opinion that when Beaufort,
5 when Berkeley, when Dorchester were brought in,
6 they had Black neighbors, and those Black
7 neighbors increased the BVAP in CD1 to a
8 politically risky 20 percent and Black
9 Charlestonians were offset.

10 Black people were treated one-to-one,
11 traded one in, one out. White voters, the
12 Republican-leaning ones, were individualized and
13 allowed to come into CD1, and white Democrats
14 were even kept in or individualized and allowed
15 to remain in CD1.

16 It's only Black people in the design
17 of this district that were treated with racial
18 stereotyping, which is offensive to this -- the
19 Constitution.

20 JUSTICE KAVANAUGH: Right. I
21 understand that principle, of course. But West
22 Ashley was predominantly white and predominantly
23 Democratic and then was moved out, right?

24 MS. ADEN: Yes, but there were
25 significant, still heavily Black precincts --

1 JUSTICE KAVANAUGH: Right.

2 MS. ADEN: -- that were moved out
3 alongside of it. And the court addressed this
4 matter --

5 JUSTICE KAVANAUGH: Your point is
6 there's a higher percentage than of Blacks than
7 whites moved out?

8 MS. ADEN: And -- and that the court
9 --

10 JUSTICE KAVANAUGH: Is that right?

11 MS. ADEN: That is correct.

12 JUSTICE KAVANAUGH: Because there were
13 a lot of white people moved out of District 1 in
14 West --

15 MS. ADEN: That is correct. And the
16 court confronted the net effect argument in its
17 opinion. And when you look at the paragraph
18 about Deer Park, it talks about how you may have
19 a precinct that has 10,000 white people in it
20 and another precinct that has 8500 Black people
21 in it, still a minority but still substantial,
22 and the movement of those precincts would
23 notwithstanding affect the overall BVAP of a
24 district.

25 And that's exactly what the court

1 considered and confronted. This is not a new
2 argument being raised. It was considered by the
3 court and it was rejected in its racial
4 gerrymandering finding.

5 JUSTICE KAVANAUGH: The other side
6 makes a point that the original plan that came
7 from Representative Clyburn's office actually
8 had a lower Black voting population for District
9 1 than what ultimately emerged. I just want to
10 get your response to that, the relevance of that
11 in the overall record.

12 MS. ADEN: I think it's irrelevant
13 because I don't think that his map determined
14 the -- the sorting that was actually done by the
15 key decisionmakers that the court acknowledged.

16 But even more, if you look to the
17 amici brief that Representative Clyburn's office
18 offers in this case, they provided a partial
19 map, and then, from there, the state drew out
20 the -- a partial map of one district and, from
21 there, drew out the other six districts.

22 So we have no idea what the BVAP of
23 CD1 would be based upon what the record reflects
24 Representative Clyburn was seeking in CD6. And
25 that is detailed in the amici brief that he

1 submitted.

2 JUSTICE KAVANAUGH: Yeah. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 Justice Jackson?

6 JUSTICE JACKSON: So I guess I'm still
7 struggling with this clear error standard and
8 the application in this context. Justice Alito
9 asked a number of questions about the reasons
10 that the district court highlighted for why it
11 did not credit Mr. Roberts' testimony.

12 And I guess, consistent with what I
13 understood the clear error standard to require
14 of us, I didn't know that we were to evaluate
15 whether we agreed or disagreed with each of
16 their findings, whether we would have found --
17 you know, had a different takeaway from the fact
18 that, you know, his testimony, the district
19 court said it -- it rang hollow. If we thought
20 it didn't rang -- ring hollow, would that be a
21 basis for clear error? Do I not understand what
22 the clear error standard is?

23 MS. ADEN: I don't believe that you
24 do. I believe that the credibility
25 determinations, the ability for the court, as in

1 White v. Regester, as in Cooper, to have
2 listened to the witnesses, is clearly given much
3 deference by this Court, that the racial
4 gerrymandering finding is a clear error finding
5 and the subsidiary findings --

6 JUSTICE JACKSON: Right, but -- and
7 the subsidiary findings --

8 MS. ADEN: -- are also --

9 JUSTICE JACKSON: -- as well so that
10 if the district court said we don't believe he
11 gave a plausible explanation and we look at it
12 and we think the explanation is plausible, that
13 distinction, the fact that we disagree with that
14 particular subsidiary finding, is not the basis
15 for clear error, is that right?

16 MS. ADEN: That is my understanding.
17 It's the total record.

18 JUSTICE JACKSON: So it -- so maybe --
19 maybe you would have clear error if, for
20 example, the district court didn't have any
21 subsidiary findings, if they didn't say anything
22 about Dr. Roberts; they just say, you know,
23 nothing maybe. But, in this case, they did have
24 three reasons, right, why they didn't agree with
25 him? So I guess I just want to be clear as to

1 what we're looking at from -- from the
2 standpoint of clear error.

3 MS. ADEN: I think it's at least three
4 reasons, and I think -- for why the court did
5 not credit all of his reasons for why the map
6 was drawn the way that they did. And it wasn't
7 just that he -- the court just listened to his
8 testimony and said I disagree with you but that
9 that testimony did not align with the other
10 facts in the record, which reflected that race
11 predominance was occurring in this map, and that
12 is overall a finding that's backed up not only
13 by the unrebutted disentangling method but is
14 borne out by the state's own data.

