

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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BEVERLY R. GILL, et al.,)
Appellants,)
v.) No. 16-1161
WILLIAM WHITFORD, et al.,)
Appellees.)
- - - - -

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6 WILLIAM WHITFORD, et al.,)
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9 Washington, D.C.
10 Tuesday, October 3, 2017

11
12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:04 a.m.

15
16 APPEARANCES:
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18 on behalf of the Appellants.
19 ERIN E. MURPHY, Washington, D.C., for Wisconsin State
20 Senate, et al., as amici curiae.
21 PAUL M. SMITH, Washington, D.C. ;
22 on behalf of the Appellees.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 16-1161, Gill versus Whitford.

Mr. Tseytlin?

ORAL ARGUMENT OF MISHA TSEYTLIN
ON BEHALF OF APPELLANTS

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

This Court has never uncovered judicially manageable standards for determining when politicians have acted too politically in drawing district lines. Plaintiff's social science metrics composed of statewide vote to seat ratios and hypothetical projections do not solve any of these problems.

Instead, they would merely shift districting from elected public officials to federal courts, who would decide the fate of maps based upon battles of the experts.

Now, as a threshold matter, this Court should hold that federal courts lack jurisdiction to entertain statewide political gerrymandering challenges, leaving for another

1 day the question of district-specific
2 gerrymandering challenges.

3 JUSTICE KENNEDY: I -- I think it's
4 true that there's no case that directly helps
5 Respondents very strongly on the standing
6 issue. You have a -- a strong argument there.

7 But suppose the Court -- and you just
8 have to assume, we won't know exactly the
9 parameters of it -- decided that this is a
10 First Amendment issue, not an equal protection
11 issue.

12 Would that change the calculus so
13 that, if you're in one part of the state, you
14 have a First Amendment interest in having your
15 party strong or the other party weak?

16 MR. TSEYTLIN: No, it wouldn't, Your
17 Honor. And I think the reason for that is,
18 even if it's a First Amendment issue, it's
19 still grounded in the right to vote.

20 And in our country's single district
21 election system, folks only vote in their own
22 district. For example, you might have some
23 vague interest in the party that you associate
24 with having more members in Congress, for
25 example, like a Wisconsin Republican might want

1 more Texas Republicans in Congress.

2 But no one would say that you have a
3 First Amendment or a first -- Fourteenth
4 Amendment right in that sort of circumstance to
5 challenge some Texas law that you would, for
6 example, argue led to less Republicans from
7 Texas coming to the Congress.

8 CHIEF JUSTICE ROBERTS: Well, but I
9 -- I think the argument is pretty
10 straightforward which you, in your district,
11 have a right of association and you want to
12 exercise that right of association with other
13 people elsewhere in the state.

14 And if you can't challenge the
15 districting throughout the state, then your
16 claim seems to be -- there's no way for to you
17 to raise your claim.

18 JUSTICE KENNEDY: And this of course
19 -- and this of course confines it to the state
20 and eliminates the problem of out-of-state, as
21 the way the Chief Justice stated the
22 hypothetical.

23 MR. TSEYTLIN: Well, Your Honor, I
24 don't think it would solve the interstate
25 problem because, of course, the structural

1 relationship of, for example, Mr. --

2 JUSTICE KENNEDY: Let's -- let's
3 assume that it does.

4 (Laughter.)

5 MR. TSEYTLIN: Well -- well, Your
6 Honor, I still think that this Court should be
7 very careful about enacting that kind of
8 doctrine.

9 As we know, race and politics are
10 often correlated in this country, so political
11 gerrymandering claims and racially
12 gerrymandering claims, even if they're
13 ultimately grounded in a different
14 constitutional amendment, will often be raised
15 together.

16 And it cannot be -- possibly be the
17 case that, if there's a showing that the map
18 drawer turned on the racial screen, the person
19 is limited to a single district claim.

20 But if that same map drawer turned on
21 the political screen, then the plaintiff would
22 get access to the holy grail of a statewide
23 claim based on --

24 JUSTICE SOTOMAYOR: I'm not --

25 JUSTICE GINSBURG: On the question of

1 -- of race, some years ago, this Court dealt
2 with what the -- the so-called "max-Black"
3 plan, said it was a deliberate attempt by the
4 legislature to make as many African American
5 districts as possible.

6 This bears a certain resemblance
7 because the effort here, intentionally, was to
8 create as many Republican districts. So is
9 max-Republican, it -- doesn't it have the same
10 problem that "max-Black" did?

11 MR. TSEYTLIN: Well, Your Honor, that
12 turns to the issue of justiciability, and I do
13 not think that raises the same problems
14 because, of course, politics is not a suspect
15 classification like race.

16 And I think the easiest way to see
17 this is to take a look at a chart that
18 Plaintiff's own expert created, and that's
19 available on Supplemental Appendix 235. This
20 is plain -- Plaintiff's expert studied maps
21 from 30 years, and he identified the 17 worst
22 of the worst maps. What is so striking about
23 that list of 17 is that 10 were neutral draws.

24 There were court-drawn maps,
25 commission-drawn maps, bipartisan drawn maps,

1 including the immediately prior Wisconsin drawn
2 map. And I think the Court should learn two
3 lessons from this list of 17, 10 of which were
4 neutral.

5 The first lesson is that partisan
6 symmetry is simply not a neutral districting
7 criteria. It is not a neutral method of
8 drawing districts. For if it were, all of
9 these commissions would not be drawing partisan
10 asymmetry maps.

11 The second lesson that this Court
12 should learn from that -- from that list is
13 that Plaintiffs are asking this Court to launch
14 a redistricting revolution based upon their
15 social science metrics.

