

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT A. RUCHO, ET AL., )  
Appellants, )  
v. ) No. 18-422  
COMMON CAUSE, ET AL., )  
Appellees. )  
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Pages: 1 through 75  
Place: Washington, D.C.  
Date: March 26, 2019

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11 Washington, D.C.

12 Tuesday, March 26, 2019

13

14 The above-entitled matter came on for  
15 oral argument before the Supreme Court of the  
16 United States at 10:12 a.m.

17

18 APPEARANCES:

19 PAUL D. CLEMENT, ESQ., Washington, D.C.;

20 on behalf of the Appellants.

21 EMMET J. BONDURANT, II, ESQ., Atlanta, Georgia;

22 on behalf of the Appellees, Common Cause, et al.

23 ALLISON J. RIGGS, ESQ., Durham, North Carolina;

24 on behalf of the Appellees, League of

25 Women Voters of North Carolina, et al.

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P R O C E E D I N G S

(10:12 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 18-422, Rucho versus Common Cause.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE APPELLANTS

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

This Court has repeatedly failed to identify a justiciable standard for partisan gerrymandering claims. The cause of that failure is not a lack of judicial imagination or a lack of claims that the particular map before the Court was the most extreme ever.

Rather, the root cause of this failure is the basic decision of the framers to give responsibility for congressional districting to political actors. The framers consciously chose to give the prime -- give the primary authority to state legislatures. And then, to police the possibility that state legislatures, which the framers knew to be partisan institutions, would engage in too much

1 partisanship, the framers chose a structural  
2 solution, by giving --

3 JUSTICE SOTOMAYOR: Mr. Clement --

4 MR. CLEMENT: -- the federal Congress  
5 supervisory authority.

6 JUSTICE SOTOMAYOR: Mr. Clement, that  
7 ship has sailed in Baker v. Carr. Once we  
8 decided the one-person, one-vote concept, we've  
9 been pretty much in all of our jurisprudence  
10 saying that certain acts by the legislature are  
11 unconstitutional, including race discrimination  
12 and others.

13 It can't be that simply because the  
14 Constitution says that a particular act is in  
15 the hands of one -- one branch of government,  
16 that that deprives the courts of reviewing  
17 whether that action is constitutional or not.

18 MR. CLEMENT: Well, Justice Sotomayor,  
19 I suppose the question of whether that ship  
20 sailed in Baker v. Carr is one way of  
21 presenting the question before the Court today.  
22 And I would submit that you don't have a  
23 one-size-fits-all solution for justiciability,  
24 and I don't think Baker v. Carr supports that  
25 proposition.

1           Indeed, I took the central lesson of  
2 Baker v. Carr to be that the same claim,  
3 essentially, when presented as an equal  
4 protection claim, was justiciable when the same  
5 claim presented as a Republican Guarantee  
6 Clause claim was not justiciable.

7           JUSTICE GINSBURG: But, Mister --

8           MR. CLEMENT: And I took --

9           JUSTICE GINSBURG: -- Mr. Clement,  
10 does one person have one vote that counts  
11 equally, which I take it to be the -- the  
12 message of those cases, now well accepted, does  
13 one person have one vote that counts equally  
14 with others if the impact of her vote is  
15 reduced based on her party affiliation?

16           MR. CLEMENT: The answer to that  
17 question, Justice Ginsburg, is yes. You still  
18 have an equal right to vote as an individual.

19           And what the parties on the other side  
20 are really complaining of here is not a purely  
21 individual injury. What they're complaining of  
22 is that they're grouped in a district with  
23 either too many people who agree with them or  
24 too few people who agree with them, and,  
25 therefore, their vote is sort of diluted in

1 some way.

2 And I don't think that is, in the  
3 first place, an individual legally cognizable  
4 interest, so I think they have a standing  
5 problem. But even if they get over the  
6 standing problem, then I don't think that's a  
7 justiciable injury.

8 And I would say more broadly, you  
9 know, lots and lots of voters live in a  
10 district where, either because of geography or  
11 because of state action, they're not going to  
12 have their preferred candidate elected.

13 Indeed, I'd go further and say most  
14 Americans don't get their preferred candidate  
15 elected because they have to choose from the  
16 candidates that are before them, and maybe  
17 based on the district they live in, it tends to  
18 give them a relatively liberal Democrat or a  
19 relatively conservative Republican when really  
20 what they'd prefer is somebody down the middle.  
21 And none of those things, I think, are things  
22 that you are constitutionally entitled to.

23 CHIEF JUSTICE ROBERTS: Mr. Clement,  
24 would your position require us to overrule  
25 Davis versus Bandemer?

1           MR. CLEMENT: I -- I think, Mr. Chief  
2 Justice, it would decide -- it would depend on  
3 which way you decided the case. I don't -- I  
4 think if you decided the case --

5           CHIEF JUSTICE ROBERTS: Well, if we  
6 decided it in your favor, would it require us  
7 to overrule?

8           (Laughter.)

9           MR. CLEMENT: And it would still  
10 depend, Your Honor, on whether you decide it in  
11 our favor on standing grounds or on  
12 justiciability grounds.

13           If you decided it in our favor on  
14 justiciability grounds, I think you would have  
15 to overrule the Bandemer case. I think the  
16 Bandemer case is a case that well deserves  
17 overruling, and I'm happy to discuss why that  
18 is the case.

19           I certainly think, as Justice Scalia  
20 pointed out for four justices in Vieth, it is a  
21 case that uniquely has no reliance interests on  
22 it, other than the potential reliance interests  
23 of litigants, but it hasn't produced actual  
24 results, and I think, as -- as Justice Scalia  
25 said, it's a decision that sort of triply



1 doesn't have a strong claim to stare decisis.

2 But I also think, if you decided the  
3 case on standing grounds, you would really be  
4 deciding the grounds -- the case on grounds  
5 that are actually interior to anything the  
6 Court decided definitively in *Bandemer*.

7 So I really think it does depend on  
8 how you decide the case in our favor as to  
9 whether you need to overrule *Bandemer*.

10 JUSTICE SOTOMAYOR: Mr. Clement, if I  
11 understand the bottom line of your argument,  
12 you would answer the question that one of my --  
13 I don't want to call him a former colleague,  
14 he's still a colleague but no longer on the --  
15 on the bench with us, Justice Kennedy asked in  
16 one of these cases, and it was if a state  
17 constitution had a provision that required  
18 redistricting to be based solely on partisan  
19 grounds -- forget about whether they -- they  
20 were meeting any other traditional grounds or  
21 not -- you would say that was constitutional?

22 MR. CLEMENT: Well, actually, Justice  
23 Sotomayor, I -- I think I might say to the  
24 particular hypo -- and I think it matters how  
25 you frame it, I mean, I do think that if you

1 took a state constitutional provision and tried  
2 to have it impose some requirement that's going  
3 to apply to every redistricting going forward,  
4 there's at least an argument that there's  
5 actually an Election Clause problem with that  
6 effort to try to control sort of subsequent  
7 redistricting efforts.

8 Now you may or may not accept that  
9 argument, but --

10 JUSTICE SOTOMAYOR: You're saying --  
11 you're basically saying yes, that would mean,  
12 as occurred here, that almost 50 percent of one  
13 party's vote is going to result in maybe less  
14 than one-third of their representation in  
15 Congress?

16 MR. CLEMENT: That's exactly right,  
17 Justice Sotomayor. And I think you've put your  
18 finger on what my friends on the other side  
19 perceive to be the problem, which is a lack of  
20 proportional representation.

21 JUSTICE SOTOMAYOR: No, that -- that  
22 -- no, because all of the tests that they're  
23 proposing and that the district court looked at  
24 didn't talk about proportionate representation.  
25 It looked at only the opportunity to elect.

1           An opportunity is different. The way  
2 this is structured, there is absolutely no  
3 opportunity to -- not none but virtually none  
4 -- I'm exaggerating slightly -- but -- but  
5 virtually none for maybe a majority party to  
6 elect more than or less than a third of the  
7 people they voted for.

8           MR. CLEMENT: Well, I think that that  
9 difference -- first of all, I think that  
10 difference is implicit in the idea of having  
11 districts rather than statewide elections for  
12 the Congress.

13           And keep in mind that the Constitution  
14 as originally enacted, there's now a statute  
15 that changes this, but as -- for constitutional  
16 purposes, it is perfectly constitutional for a  
17 state to embrace the policy idea that  
18 proportional representation is a good thing and  
19 implement it by saying we're going to elect  
20 Congress not by districts but by statewide  
21 votes. That was a perfectly --

22           JUSTICE GORSUCH: Well, Mister --

23           JUSTICE KAGAN: Mr. Clement, can I --  
24 can I take --

25           JUSTICE GORSUCH: -- Mr. Clement --

1 no, please.

2 JUSTICE KAGAN: -- can I take you back  
3 to Justice -- the Justice Kennedy question that  
4 Justice Sotomayor talked about. I wasn't quite  
5 sure I understood your answer, and I'll say the  
6 question in a little bit of a different way.