15 JUSTICE JACKSON: All right. Let me
16 ask about the hypothetical that Justice Alito
17 put forward with respect to moving in 900 Trump
18 voters versus -- you know, a district with 900
19 Trump voters and 600 Biden voters versus a
20 district with 700 Biden voters and 600 Trump
21 voters.

22 I may have gotten that wrong, but I
23 think if -- I think his point was that if
24 politics is at play, then, clearly, you'd want
25 to bring in the district with more Trump voters

1 if you are trying to get a Republican tilt.

2 And I think that's -- I think that's
3 right, but I guess what I am trying to
4 understand is how the BVAP stays the same unless
5 you're looking at race so that if you bring in
6 the district with more Trump voters, the
7 assumption, I think, that everybody seems to be
8 operating under is that you would -- that
9 district would likely have more white voters in
10 it because race is correlating with -- with --
11 with politics.

12 And if that's the case, then I would
13 expect bringing that district in, the BVAP would
14 drop. And yet, here, it stayed the same, and I
15 understood your argument to be, because Black
16 voters elsewhere were moved out, that race was
17 used to move out Black voters in a -- when you
18 brought in the 900 Trump voter district.

19 Is that the point that you're making?

20 MS. ADEN: That is the point that I'm
21 making, that's correct.

22 JUSTICE JACKSON: And you're saying
23 that that is the unlawful application of racial
24 gerrymandering. So even though, as Justice
25 Kavanaugh pointed out, the sort of overall BVAP

1 remains the same, in a situation in which you're
2 bringing in more white voters and moving out
3 Black voters, in -- in this kind of
4 circumstance, you're still relying on race in a
5 way that is, you say, improper?

6 MS. ADEN: Yes. Correct. And I would
7 only detail that not only are you moving in
8 white voters, you're moving in Black voters, and
9 you're not just -- and then, for those Black
10 voters moved in, you're offsetting them by
11 kicking out the Black Charlestonians. And
12 that's exactly what the court details in its
13 opinion happened here, the race as the means to
14 achieve this political goal.

15 And I just want to acknowledge also
16 that this is not -- I mentioned at the onset
17 this is not the case of Cromartie, where this
18 Court said the plaintiffs failed to prove racial
19 predominance because we see in the record that
20 they were actually looking at voting behavior
21 data.

22 The record does not reflect -- this is
23 the inverse of that case, where the record
24 reflects they were looking at racial data for
25 its predictive purpose and they were every once

1 in a while looking at partisan data to see its
2 connection, but they were relying upon race data
3 and they had no good reason to do that.

4 JUSTICE JACKSON: And as Justice Kagan
5 said, we -- we kind of think that racial -- your
6 argument is that racial data was really kind of
7 driving this because they didn't have a robust
8 set of political data that they were drawing
9 from in order to do this?

10 MS. ADEN: Because, in their mind,
11 they were using race as a proxy for -- to
12 predict partisan behavior.

13 JUSTICE JACKSON: Thank you.

14 MS. ADEN: That's what the record
15 reflects.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 MS. ADEN: Thank you, Your Honors.

19 CHIEF JUSTICE ROBERTS: Ms. Flynn.

20 ORAL ARGUMENT OF CAROLINE A. FLYNN
21 FOR THE UNITED STATES, AS AMICUS CURIAE,
22 SUPPORTING NEITHER PARTY

23 MS. FLYNN: Mr. Chief Justice, and may
24 it please the Court:

25 This Court has recognized that cases

1 like these, where state defendants disclaim the
2 use of race in line drawing and argue that any
3 racial disparities are simply the result of a
4 correlation between race and political
5 affiliation, present special challenges for
6 trial courts and require an especially sensitive
7 inquiry.

8 As part of that inquiry, plaintiffs
9 bear the burden to disentangle race and politics
10 and show that race drove the map-makers'
11 decisions about where to place a significant
12 number of voters. The district court found that
13 plaintiffs had done that here.

14 But this Court has also been clear
15 that on appeal, this Court's job is more
16 straightforward. Racial predominance is a
17 factual finding subject to clear error review
18 even when there's a politics defense.

19 The Court has also repeatedly rejected
20 attempts to impose unjustified evidentiary
21 hurdles as a matter of law on redistrict --
22 redistricting plaintiffs.

23 Defendants' arguments for reversal in
24 this case contradict those settled principles.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: If we find no intent
2 to discriminate or to -- that there was vote --
3 on the vote dilution claim, that's what I'm more
4 interested in, you seem to want us to send it
5 back on that. But, if you find -- we find no
6 intent, should we, or should we just simply
7 resolve it here?

8 MS. FLYNN: So our position on the
9 second claim is that if this Court were not to
10 affirm on the first racial gerrymandering
11 claim --

12 JUSTICE THOMAS: Yeah.

13 MS. FLYNN: -- and not find racial
14 predominance there, that this Court should
15 remand on the second claim because we believe
16 the district court used the wrong legal
17 standards to evaluate that claim.

18 JUSTICE THOMAS: And what should that
19 standard be?

20 MS. FLYNN: So, first, we -- the
21 district court simply sort of took the findings
22 it had made on racial predominance and the Shaw
23 standard and carried them over, but the intent
24 standard is different for an intentional vote
25 dilution claim. It's the Arlington Heights

1 inquiry that this Court --

2 JUSTICE THOMAS: And that is -- it's
3 the -- again, the vote dilution claim. It seems
4 as though those were collapsed into one another,
5 the redistribute -- the redistricting and the
6 vote dilution, and dealt with on -- on the same
7 standard.