16 JUSTICE ALITO: Before you get too
17 deeply into the merits, which I -- I assume
18 you'll want to do in a minute, can I just ask
19 you a question about standing along the lines
20 of those asked by my colleagues?

21 Suppose that it was alleged that town
22 officials in someplace in northern Wisconsin
23 where the Republicans predominate were
24 discriminating against the Democratic candidate
25 for a legislative district by, let's say, not

1 allowing that candidate's signs to be put up
2 along the roadsides, but allowing the
3 Republican signs to be put up along the
4 roadsides, or they were pressuring town --
5 let's just leave it at that.

6 They're discriminating with respect to
7 these signs. Now, who would have standing to
8 raise a First Amendment challenge to that?
9 Would it be just the candidate in that district
10 or maybe voters in that district? Or could a
11 -- a Democratic voter in, let's say, Milwaukee
12 have standing to raise that First Amendment
13 argument?

14 MR. TSEYTLIN: I would certainly
15 think, Your Honor, the candidate would have
16 standing, and I -- I'm not so sure about the
17 voters in the district, but probably.

18 But certainly, voters in Milwaukee who
19 don't vote for that candidate, they're not
20 eligible to vote for that candidate any more
21 than someone in California is eligible to vote
22 for that candidate.

23 And I think we see this from --

24 CHIEF JUSTICE ROBERTS: Wait. I'm
25 sorry. Certainly, voters in Milwaukee -- you

1 left out the -- would not have standing?

2 MR. TSEYTLIN: Would not have
3 standing.

4 And I -- I think we see this from the
5 testimony of -- of the lead plaintiff, who is
6 the only plaintiff that testified in this case.

7 He was asked, during his testimony,
8 what harm does Act 43 put on you, given that
9 you live in a Democratic-dominated district in
10 Madison under any possible map.

11 Well, he said, I want to be able to
12 campaign for a majority in assembly, which
13 shows that his injury has nothing to do with
14 him as a voter. It's just a generalized
15 interest in more Wisconsinites -- more
16 Wisconsin Democrats being elected, which
17 someone in Wisconsin can have or someone
18 outside of Wisconsin --

19 JUSTICE GINSBURG: May I --

20 JUSTICE KENNEDY: I think we're
21 anxious to get to the merits, but one more
22 thing on the sign. Suppose the sign in the
23 southern part of the state had talked about an
24 issue which was very important to the people in
25 Milwaukee.

1 MR. TSEYTLIN: I think that one could
2 frame a hypothetical where, if it was some sort
3 of a home rule thing, where Milwaukee's right
4 to have certain height buildings was affected,
5 you could have a no longer generalized
6 interest, but we don't have anything like that
7 here.

8 JUSTICE BREYER: All right. So can I
9 do this? Because I think the hard issue in
10 this case is are there standards manageable by
11 a court, not by some group of social science
12 political ex -- you know, computer experts. I
13 understand that, and I am quite sympathetic to
14 that.

15 So let me spend exactly 30 seconds, if
16 I can, giving you, as you've read all these
17 briefs, I have too, this is -- this is where I
18 am at the moment -- not that I'm for this,
19 react to this as you wish, and if you wish to
20 say nothing, say nothing, and it's for
21 everybody because it's a little complicated.

22 When I read all that social science
23 stuff and the computer stuff, I said, well,
24 what -- is there a way of reducing it to
25 something that's manageable?

1 So I'd have step one, the judge says,
2 was there one party control of the
3 redistricting? If the answer to that is no,
4 say there was a bipartisan commission, end of
5 case. Okay?

6 Step two, is there partisan asymmetry?
7 In other words, does the map treat the
8 political parties differently? And a good
9 evidence of that is a party that got 48 percent
10 of the vote got a majority of the legislature.

11 Other evidence of that is what they
12 call the EG, which is not quite so complicated
13 as the opposition makes it think. Okay? In
14 other words, you look to see.

15 Question 3, is -- is there going to be
16 persistent asymmetry over a range of votes?
17 That is to say one party, A, gets 48 percent,
18 49 percent, 50 percent, 51, that's sort of the
19 S-curve shows you that, you know, whether there
20 is or is not. And there has to be some.

21 And if there is, you say is this an
22 extreme outlier in respect to asymmetry? And
23 there we have Eric Lander's brief, okay? You
24 know that one.

25 And -- and we look through thousands

1 and thousands of maps, and somebody did it with
2 real maps and said how bad is this compared to,
3 you know, the worst in the country.

4 And then, if all those -- the -- the
5 test flunks all those things, you say is there
6 any justification, was there any other motive,
7 was there any other justification?

8 Now, I suspect that that's manageable.
9 I'm not positive. And so I throw it out there
10 as my effort to take the technicalities and
11 turn them into possibly manageable questions
12 for a response from anyone insofar as you wish
13 to respond, and if you wish to say, I wish to
14 say nothing, that's okay with me.

15 (Laughter.)

16 MR. TSEYTLIN: Thank you, Your Honor.
17 I'd like to talk about the third and fourth
18 aspects of that because I think those are --
19 I've already talked about the second a little
20 bit.

21 But with regard to the third, which is
22 persistence, that is exactly the kind of
23 conjectural, hypothetical state of affairs
24 inquiry that was submitted to this Court in
25 LULAC in Professor King's amicus brief because,

1 of course, as your suggestion -- suggested
2 steps recognize, a single election doesn't mean
3 much. A single election, you could have an EG
4 for any particular reason.

5 So you would have federal courts
6 engaging in battles of the hypothetical experts
7 deciding, well, what would it be under this map
8 or that map? So I think that's a non-starter
9 for that reason.