7 MR. CLEMENT: Sure.

8 JUSTICE KAGAN: Because it -- it -- it  
9 seems to me that this is kind of Justice  
10 Kennedy's hypothetical come to life in -- in  
11 this sense, that there is a particular  
12 provision in the legislation here that says the  
13 partisan makeup of the congressional delegation  
14 is 10 Republicans and three Democrats, and the  
15 committee shall make reasonable efforts to  
16 construct districts to maintain that current  
17 partisan makeup, 10 and three.

18 So it was specifically written into  
19 the law that whatever else you do, and there  
20 were definitely other things that the lawmakers  
21 wanted done, but whatever else you do, go come  
22 back with the same 10 and three. And I think  
23 that that was the import of Justice Kennedy's  
24 question, is like can you write that into a law  
25 and say that's what we're trying to do here?

1           MR. CLEMENT: So, Justice Kagan, two  
2 responses. One is I -- I -- I -- I did notice  
3 every time Justice Kennedy asked that question,  
4 he did ask it the way that Justice Sotomayor  
5 did and built in this notion that you were  
6 going to permanently enshrine that preference  
7 for future elections.

8           So I do just want to drop the footnote  
9 that I think there may be something distinctly  
10 problem --

11           JUSTICE KAGAN: This seems pretty  
12 enshrined. Go do it --

13           MR. CLEMENT: Well --

14           JUSTICE KAGAN: -- 10 and three.  
15 That's the current. That's what we want to  
16 maintain.

17           MR. CLEMENT: But, no, I think there's  
18 a difference, and -- but I'm happy to respond  
19 to your -- your question about can you have it  
20 as an express criterion for a particular  
21 districting.

22           And I think the answer -- sort of  
23 obviously given who I'm representing -- is  
24 absolutely yes, that's not a problem, and, by  
25 the way, I think actually being candid about it

1 probably serves accountability principles in  
2 the long run, which is to say if you think --  
3 which I think almost everybody does -- that  
4 implicitly that's what the Republican  
5 legislature was doing in Bandemer, in fact,  
6 they were explicit in their deposition  
7 testimony, if you look at Footnote 5 of Justice  
8 White's opinion, that the people who drew that  
9 map, the speaker of the Republican House of  
10 Indiana was express that his goal was to  
11 preserve as many Republican incumbents as  
12 possible.

13 JUSTICE ALITO: Could I take you back  
14 to --

15 JUSTICE KAGAN: Yes, but --

16 JUSTICE ALITO: -- to the way Justice  
17 Kennedy formulated the question, which  
18 hypothesized a provision of the state  
19 constitution. And you made reference to the  
20 Elections Clause.

21 The Elections Clause says that it is  
22 to be prescribed by the -- the times, places,  
23 and manners are to be prescribed by each -- by  
24 the legislatures of the state.

25 Are -- do the legislatures of the

1 state typically control what is in the state  
2 constitution?

3 MR. CLEMENT: They -- they don't,  
4 Justice Alito, and that's why I do think it is  
5 important to figure out -- I mean, I think  
6 Justice Kennedy may have framed that question  
7 in a particular way.

8 I mean, I -- I don't want to go too  
9 far down the road of relitigating the Arizona  
10 independent redistricting case here, but, you  
11 know, I do think there is a certainly  
12 respectable argument that state legislature  
13 means state legislature and not the other parts  
14 of the state government. And that's why I do  
15 think there are separate issues.

16 JUSTICE GINSBURG: It can mean the  
17 people --

18 MR. CLEMENT: It -- it -- it --

19 JUSTICE GINSBURG: -- when it's done  
20 by referendum.

21 MR. CLEMENT: -- it well could,  
22 Justice Ginsburg. And, indeed, there are --  
23 there are at least four people that agreed with  
24 you on that proposition. And I -- and I don't  
25 want to relitigate that here because I don't --

1 JUSTICE GORSUCH: Well --

2 MR. CLEMENT: -- think the result in  
3 that case -- I think that case can be taken as  
4 a given --

5 JUSTICE GORSUCH: -- along --

6 MR. CLEMENT: -- and you can still say  
7 that the claims here are not justiciable.

8 And to be as responsive as I can to  
9 Justice Kagan's question, I don't think there  
10 is a constitutional problem when a state  
11 legislature makes explicit with respect to the  
12 redistricting they're undertaking at that  
13 moment if they make explicit what was  
14 ultimately explicit after the record was built  
15 up in Bandemer and Vieth, which is it just  
16 didn't happen that they got a map that was  
17 favorable to Republicans, that they actually  
18 intended to do that, along with traditional  
19 redistricting principles.

20 And I think, Justice Kagan, the way  
21 you read the criteria is exactly right. With  
22 respect to partisan advantage, as they called  
23 it, they said reasonable efforts will be made.

24 With respect to other items on their  
25 list of criteria, like -- like contiguity, they



1 said shall. So some things were  
2 non-negotiable, like contiguousness and equal  
3 population. Other things were negotiable, but  
4 reasonable efforts would be made.

5 JUSTICE GORSUCH: Mr. Clement, along  
6 those lines, in terms of Democratic  
7 accountability on this, one of the arguments  
8 that we've heard is that the Court must act  
9 because nobody else can as a practical matter.

10 But -- but given Arizona, and that is  
11 the holding of the Court, is that true? And to  
12 what extent have states, through their  
13 initiatives, citizen initiatives, or at the  
14 ballot box in elections through their  
15 legislatures, amended their constitutions or  
16 otherwise provided for remedies in this area?

17 I -- I -- I just happen to know my  
18 home state of Colorado this last November had  
19 such a referendum on the ballot that passed  
20 overwhelmingly, as I recall. So I -- I believe  
21 there are others and I'm just wondering, what's  
22 the scope of the problem here? I also know  
23 there are five states with only a single  
24 representative, right, so -- in Congress, so  
25 presumably this isn't a problem there.

1           MR. CLEMENT: That's right. And to  
2 the extent it's a problem at all, the scope of  
3 the issue, shall we say, is, you know, roughly  
4 30 states that don't have some kind of  
5 mechanism like you've described or have  
6 multiple districts and, you know, I think even  
7 when you get to --

8           JUSTICE GORSUCH: But how many -- my  
9 sense is there's a lot of movement in this  
10 area. I -- I believe there were four or five  
11 states along with Colorado just this last  
12 election that acted.

13          MR. CLEMENT: That's exactly right.  
14 Michigan is another state that passed a ballot  
15 initiative. And, of course, the other sort of  
16 place where there can be a solution to this,  
17 which is the most obvious one and is a solution  
18 no matter what you think of the Arizona  
19 independent case, is Congress.

20                 And if you look at HR-1, the very  
21 first bill that the new Congress put on their  
22 agenda, it was an effort to essentially force  
23 states to have bipartisan commissions, now  
24 query whether that's constitutional, but it  
25 certainly shows that Congress is able to take

1 action in this particular area.

2 CHIEF JUSTICE ROBERTS: Well, I  
3 suppose the -- I suppose the members of  
4 Congress are pretty happy with the way the  
5 districting has been done.

6 (Laughter.)

7 MR. CLEMENT: Well, you -- you might  
8 think, Mr. Chief Justice, but, actually, I  
9 don't think the majority of them are, because  
10 that was a bill that I think passed on party  
11 line votes.

12 And so, I mean, to the extent that --  
13 that people, other justices of this Court in  
14 the past have been concerned about things like  
15 entrenchment and the like, I mean, it's a  
16 little odd here that we've had all of this  
17 supposedly partisan redistricting to benefit  
18 the composition of Congress, and yet a majority  
19 of Congress thinks that they should pass HR-1.

20 So I just don't know that there really  
21 is that much of a problem. And I do think it's  
22 -- you know, the particular context that arises  
23 here is the context of congressional  
24 redistricting, and one of the elements of the  
25 framers' structural solution was they didn't

1 directly tell Congress: Why don't you district  
2 for yourself.

3 They said in the first instance let's  
4 have somebody else at the state level closer to  
5 the people do the districting and then we'll  
6 give Congress a role to supervise that.

7 So they didn't have sort of the same  
8 fox guarding the same hen house in this  
9 particular context.

10 JUSTICE BREYER: Imagine I -- you may  
11 not want to answer this question, which I'd  
12 understand. You might not have thought about  
13 it.

14 But assume that absolutely this is  
15 illegal, all right, or unconstitutional, but  
16 there's no remedy. We can't figure out a  
17 remedy. All right? That's where I want you to  
18 start.

19 Now I -- I tried one in Vieth, you  
20 know, and -- and the -- and my guess is from  
21 the reaction there was none and so probably  
22 there's something wrong with it.

23 But what I'm trying to do is to figure  
24 out if there's a way to catch real outliers,  
25 just you can't go beyond that, I mean, at the

1 moment I'm assuming, the real outliers.

2 So which are the real outliers? Now,  
3 if we look at history, there wasn't that much  
4 gerrymandering in the past compared to what  
5 there might be with computers in the future.  
6 Okay?

7 So I've tried to figure out something  
8 simple, not going to get all -- every judge in  
9 the country mixed up, not going to lead to  
10 every election contested and throw it all to  
11 the judges instead of the people. Okay?  
12 Anybody can figure it out.

13 Now this is what it is, that if a  
14 gerrymander, dah-dah-dah, is un -- if -- if  
15 there's a -- a commission or something, forget  
16 it, you're out of court right away. Okay?