8 So I'm wondering, if the standard is
9 intent with respect to the dilution claim, if
10 you don't see that intent here, why should we
11 remand it?

12 MS. FLYNN: Well, I don't think the
13 court -- the district court made the findings
14 under the correct intent standard for you to
15 evaluate that. I mean, as I mentioned, the
16 district court just asked about racial
17 predominance, but they are different intent
18 inquiries.

19 For intentional vote dilution, you're
20 asking about a specific intent to dilute the
21 voting strength of the minority population, not
22 just whether race predominated in the
23 line-drawing decisions.

24 JUSTICE THOMAS: And you're saying we
25 couldn't determine that on the record that's

1 here?

2 MS. FLYNN: I think this Court should
3 follow its usual practice and instruct the lower
4 court about the correct legal standards and then
5 send it back for that decision, determination to
6 be made in the first instance by the court
7 looking at the full record if the Court were to
8 have occasion to reach that second claim.

9 JUSTICE SOTOMAYOR: I guess my --

10 CHIEF JUSTICE ROBERTS: Ms. --

11 JUSTICE SOTOMAYOR: -- question is --
12 I'm sorry, Chief.

13 CHIEF JUSTICE ROBERTS: Ms. Flynn,
14 your office reviews a lot of these voting cases,
15 right?

16 MS. FLYNN: Well, our enforcement work
17 is typically in vote dilution, not in racial
18 gerrymandering per se, but, yes, of course,
19 we've been involved in these cases before the
20 Court.

21 CHIEF JUSTICE ROBERTS: Put -- yeah.
22 Putting that aside, have you ever supported the
23 plaintiffs in a case in which there was no
24 evidence of any direct discrimination, no
25 alternative map, no oddly shaped districts, and

1 a -- volume and volume of political data?

2 Can you think of one where your office
3 has done that before?

4 MS. FLYNN: Well, I -- you know, this
5 might be the first case where there hasn't been
6 sort of direct evidence of an attempt at VRA
7 compliance or the like, but I do think that --
8 when you brought up the alternative map, I do
9 think that the -- the plaintiffs offered expert
10 evidence to answer that same question about was
11 it race or was it politics that were driving the
12 line-drawing decisions.

13 CHIEF JUSTICE ROBERTS: Yeah, that's
14 one of the things I brought up. I also brought
15 up the absence of direct discrimination, the
16 absence of oddly shaped districts, the lack of
17 -- I mean the great volume of political
18 evidence, and throw in another one, anything
19 that all of that has been done, it is alleged on
20 racial basis, to change the population in the
21 district of the desired voters by 1.3 percent?
22 I mean -- I mean, my point is -- is a clear one.

23 Have you ever seen anything like this?

24 MS. FLYNN: Well, this Court has
25 affirmed, I believe, on a circumstantial record

1 I think in North Carolina versus Covington. The
2 Court said that there, the state was completely
3 denying using race. The legislature told its
4 map-maker not to look at race. And this Court
5 still said it was permissible for the district
6 court to find based on demographic information
7 and information about the shape of the district
8 that race was, in fact, relied upon.

9 I'd also say that here, the district
10 court did look at traditional redistricting
11 principles and find that they were subordinated
12 in this instance. For instance, this new
13 district is not contiguous when the previous
14 district was.

15 Of course, there was previously a
16 Charleston County divide, but this is I don't
17 think the case that the traditional districting
18 principles wholly supported the state's story
19 here.

20 And I will sort of go back to the
21 expert evidence in this case. In our view, we
22 think the Ragusa expert and Liu were the most
23 probative on the question we've been talking
24 about today, which is was it race or was it
25 politics that were driving the district lines.

1 And Dr. Ragusa took the methodology in
2 Cooper, arguably improved upon it by looking at
3 VTDs at precincts rather than voter by voter,
4 which is what the Cooper expert did, and then he
5 also ran a regression analysis to further
6 isolate out the effect of race from politics.

7 JUSTICE GORSUCH: Counsel, I -- I -- I
8 want to just explore the alternative map
9 non-requirement requirement thing for a minute.

10 MS. FLYNN: Sure.

11 JUSTICE GORSUCH: Everybody seems to
12 take as given that the legislature here did seek
13 to pursue a partisan gerrymander, if you will,
14 or a partisan tilt, I think, is their preferred
15 term, and that that's permissible under this
16 Court's precedents. We start with that as a
17 given.

18 MS. FLYNN: Mm-hmm.

19 JUSTICE GORSUCH: Right?

20 MS. FLYNN: Yes.

21 JUSTICE GORSUCH: Okay. And that the
22 plaintiff bears the burden of -- of -- of --
23 of -- of overcoming a good-faith presumption
24 that -- that the legislature is doing just what
25 it says, right?

1 MS. FLYNN: Mm-hmm.

2 JUSTICE GORSUCH: How do you prove
3 that they are acting in bad faith without
4 showing that they could achieve their objective
5 some different way?

6 MS. FLYNN: I agree that that could be
7 a probative piece of evidence in some cases, and
8 I think that's what the Court said in Cooper.
9 What we're pushing back on is the idea that you
10 need to have, as a matter of law, for the
11 plaintiffs' case to even get off the ground, an
12 alternative map that checks all the boxes.

13 JUSTICE GORSUCH: I -- I get that, and
14 I'm wondering why. I mean, normally, if a
15 plaintiff bears a burden of proof, you have to
16 show that it would have happened but for, you
17 know, this change in the world.