10 Now, with regard to extremity, this
11 was an arg --

12 JUSTICE KAGAN: Well, if I could just
13 stop you there for a second, because I was
14 under the impression that legislators are
15 capable of doing this actually pretty easily
16 now.

17 You know, the world of voting
18 technology has changed a great deal, and when
19 legislatures think about drawing these maps,
20 they're not only thinking about the next
21 election, they're thinking often -- not
22 always -- but often about the election after
23 that and the election after that and the
24 election after that, and they do sensitivity
25 testing, and they use other methods in order to

1 ensure that certain results will obtain not
2 only in the next one but eight years down the
3 road.

4 And it seems to me that, just as
5 legislatures do that, in order to entrench
6 majorities -- or minorities, as the case may
7 be -- in order to entrench a party in power,
8 so, too, those same techniques, which have
9 become extremely sophisticated, can be used to
10 evaluate what they're doing.

11 MR. TSEYTLIN: Well, Your Honor,
12 legislatures don't have to worry about judicial
13 manageability standards. Legislatures don't
14 have to worry about false positives, false
15 negatives. Legislatures don't have to worry
16 about conjecture. They can --

17 JUSTICE KAGAN: What -- what I'm
18 suggesting is that this is not kind of
19 hypothetical, airy-fairy, we guess, and then we
20 guess again. I mean, this is pretty scientific
21 by this point.

22 MR. TSEYTLIN: Well, Your Honor,
23 they're just estimates. They're not all
24 scientific. And let me give you one example
25 from the record --

1 JUSTICE SOTOMAYOR: I'm sorry.
2 They're -- they're estimates where you haven't
3 put any social scientist to say that the
4 estimate's wrong. You've poked holes, but
5 every single social science metric points in
6 the same direction.

7 So there are five of them. Your map
8 drawer is one of them, by the way, the person
9 who actually drew these maps, and what we know
10 is that they started out with the court plan,
11 they created three or four different maps, they
12 weren't partisan enough. They created three or
13 four more maps, they weren't partisan enough.

14 And they finally got to the final map,
15 after maybe 10 different tries of making it
16 more partisan, and they achieved a map that was
17 the most partisan on the S-curve.

18 And it worked. It worked better than
19 they even expected. So the estimate wasn't
20 wrong. The estimate was pretty right.

21 So, if it's the most extreme map they
22 could make, why isn't that enough to prove --

23 MR. TSEYTLIN: Well, Your Honor, I
24 think --

25 JUSTICE SOTOYMAJOR: -- partisan

1 asymmetry and unconstitutional gerrymandering?

2 MR. TSEYTLIN: Well, Your Honor, I
3 think the facts in this case, which is what you
4 were discussing, are significantly less
5 troubling than the facts in the cases that this
6 Court has previously faced, for example,
7 Bandemer and Vieth, and that's for two reasons.
8 One, the map drawers here complied fastidiously
9 with traditional districting principles, which
10 was not true in Bandemer and Vieth.

11 JUSTICE SOTOMAYOR: But they kept
12 going back to fix the map to make it more
13 gerrymandered. That's undisputed. The people
14 involved in the process had traditional maps
15 that complied with traditional criteria and
16 then went back and threw out those maps and
17 created more -- some that were more partisan.

18 MR. TSEYTLIN: That's correct, Your
19 Honor. And, of course, there were computers
20 used in --

21 JUSTICE SOTOMAYOR: So why didn't they
22 take one of the earlier maps?

23 MR. TSEYTLIN: Because there was no
24 constitutional requirement that they do so.
25 They complied with all state law.

1 JUSTICE SOTOMAYOR: That's the point.

2 MR. TSEYTLIN: And they complied with
3 all traditional districting principles.

4 JUSTICE ALITO: Can I take you back to
5 -- to Justice Kagan's question about the
6 legislators' use of these techniques? Are all
7 the techniques that are used by politicians in
8 order to try to maximize their chances of
9 electoral success scientific? I think they
10 rely a lot on polls, don't they? How
11 scientific have they proven to be?

12 MR. TSEYTLIN: Of course, Your Honor.
13 Legislatures can very much rest on conjecture,
14 whereas courts cannot. If I could reserve the
15 balance of my time.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Ms. Murphy.

19 ORAL ARGUMENT OF ERIN E. MURPHY
20 FOR WISCONSIN STATE SENATE, AS AMICUS CURIAE

21 MS. MURPHY: Mr. Chief Justice, and
22 may it please the Court:

23 Plaintiffs have not identified a
24 workable standard for determining when the
25 inherently political task of districting

1 becomes too political for the Constitution to
2 tolerate.

3 Indeed, the only thing Plaintiffs have
4 added to the mix since LULAC is a wasted votes
5 test that identifies court-drawn maps as
6 enduring partisan gerrymanders and conveniently
7 favors their own political party.

8 JUSTICE KENNEDY: You've probably
9 considered the hypo many times. Suppose a
10 state constitution or a state statute says all
11 districts shall be designed as closely as
12 possible to conform with traditional
13 principles, but the overriding concern is to
14 increase -- have a maximum number of votes for
15 party X or party Y. What result?

16 MS. MURPHY: I think if -- if you have
17 something that says the ultimate principle that
18 we're going to follow is abandon all other
19 criteria in favor of partisan advantage, at
20 least you're closer at that point --

21 JUSTICE GINSBURG: I don't think -- I
22 don't think that was the question. It was it
23 satisfies all the traditional criteria,
24 contiguous, but it was a deliberate attempt to
25 maximize the number of seats that Republicans

1 would hold.

2 JUSTICE KENNEDY: This is mandated by
3 the state constitution.

4 MS. MURPHY: I don't think that in a
5 world where the legislature is required to and
6 is, in fact, complying with a number of other
7 metrics and is as one of those things taking
8 into account partisan advantage, that you've
9 proven a constitutional violation.