17 But, if there is no commission, one  
18 party controls it, then a gerrymander is  
19 unconstitutional if a party that wins a  
20 majority of the votes in a state, so they won a  
21 majority of the votes, but the other party gets  
22 more than two-thirds of the seats. You see?

23 That would be pretty extreme. But  
24 your client might meet it. And the virtue of  
25 it, it's absolutely simple. By the way, they

1 can try to justify it and then we can use, you  
2 know, the -- Landers -- you know, something  
3 like those five percent things to test the  
4 justifications, but there won't be much can be  
5 justified. Now it could be a starting place.

6 And that two-thirds number is not  
7 drawn out of thin air. The Constitution, in  
8 fact, you can find serious matters, overriding  
9 vetoes, constitutional amendments, and you can  
10 show how gerrymandering wrecks what they  
11 assumed for those, but that's a different  
12 story, you can find.

13 And it -- it very rarely would  
14 operate, but it would be somewhere. Now have  
15 you thought about anything like that? Do you  
16 have any reaction? Your reaction would be, no,  
17 that's no good, but I mean aside from -- aside  
18 from that, have -- is there anything you want  
19 to contribute to thought on that?

20 MR. CLEMENT: Well, Justice Breyer, in  
21 -- in all candor, there's so much in that that  
22 I disagree with that it's a little hard to know  
23 where to start.

24 (Laughter.)

25 JUSTICE BREYER: All right, all right.

1           MR. CLEMENT: I'm going to resist at  
2 first the temptation to take issue with the  
3 premises, though if I have time I'll get back  
4 to that. Let me take issue with the two basic  
5 prongs of your test.

6           So, first, the reason I think your  
7 test has to be a non-starter is the fact that,  
8 as you say, your test would basically give a  
9 pass to any state that doesn't use the method  
10 prescribed by the framers to engage in  
11 congressional districting.

12           So it would be a strike against the  
13 state if they actually did what the framers  
14 envisioned --

15           JUSTICE BREYER: Wait, wait, wait,  
16 wait, wait --

17           MR. CLEMENT: -- which is have a  
18 legislature --

19           JUSTICE BREYER: -- wait one second  
20 there. I'm just saying this is perhaps a  
21 start. I'm not saying anybody gets a pass.  
22 But I'm saying you wouldn't have to go further  
23 than that in this case.

24           MR. CLEMENT: Well, I thought I heard  
25 you say that if you were a state that used a

1 bipartisan commission, dot, dot, dot --

2 JUSTICE BREYER: Oh, yes, that's  
3 right. That's right.

4 MR. CLEMENT: -- you would get a pass.

5 JUSTICE BREYER: Yeah, yeah, you're  
6 right.

7 MR. CLEMENT: And that seems to me  
8 itself to be remarkably revealing because  
9 you're basically saying that it would be a good  
10 thing for the state if they chose to use a  
11 mechanism other than the one that the framers  
12 picked.

13 So that's my big objection to the  
14 intent prong.

15 JUSTICE GINSBURG: Not if you -- not  
16 if you say that for this purpose, the  
17 legislature is the people. And that's what  
18 Arizona held --- held.

19 MR. CLEMENT: Well, Justice Ginsburg,  
20 in fairness, I think what Arizona held is that  
21 the people are within that concept, but I  
22 certainly don't think Arizona stands for the  
23 proposition that what the framers had in mind  
24 primarily was something other than the state  
25 legislatures.



1           So it seems to me it's a strike  
2           against your test that it identifies as a  
3           problem something that the framers would have  
4           associated with the primary mechanism they used  
5           for redistricting. So on the effects --

6           JUSTICE KAGAN: If I -- if I can just  
7           interrupt for one second.

8           MR. CLEMENT: Sure.

9           JUSTICE KAGAN: I mean, going down  
10          that road would suggest that Justice Gorsuch's  
11          attempt to sort of say this is not so bad  
12          because the people can fix it is not so true  
13          because you're suggesting that the people  
14          really maybe can't fix it, you were wrong about  
15          the people being able to fix it, and if the  
16          people could fix it, while it's not the  
17          constitutionally prescribed way because it's  
18          never been done before, so Justice Gorsuch's  
19          attempts to save what's so dramatically wrong  
20          here, which is the Court leaving this all to  
21          professional politicians who have an interest  
22          in districting according to their own partisan  
23          interests, seems to fail.

24          MR. CLEMENT: Well, I -- I would  
25          disagree, Justice Kagan. I mean, I took the

1 import of Justice Gorsuch's question being  
2 that, you know, maybe we can allow the states  
3 to solve this problem for themselves.

4 But I think then, when you get at the  
5 starting point of Justice Breyer's question,  
6 which is at a certain point --

7 JUSTICE BREYER: Yeah.

8 MR. CLEMENT: -- the federal  
9 government, through its justices and judges,  
10 are going to intervene and put limits on what  
11 the state does.

12 JUSTICE BREYER: All right, I've got  
13 this point, but what I'm trying to get you to  
14 focus on -- because I've read the briefs, you  
15 know, I -- this is the fourth time, and I --  
16 and I -- I think I -- but the thing that I want  
17 you to focus on, if you can, if you want to, is  
18 the two-thirds majority idea.

19 Look, my party got a majority of the  
20 votes in the state, but we ended up with less  
21 than a third of the seats. You see, I said --  
22 my tone of voice is meant to be, gee, this is  
23 really extraordinary, but there is absolutely a  
24 workable standard.

25 Now the next question is all the

1 constitutional arguments you're raising. I'm  
2 not pushing those under the rug, but, for  
3 present purposes, I want you to see if there's  
4 any reaction to the practicality of this  
5 standard.

6 MR. CLEMENT: Well, I -- I think the  
7 way I would respond to that, Justice Breyer, is  
8 I am not here to tell you that if the  
9 Constitution included a one standard deviation  
10 from proportional representation clause or a  
11 one-third/two-thirds clause, that judges  
12 somehow would be incapable of administering  
13 that clause.

14 So I think the fundamental problem is  
15 there is no one standard deviation from  
16 proportional representation clause in the  
17 Constitution. And, indeed, you can't talk even  
18 generally about outliers or extremity unless  
19 you know what it is you're deviating from.

20 And I take it, implicit in your  
21 question and implicit in Justice Sotomayor's  
22 question, that what's bothering people is a  
23 deviation from a principle of proportional  
24 representation.

25 JUSTICE KAGAN: Well, Mr. Clement --

1 JUSTICE SOTOMAYOR: Actually --

2 JUSTICE KAGAN: -- you keep saying  
3 that, but I -- I -- I don't quite think that  
4 that's right given the statistical analysis in  
5 this case.

6 I mean, you're quite right that this  
7 Court in the past has said this country does  
8 not run on proportional representation and this  
9 is a hang-up in our ability to solve this  
10 problem. But what's -- what's -- what's quite  
11 interesting about the statistical analysis in  
12 this case is that quite a lot of it does not  
13 run off a proportional representation  
14 benchmark.

15 In other words, all the computer  
16 simulations, all the 25,000 maps, right, really  
17 do take the political geography of the state as  
18 a given. So -- so, if Democrats are clustered  
19 and Republicans aren't, that's in the program.  
20 And all the other redistricting requirements or  
21 preferences, like contiguity, like following  
22 natural boundaries, that's all in the program.

23 So there's -- the benchmark is not  
24 proportional representation. The benchmark is  
25 the natural political geography of the state,

1 plus all the districting criteria, except for  
2 partisanship.

3           And if you run those maps, right, what  
4 did you get? You got 24,000 maps and this --  
5 and 99 percent of them, 99 plus percent of  
6 them, were on one side of the map that was  
7 picked here. All of those maps show that a  
8 10/three configuration is not the natural one.  
9 And it's not the natural one not because it's  
10 not proportional representation. It's just not  
11 the way anybody can district, given the actual  
12 political geography on the ground, unless you  
13 absolutely try to overrule that political  
14 geography.

15           MR. CLEMENT: So, Justice Kagan, two  
16 points. One is, I mean, I'm happy to respond  
17 to the maps, but I do think Justice Breyer, in  
18 fairness, did build in a notion of proportional  
19 represent --

20           JUSTICE BREYER: No, I don't think it  
21 does --

22           MR. CLEMENT: Well, okay. Then I'm --

23           JUSTICE BREYER: -- for this reason.  
24 The reason is all it says is a part --

25           JUSTICE KAGAN: Well, yeah, I -- I --

1 wait. Justice Breyer -- I want you to come  
2 back to Justice Breyer's question, but --

3 MR. CLEMENT: Okay. I -- I just --

4 JUSTICE KAGAN: -- I want you to ask  
5 mine -- answer mine.

6 MR. CLEMENT: -- I hear one-third/  
7 two-third, and I -- I sure thought we were  
8 talking about proportional representation.

9 As to the maps, you know what I found  
10 striking about the maps -- and I think this is  
11 different from what you found striking about  
12 the maps -- but, first of all, you can do this  
13 24,000 different ways. So that seems like this  
14 is about as discretionary a government function  
15 as one could imagine.

16 And if you go all the way back to  
17 Marbury versus Madison and what makes something  
18 a political question, it is a purely  
19 discretionary function. You can do this 24,000  
20 different ways.