18 And I think the -- here, the analogy
19 would be -- and I'm just exploring this. I
20 don't know. All right? I could be wrong.
21 Probably am. But, in a but-for world, the
22 legislature could have achieved its partisan
23 purposes, nefarious, happy, whatever you think
24 they are, in some other way without -- without
25 doing what it did that you're objecting to.

1 And, here, there's no -- no evidence
2 that the legislature could have achieved its
3 partisan tilt, which everyone says is
4 permissible, in any other way.

5 MS. FLYNN: So I --

6 JUSTICE GORSUCH: What do we do with
7 that when -- when -- with the presumption of
8 good faith?

9 MS. FLYNN: So I have a couple
10 responses to that. First, I do think the expert
11 evidence answer the same question. An
12 alternative map says, if you were really relying
13 on the thing you said you were relying, wouldn't
14 you have done -- maybe you would have done this
15 other thing instead.

16 JUSTICE GORSUCH: I could have
17 achieved the same partisan objective
18 different ways, and with map-drawing technology
19 and computers, you know, they spit out maps by
20 the thousands these days. I would have thought
21 that would have been a relatively modest burden.

22 MS. FLYNN: But it's still --

23 JUSTICE GORSUCH: What am I missing?

24 MS. FLYNN: -- it's still just a way
25 to answer the question what better explains how

1 lines were drawn. And we think the expert
2 evidence does that.

3 The other thing I would say about
4 creating this kind of requirement as a legal
5 rule, rather than something that can be a piece
6 of evidence that both sides can make arguments
7 about, is that I think it's going to add even
8 more complication to these even very, very
9 complicated cases.

10 So my understanding is that defendants
11 want their alternative map requirement to be
12 limited to circumstances where there is no or
13 meager direct evidence. So I think, first,
14 you're going to have a mini-trial on is this a
15 case where there's sufficient direct evidence or
16 not to bring this rule into play.

17 And then I think you're going to have
18 to have litigation and probably appeals on what
19 the alternative map has to do.

20 JUSTICE GORSUCH: No, I'm not even
21 asking about -- I'm -- I'm -- I'm -- I'm really
22 not interested in whether it's a requirement or
23 not. I'm just -- just as a factual matter,
24 wouldn't it have been the simplest thing to do?
25 If I'm plaintiff and I want to show the

1 defendant can achieve its permissible ends in
2 some other way, I think, in most other
3 scenarios, in a tort case or an antitrust case,
4 is what I'm thinking about, I would show that
5 there were 15 other ways to achieve that which
6 you said you wanted to achieve.

7 And that would -- that would be really
8 strong probative evidence -- whether it's
9 required or not, put -- put that aside -- that,
10 hey, you're not telling the truth about what you
11 were up to here.

12 MS. FLYNN: I agree it can be very
13 probative evidence. I can't really speak --

14 JUSTICE GORSUCH: Should its absence
15 --

16 MS. FLYNN: -- to why it would be
17 easier --

18 JUSTICE GORSUCH: -- should its
19 absence here tell us something?

20 MS. FLYNN: I don't think so, because
21 I think the plaintiffs offered two experts that
22 went un rebutted to answer the same question.

23 I will also just point out that I
24 believe there are maps that are in the record
25 that did have a higher BVAP that stayed based on

1 the 2020 election data as a Republican-leaning
2 district. So, you know, I don't -- I believe
3 those maps are the first House staff plan and I
4 think there was one from a Senator Sabb that
5 also had that.

6 So, you know, whether -- what's
7 easier, easiest for a plaintiff to do to prove
8 their case, I'm not really in a position to sort
9 of speak to their litigation choices, but --

10 JUSTICE SOTOMAYOR: That's the point,
11 isn't it? There were maps that remained
12 Republican-leaning that were rejected, and,
13 instead, there was this unusual movement in and
14 out based on race. That's what the experts
15 showed, that you can't explain the movements
16 based on partisanship, that they can only be
17 explained on the basis of race. That's the
18 burden the plaintiff meets, correct?

19 MS. FLYNN: Yes.

20 JUSTICE SOTOMAYOR: I had this
21 question as I was going through: If you can't
22 get to where you want to go without using race,
23 do you think our law permits that?

24 MS. FLYNN: No, Your Honor. I think
25 that the --

1 JUSTICE SOTOMAYOR: That's the whole
2 point, isn't it? If you can't reach a goal, no
3 matter how laudatory it is, if the only way that
4 you can satisfy yourself for whatever your
5 political reasons are is by using race, that's
6 illegal.

7 MS. FLYNN: Right. This Court said
8 that in Cooper, and the plurality opinion said
9 that in Bush v. Vera as well.

10 JUSTICE SOTOMAYOR: Right.

11 MS. FLYNN: You can't use race as a
12 proxy for a political goal.

13 JUSTICE SOTOMAYOR: So the bottom line
14 is they had maps that were created that reached
15 -- that kept them Republican-leaning and they
16 chose not to use them. For whatever other
17 political reasons, what they went back to was
18 race to make the map they made, correct?

19 MS. FLYNN: That's what the district
20 court found, yes.

21 JUSTICE SOTOMAYOR: All right. Thank
22 you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Thomas?

1 JUSTICE THOMAS: This is just a matter
2 of curiosity. If you can't -- your answer was
3 you couldn't use race to draw the districts,
4 right?

5 MS. FLYNN: Right. Well, or you would
6 be in strict scrutiny land and perhaps VRA
7 compliance would be a reason, but -- right.