10 JUSTICE ALITO: It's not a -- that's
11 not a manageable standard. It's not a
12 manageable standard that you cannot have a law
13 that says draw maps to favor one party or the
14 other.

15 MS. MURPHY: If it's --

16 JUSTICE ALITO: That seems like a
17 perfectly manageable standard.

18 MS. MURPHY: If it's on --

19 JUSTICE ALITO: You cannot have that.

20 MS. MURPHY: -- the face of the
21 statute, I think you have a different scenario
22 because at least at that point, you know the
23 intent. You know there's no debate to have
24 about the intent of what the legislature is
25 doing and if they are intentionally drawing for

1 one purpose or other purposes.

2 JUSTICE KAGAN: Well, there are plenty
3 areas of law, Ms. Murphy, where we look at
4 intent beyond the face of a statute. And, you
5 know, sometimes that's harder than other times.
6 We understand it can be difficult. We
7 understand in other cases it can be easy. But
8 we do it all over the place in our law. We
9 don't -- we don't say, oh, if it's not on the
10 face of the statute, we're never going to look
11 at it.

12 So, if your answer to Justice Alito
13 is, well, on the face of the statute, that's
14 certainly a manageable standard, I guess I
15 would ask why not if it's not on the face of
16 the statute? But you absolutely -- you know,
17 but you have good evidence that there was the
18 intent here, and you have good evidence that
19 the intent led to a certain kind of effect,
20 which was to entrench a party in power.

21 MS. MURPHY: I think what
22 differentiates this from a lot of other
23 contexts is that here we have opinion after
24 opinion from this Court, dissenting opinions,
25 concurring opinions, plurality opinions, what

1 have you, saying that considering politics in
2 districting is not in and of itself inherently
3 unconstitutional.

4 JUSTICE GORSUCH: Ms. Murphy --

5 MS. MURPHY: So just finding the
6 intent isn't a problem.

7 JUSTICE KAGAN: But there is a
8 difference --

9 JUSTICE GORSUCH: I'd like to go back
10 to Justice Breyer's question. It would be
11 helpful to get an answer for me on that. What
12 criteria would a state need to know in order to
13 avoid having every district and every case and
14 every election subject to litigation? Because
15 the -- the standards given in -- in the lower
16 court here was, well, a little bit of partisan
17 symmetry problem, a little bit of an efficiency
18 gap problem, not a real set of criteria.

19 And here, you know, is it 7 percent,
20 how durable, how many elections would we need?
21 How much data would we have to gather? Walk us
22 through Justice Breyer's question and provide
23 some answers, if you -- if you would.

24 MS. MURPHY: Sure. So I think some of
25 the problems with the criteria that have been

1 suggested, in particular with the tests that
2 focus on these symmetry metrics, is that so far
3 the metrics that we have, I mean, they identify
4 false positives roughly 50 percent of the time.

5 And I don't know how a legislature is
6 supposed to comply with criteria that can't
7 differentiate between a court-drawn map and a
8 map drawn for partisan advantage. So, when you
9 start with this partisan symmetry concept, you
10 automatically have the basic problem that you
11 have to have some way to decide what is the
12 appropriate partisan asymmetry.

13 JUSTICE GORSUCH: Okay. But what are
14 the questions -- you know, I need two years or
15 two cycles worth of data. I need an S curve of
16 a certain shape and size. I need an efficiency
17 gap of something. What are the numbers, what
18 are the criteria we'd have to fill in as a
19 constitutional matter in order for a state to
20 be able to administer this?

21 MS. MURPHY: Well, I mean, with all
22 due respect, I -- I -- I'm not convinced that
23 there are manageable criteria for the courts to
24 be putting on legislatures for how to go about
25 this process. And I certainly don't think that

1 anyone in this case has identified that.

2 JUSTICE GORSUCH: But if you could try
3 to answer --

4 MS. MURPHY: But I would suggest that,
5 you know, one of the starting points for me
6 would have to be that traditional districting
7 criteria should matter in the analysis.

8 If you have a legislature that has
9 started by saying we're going to comply with
10 everything that we're supposed to do, not only
11 as a legal matter, but also all of these
12 practical constraints, we're going to draw
13 districts that comply --

14 JUSTICE GINSBURG: Ms. Murphy, because
15 -- because your time is running out, I would
16 like to ask you what's really behind all of
17 this. The precious right to vote, if you can
18 stack a legislature in this way, what incentive
19 is there for a voter to exercise his vote?
20 Whether it's a Democratic district or a
21 Republican district, the result -- using this
22 map, the result is preordained in most of the
23 districts.

24 Isn't that -- what becomes of the
25 precious right to vote? Would we have that

1 result when the individual citizen says: I
2 have no choice, I'm in this district, and we
3 know how this district is going to come out? I
4 mean, that's something that this society should
5 be concerned about.

6 MS. MURPHY: Well, a -- a couple of
7 responses to that, Your Honor. First of all,
8 it's inherent in our districting scheme that
9 there are plenty of people who are always going
10 to be voting in districts where they know what
11 the result is going to be. And that has
12 nothing to do with partisan gerrymandering; it
13 has to do with the geography of politics and
14 the fact that some of us just live in districts
15 where --

16 JUSTICE GINSBURG: Some of us, but --

17 MS. MURPHY: -- we know that our vote
18 will come out one way or another.

19 JUSTICE GINSBURG: In Wisconsin,
20 before this plan, was it the case that when it
21 was something like 49 out of 99 districts were
22 uncontested, nobody -- the election was --
23 wasn't contested because the one party or the
24 other was going to win.

