

1 And that's just not the way that Shaw was originally
2 constructed. It ignores that there is a separate vote
3 dilution claim that can be brought that has a much
4 higher standard of proof, and people are essentially
5 trying to evade that --

6 JUSTICE KAGAN: But, Mr. Clement --

7 MR. CLEMENT: -- by bringing junior
8 varsity -- I'm sorry.

9 JUSTICE KAGAN: No, please.

10 MR. CLEMENT: People are bringing junior
11 varsity dilution claims under the guise of calling them
12 Shaw claims, and I think it's really distorted the law.

13 The third point, just to put it on the
14 table, is that at some point then you have to ask the
15 question -- if -- if you disagree with me on those first
16 two points and you actually think you have a different
17 conception of what a Shaw claim is, there still has to
18 be the question of is the game worth the candle given
19 the stated need to defer to State legislatures. And 80
20 members of the House of Delegates voted in favor of this
21 plan because they -- it comported with traditional
22 districting principles and everybody wanted to preserve
23 majority-minority districts.

24 I'm sorry, Justice Kagan.

25 JUSTICE KAGAN: Just -- yeah, no, just going

1 back to Justice Kennedy's question, it seems pretty
2 clear to me that in the cases after Shaw -- because
3 Shaw, you could have looked at it as, this is all about
4 the way the district looks, and then in the cases after
5 Shaw, in Shaw II, and in Miller, the Court makes very
6 clear that it's not all about the way the district
7 looks, and indeed --

8 MR. CLEMENT: But can I -- can I stop you
9 there, though, and say: In Miller, what this Court
10 confronted was an argument that bizarreness is an
11 element of the claim. And I think, you know -- and
12 nobody, I think, thinks that's the right answer.

13 JUSTICE KAGAN: If you look at Shaw and
14 Shaw II and you look at Miller, and then you think about
15 the -- the hypothetical that Justice Kennedy gave you,
16 which is essentially -- maybe I'll change it a little
17 bit -- it's essentially a mapmaker who says, look, we
18 really want to do race-based districting here. We can
19 manage to do this in a way where the maps look kind of
20 contiguous and kind of regularly shaped, but what we're
21 doing is race-based decision making.

22 Now, it seems pretty clear to me that if you
23 look at Shaw II, if you look at Miller, that's
24 forbidden. And -- and -- and that's exactly the
25 opposite of what the district court said here.

1 MR. CLEMENT: I don't think that you have to
2 read those decisions in that way. I think if you're
3 going to read those decisions in that way, it's
4 appropriate to pause and reflect where it's gotten us.
5 And I think that every one of those decisions starts out
6 by saying this is a very difficult task for State
7 legislatures. It's hard enough to draw districting --
8 districts without the Voting Rights Act, but to draw
9 them in compliance with the Voting Rights Act is
10 exquisitely difficult. And we want to have deference to
11 State legislatures.

12 JUSTICE KAGAN: Well, then I'm with
13 Justice Breyer, who suggested that a few years ago we
14 took those concerns into account and we tried to figure
15 out a test that was responsive to those concerns, and
16 that is not the test that the district court used here.

17 MR. CLEMENT: I -- I beg to differ. I think
18 you have to, as Justice Breyer was suggesting, at least
19 in the first 25 minutes, give the district court a
20 little more credit than that.

21 The district court had Alabama in front of
22 him. He also had the arguments of the parties, and I
23 think if you go back and look -- I mean, with all due
24 respect to my friends on the other side, they did not
25 argue this in terms of, let's look at all the people

1 moving in and out. That was not the thrust of their
2 case. They really argued that this was a direct
3 evidence case based on the fact that --

4 JUSTICE BREYER: That's -- that's what I
5 have to do after this argument, isn't it? I mean, you
6 gave me exactly what I needed. You -- you gave me the
7 things to look up. He gave me the things on the other
8 side, and -- and they -- they didn't use exactly the
9 right test, but does it matter?

10 And -- and -- and I -- I think the -- the
11 reason I approach it that way is because this is such
12 a -- the reasons you said. Okay. You have to give
13 leeway here; leeway, leeway.

14 But the government makes a pretty good point
15 here that it -- that really was important evidence he
16 didn't look at. And -- and that's -- that's my job,
17 isn't it, to go back and read these things and figure
18 out how they -- the -- the evidence.