8 JUSTICE THOMAS: But you used -- you
9 can use race to draw a majority/minority
10 district?

11 MS. FLYNN: Right. So, if race
12 predominates, and in that circumstance, where
13 the overriding consideration is to draw a
14 majority/minority district and that racial
15 target actually dictates how lines are being
16 drawn on the ground, I agree the first half of
17 the Shaw test would be met, and then you would
18 be -- in the second half, you would ask the
19 strict scrutiny question of whether or not there
20 was a strong basis in evidence to believe the
21 other requirement.

22 JUSTICE THOMAS: Outside of this
23 context, do we use the predominant standard in
24 -- in our Fourteenth Amendment analysis?

25 MS. FLYNN: I'm not aware of another

1 context besides gerrymandering.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 No?

4 Justice -- anything further?

5 Justice Kagan?

6 JUSTICE KAGAN: Ms. Flynn, so it's a
7 funny case because it's our first post-Rucho
8 case of this kind. So, before Rucho, right, you
9 could understand completely why it was that
10 map-makers started doing race in order to
11 achieve partisan gerrymanders, because they
12 couldn't do partisan gerrymanders directly.
13 They were afraid that that was going to be found
14 unlawful.

15 But now that Rucho has come about and
16 -- and all these partisan gerrymandering claims
17 have been held to be non-justiciable, you know,
18 some people might sort of say, well, I don't get
19 it. Like, why do people keep using race when
20 they can just do it directly? Just do -- use
21 the election data, do the partisan
22 gerrymandering.

23 You know, doesn't the fact that they
24 can do it directly suggest that they're not --
25 why would you need race as a proxy? So that's

1 my question to you.

2 Why would map-makers in general and in
3 this case use race as a proxy to do partisan
4 gerrymandering now that you could just, like, do
5 partisan gerrymandering?

6 MS. FLYNN: So I don't know that I'm
7 in a position to speak to in general, but in
8 this case, as has been discussed earlier today,
9 there was evidence in the record that the
10 political data the map-makers had available was
11 sort of limited and imperfect. It was a single
12 election that wasn't congressional, and it was
13 not looking at the durability of voting across
14 multiple elections.

15 So, given the evidence that voting is
16 racially polarized in South Carolina, it was
17 plausible for the district court to find that
18 the map-makers would have relied on race as a
19 more durable proxy in the hopes of achieving
20 their political end.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 JUSTICE GORSUCH: Your brief also
24 makes the point that it would have been
25 plausible for the district court to have come to

1 the exact opposite conclusion it came to here
2 and that it would have been just as plausible
3 for them to find, as Justice Kagan alluded to,
4 that the simplest explanation was they wanted to
5 do politics and they did politics.

6 How does that -- how should we think
7 about that under our clear error standard?

8 MS. FLYNN: So we've made that point
9 in previous cases before this Court as well. We
10 think that the clear error standard doesn't ask
11 what is the most plausible reading of the record
12 or whether, on the whole, more evidence supports
13 one outcome than the other. It asks just
14 whether the district court's is plausible based
15 on the entirety of the evidence, and so --

16 JUSTICE GORSUCH: And how does that
17 fit with the presumption of good faith that we
18 -- because we're reviewing state legislative
19 actions here, that we ask people, lower courts,
20 to make sure that they're -- they're not
21 overstepping their bounds and -- and getting too
22 involved in state and local politics?

23 MS. FLYNN: We think the -- the
24 presumption of good faith is sort of baked into
25 how the burdens work here and also that in this

1 particular case, the plaintiffs did have the
2 obligation to disentangle race and politics.
3 And we also think that the predominant standard
4 is a very high standard that also accounts --
5 that doesn't, you know, find predominance met
6 based just on racial awareness or race
7 consciousness. And so we think setting the bar
8 that high is what affords respect to
9 legislatures' districting choices in this area.

10 JUSTICE GORSUCH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

13 JUSTICE KAVANAUGH: Just to follow up
14 on Justice Gorsuch's question, how would a
15 district court look at this exact same
16 evidentiary record and come to the opposite
17 conclusion in your view?

18 MS. FLYNN: I think the expert
19 evidence played a very big role here. You know,
20 I think the district court is in a very good
21 position to make the kind of assessments about
22 methodology that we've been discussing here
23 today.

24 JUSTICE KAVANAUGH: But you've looked
25 at this record and you obviously concluded that

1 the district court could have said no, that
2 expert evidence is not sufficiently reliable or
3 probative in light of the overall record to
4 support the plaintiffs' case?

5 MS. FLYNN: Well, we think that the
6 expert evidence is a big part of it. We think
7 that there were credibility findings here that
8 might have come out differently with a different
9 three-judge panel possibly. It's kind of hard
10 to tell because we weren't there seeing the
11 witnesses firsthand.

12 And, you know, we -- we take the point
13 that these are just difficult cases, as this
14 Court said in Cooper, when there is a political
15 defense being raised and so you can often
16 describe or attribute certain oddities in
17 district lines to being politics or race.

18 And so, given that, we recognize that
19 district courts have a -- a tough job here to
20 sort of just look at the entirety of the
21 evidence and figure out whether or not the
22 plaintiffs can carry their burden.

23 JUSTICE KAVANAUGH: To -- to pick up
24 on Justice Kagan's question and I think a big
25 theme of the other side's briefing is, why would

1 we do this when we have the political data?
2 Justice Kagan mentioned that. And that's all
3 over the briefs and the amicus briefs on their
4 side.