25 MS. MURPHY: Well, I -- I don't think

1 you can quite draw that conclusion from the
2 fact there's uncontested races. I mean, the
3 reality is that political parties have to make
4 decisions about where to put their resources,
5 and they're going to have to do that for
6 reasons that, again, have nothing to do with
7 districting for partisan advantage. They have
8 to do with the fact that drawing districts is
9 always going to reflect political calculations
10 and it's always going to be driven by
11 communities of interest, and communities of
12 interest sometimes feel very strongly about one
13 political party rather than another.

14 JUSTICE KENNEDY: I have to say that I
15 don't think you ever answered the question: If
16 the state has a law or a constitutional
17 amendment that's saying all legitimate factors
18 must be used in a way to favor party X or party
19 Y, is that lawful?

20 MS. MURPHY: I think it's -- on the
21 face of the Constitution as a requirement the
22 district must -- the legislature must comply
23 with, then that could be your instance of a --
24 a problem that can be actually solved by the
25 Constitution, but it's quite different to me

1 when you have a facially neutral districting
2 matter --

3 JUSTICE KENNEDY: Is that an equal
4 protection violation or a First Amendment
5 violation?

6 MS. MURPHY: Well, it's a little hard
7 to say at this point because, you know, it
8 really just hasn't been fully explored, this
9 concept of how you would come at all of this
10 from a First Amendment perspective. I think
11 this comes back to really the standing question
12 --

13 JUSTICE KENNEDY: Well, you said
14 there's a Constitution -- is it equal
15 protection?

16 MS. MURPHY: I think the question -- I
17 mean, it would be who has standing to bring
18 their --

19 JUSTICE KENNEDY: Well, assume
20 standing. I'd like an answer to the question.

21 MS. MURPHY: Yes. It would be an
22 unconstitutional if it was on the face of it,
23 and I think that that would be better thought
24 of probably as an equal protection violation,
25 but you could think of it just as well, I

1 think, as a First Amendment violation in the
2 sense that it is viewpoint discrimination
3 against the individuals who the legislation is
4 saying you have to specifically draw the maps
5 in a way to injure, but, again, I --

6 JUSTICE SOTOMAYOR: Could you tell me
7 what the value is to democracy from political
8 gerrymandering? How -- how does that help our
9 system of government?

10 MS. MURPHY: Sure. Well, I would
11 point to --

12 JUSTICE SOTOMAYOR: You -- you almost
13 concede that it doesn't when you say if a state
14 filed -- has a constitutional amendment or has
15 a law that says you must comply with
16 traditional criteria, but you must also
17 politically gerrymander, you're saying that
18 might be unconstitutional?

19 MS. MURPHY: It might be, but I don't
20 think that necessarily means that districting
21 for partisan advantage has no positive values.
22 I would point you to, for instance, Justice
23 Breyer's dissenting opinion in Vieth which has
24 an extensive discussion of how it can actually
25 do good things for our system to have districts

1 drawn in a way that makes it easier for voters
2 to understand who they are account -- who the
3 legislature is. It produces values in terms of
4 accountability that are valuable so that the
5 people understand who isn't and who is in
6 power.

7 JUSTICE SOTOMAYOR: I really don't
8 understand how any of that -- what that means.
9 I mean, it -- it's okay to stack the decks so
10 that for 10 years or an indefinite period of
11 time one party, even though it gets a minority
12 of votes, can't get a minor -- gets a minority
13 of votes, can get the majority of seats?

14 MS. MURPHY: With all due respect, you
15 know, I would certainly dispute the premise
16 that the decks are stacked here. At the end of
17 the day, what matters is how people vote in
18 elections and that's what's going to determine
19 the outcomes, as it has in Wisconsin where the
20 Republicans have won majorities because they've
21 actually won the majority of the vote in most
22 of the elections over the past four years.
23 Thank you, Your Honor

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Counsel.

1 Mr. Smith.

2 ORAL ARGUMENT OF PAUL M. SMITH

3 ON BEHALF OF APPELLEES

4 MR. SMITH: Mr. Chief Justice, and may
5 it please the Court:

6 What the state is asking for here is a
7 free pass to continue using an assembly map
8 that is so extreme that it effectively
9 nullifies democracy.

10 As this case illustrates, it's now
11 possible even in a 50/50 state like Wisconsin
12 to draw a district map that is so reliably and
13 extremely biased that it effectively decides in
14 advance who's going to control the legislative
15 body for the entire decade.

16 CHIEF JUSTICE ROBERTS: Maybe we can
17 just talk briefly about the standing issue.

18 It is a little arresting to have a
19 rule that we establish that when your claim is
20 racial gerrymandering, it has to be limited to
21 your district, you can't complain about racial
22 gerrymandering elsewhere in the state, but
23 here, if the claim is going to be political
24 gerrymandering, you can raise claims about
25 whole statewide issues even if there is no

1 argument that you're gerrymandered, like the
2 first plaintiff who votes in Madison, his vote
3 isn't diluted in any way, and yet he is able to
4 complain about voting anywhere in the state.

5 MR. SMITH: Well, Mr. Chief Justice, I
6 think that standing has to follow from the
7 nature of the injury and that follows from the
8 nature of the constitutional violation.

9 A racial gerrymandering claim, a Shaw
10 v. Reno claim, is an attack on a particular
11 district for being drawn with excessive focus
12 on race. In that situation, the injury has to
13 be localized to the place where that district
14 is.

15 Partial -- partisan gerrymandering has
16 the same word in it, but it's an entirely
17 different kind of injury because it involves
18 dilution of votes. Racial gerrymandering is
19 analytically distinct from any dilution case.