21 The second thing I found --

22 JUSTICE KAGAN: Well, that's making  
23 lemonade out of lemons.

24 MR. CLEMENT: Well, let me -- let me  
25 try to make -- can I make --

1 (Laughter.)

2 MR. CLEMENT: -- can -- can I make one  
3 point more?

4 JUSTICE KAGAN: You can do it 24,000  
5 different ways and 23,999 produce an outcome  
6 that's less partisan than the one the  
7 legislature picked here.

8 MR. CLEMENT: But, see, what I think  
9 is remarkable is actually that what the  
10 statistics show -- and this is on page 162 of  
11 the -- of the -- of the JSA -- is that if you  
12 run 24,000 maps with partisanship taken out  
13 entirely and you just use traditional juris- --  
14 traditional principles, you get 162 different  
15 maps that produce a 10/three Republican split.

16 So, yeah, it's one percent,  
17 it's .7 percent -- I mean .7 percent, just to  
18 be clear. That's 162 different ways to get to  
19 a 10/three map that didn't take politics into  
20 account at all.

21 JUSTICE ALITO: But, if you have  
22 24,000 maps that satisfy all of the so-called  
23 neutral criteria that you put in your computer  
24 program, don't you need a criterion or criteria  
25 for deciding which of the 24,000 maps you're

1 going to choose?

2 And implicit in Justice Kagan's  
3 comments is the idea, is it not, that you have  
4 to choose one that honors proportional  
5 representation? You have no other criteria for  
6 distinguishing among the 24,000 maps.

7 MR. CLEMENT: I -- I think that's  
8 right. And at a bare minimum, it has to be  
9 that those 162 --

10 JUSTICE SOTOMAYOR: Why, Mr. Clement?

11 MR. CLEMENT: -- because they're over  
12 here, are off limits.

13 CHIEF JUSTICE ROBERTS: Yeah, finish  
14 your answer.

15 JUSTICE SOTOMAYOR: Mr. Clement, let's  
16 go back to the why of that. You keep talking  
17 about proportional representation, but it's  
18 not, because what was shown is that 99 percent  
19 of the time you get a map that is more fair to  
20 both parties than the one that was chosen.

21 And so the issue is you can -- you can  
22 have 162, 164, but what you can't do in picking  
23 that one percent of a map is discriminate  
24 against a group of people based on their  
25 political views. We have a legion of cases



1 that say you can't treat political parties  
2 differently because it's an equal protection  
3 violation. And it's the same thing, whether  
4 it's because of their speech or their  
5 activities.

6 What we're telling you is pick any  
7 other map you want; just don't split counties,  
8 as was done here, solely -- based solely on your  
9 political views, because counties were split.  
10 Don't pick or don't -- you may use saving an  
11 incumbent, but don't kick one out because by  
12 kicking one out -- and there is a map that  
13 would keep all of the incumbents in place --  
14 don't kick one out because you're excluding  
15 people based on their political views.

16 This is what this is about. You're  
17 discriminating on the basis of a group's speech  
18 and diluting their vote accordingly.

19 MR. CLEMENT: So, Justice Sotomayor, I  
20 would have three points, if I could get them  
21 out. I mean, one is the key word in your  
22 question is "fair." And what makes this  
23 unfair, I would submit, at the end of the day,  
24 is some principle of proportional  
25 representation.

1           Nobody thinks it's unfair, I don't  
2 think, that Republicans in Massachusetts under  
3 the current maps are never going to be able to  
4 elect somebody to Congress even though they're  
5 something like 35 percent of the population,  
6 nobody thinks that's unfair, because you really  
7 can't draw districts to do it because they're  
8 evenly distributed. It might be unfortunate  
9 for them, but I don't think it's unfair.

10           And what makes this unfair is some  
11 conception of proportional representation and  
12 the ability to do it.

13           JUSTICE BREYER: Yes, that's true,  
14 but, look, party A gets over and over and over  
15 55 percent of the votes. Party B every single  
16 time gets 90 percent of the seats.

17           Now, if you want to call that a  
18 proportional representation problem, do it, but  
19 I'm limiting to that kind of thing. I mean,  
20 it's not proportional representation. It's a  
21 problem of seeing a legislator -- legislature  
22 reflect to some degree, you know, the views of  
23 the majority of people that elect its members.

24           MR. CLEMENT: So, Justice Breyer, let  
25 me say why I don't think that's such a horrible

1 problem and let me try to put what's on the  
2 other side of the ledger.

3           So why I don't think that's a horrible  
4 problem is even if it's as you described,  
5 what's going to happen in almost every state in  
6 the union, if that happens, is the 55 percent  
7 majority will elect to statewide office  
8 governors, attorneys general, and the like, and  
9 the next time around they're not going to be  
10 able to pass a map, and the next time around  
11 it'll probably end up in gridlock and a  
12 judicial line drawing.

13           And I don't think that's the happiest  
14 result in the world, but it means that you're  
15 not going to be able to perpetuate this in the  
16 long run.

17           Now here is what's on the other side  
18 of the ledger and then I'll try to sit down and  
19 reserve my time.

20           JUSTICE KAVANAUGH: May I --

21           JUSTICE KAGAN: Well, let me just give  
22 you a different, you know, a 49 percent state,  
23 which is more like what North Carolina is, so a  
24 48 or 49 percent state might not find it so  
25 easy to do that.

1           And yet that 48 or 49 percent in this  
2 map is consistently being represented by  
3 25 percent, give or take, of the legislature.

4           MR. CLEMENT: Well, and -- and -- and  
5 I don't think anybody has a solution. I don't  
6 know. Forty-eight percent, I think,  
7 gerrymandering is sufficiently unpopular, as  
8 proven by history, that the 48 percent might  
9 get elected, but if you're 35 percent, nobody's  
10 got a solution for you.

11           So here's what's on the other side of  
12 the ledger, which is, all right, I think these  
13 problems, as Justice O'Connor, who probably  
14 more than anybody who sat on this Court  
15 recently had her finger on the pulse of state  
16 electoral politics, said this problem is  
17 largely self-healing.

18           But, on the other side of the lens, on  
19 the other side of the weight, rather, if you  
20 get in the business of adjudicating these  
21 cases, these cases will come, they will come in  
22 large numbers, and they will come on your  
23 mandatory appellate jurisdiction.

24           And once you get into the political  
25 thicket, you will not get out and you will

1       tarnish the image of this Court for the other  
2       cases where it needs that reputation for  
3       independence so people can understand the  
4       fundamental difference between judging and all  
5       other politics.

6                 JUSTICE GINSBURG:   Exactly the same  
7       thing was said about --

8                 JUSTICE SOTOMAYOR:  Mr. Clement, do  
9       you seriously --

10                JUSTICE GINSBURG:   -- one-person,  
11       one-vote.

12                CHIEF JUSTICE ROBERTS:  Justice  
13       Ginsburg.

14                MR. CLEMENT:   I'm sorry?

15                JUSTICE GINSBURG:   Exactly what you  
16       said, just what you said now, that was the  
17       exact same argument about don't go to  
18       one-person, one-vote, the courts are going to  
19       be flooded with cases and they'll never be able  
20       to get out of it.  That's not what happened.

21                MR. CLEMENT:   But, Justice Ginsburg,  
22       sometimes an argument that's not a great  
23       argument in one context turns out to be pretty  
24       darn good in another context.  And here is the  
25       thing.

1           State legislatures can deal perfectly  
2 well with a one-person, one-vote requirement.  
3 But if you tell state legislators --  
4 legislatures that are literally divided down  
5 the line in the middle with an aisle, a  
6 physical aisle between Democrats and  
7 Republicans, that they can't take partisanship  
8 into account, then you're really either telling  
9 them to get out of the business of  
10 redistricting entirely or you're opening  
11 yourself up for case after case after case.

12           I'd like to reserve my time.

13           JUSTICE KAVANAUGH: On -- on  
14 proportional representation, can I ask a  
15 question, which is, first, isn't proportional  
16 representation a judicially-manageable  
17 standard?

18           MR. CLEMENT: Well, it's -- it's --  
19 it's a difficult standard. It would require  
20 answering some questions about where it's  
21 baseline, what elections do you get the  
22 baselines from, but it could be manageable.

23           JUSTICE KAVANAUGH: And the second is,  
24 why can't the Equal Protection Clause be  
25 interpreted to require something resembling

1 proportional representation?

2 MR. CLEMENT: Because it's entirely  
3 ahistorical. And keep in mind, the framers  
4 gave state legislatures the choice of ensuring  
5 proportional representation by having  
6 state-wide elections. But they also gave them  
7 the choice to district, which is fundamentally  
8 inconsistent with that.

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Mr. Bondurant.

13 ORAL ARGUMENT OF EMMET J. BONDURANT, II  
14 ON BEHALF OF THE APPELLEES, COMMON CAUSE, ET AL.

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

17 This case involves the most extreme  
18 partisan gerrymander to rig congressional  
19 elections that has been presented to this Court  
20 since the one-person, one-vote cases.