5 And then I think the main response is
6 the political data is not good enough to achieve
7 the end they want to achieve of a greater
8 Republican tilt.

9 Do you agree with that?

10 MS. FLYNN: Yes. We agree there's
11 evidence in the record for the district court to
12 -- to find that, yes.

13 JUSTICE KAVANAUGH: Right. What if we
14 disagree on that point about the strength of the
15 political data? I think an earlier question
16 Justice Kagan mentioned that that asked about
17 the reliability of that data or how probative
18 that data is.

19 Suppose we think that data is fairly
20 probative. Does the whole case that -- that
21 plaintiffs had, the district court's conclusion
22 then all fall because that's really the linchpin
23 of the response to the main argument that the
24 state's giving, which is we relied on this
25 political data, the response is that political

1 data is no good, so you couldn't have been.

2 If that data is good, should we
3 reverse?

4 MS. FLYNN: No, I don't think so. I
5 think there is also the fact that the BVAP in
6 CD1 stayed basically frozen even after about
7 190,000 people were being moved in and out of
8 the district. I think there's the --

9 JUSTICE KAVANAUGH: Can't that show
10 correlation?

11 MS. FLYNN: I'm not sure it can. I
12 mean, I -- it's -- I'm not sure that defendants
13 have shown that inevitably you would have
14 arrived at that exact same BVAP given those line
15 drawings.

16 I mean, the line-drawing decision in
17 Charleston County are what we're talking about,
18 how people were moved in that area to achieve
19 what the district court found was a racial
20 target. So there's that.

21 There's the -- the disparities in
22 white voters -- or Black voters being taken out
23 and white voters being left in, even of the same
24 political party. The district court did have
25 credibility findings here. And there was also

1 the expert evidence that isolated out race from
2 political affiliation and said race explains the
3 lines here.

4 JUSTICE KAVANAUGH: Why do you think
5 2020 presidential election data is not reliable,
6 probative, or whatever term you want to use
7 there, or sufficiently reliable or probative
8 that it would have made sense to rely on that?

9 MS. FLYNN: I think looking at just
10 one, and there's evidence in the record about
11 all of this, but looking to just one election
12 and not an election for the race that you're
13 actually studying, my understanding is that when
14 we do functional analyses of voting patterns, we
15 look at multiple elections and, you know, hope
16 to be able to look at voting patterns in races
17 that are actually at issue with the districts
18 we're talking about.

19 I think there's also --

20 JUSTICE KAVANAUGH: Would you think
21 looking at 2020 and figuring out were you a
22 Trump voter or were you a Biden voter is not
23 probative to whether you're going to vote for
24 Nancy Mace or not in the next election?

25 MS. FLYNN: I think there is evidence

1 discussing about how voters are more likely to
2 -- at least I believe that white voters are more
3 likely to switch over and vote for a candidate
4 in a presidential race and not, you know, switch
5 across party lines to do that.

6 And given that evidence, I think it
7 was plausible for the district court to reason
8 that there would be a reason to rely on race in
9 order to achieve the political goal.

10 JUSTICE KAVANAUGH: Okay. Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Barrett?

13 JUSTICE BARRETT: So I think the
14 difficult thing about this case is that clear
15 error review, we owe a lot of deference to the
16 district court's findings. But we're also
17 reviewing it in light of the legal standards,
18 and I'm not -- I'm talking about factual, I'm
19 not talking about the arguments that there was
20 legal error here, but we're reviewing it in
21 light of the fact that the plaintiffs bear an
22 exceedingly heavy burden when they're trying to
23 disentangle race and politics and that we give
24 the legislature a presumption of good faith.

25 So we're asking whether the district

1 court made a clear error in light of the fact
2 that it was judging the factual record with
3 those things into account.

4 And the Chief Justice has outlined,
5 you know, kind of the sum I think in a -- in a
6 pretty concise way of the evidence which was all
7 circumstantial here.

8 I think there's a reason why
9 Dr. Ragusa's report keeps coming up, is because
10 it was the best of the expert reports that
11 actually did try to disentangle race and
12 politics, which was the key question here.

13 And you pointed out, and -- and so
14 did -- so did the Respondent, that they didn't
15 point out an alternative map, but they had
16 expert evidence that was just as good because it
17 made similar points. But this is my question
18 about Dr. Ragusa's evidence.

19 Did it control for factors like
20 contiguousness and compactness? Because
21 Respondent pointed out in trying to address this
22 problem, which I think is why, you know, that
23 we've all been asking about and struggling with,
24 that, you know, Respondents said, well, some of
25 the experts testified about traditional

1 districting criteria and some testified about
2 attempts to disentangle race and politics, and
3 they were all showing different things, but did
4 anybody consider all of them?

5 Because it seems to me like that would
6 be really relevant evidence. And I want to be
7 sure that I'm understanding Dr. Ragusa's
8 testimony and its assumptions accurately.

9 So what's -- what's your view on that?

10 MS. FLYNN: So the county envelope
11 methodology essentially looks at the area from
12 which voters or, in this case, precincts, can be
13 drawn by looking at the counties that previously
14 constituted or overlapped with CD1, and he -- so
15 that, I think, has these considerations built
16 into the analysis because he's looking at, as
17 the expert did in Cooper, which this Court
18 credited, looking at basically what is the
19 available area from which the -- the map-makers
20 had to draw.

21 And I will also say that, you know, my
22 friend has made the point that, you know, it's
23 -- your -- theoretically possible that you can
24 go pretty deep into a county under that
25 analysis, but that is what the map-makers did.