20 JUSTICE ALITO: I don't understand --

21 CHIEF JUSTICE ROBERTS: What about --
22 what about the sign hypothetical? You know,
23 you're up in far north of Wisconsin and
24 somebody is -- is taking down the signs for the
25 one candidate in the far south.

1 That affects that individual's -- the
2 strength of his vote for the state-wide
3 purposes. Is he really have standing to
4 complain about that?

5 MR. SMITH: Well, Your Honor, I think
6 you could decide that while it might have some
7 de minimis effect on the interest of any
8 Democrat attempting to carry out that group's
9 political agenda, that it's sufficiently de
10 minimis that you wouldn't want to give standing
11 to people outside the directly affected area.

12 JUSTICE ALITO: Why -- why is it de
13 minimis? It seems to me it's exactly the same
14 thing. If you have a system, let's extend it
15 to many towns that are controlled by the
16 Republicans and they're taking down all the
17 Democratic signs. And if that's an effective
18 strategy, it will mean fewer members of the
19 legislature are Democrats and, therefore, the
20 interests of the Democratic voter in Milwaukee
21 or Madison will be impaired. It seems like
22 exactly the same thing.

23 MR. SMITH: Well, Your Honor, if you
24 had a systematic effort in a lot of places by
25 members of one party to prevent the other party

1 from campaigning effectively, I think that
2 anybody in the Democratic Party in the state
3 would have standing.

4 JUSTICE ALITO: All right. Well, on
5 the -- let's -- let's look at the race issue.

6 So you have a state where there you
7 have an African American voter in -- in a -- in
8 one part of the state who wants to complain
9 that districts in another part of the state are
10 -- are packed or cracked and, as a result of
11 that, there are going to be fewer African
12 Americans in the legislature than there should
13 be.

14 And that's going to impair that
15 person's interests, including, I would suppose,
16 their right of association. What -- what is
17 the difference between those two situations?

18 MR. SMITH: Well, Your Honor, that's a
19 Section 2 vote dilution claim, and I think that
20 the law appropriately limits standing in that
21 situation to people who live in the region of
22 the state where there's an absence of an
23 additional minority district.

24 You wouldn't want to assume that some
25 African American from a different part of the

1 state has a collective interest with people
2 over here in this part of the state just
3 because of race. That's just stereotyping.
4 But with party, people join the party to -- to
5 work together to achieve a collective end. So
6 you're not --

7 CHIEF JUSTICE ROBERTS: Well, but
8 that's equally stereotyping. Sometimes people
9 vote for a wide variety of reasons. Maybe the
10 candidate, although he's of a different party,
11 is a -- is a friend, is a neighbor. Maybe they
12 think it's a good idea to have the
13 representatives from their district to balance
14 out what they view would be necessary -- likely
15 candidates from other districts.

16 MR. SMITH: Maybe they do --

17 CHIEF JUSTICE ROBERTS: I don't think
18 it's any more -- any less stereotypical to say
19 that people are going to vote for parties
20 because they support everything the party does
21 statewide.

22 MR. SMITH: Well, but to have
23 standing, I think you'd want to find plaintiffs
24 who do that, Your Honor. And certainly the
25 plaintiffs we have here are thorough going

1 supporters of the disfavored party. Their
2 party has been punished by the law of the State
3 of Wisconsin. And I think that the -- the
4 standing issue ought to be satisfied by the
5 description of what our claim is, which comes
6 right out of Justice Kennedy's concurrence in
7 Vieth where -- this is on page 86-A of the
8 jurisdictional statement, The White Appendix.

9 It's just a two-sentence description
10 of our claim: "First Amendment concerns arise
11 where a state enacts a law that has the purpose
12 and effect of subjecting a group of voters or
13 their party to disfavored treatment by reason
14 of their views. In the context of partisan
15 gerrymandering, that means that First Amendment
16 concerns arise where an apportionment has the
17 purpose and effect of burdening a group of
18 voters' representational rights."

19 So the group is -- is the targeted
20 people, those are the people who have the
21 injury, the injury to their First Amendment
22 interests, and anybody in the group has --
23 ought -- should be able to -- to bring a First
24 Amendment argument saying --

25 JUSTICE KAGAN: Mr. Smith.

1 CHIEF JUSTICE ROBERTS: Mr. Smith --
2 do you have standing? Well, Justice Kagan?

3 JUSTICE KAGAN: In a one-person
4 one-vote case, does one person in an
5 overpopulated district have standing to
6 challenge not only that district, those
7 district lines, but the entire state map?

8 MR. SMITH: That is true. That is the
9 way that it's been handled ever since the
10 Reynolds case.

11 JUSTICE KAGAN: And why is that, and
12 does it -- is it an analogy to this case?

13 MR. SMITH: Well, it's certainly a
14 helpful analogy. It's not exactly the same
15 because they have to live in an overpopulated
16 district rather than an underpopulated
17 district.

18 But those are the people in -- who
19 suffer vote dilution because they're living in
20 the overpopulated districts. And the Court has
21 said not only does that person have standing to
22 challenge their own district but also to
23 challenge the entire map and make all of the
24 districts closer in population. That's just
25 the way that's been handled since the '60s.

1 CHIEF JUSTICE ROBERTS: Mr. Smith, I'm
2 going to follow an example of one of my
3 colleagues and lay out for you as concisely as
4 I can what -- what is the main problem for me
5 and give you an opportunity to address it.

6 I would think if these -- if the claim
7 is allowed to proceed, there will naturally be
8 a lot of these claims raised around the
9 country. Politics is a very important driving
10 force and those claims will be raised.

11 And every one of them will come here
12 for a decision on the merits. These cases are
13 not within our discretionary jurisdiction.
14 They're the mandatory jurisdiction. We will
15 have to decide in every case whether the
16 Democrats win or the Republicans win. So it's
17 going to be a problem here across the board.