19 MR. CLEMENT: Absolutely. But I think you
20 should -- I think you should look at the evidence in
21 this case, and you shouldn't look at the evidence that
22 could have been mounted. You should look at the
23 evidence as it actually came in, the way it was argued
24 to the district court.

25 I think if you go and look, for example, at

1 the closing arguments of this case, you will see that
2 the other side did not say, this is a case about moving
3 too many people in and out of a particular district.
4 They said, this is a direct evidence case. They told
5 you what the problem was. They told you they were going
6 to apply a 55 percent BVAP floor.

7 And that -- and so really, they tried to get
8 not just some tailwind from the fact that there was a
9 BVAP floor; they tried to make -- essentially rest their
10 case below on that proposition. And as a result of
11 that, it left them with a vacuum in the evidence,
12 because we had extraordinarily good evidence on our side
13 of this case, because the principal map drawer, Delegate
14 Jones, testified for hours and hours about why
15 particular lines were drawn. And in every case, he
16 provided explanations for why they comported with
17 traditional principles.

18 But not just that, he told you why the lines
19 were there. The lines weren't there because, oh, we
20 have this 55 percent BVAP target and everything had to
21 go out the window. He said, well, you know, down here
22 in Southampton Roads, we have three incumbents that are
23 all close together because this part of the state lost a
24 lot of population. So I drew some zigs and zags here to
25 keep the three incumbents separate, which I think is a

1 perfectly nonracial explanation for it.

2 Now, down in Delegate 77 -- in District 77,
3 that looks a little funny, but I got together with
4 Delegate Spruill, and Delegate Spruill said he wanted to
5 reunite the old city of South Norfolk, so we did that.
6 And that required to us move a couple of districts
7 around, and there it is.

8 There's -- there's reams of evidence of
9 that. And there's really a vacuum of evidence on the
10 other side of this.

11 And I do want to sort of rewind the tape a
12 little bit, too, here, which is the reason it's so
13 problematic, I think, to think that just because they
14 applied a BVAP floor, you're, like, already
15 three-fourths of the way to applying strict scrutiny is,
16 what else is a State legislature supposed to do? I
17 don't think in this context a BVAP floor is inherently
18 sinister.

19 And, I mean, one way of thinking about this,
20 Justice Kagan, is the Voting Rights Act itself is a BVAP
21 floor. I mean, in those situations where it -- it
22 requires a majority-minority district, that's a
23 quantitative floor of at least 50 point --
24 plus .01 percent. But everywhere, it's a qualitative
25 floor, that you have to preserve the ability -- ability

1 to elect.

2 And so there's nothing in this context --
3 and I think that's exactly why this Court has gotten
4 where it's gotten. And I'm not so sure that you
5 couldn't even further refine what you said in Alabama to
6 make it a little bit closer to where I think the law
7 should be in this area.

8 But here's the point: I mean, the reason
9 that, in this area uniquely, the Court allows race to be
10 considered is in part because the Voting Rights Act
11 makes the consideration of race absolutely necessary.
12 And I don't want -- think you want to send the signal --
13 I mean, unless you want to take the first steps towards
14 declaring the Voting Rights Act unconstitutional, you
15 don't want to send the signal that when legislatures
16 approach this in a way that I think is perfectly
17 appropriate to what's going on. I mean, Virginia's got
18 12 --

19 JUSTICE KAGAN: You absolutely don't,
20 Mr. Clement. But it's one thing for a legislature to
21 say, we view it as a core priority up there with
22 one-person, one-vote to comply with the Voting Rights
23 Act. That's a terrific thing. It's another thing for
24 the legislature to do what it did, for example, in the
25 Alabama case, which is to just say something about there

1 can't be any retrogression from whatever there is,
2 notwithstanding that that's just not Section 5 law, and,
3 similarly, it's another thing for the legislature to
4 just pick a number out of one district, apply it to all
5 12 districts, and say that that's compliance with the
6 Voting Rights Act.

7 Now, I agree with you and with Mr. Elias and
8 with Mr. Gornstein: That does not get you all the way
9 there. But there's something about -- this is --
10 Alabama suggested this was evidence. When a State says
11 across the board we're going to do something that just
12 on its face you know is not required by the Voting
13 Rights Act, that's a problem.

14 MR. CLEMENT: Well, I'm with a lot of what
15 you had to say, Justice Kagan. I think where I'm not
16 with you is that there is something particularly
17 problematic about picking a 55 percent number and
18 applying it in Richmond and south and in the Hampton
19 Roads area. And I think -- I mean, I'd say two things
20 about that.