21 The North Carolina legislature's  
22 defense is equally extreme. They take the  
23 position that no matter how predominant the  
24 intent, no matter how extreme the effects,  
25 there are absolutely no constitutional

1 limitations --

2 JUSTICE KAVANAUGH: When you use the  
3 word --

4 MR. BONDURANT: -- on partisan  
5 gerrymander.

6 JUSTICE KAVANAUGH: -- when you use  
7 the word "extreme," that implies a baseline.  
8 Extreme compared to what?

9 MR. BONDURANT: In this case, it is  
10 extreme in comparison to any statistical  
11 application of neutral redistricting principles  
12 in the context of the political geography of  
13 North Carolina.

14 It was statistically impossible to  
15 come up with an 11/two plan. As this -- one of  
16 the authors said, we're proposing a 10/three  
17 partisan gerrymander because it's not possible  
18 to do an 11/two plan. The statistics bear that  
19 out.

20 Moreover, Dr. Chen's maps, which took  
21 every possible criteria that they used that was  
22 legitimate, applied them to 1,000 randomly  
23 drawn maps, showed multiple things.

24 First, that you cannot possibly  
25 explain the 10/three advantage based on



1 political geography, democratic clustering, the  
2 application of independent redistricting  
3 principles, or pure chance. This is not the  
4 result of chance.

5 You can only achieve it by making  
6 partisan advantage the predominant motivation.

7 JUSTICE KAVANAUGH: Mr. Clement --

8 CHIEF JUSTICE ROBERTS: Well, if the  
9 predominant -- I -- I understood your brief and  
10 your -- your friend on the other side  
11 characterized your brief as saying that any  
12 element of partisanship was bad. Is that your  
13 position?

14 MR. BONDURANT: No, Your Honor. Our  
15 position is that partisanship has to be at  
16 least a material factor, as it is in Arlington  
17 Heights or Mount Healthy, but, in this case, we  
18 prove that was a predominant factor, and that  
19 is the ruling of the lower court.

20 CHIEF JUSTICE ROBERTS: Well, I guess  
21 it just rephrases the question of what  
22 constitutes a material factor.

23 MR. BONDURANT: Well, the difference  
24 between material and being immaterial, having  
25 no consequence, is a very real difference.

1 CHIEF JUSTICE ROBERTS: So -- so just  
2 so I understand, any partisanship that has a  
3 consequence is impermissible under your view?

4 MR. BONDURANT: We do not need to go  
5 that far in this case because you have evidence  
6 of predominance, that is, this objective,  
7 partisan advantage, superseded every other  
8 conceivable objective.

9 CHIEF JUSTICE ROBERTS: I -- I  
10 understand the view that it's -- the reality,  
11 that it's an extreme case, but, to state a  
12 principle that we're going to be able to apply  
13 to other cases, your -- your definition of  
14 material is that it has a partisan consequence?

15 MR. BONDURANT: It is a material part  
16 of the decision, as in, for example, firing in  
17 Mount Healthy. If that was a material part of  
18 the decision of the school board to fire the  
19 school teacher, then he had made a prima facie  
20 case which could then be defended based on  
21 either there were intervening causes, that is,  
22 the real reason why she didn't show up to  
23 teach, or you have legitimate state interests  
24 that are being served.

25 In this case, the North Carolina

1 legislature before, below, did not advocate,  
2 contend in any way that there is any legitimate  
3 state interest of any kind served by partisan  
4 gerrymandering.

5           So you're -- you have under any of  
6 your analyses, Anderson Burdick, a clear  
7 burden. You have clear vote dilution,  
8 intentional vote dilution, carefully thought  
9 out, skillfully executed.

10           JUSTICE ALITO: Can I take you back to  
11 questions that were asked before? If you -- if  
12 you make a list of the so-called neutral  
13 criteria -- compactness, contiguity, protecting  
14 incumbents, if that's really neutral,  
15 respecting certain natural features of the  
16 geography -- and you have a computer program  
17 that includes all of those and weights them  
18 all, and let's assume all that is neutral, and  
19 at the end, what you get is a large number of  
20 maps that satisfy all those criteria.

21           And I think that's realistic. That's  
22 what you will get. Then -- and the legislature  
23 chooses from among those maps. How do you  
24 determine whether that choice is  
25 unconstitutional?

1           MR. BONDURANT: The choice would be  
2 the standards that the Court has traditionally  
3 applied. Picking an example, the Island Trees  
4 School case in which the Court said that a  
5 Democratic school board could not use its  
6 discretionary choices to discriminate based on  
7 viewpoint by excluding Republican authors and  
8 Republican books.

9           JUSTICE ALITO: No, no, but can you  
10 just answer that -- that question, because it's  
11 a real puzzle to me. So you've got -- let's  
12 say you've got 100 maps or you might even have  
13 25. I think you probably have thousands. So  
14 you have all of these maps, and you have to  
15 choose among them. The legislature chooses  
16 among them.

17           And you've already programmed in all  
18 of the so-called neutral criteria. How do you  
19 -- how does the legislature go about choosing  
20 among those maps? Would anything other than  
21 just random choice be sufficient -- be  
22 satisfactory?

23           MR. BONDURANT: The legislature has  
24 wide discretion, as long as it does not attempt  
25 to do two things: dictate electoral outcomes,

1 favor or disfavor a class of candidates. That  
2 is an easily administered --

3 JUSTICE GORSUCH: But, counsel, that  
4 -- that first one, dictate electoral outcomes,  
5 I think is going to turn -- turn on -- on  
6 numbers, right? How much deviation from  
7 proportional representation is enough to  
8 dictate an outcome?

9 So aren't we just back in the business  
10 of deciding what degree of tolerance we're  
11 willing to put up with from proportional  
12 representation? We might pluck a number out of  
13 the air or see that, you know, maybe two-thirds  
14 is used for veto overrides, so we like that.  
15 Where -- where are we going to get the number  
16 on the business end of this?

17 MR. BONDURANT: The business end of it  
18 is looking at how this is done. This was done  
19 by looking at voting history as the best  
20 predictor of voting behavior.

21 Sorting voters among districts to  
22 achieve a particular outcome, to guarantee that  
23 in 10 districts, there would be safe Republican  
24 majorities in which the general election is  
25 essentially irrelevant and the primary election

1 is the determining factor.

2 JUSTICE ALITO: Well, let me try one  
3 more time. So we've got -- let's say that you  
4 have a range of outcomes with all of these  
5 neutral maps that satisfy the neutral criteria,  
6 and they extend from 10 to two in favor of  
7 Republicans to 10 to two in favor of Democrats.

8 So which one do you choose -- do you  
9 have to choose? Nine to three for Republicans?  
10 Eight to four? Six to six?

11 MR. BONDURANT: The -- the -- clearly,  
12 it's an evidentiary matter in terms of intent.  
13 If the predominant intent is to favor one  
14 party, to penalize another based on their  
15 voting history, that goes too far, but --

16 JUSTICE KAVANAUGH: Isn't that always  
17 going to be the case when you deviate too far  
18 from six to six, in Justice Alito's  
19 hypothetical?

20 MR. BONDURANT: It certainly is going  
21 to be a question of factual proof. The closer  
22 you come to proportional representation, the  
23 harder it's going to be for a plaintiff to  
24 prove that there was an intent.

25 JUSTICE GORSUCH: Well, there we go.

1 I think that's the answer to the question,  
2 right? Is that we're going to -- that your --  
3 you would like us to mandate proportional  
4 representation.

5 MR. BONDURANT: Not at all. Our  
6 position is you cannot discriminate  
7 intentionally against political parties and  
8 voters based on their political views and their  
9 voting history.

10 JUSTICE GORSUCH: And the further you  
11 deviate from proportional representation, the  
12 more likely you are to be found guilty of that.

13 MR. BONDURANT: It is purely an  
14 evidentiary question. This Court itself said  
15 in Reynolds, it said again in LULAC, that in a  
16 case in which you look statewide and see  
17 proportional representation, it is less  
18 likely --

19 JUSTICE GORSUCH: Okay. So as to each  
20 -- each case --

21 MR. BONDURANT: -- that you have  
22 partisan gerrymandering.

23 JUSTICE GORSUCH: -- we're going to  
24 have to, as part of our mandatory jurisdiction,  
25 in every single redistricting case, look at the

1 evidence to see why there was a deviation from  
2 the norm of proportional representation.  
3 That's -- that's -- that's the ask?

4 MR. BONDURANT: You're going to have  
5 to look at the case and determine whether or  
6 not the plaintiffs proved intentional,  
7 predominant, partisan intent to discriminate  
8 based on --

9 JUSTICE GORSUCH: I would think that  
10 would always be present so long as you're  
11 deviating from proportional representation.  
12 What good reason could there be but  
13 partisanship at the end of the day?

14 MR. BONDURANT: Not at all. If -- the  
15 legislature in North Carolina could have picked  
16 any -- among hundreds of maps that would have  
17 produced either a seven/six, a six/seven, maybe  
18 a -- an eight/five representation, but, here,  
19 that is not this case.

20 JUSTICE GORSUCH: What do we do as  
21 well about the -- the fact that about 20  
22 states, as I understand it, from -- from your  
23 friend on the other side, have dealt with this  
24 problem through citizen initiatives as a remedy  
25 to deal with this, including, I think, five of



1       them just this last election and a bunch more  
2       on the ballot in the coming election.