18 And if you're the intelligent man on
19 the street and the Court issues a decision, and
20 let's say, okay, the Democrats win, and that
21 person will say: "Well, why did the Democrats
22 win?" And the answer is going to be because EG
23 was greater than 7 percent, where EG is the
24 sigma of party X wasted votes minus the sigma
25 of party Y wasted votes over the sigma of party

1 X votes plus party Y votes.

2 And the intelligent man on the street
3 is going to say that's a bunch of baloney. It
4 must be because the Supreme Court preferred the
5 Democrats over the Republicans. And that's
6 going to come out one case after another as
7 these cases are brought in every state.

8 And that is going to cause very
9 serious harm to the status and integrity of the
10 decisions of this Court in the eyes of the
11 country.

12 MR. SMITH: Your Honor --

13 CHIEF JUSTICE ROBERTS: It is just
14 not, it seems, a palatable answer to say the
15 ruling was based on the fact that EG was
16 greater than 7 percent. That doesn't sound
17 like language in the Constitution.

18 MR. SMITH: Your Honor, first thing I
19 would say in response to that is that those
20 challenges are already being brought. Partisan
21 gerrymandered maps get challenged -- they get
22 challenged in other ways, under the one person,
23 one vote doctrine, under the racial
24 gerrymandering doctrine, under Section 2. And
25 -- and so you're getting those cases. Most of

1 the -- the statewide redistricting maps in this
2 country are challenged every 10 years in some
3 way or another.

4 What -- what would make the system
5 work better is if people could bring a
6 challenge to what they actually think is wrong
7 with the map, which is that it's anti-
8 democratic, it decides in advance that one
9 party is going to control the state government
10 for 10 years and maybe for 20 years because
11 they can replicate it at the end of the 10
12 years and do it again.

13 That is the real problem. And I think
14 what -- what the Court needs to know is it's --
15 this is a cusp of a really serious, more
16 serious problem as gerrymandering becomes more
17 sophisticated with computers and data analytics
18 and a -- and an electorate that is very
19 polarized and more predictable than it's ever
20 been before. If you let this go, if you say
21 this is -- we're not going to have a judicial
22 remedy for this problem, in 2020, you're going
23 to have a festival of copycat gerrymandering
24 the likes of which this country has never seen.

25 And it may be that you can protect the

1 Court from seeming political, but the country
2 is going to lose faith in democracy big time
3 because voters are going to be like --
4 everywhere are going to be like the voters in
5 Wisconsin and, no, it really doesn't matter
6 whether I vote.

7 JUSTICE ALITO: Well, Mr. Smith --

8 CHIEF JUSTICE ROBERTS: No, but you're
9 going to take these -- the whole point is
10 you're taking these issues away from democracy
11 and you're throwing them into the courts
12 pursuant to, and it may be simply my
13 educational background, but I can only describe
14 as sociological gobbledygook.

15 MR. SMITH: Your Honor, this is --
16 this is not complicated. It is a measure of
17 how unfair the map is. How much burden can the
18 party --

19 JUSTICE BREYER: Can you say this?
20 Look, don't agree with me just because it
21 sounds favorable, because he won't in two
22 minutes. Can you answer the Chief Justice's
23 question and say the reason they lost is
24 because if party A wins a majority of votes,
25 party A controls the legislature. That seems

1 fair.

2 And if party A loses a majority of
3 votes, it still controls the legislature. That
4 doesn't seem fair. And can we say that without
5 going into what I agree is pretty good
6 gobbledygook?

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: And if you
9 need a convenient label for that approach, you
10 can call it proportional representation, which
11 has never been accepted as a political
12 principle in the history of this country.

13 MR. SMITH: Your Honor, we are not
14 arguing for proportional representation. We
15 are arguing for partisan symmetry, a map which
16 within rough bounds at least treats the two
17 parties relatively equal in terms of their
18 ability to translate votes into seats.
19 That's --

20 CHIEF JUSTICE ROBERTS: That sounds
21 exactly like proportional representation to me.

22 MR. SMITH: Proportional
23 representation is when you give the same
24 percentage of seats as they have in percentage
25 of votes. That's what proportional

1 representation means. And our -- our claim
2 simply doesn't remotely do that. It says if
3 party A at 54 percent gets 58 percent of the
4 seats, party B when it gets 54 percent ought to
5 get 58 percent of the seats. That's symmetry.

6 That's what the political scientists
7 say is the right way to think about a map that
8 does not distort the outcome and put a thumb on
9 the scale. Now what --

10 JUSTICE ALITO: Mr. Smith, can I just
11 say something -- ask you a question about the
12 political science? I mean, I -- gerrymandering
13 is distasteful. But if we are going to impose
14 a standard on the courts, it has to be
15 something that's manageable and it has to be
16 something that's sufficiently concrete so that
17 the public reaction to decisions is not going
18 to be the one that the Chief Justice mentioned,
19 that this three-judge court decided this, that
20 -- this way because two of the three were
21 appointed by a Republican president or two of
22 the three were appointed by a Democratic
23 president.

24 Now, it's been 30 years since
25 Bandemer, and before then and since then,

1 judges, scholars, legal scholars, political
2 scientists have been looking for a manageable
3 standard. All right.

4 In 2014, a young researcher publishes
5 a paper, Eric McGhee publishes a paper, in
6 which he says that the measures that were
7 previously -- the leading measures previously,
8 symmetry and responsiveness, are inadequate.
9 But I have discovered the key. I have
10 discovered the Rosetta stone and it's -- it is
11 the efficiency gap.