21 I mean, in the universe of possible numbers,
22 55 percent's about the best number you could come up
23 with, because -- I mean, my friends on the other side
24 agree these all need to be majority-minority districts.
25 So if the whole debate is it's got to be somewhere north

1 of 50 percent, I mean, 55 percent, which gives you a
2 little bit of margin for the fact that there may be
3 differentials in -- in -- in turnout. And where the
4 rubber's going to meet the road, remember, is on the
5 cases where -- I mean, you know, the incumbents are
6 going to always win. And most of these districts are
7 majority-minority, but they're way majority Democrat.
8 So where the rubber is going to meet the road about
9 opportunity to elect is going to be in the open
10 primaries. That's when you're really going to tell
11 whether the African-American has -- community has the
12 opportunity to elect the candidate of their choice.

13 Now, those are relatively rare. And so the
14 idea that, you know, it's -- it's somehow presumptively
15 unconstitutional for the State to look at one of the
16 most recent open primaries in HD75 and say, well, yeah,
17 5 percentage points, but 5 percentage points in a badly
18 splintered primary, it's only 300 votes. And Delegate
19 Tyler herself is saying, you know, these need to be
20 north of 50 percent. Everybody is basically saying
21 that.

22 You know, I don't think it's fair to put
23 this -- and I guess this is where I really take issue.
24 I don't think it's -- I think it's a mistake to put this
25 in the same basket as Alabama. The idea that you can't

1 go from 80 to 79 percent is a cartoonish version of the
2 Voting Rights Act. To say that in an area where 9 of
3 the 12 districts are already north of 55 percent, to say
4 that 55 percent is a pretty darn good threshold for
5 compliance with the Voting Rights Act just isn't in the
6 same category at all.

7 And I know they try to get a lot of sort of
8 mileage out of the idea of, well, it was
9 one-size-fits-all. But the two things I would say about
10 that -- what I sort of already said -- which is we're
11 talking about the same part of the State, and there's no
12 reason to think there's a different dynamic in this --
13 and all of these districts are majority-minority
14 districts, African-American districts. It's not like
15 they're applying one rule and trying to say that it
16 fits, you know, for the -- for the complicated districts
17 in Northern Virginia with multiracial groups and those
18 districts down in the South. They're all very similar
19 districts. That's one thing.

20 The second thing is -- I mean, keep in mind,
21 whatever rule you adopt here is not just for relatively
22 sophisticated State legislatures. It's going to apply
23 to all sorts of school boards and sewer districts.
24 There has to be -- I mean, I -- you know, I just don't
25 think the analysis is that you have to go district by

1 district with regression analysis in order to comply
2 with the Voting Rights Act. I don't think that's the
3 rule you want to lay down.

4 And I also think -- and this is, I think,
5 responsive to Justice Kennedy's earlier question -- I
6 mean, the -- the -- the idea that they have on the other
7 side, it's -- they're not against racial targets. They
8 agree these need to be majority-minority districts.
9 Here, they agree they need to be north of 50 percent.

10 The real beef is with the legislature making
11 a sort of commonsense judgment based on the evidence in
12 front of them that it should be 55 percent. What they
13 want is more use of race in more minute detail where you
14 go district by district and say, all right. As to 75,
15 it's going to be 55. As to 63, it's going to be 74. As
16 to 77, it's going to be 56. I don't think that gets us
17 further along the lines of compliance with the Equal
18 Protection Clause. I also don't even think it's
19 practically possible.

20 JUSTICE KAGAN: I think the -- the real
21 difference between your standard and the SG's standard
22 is that in your standard, the shape of a district
23 functions as a threshold inquiry such that if the shape
24 is okay, we don't look at anything else, and
25 particularly we don't look even if the districting was

1 completely race-based in motive. And that's just what
2 the -- that three-part test does. It sets up a
3 threshold inquiry about -- about how the district is
4 shaped in a way that some people thought Shaw was when
5 Shaw was first announced and that this Court in one,
6 two, three subsequent cases made clear it wasn't.

7 MR. CLEMENT: Well, Justice Kagan, first of
8 all, I think the real difference between our position
9 and the SG's position is a difference in the real world,
10 which is, they admit it's not going to make a difference
11 in 99 percent of the cases. All right. Maybe they had
12 something else in mind by vast majority. But in a lot
13 of these cases, it won't make any differences.