3                 Why should we wade into this --

4                 MR. BONDURANT:   The simple --

5                 JUSTICE GORSUCH:  -- when that  
6       alternative exists?

7                 MR. BONDURANT:  -- the simple answer,  
8       Justice Gorsuch, is this:  The vast majority of  
9       states east of the Mississippi, including  
10      specifically North Carolina, do not have  
11      citizen initiative.

12                JUSTICE GORSUCH:  Can you amend your  
13      constitutions?  That -- that has happened in a  
14      lot of states too.

15                MR. BONDURANT:  You can only amend the  
16      constitution with the approval of the  
17      legislature, in proposing an amendment that  
18      gets to the ballot and is then ratified.  And  
19      that is not an effective remedy.

20                And the states in which you have  
21      independent redistricting commissions are  
22      states in which those commissions were adopted  
23      over the dead bodies of the legislators by  
24      citizen initiative, passed overwhelmingly by  
25      the citizens and in the face of legislative

1 opposition.

2 CHIEF JUSTICE ROBERTS: Mr. Bondurant,  
3 what do you do with the fact that partisan  
4 identification is not the only basis on which  
5 people vote? Do you see electoral results  
6 change dramatically depending, for example, on  
7 the particular appeal of individual candidates,  
8 turning on who's at the -- the head of the  
9 ticket rather than down ticket?

10 And how do you deal with that -- those  
11 factors that depart from the arguments about  
12 the inevitability of electoral results based on  
13 partisan identification?

14 MR. BONDURANT: Your Honor, the social  
15 science and the experts in this field, which  
16 included Dr. Hofeller, who designed this plan,  
17 was the Republican Party's leading  
18 redistricting expert -- he testified that based  
19 on social science and his 20 years of  
20 experience in redistricting in North Carolina,  
21 he could demonstrate that how a small, what are  
22 called voter tabulation districts had voted in  
23 past elections, whether Democratic or  
24 Republican, was the best predictor of how they  
25 would vote in future elections and that all

1 partisan gerrymandering in the modern era is  
2 based on that kind of social science.

3 CHIEF JUSTICE ROBERTS: Well, but the  
4 one thing that -- I forget where the -- which  
5 brief it is -- but it turns out that a lot of  
6 the predictions in this area -- and I don't  
7 know if this applies to North Carolina or not  
8 -- prove to be very, very wrong very often.

9 I mean, you have the famous example in  
10 the Vieth case where the argument was this --  
11 this change would -- or the method under  
12 challenge would never allow the election of  
13 Republican judges. And 15 days after the  
14 opinion came down, all the judges were  
15 Republican.

16 I mean, in -- even as in the more  
17 recent cycle, I understand that a lot of things  
18 that were never supposed to happen happened.

19 MR. BONDURANT: In this case, on this  
20 undisputed record, the way this was done was  
21 that Dr. Hofeller used a composite of seven  
22 statewide elections over four election cycles  
23 to come up with a calculation of partisan  
24 advantage and predict -- predictability.

25 And it predicted 10 Republican

1 districts, and the Republicans won all 10. It  
2 predicted three Democratic districts. The  
3 Democrats won all 10. In 2-18, they did the  
4 same thing. He used the same methodology in  
5 2-11 to design the districts that were in 2-12.

6 JUSTICE SOTOMAYOR: Counsel, the  
7 reality is that with all statistical models --  
8 and we spend our lives based on them, insurance  
9 is paid on statistical models, health insurance  
10 premiums are based on statistical models. I'm  
11 given to understand by the amicus briefs in  
12 this case that nuclear plants are built based  
13 on statistical models.

14 The one thing about statistical models  
15 is there's always the possibility of an  
16 aberration, correct?

17 MR. BONDURANT: There is a remote  
18 possibility sometimes.

19 JUSTICE SOTOMAYOR: And the sometimes  
20 happen; that's why they're a probability,  
21 right -- a possibility?

22 MR. BONDURANT: Correct.

23 JUSTICE SOTOMAYOR: So the fact that  
24 you have one exception doesn't disprove the  
25 rule?

1                   MR. BONDURANT: Certainly not 100 maps  
2 out of 24,000 maps.

3                   JUSTICE BREYER: Yes, but the -- the  
4 -- the -- the problem I think your side  
5 throughout this morning has to deal with, a  
6 problem, is from this side of the bench, to  
7 some people looking at the prior cases, there  
8 is a great concern that unless you have a very  
9 clear standard, you will turn many, many  
10 elections in the United States over to the  
11 judges. There's always someone who wants to  
12 contest it. They will always find experts of  
13 all kinds. And what you'll discover is judges  
14 simply deciding too much.

15                   Now I'm -- that's -- I've written  
16 about why I don't take that position, et  
17 cetera, but I'm not -- I'm not speaking for  
18 myself here. I'm speaking as a reader and an  
19 understander of what's on the other side, at  
20 least one thing.

21                   And I -- and I think it's important  
22 for you and the others to deal square on with  
23 that question.

24                   MR. BONDURANT: And our square-on  
25 answer to that question is, in this case, we

1 prove beyond a reasonable doubt a predominant  
2 partisan intent that was admitted on this  
3 record and demonstrated statistically beyond  
4 any possibility of dispute, and we have proved  
5 an extreme partisan effect not only on a  
6 state-wide level but on a district-specific  
7 level.

8 In Dr. Mattingly's charts, six of the  
9 districts are extreme statistical outliers that  
10 would not be achieved in even one, in some  
11 instances, of 24,000 plans. That is this case.

12 Moreover, this Court has held that the  
13 Elections Clause is, number one, intended to  
14 provide limits on partisan gerrymandering.  
15 Justice Scalia said that in *Vieth*.

16 And this Court has said the Elections  
17 Clause was a limited delegation of power to  
18 adopt procedural rules for time, place, and  
19 manner, but was not to provide power to dictate  
20 electoral outcomes or favor or disfavor a class  
21 of candidates.

22 That is an understandable standard  
23 that legislators throughout this country can  
24 understand. They already are told that you  
25 can't discriminate based on political

1 viewpoint. They're already told in  
2 redistricting you can't discriminate  
3 predominantly based on race. They're --

4 JUSTICE ALITO: Suppose the  
5 legislature had said we have all these maps we  
6 can choose from, but we don't -- we don't want  
7 to be too greedy, so we're going to pick a map  
8 solely for the purpose of giving us an  
9 advantage. We're going to pick a map that  
10 builds in a seven to five advantage for us.

11 Would there be a problem with that?

12 MR. BONDURANT: It would be very  
13 difficult to prove predominant partisan intent.

14 JUSTICE ALITO: What if they said it  
15 outright: The only reason why we're picking  
16 this map is we want to build in a seven to five  
17 advantage?

18 MR. BONDURANT: If -- to take your  
19 hypothetical example -- if, in North Carolina,  
20 the legislature said we in our wisdom have  
21 decided that the people in Charlotte are going  
22 to be represented by a Democrat, the people in  
23 Asheville are going to be represented by a  
24 Republican, that we're going to split Guilford  
25 County and North Carolina A&T to ensure that

1 the students in that school are going to be  
2 represented by a Republican in one district and  
3 a Republican in another, they would be  
4 dictating electoral outcomes even if it were  
5 seven/six.

6 The whole idea of the democratic  
7 process in a general election is the people  
8 elect a member of Congress in a general  
9 election in which everybody can vote. And when  
10 you rig the districts in that manner, you are  
11 making the general election irrelevant. You're  
12 making the primary election in which only some  
13 people can vote --

14 JUSTICE ALITO: So even if it's --

15 MR. BONDURANT: -- outcome  
16 determinative.

17 JUSTICE ALITO: -- I mean, even if the  
18 map provides only a very small partisan  
19 advantage, that would be subject to challenge  
20 in litigation?

21 MR. BONDURANT: If, in the facts that  
22 I posited, you had the legislature essentially  
23 deciding that the people in X part of the state  
24 were going to be represented by a Democrat and  
25 the people in Y part of the state were going to



1 be represented by a Republican, that the people  
2 in those respective districts of the other  
3 persuasions were not going to have a choice,  
4 were not going to have an opportunity, that  
5 would clearly violate every principle for which  
6 this Court has stood.

7 JUSTICE ALITO: And when you say that,  
8 aren't you answering Justice Breyer's question  
9 yes, all of these things are going to  
10 potentially end up in court --

11 MR. BONDURANT: No.

12 JUSTICE ALITO: -- where --

13 MR. BONDURANT: I -- I --

14 JUSTICE ALITO: -- judges are going to  
15 have to decide what's the right answer?

16 MR. BONDURANT: Quite the contrary.  
17 As with the one-person, one-vote rule, if the  
18 Court says, as this Court said in Term Limits  
19 and in Cook v. Gralike, that the Elections  
20 Clause means that the legislature can't put its  
21 thumb on the scale and pick winners and losers,  
22 dictate electoral outcomes, favor or disfavor a  
23 class of candidates, that is a standard that  
24 can be understood. That is a standard that  
25 legislators will obey. And that is a standard

1 that will reduce, not increase, litigation.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Ms. Riggs.