1 They took in the entirety of two
2 counties and went to their furthest reaches when
3 they drew the map, and so I think it was
4 reasonable for Dr. Ragusa's analysis to do the
5 same thing in figuring out the area from which
6 he could draw.

7 JUSTICE BARRETT: And last question:
8 How do you think we should think about clear
9 error review in the kind of situation that I
10 outlined where the plaintiffs' burden was so
11 heavy below because of the good-faith standard
12 and because of the heavy burden that a plaintiff
13 bears in trying to disentangle race and
14 politics?

15 How do you think that should affect
16 our review of the facts?

17 MS. FLYNN: I think Cooper spoke to
18 this and said that it doesn't affect how clear
19 error works. It doesn't affect -- it doesn't
20 create some kind of a pro -- a pro-defendant
21 presumption on review. It's still factual
22 findings. It's still this Court's usual
23 Anderson standards for looking at those.

24 JUSTICE BARRETT: Okay. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: Yeah, I just wanted
3 to ask about the question that Justice Kavanaugh
4 asked with respect to our own assessment of the
5 presidential election data and whether or not
6 it's reliable.

7 Is that a finding of fact or that we
8 would owe sort of clear error review deference
9 to the district court's determination, or is
10 that something we are apt to or allowed to take
11 into account ourselves?

12 MS. FLYNN: I think that's evidence
13 that's in the record that renders the district
14 court's finding of a racial target and the
15 legislature's use of race plausible. So, no, I
16 don't think you have to --

17 JUSTICE JACKSON: So, in other words,
18 are we looking at a de novo? So what -- what
19 result from the fact that we might disagree
20 about the fact that the district -- about the
21 reliability of the presidential election?

22 Do we owe the district court deference
23 with respect to their determination that having
24 that data, you know, was -- was not enough and
25 that race was actually at issue here? Do we owe

1 them any deference with respect to that?

2 MS. FLYNN: So I do want to be
3 careful. I'm not sure there was a specific
4 finding in the district court opinion about this
5 question of the 2020 data.

6 JUSTICE JACKSON: I see.

7 MS. FLYNN: And so I think this is --
8 because this Court's looking at the -- all the
9 evidence in the record to determine whether the
10 findings the district court made were plausible,
11 that's why I think this is coming up.

12 JUSTICE JACKSON: Okay. And -- and
13 with respect to this question about maps and
14 alternative map, I'm just wondering whether or
15 not an alternative map is helpful with respect
16 to the contention that the district was being
17 oddly manufactured with respect to who was being
18 moved in or out.

19 This is similar to the question that I
20 asked plaintiffs' counsel. My understanding is
21 that politics is driving it at a sort of meta
22 level, and the map-maker identifies a
23 Republican-leaning district that he would like
24 to include. That Republican-leaning district
25 has both white and Black voters in it. And so

1 one would assume that just by that move, the
2 BVAP goes up. I don't know if that's right, but
3 I'm just -- I'm walk -- I'm walking it through.

4 But, in this situation, the BVAP stays
5 the same at the end of the day and we have
6 evidence that the map-maker went into the rest
7 of the district and moved out a certain number
8 of Democratic-leaning voters who happened to be
9 Black or plaintiffs say because they were Black,
10 but that's what makes the BVAP remain the same.
11 It's that we've now moved out Black Democrats to
12 account for, I guess, the Republican-leaning
13 district that we have included.

14 Is the use of race in that way, you
15 know, I have now got a higher BVAP than I want,
16 and I'm moving out Black voters, not white
17 Democrats, Black Democrats, in order to bring
18 the BVAP down, is that a violation in -- in this
19 world?

20 MS. FLYNN: Yes. And we think that
21 was a very probative piece of evidence that
22 contributed to the district court's finding.

23 JUSTICE JACKSON: And what would a map
24 do? If that's the kind of violation that I am
25 trying to establish as the plaintiff, I guess

1 what I don't understand is why having an
2 alternative map is going to illuminate that in
3 any way.

4 MS. FLYNN: Right. I think an
5 alternative map could show a different way the
6 lines could have been drawn and show whether or
7 not there are different ways to do it that it
8 could accomplish some or all of the defendants'
9 goals, but I don't think it's the only way to
10 answer this core question of what was driving
11 the decisionmaking. And --

12 JUSTICE JACKSON: And, in fact, if
13 this dynamic is what is really bothering me, for
14 example, as the plaintiff -- I'm putting myself
15 in their shoes -- it doesn't necessarily even
16 make sense to me that you would produce a map to
17 prove that dynamic is happening. You would have
18 expert testimony in the way that you have, you
19 would, you know, explain it all through, but I
20 don't -- I guess I just don't see how a map
21 would be helpful if -- if that's the dynamic
22 that I'm trying to focus on.

23 MS. FLYNN: I think that it was very
24 reasonable for plaintiffs to offer expert
25 testimony to that. I think the other evidence

1 speaks to it as well. I do think that cases
2 have sort of a different mix of circumstantial,
3 sometimes with direct, and you just kind of have
4 to take the record and see what persuasive
5 conclusions can be drawn for it without any --

6 JUSTICE JACKSON: So the government's
7 position is that you don't necessarily have to
8 have a map and you don't necessarily have to
9 have direct evidence. We've been hearing a lot
10 about the lack of direct evidence in this case.

11 Is there a world in which you can put
12 together a case that demonstrates that race is
13 actually operative in this environment without
14 direct evidence and without a map?