14 But given the stakes, it's going to mean
15 that lots more State legislatures get sued over
16 districts that don't even look particularly suspicious.
17 And this case is the perfect example. These districts
18 existed for four years and two complete election cycles
19 before anybody perceived there was a racial gerrymander
20 lurking here. And what changed in 2014 was the resident
21 of the Governor's Mansion in Richmond. And what
22 happened is these guys realized that if we can get these
23 districts thrown out and they have to redraw the
24 district, we'll now have a veto power that we didn't
25 have before. That explains why lines that looked

1 perfectly square relatively and were approved 80 to,
2 like, 9, with a majority of Democrats supporting them,
3 all but two members of the African-American Caucus
4 supporting them, with one of the two members of that
5 caucus opposing because the numbers weren't high enough.
6 That's the dynamic that was 2011.

7 You go from a bipartisan success story where
8 everybody points to the House and said, these guys did
9 it right; the Senate, not so much. The House, these
10 guys did it exactly right. They did everything they
11 were supposed to do.

12 Four years later, they can still draw a
13 racial gerrymandering charge and have to litigate for
14 years based on this theoretical possibility that maybe,
15 just maybe, in drawing these square lines, someone
16 took --

17 JUSTICE KAGAN: Well, it's more than a
18 theoretical possibility. And Mr. Gornstein says -- and
19 he seems to be pretty sensitive to the idea of giving
20 States latitude. But he looks at this and says, this
21 standard actually did make a difference on the ground,
22 that there were districts kicked out and said, oh, this
23 isn't race-based because it looks good, even though it
24 was race-based.

25 MR. CLEMENT: Well, I would put,

1 representing the State Legislature of Virginia, my bona
2 fides in looking out for the State's even ahead of
3 Mr. Gornstein's. And it's easy in the Solicitor
4 General's Office to throw out a standard that's
5 theoretically pure and that's going to force lots of
6 other people to litigate for years.

7 These districts were good enough for
8 everybody for four years. They were good enough to be
9 pre-cleared by the Justice Department. Having this
10 detailed inquiry out there to have them invalidated
11 years later does not seem to me to have a lot to
12 recommend it.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Elias, you have two minutes left.

15 REBUTTAL ARGUMENT OF MARC E. ELIAS

16 ON BEHALF OF THE APPELLANTS

17 MR. ELIAS: Mr. Chief Justice, and may it
18 please the Court:

19 I want to clarify a few factual points and
20 obviously answer any questions you have.

21 The first is, the timing of this case
22 followed the Page decision. It was the Page III court
23 that -- that ruled on the congressional map that then
24 was the -- it had nothing to do -- that case was filed
25 when there was a Republican in the Governor's Mansion.

1 It had nothing to do with who was in the Governor's
2 Mansion, that just as a factual matter.

3 Justice Breyer, to your -- the question that
4 you posed to me earlier, and which is at the heart of
5 this, we completely agree with the analysis in Alabama
6 that -- that there needs to be a -- that you need to
7 show voters moved in and out on account of this rule.
8 And if you look at JA672, you will see there is a
9 50.8 percent differential between the white voters moved
10 out and the black voters moved in. As you point out,
11 three-quarters of the -- of the -- of the voters moved
12 in were black, and --

13 JUSTICE BREYER: You make a point of that.

14 MR. ELIAS: Yes. That --

15 JUSTICE BREYER: I mean, I think I heard
16 the -- Mr. Clement say that, well, no, this has all been
17 brought up after the case was over, and --

18 MR. ELIAS: Your Honor, it's in our expert's
19 report from trial. It's just not true. You can find it
20 in the JA, because --

21 JUSTICE BREYER: You called it to the
22 attention --

23 MR. ELIAS: -- we called it -- it was in our
24 expert's report at -- at trial. Point number one.

25 Point number two, very quickly, this Court

1 in Shaw v. Hunt specifically dealt with Justice Stevens'
2 dissent, saying there should be an actual conflict test.
3 And what this Court said is, in his dissent, Justice
4 Stevens argues that strict scrutiny does not apply where
5 the State respects or complies with traditional
6 districting principles.

7 That, however, is not the standard
8 allowed -- announced and applied in Miller. Shaw II
9 resolved for -- for this three-judge court well before
10 Alabama that an actual conflict test was not the law,
11 and the district courts here simply -- simply ignored
12 it.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 The case is submitted.

15 (Whereupon, at 11:05 a.m., the case in the
16 above-entitled matter was submitted.)

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