5 ORAL ARGUMENT OF ALLISON J. RIGGS ON  
6 BEHALF OF THE APPELLEES, LEAGUE OF WOMEN  
7 VOTERS OF NORTH CAROLINA, ET AL.

8 MS. RIGGS: Mr. Chief Justice, and may  
9 it please the Court:

10 The North Carolinians who are  
11 plaintiffs in this case come before this Court  
12 today seeking relief because, when the General  
13 Assembly enacted an allegedly remedial plan in  
14 2016, its leadership essentially bragged to  
15 these voters and the public at large that, by  
16 enacting a 10/three plan, it was punishing  
17 voters who supported Democratic candidates and  
18 it was going to create districts that would not  
19 allow voters in those districts any meaningful  
20 ability to use normal democratic processes to  
21 redress infringements on their individual  
22 constitutional rights.

23 This case is not the first North  
24 Carolina voting case to reach this Court this  
25 decade, but it represents the most extreme

1 example of a non-responsive legislature that  
2 believes that this Court will implicitly  
3 endorse unfettered partisan manipulation in  
4 redistricting by declining to rein in this most  
5 egregious example.

6 The vote dilution test presented to  
7 this Court today is a limited and precise test  
8 designed only to impose liability on the worst  
9 of the worst cases, thus limiting the number of  
10 partisan gerrymandering cases that this Court  
11 will see.

12 And under this very limited and  
13 precise vote dilution test, a lower court will  
14 apply a three-prong test where all three prongs  
15 must be satisfied in an -- and under many of  
16 those prongs, there are multiple screens to  
17 limit the number of plans subject to liability.

18 First, partisan intent has to be  
19 proven on a district-specific basis, that is,  
20 proving that district lines were drawn to  
21 subordinate the adherence of one political  
22 party and entrench the power of the party  
23 drawing the lines.

24 Second, partisan effect has to be  
25 shown at the district-specific and plan-wide

1 levels. The district-specific effect inquiry  
2 looks at intentional cracking, the cracking and  
3 packing of Democratic clusters or Republican  
4 clusters, as it will, and the state-wide, the  
5 plan-wide inquiry is whether the map as a whole  
6 creates a severe and durable effect on the  
7 disfavored party.

8 Then, finally, the Court asks whether  
9 there's any justification at the  
10 district-specific level for the cracking and  
11 packing observed and whether plan-wide the map  
12 as a whole is more biased than you would expect  
13 given the state's political geography and use  
14 of legitimate non-discriminatory criteria.

15 JUSTICE ALITO: But do you deny that  
16 built into this is the idea that we should at  
17 least have proportional representation light?  
18 Proportional representation is in a sense that  
19 -- is in some way the baseline against which  
20 all of this is measured?

21 MS. RIGGS: Not at all, Justice Alito.  
22 With the three prongs, there is plenty of room  
23 for non-proportional plans.

24 JUSTICE ALITO: A degree. I mean, you  
25 can -- you don't have to have strict

1 proportional representation, but that's --  
2 that's the baseline. That's what you're  
3 measuring.

4 Was there a partisan effect? Well,  
5 there's a partisan effect because it deviates  
6 from some notion of proportional  
7 representation.

8 MS. RIGGS: The -- the effects prong  
9 and the justification prong do real work to  
10 prevent that situation from happening, from  
11 this being just a measurement from the  
12 deviation --

13 JUSTICE GORSUCH: Well, how --

14 MS. RIGGS: -- of proportional rep --

15 JUSTICE GORSUCH: -- How can that be?  
16 Because I would have thought under the effects  
17 prong there has to be at least some effect,  
18 right?

19 MS. RIGGS: There has to be --

20 JUSTICE GORSUCH: It's not --

21 MS. RIGGS: -- a district-specific and  
22 severe and durable statewide.

23 JUSTICE GORSUCH: Right. I got it. I  
24 got it. So we have to measure effect from  
25 what?

1 MS. RIGGS: So there --

2 JUSTICE GORSUCH: So -- so every --  
3 every test that's been presented to this Court,  
4 last year and this year, we talked a lot about  
5 last year the efficiency gap, which is how far  
6 a deviation from proportional representation.  
7 And we were told, I think, six or seven percent  
8 of deviation would be okay, and that would not  
9 be an untoward effect. But anything above six  
10 or seven percent.

11 Today, we're talking about two-thirds  
12 is an effect. We need to have a number or some  
13 formula to determine what effect is enough to  
14 state a claim and what isn't; otherwise, every  
15 case is going to come to this Court.

16 And I'm -- I'm -- I'm still waiting to  
17 hear what that might -- what that number, what  
18 that formula might be, other than proportional  
19 representation, and we're not going to tell you  
20 today just how far deviation will be  
21 permissible because that would expose the  
22 problem.

23 MS. RIGGS: The -- several points in  
24 response, Justice Gorsuch. The legal standard  
25 in question is severe and durable effect. All

1 of the social science is just an evidentiary  
2 tool, not a legal tool.

3 Two categories of social science  
4 evidence were brought to bear on this question  
5 of severe and durable effect. The simulations  
6 didn't set a numerical threshold baseline  
7 because you see a range of produced plans with  
8 Democrat -- varying Democrat/Republican splits  
9 using these simulations and we're giving the  
10 legislatures breathing room.

11 The -- the -- all of the simulations  
12 --

13 JUSTICE GORSUCH: But -- but the --

14 MS. RIGGS: -- produce a U curve.

15 JUSTICE GORSUCH: -- but with -- with  
16 respect, counsel, and I'm sorry to interrupt,  
17 but breathing room from what?

18 MS. RIGGS: Breathing room to --

19 JUSTICE GORSUCH: From -- how much  
20 breathing room, from what standard? And isn't  
21 the -- isn't the answer that you just -- I  
22 understand you don't want to give it, but isn't  
23 the real answer here breathing room from  
24 proportional representation up to maybe  
25 seven percent?

1 MS. RIGGS: No.

2 JUSTICE GORSUCH: Just -- if it's not  
3 that, then what is this breathing room and what  
4 -- where does it exist?

5 MS. RIGGS: Breathing room exists in  
6 -- in the Bell curve of expected and reasonable  
7 map allocations of representation. It's  
8 breathing room to employ some political  
9 consideration. It's breathing room --

10 JUSTICE KAGAN: Well, why -- why isn't  
11 the answer to Justice Gorsuch's question that  
12 what's not allowed is deviation from whatever  
13 the state would have come up with, absent these  
14 partisan considerations? In other words, the  
15 state can do whatever it wants, it can depart  
16 from proportional representation however much  
17 it wants to, however much the natural features  
18 of the state would suggest, it can come up with  
19 something that's not proportional  
20 representation at all.

21 What it can't do is deviate from that  
22 based on partisan considerations. Isn't that  
23 what this test is essentially driving at?

24 MS. RIGGS: It -- that gets at the  
25 effects prong. I think that's a grading



1 calculation.

2 JUSTICE KAGAN: Yes, that's what I was  
3 talking about.

4 MS. RIGGS: But you would still  
5 potentially lack discriminatory effect, and it  
6 really is a question of whether the  
7 line-drawing party is imposing upon a  
8 disfavored party a severe and durable effect.  
9 And that's the legal --

10 CHIEF JUSTICE ROBERTS: Counsel, what  
11 -- what is --

12 JUSTICE GORSUCH: Well, counsel, I get  
13 -- I get that, you know, you've -- you've  
14 wisely adopted a very fine answer, given for  
15 you. But I guess my question is, once we  
16 control for geography, once we control for all  
17 those things, we're going to have hundreds and  
18 hundreds of maps, as Justice Alito has pointed  
19 out. Computers spit them out infinitely now.

20 And once we say, okay, all these other  
21 factors are controlled for, we can -- we can do  
22 a regression analysis, control for geography  
23 and all these things, we're still going to have  
24 hundreds of maps. And the legislature is going  
25 to choose one.

1           And at that point, we have to say,  
2           what's the range of permissible options? And  
3           that -- from that, we need a baseline. And the  
4           baseline, I still think, if it's not  
5           proportional representation, what is the  
6           baseline that you would have us use?

7           MS. RIGGS: There is no --

8           JUSTICE GORSUCH: Controlling for  
9           geography and everything else.

10          MS. RIGGS: Well, the geography is  
11          baked into that Bell curve.

12          JUSTICE GORSUCH: It is baked in, I  
13          accept that. We agree on that. You and I  
14          actually agree on that. So, after that, when  
15          we're left with -- we've thrown out millions of  
16          -- of maps; we're only left with a mere few  
17          thousand, okay? What -- what deviation? From  
18          what to what?

19          MS. RIGGS: If -- if what we're left  
20          with is no extreme statistical outlier or no  
21          grossly asymmetrical map, the legislature can  
22          choose from any of those plans.

23          CHIEF JUSTICE ROBERTS: Counsel, what  
24          is -- what is wrong with proportional  
25          representation?

1 MS. RIGGS: There are -- there are  
2 certainly states where the -- the natural  
3 geography of the state doesn't lend itself to  
4 proportional representation. We -- we live in  
5 a system with single-member plan --

6 CHIEF JUSTICE ROBERTS: If you -- if  
7 you were cracking or packing to get to  
8 proportional representation, would that in your  
9 view be unconstitutional?