15 MS. FLYNN: Yes.

16 JUSTICE JACKSON: Thank you.

17 MS. FLYNN: Thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Rebuttal, Mr. Gore?

21 REBUTTAL ARGUMENT OF JOHN M. GORE

22 ON BEHALF OF THE APPELLANTS

23 MR. GORE: Today's argument
24 underscores why the alternative map requirement
25 is so vital. It ensures that racial

1 gerrymandering cases remain focused on racial
2 discrimination and not partisan disputes. It
3 also ensures that the grave finding of racial
4 gerrymandering rests on actual evidence of
5 racial predominance and not malleable expert
6 analysis.

7 If Dr. Ragusa were correct that race
8 better explains the enacted plan than politics,
9 it should have been very easy to draw an
10 alternative map that disentangled the two and
11 preserved the Republican political lean in
12 District 1. Appellees failed that requirement.
13 They did put alternative maps into the record,
14 so they obviously had the capacity to do that,
15 and all the alternative maps turned District 1
16 into a majority Democratic district.

17 We've heard from counsel for the
18 United States about two plans in the record, the
19 House Staff Plan and the Sabb Plan. Neither of
20 those increased the Republican tilt like the
21 enacted plan did, and neither was as compliant
22 with traditional districting principles, so
23 neither of those plans would have been enacted.
24 In fact, Senator Campsen became involved in
25 drawing the enacted plan and sponsoring it

1 precisely because the House Staff Plan imperiled
2 District 1 and threatened to turn it into a
3 majority Democratic district.

4 Counsel for the other side mentioned
5 Gomillion. But, in Gomillion, there was an
6 alternative map because there had been prior
7 municipal boundaries of Tuskegee that were
8 perfectly square before the redrawing that was
9 done in an intentionally discriminatory way. So
10 that map also underscored that there was
11 intentional discrimination in Gomillion, which
12 is a totally different case from this for -- for
13 a host of reasons otherwise.

14 Let me address the point about
15 election data. The district court did not find
16 that the 2020 presidential election data was
17 unreliable. The district court actually itself
18 relied on that data. It used that data to
19 illustrate the correlation between race and
20 politics. It thought that data was reliable.
21 And all the direct evidence showed that it was
22 reliable and far more reliable than racial data
23 that doesn't address white voters and doesn't
24 address voting and turnout.

25 The reason that the General Assembly

1 used only one year of election data is A very
2 simple one in the record: that 2020 was the
3 first year that the Election Commission
4 allocated absentee votes down to the precinct
5 where the voter lives instead of at the county
6 level. So it was more accurate and finely tuned
7 data, political data, than any election data
8 that had come before in the history of South
9 Carolina.

10 This is a circumstantial case with
11 very weak circumstantial evidence. There's no
12 direct evidence. There's no alternative map.
13 Here, we have a plan that complied with
14 traditional districting principles in Charleston
15 County and in District 1 and did so better than
16 all of the alternatives that were presented at
17 trial.

18 There was a mention of contiguity.
19 The district court also made no finding about
20 contiguity. The enacted District 1 is
21 contiguous. It's contiguous by water. Every
22 plan drawn in Charleston County is contiguous by
23 water because Charleston County contains islands
24 and rivers. So there's nothing suspect about
25 the contiguity of this particular plan.

1 We heard about the Covington case.
2 That was a remedial case. That was a remedial
3 case where the panel had already found racial
4 gerrymandering, sent it back to the legislature,
5 and then determined that the legislature had not
6 adequately fixed the problem. It's not a case
7 in which there was only weak circumstantial
8 evidence to support a finding of racial
9 gerrymandering.

10 We heard today that the legislative
11 record gave no indication that the General
12 Assembly was drawing lines based on politics.
13 That's completely incorrect. The guidelines
14 from both the House and the Senate permitted the
15 General Assembly to draw based on politics, to
16 draw communities of interest based on politics.
17 And the House guidelines went even further.
18 They allowed the General Assembly to draw around
19 communities of interest defined by voting
20 behavior, which is exactly what the General
21 Assembly did here.

22 Senator Margie Bright Matthews, who
23 was a Democrat who opposed the enacted plan,
24 said on the floor of the Senate that it was
25 about politics. She even disclaimed the

1 allegation that it was about race. She said
2 that Senator Campsen had drawn based on how
3 people voted, including in West Ashley.

4 This also -- this political goal also
5 was made clear in discovery. Mr. Roberts
6 testified to it in his deposition. Senator
7 Campsen, Senator Massey, and also Representative
8 Jordan. There were production of emails and
9 documents and text messages, including from
10 Representative Jordan, establishing that the
11 General Assembly had pursued a political goal.

12 We've heard a lot of discussion today
13 that Mr. Roberts or others were aware of race.
14 But mere awareness of race does not prove racial
15 predominance. The question here is whether race
16 was actually used to draw lines in a
17 predominantly way -- in a -- in predominant
18 manner.

19 That did not happen on this record,
20 and the district court's own description of what
21 the General Assembly did disproves it. It said
22 that the first move was to move in Berkeley and
23 Beaufort Counties whole. Once you do that, you
24 end up --

25 CHIEF JUSTICE ROBERTS: You can finish

1 your sentence.

2 MR. GORE: -- you could -- you could
3 -- you end with a district with a 20 percent
4 BVAP that's also majority Republican.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 The case is submitted.

8 (Whereupon, at 12:09 p.m., the case
9 was submitted.)

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