10 MS. RIGGS: This Court has endorsed  
11 that kind of activity in Gaffney, where a  
12 legislature is striving for proportional  
13 representation. Our test would not invalidate  
14 a plan like Gaffney because it would not have a  
15 statewide severe and durable effect and it  
16 would be something that you would see within  
17 the simulations.

18 JUSTICE KAVANAUGH: Do you agree with  
19 Mr. Clement that the Constitution does not  
20 require proportional representation or require  
21 something close to proportional representation?

22 MS. RIGGS: The Constitution does not  
23 require it. But what we see here in this test  
24 that we've employed, Justice Roberts, to get to  
25 one of your earlier questions, is a test that

1 employs a durability inquiry and sensitivity --  
2 sensitivity testing, technology that was not in  
3 existence in Vieth and Bandemer and the  
4 Republican judges case in the 1990s, and that  
5 map drawers are using right now.

6 If there is a plan where, under any  
7 plausible shift of voter sentiment, the bias  
8 across the plan would disappear, that plan  
9 would not be unconstitutional. Again, this is  
10 a -- an enormous screen to the kinds of plans  
11 that would be subject to liability.

12 Our proposed test, the one adopted by  
13 the district court, is so exacting that it  
14 narrows dramatically the number of plans  
15 subject to -- to scrutiny and leaves  
16 legislatures lots of breathing room. And --  
17 and --

18 CHIEF JUSTICE ROBERTS: Am I right to  
19 understand that your -- your test allows a  
20 greater degree of partisanship in redistricting  
21 than Mr. Bondurant's?

22 MS. RIGGS: I think they're -- they're  
23 complementary tests depending on how you  
24 understand the constitutional harm, where we  
25 see vote -- the vote dilution tests based on

1 the one-person, one-vote and the racial vote  
2 dilution frameworks, we see those tests as  
3 allowing room for some political  
4 considerations, particularly the ones endorsed  
5 by this Court. But it -- it's just a different  
6 approach to the same problem.

7 We do believe that our test does give  
8 -- is narrow and descriptive enough that it  
9 gives legislatures guidance on what to do to  
10 make sure that they stay on the right side of  
11 the Constitution, and limits -- gives -- gives  
12 lower courts something very manageable to -- to  
13 apply and to grapple with, and that the  
14 pleading standards are going to be very high.  
15 To prove a severe and durable effect is not to  
16 just allege it. It's to come forward with  
17 rigorous statistical evidence that supports  
18 this situation.

19 JUSTICE KAVANAUGH: I took -- I took  
20 some of your argument in the briefs and the  
21 amicus briefs to be that extreme partisan  
22 gerrymandering is a real problem for our  
23 democracy -- and I'm not going to dispute that  
24 -- and that the Court, even though it might be  
25 a problem to get involved in all these cases,

1 should, in essence, recognize the emergency  
2 situation from your perspective.

3 But what about, to pick up on  
4 something Justice Gorsuch said earlier, that  
5 there is a fair amount of activity going on in  
6 the states on redistricting and attention in  
7 Congress and in state supreme courts?

8 In other words, have we reached the  
9 moment, even though it would be a -- have we  
10 really reached the moment, even though it would  
11 be a big lift for this Court to get involved,  
12 where the other actors can't do it?

13 MS. RIGGS: The North Carolinian  
14 plaintiffs in front of you can do nothing to  
15 solve this problem. And in --

16 JUSTICE KAVANAUGH: But I'm thinking  
17 about more nationally. Your -- your -- the  
18 amicus briefs are certainly referencing a -- a  
19 problem in many states. And the idea, I think  
20 in the briefs, is this Court and this Court  
21 alone can step in. And -- and there is a fair  
22 amount of activity going on in the states,  
23 recognizing the same problem that you're  
24 recognizing.

25 MS. RIGGS: And as Mr. Bondurant

1 acknowledged, east of the Mississippi there's a  
2 very small number of states where this is a  
3 possibility. This Court has rightfully been  
4 concerned about the burden on the Court and the  
5 reputation of the Court, but --

6 JUSTICE GORSUCH: Well, but that --  
7 that's on -- that's on initiatives, right? And  
8 even -- even there, I mean, there are -- I  
9 mean, New Jersey, Michigan, Ohio, have -- have  
10 -- have dealt with this in some way, just to  
11 pick a few that I -- I've got in front of me.

12 MS. RIGGS: And --

13 JUSTICE GORSUCH: But -- but you also  
14 have the state supreme court option, as -- as  
15 Justice Kennedy -- Kavanaugh pointed out. And  
16 we often overlook that possibility in -- in our  
17 -- in our federal system. What do we -- what  
18 do we do about that?

19 MS. RIGGS: Other options don't  
20 relieve this Court of its duty to vindicate  
21 constitutional rights. And, certainly, while  
22 the -- the reputation of the Court as an  
23 independent check is an important  
24 consideration, understand that on the facts of  
25 this case, the reputational risk to the Court

1 of doing nothing when -- when David Lewis says,  
2 I'm going to draw a 10/three plan and if I  
3 could draw an 11/two plan, I would, the  
4 reputational risk of doing something is much,  
5 much less than the reputational risk of doing  
6 nothing, which will be read as a green light  
7 for this kind of discriminatory rhetoric and  
8 manipulation in redistricting from here on out.

9 This is -- this is a situation where,  
10 with all due respect, Justice O'Connor was not  
11 correct. This isn't self-correcting. Voters  
12 in North Carolina, no matter how hard -- no  
13 matter what level they turn out -- this was a  
14 swing election in 2018 for North Carolina  
15 voters, and they were not able to eliminate the  
16 bias in the plans.

17 This -- the techniques are so  
18 sophisticated now that there's no room for  
19 self-correction. And these voters --

20 JUSTICE ALITO: Well, if we look at  
21 the -- the popular vote for the House of  
22 Representatives nationally in the 2018 election  
23 and compare that to the percentage of seats won  
24 by the two parties, what -- to what degree do  
25 they diverge?



1 MS. RIGGS: I don't know the answer to  
2 that question off -- off the top of my head. I  
3 know there was a five point advantage for North  
4 Carolina Democrats in -- in 2018.

5 JUSTICE ALITO: But, if this is a  
6 great national problem, is there -- would we  
7 see a great divergence there if we look at the  
8 statistics across the whole country?

9 MS. RIGGS: There's not gerrymandering  
10 in every state. In fact, our brief points out  
11 the fact that most plans are symmetrical.  
12 Gerrymandering isn't in every state. And so I  
13 don't think that metric is particularly  
14 informative on that front.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Two minutes, Mr. Clement.

18 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

19 ON BEHALF OF THE APPELLANTS

20 MR. CLEMENT: Thank you, Your Honors.  
21 Just a few points in two minutes.

22 First, I do think at a very  
23 fundamental level my friends on the other side  
24 are the victim of their own technology because  
25 they have produced 24,000 maps that are

1 permissible maps that don't take partisanship  
2 into account at all.

3 And their submission is that a  
4 legislature organized on partisanship lines  
5 cannot take partisanship into account to any  
6 material degree in picking among the 24,000  
7 maps.

8 And that's just an argument ultimately  
9 to reassign this authority away from state  
10 legislatures and to somebody else who doesn't  
11 have a partisanship interest --

12 JUSTICE SOTOMAYOR: I'm sorry --

13 MR. CLEMENT: -- or a partisanship  
14 organization.

15 JUSTICE SOTOMAYOR: -- that -- that's  
16 just not true because what they have shown is,  
17 if you don't use partisanship as the  
18 predominant factor, then you can produce a lot  
19 of maps that are not this one. That's what  
20 they have shown.

21 MR. CLEMENT: Right. But you can also  
22 pick 162 that are this map, and how is a  
23 partisan legislature supposed to choose from  
24 among those maps if they can't --

25 JUSTICE SOTOMAYOR: Don't use --

1 MR. CLEMENT: -- take partisan --

2 JUSTICE SOTOMAYOR: -- the one  
3 criteria that intentionally and invidiously  
4 looks to exclude the other party. That's their  
5 basic point. That was the basic point of the  
6 judge below.

7 MR. CLEMENT: That's right. So you're  
8 basically asking state legislatures not to act  
9 as state legislatures.

10 And let me just finish with this  
11 observation, which is a lot of hard  
12 constitutional issues come before this Court  
13 because you're dealing with something that was  
14 unknown to the framing generation.

15 But the framing generation understood  
16 partisan gerrymandering firsthand. James  
17 Madison was the intended target of a partisan  
18 gerrymander by Patrick Henry. He complained  
19 about it bitterly. So did George Washington.  
20 Neither of them contemplated suit.

21 Hamilton actually suggested to John  
22 Jay that the Federalists ought to partisanly  
23 gerrymander the electoral college for the 1800  
24 Presidential election. John Jay said it wasn't  
25 such a good idea.

1           All three authors of the Federalist  
2 Papers knew about this and didn't think there  
3 was a judicial solution.

4           Thank you.

5           CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel. The case is submitted.

7           (Whereupon, at 11:23 a.m., the case  
8 was submitted.)

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## Official - Subject to Final Review

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## Official - Subject to Final Review

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