12 And then a year later you bring this
13 suit and you say: There it is, that is the
14 constitutional standard. It's been finally --
15 after 200 years, it's been finally discovered
16 in this paper by a young researcher, who
17 concludes in the end -- this is the end of his
18 paper -- after saying symmetry and
19 responsiveness have shown to be -- looked to be
20 inappropriate, "The measure I have offered
21 here, relative wasted votes, is arguably" --
22 arguably -- "a more valid and flexible measure
23 of -- of partisan -- of partisan
24 gerrymandering."

25 Now, is this -- is this the time for

1 us to jump into this? Has there been a great
2 body of scholarship that has tested this
3 efficiency gap? It's full of questions.
4 Mr. McGhee's own amicus brief outlines numerous
5 unanswered questions with -- with this theory.

6 What do you do in -- in elections that
7 are not contested? Well, then you have to --
8 you have to make two guesses. How many people
9 would have voted for the winning candidate if
10 it had been a contested election? How many
11 people would have voted for the losing
12 candidate if it had been a contested election?

13 One of the judges in the court below
14 asks: Why do you calculate EG by map, by
15 subtracting from the votes obtained by the
16 winner, 50 percent of the votes, instead of the
17 votes obtained by the runner up? And
18 Mr. McGhee says: Well, I have an answer to
19 this, and I have a forthcoming paper and I'll
20 answer it in the forthcoming paper.

21 (Laughter.)

22 JUSTICE ALITO: And there are all of
23 these questions. This is -- 2017 is the time
24 to jump into this? That's a question.

25 MR. SMITH: Is there a question there,

1 Your Honor?

2 JUSTICE ALITO: Yeah, there is a
3 question there. There are about 10 of them.

4 (Laughter.)

5 MR. SMITH: I would say this if I
6 might, Justice Alito. In Vieth, the Court
7 appropriately laid down a challenge and said if
8 you want us to do this, you've got to give us a
9 lot more than you've given us. You've got to
10 give us two things, a substantive definition of
11 fairness and a way to measure it so we can
12 limit judicial intervention to the really
13 serious cases, and so we won't have the Court
14 entering into the political fray all the time,
15 but we'll have standards that say you go this
16 far, we're going to go -- we're going to go
17 after you, but in the meantime, anything less
18 serious than that, we're going to leave to the
19 political branches.

20 And so the social scientists stepped
21 up and said we have three different ways to
22 calculate asymmetry, not just one: the
23 median-mean measure; the partisan bias measure,
24 where you're equalizing to 50/50; and the --
25 the efficiency gap. And in this case, they all

1 come to the exact same conclusion that this is
2 one of the most extreme gerrymanders ever drawn
3 in -- in living memory of the United States,
4 one of the five worst out of the 230 maps that
5 Professor Jackman studied.

6 And so there is no -- there's no
7 question here about this being the --
8 maximizing one party control as far as they
9 could go. As Justice Sotomayor was saying,
10 they pushed the limits and pushed the limits
11 and pushed the limits. And it --

12 JUSTICE KAGAN: Mr. Smith, may I --
13 I'm sorry. Please.

14 MR. SMITH: Please go ahead, Your
15 Honor.

16 JUSTICE KAGAN: I -- I think that this
17 symmetry idea is both an intuitive and an
18 attractive principle. So, if the first
19 question was do you have a substantive
20 principle, I actually think you do.

21 The second question is, is there
22 ways -- are there ways to make sure that not
23 every district is subject to challenge as
24 violating that principle? And so I'd like to
25 hear you talk about that.

1 How is it that we are not going to
2 create a world in which in every district
3 somebody can come in and say: A-ha, there's
4 been a violation of partisan symmetry; we're
5 entitled to a redrawn map?

6 What's the threshold? Where do you
7 draw the line?

8 MR. SMITH: Well, the --

9 JUSTICE KAGAN: Because this -- this
10 -- it seems to me that this map goes over
11 pretty much every line you can name.

12 MR. SMITH: That's true.

13 JUSTICE KAGAN: But where do you draw
14 the line in another case and another case?

15 MR. SMITH: Well, Justice Kagan, the
16 great virtue of these three different measures,
17 none of which were presented to the Court in
18 Vieth when I argued the Vieth case -- and I
19 didn't do a very good job -- is that they each
20 allow you to assign a number to each
21 gerrymander and that allows you to compare them
22 across the country and back in history. And,
23 therefore, it is possible to draw a line.

24 Now, in addition to just measuring the
25 degree of asymmetry, the other thing that's

1 important to do is to measure the likelihood of
2 durability of that asymmetry. And you do that
3 with the sensitivity testing so you make sure
4 you don't have the kind of map that, with a
5 small swing of voting over the next decade, is
6 going to flip over, as the map in Pennsylvania
7 in Vieth actually did. That -- if we had the
8 right tests, the ones that I'm now presenting
9 to you, we wouldn't have won that case in -- in
10 2004.

11 But this map is never going to flip
12 over. The evidence is unequivocal that the
13 Democrats would have to have an earthquake of
14 unprecedented proportions to even have a chance
15 to get up to 50 votes out of 99.

16 CHIEF JUSTICE ROBERTS: All of those
17 predictions -- I mean, Bandemer predicted the
18 Democrats would never be able to attain a
19 majority. It was 50/50 the next election, and
20 they got a majority the one after that. You
21 already mentioned Vieth. It was five days,
22 right, after the District Court said, oh, the
23 -- I forget who it was -- Republicans are never
24 going to get elected. And they won every
25 single race. Predicting on the basis of the

1 statistics that are before us has been a very
2 hazardous enterprise.

3 MR. SMITH: The technique of
4 sensitivity testing, which was done by the
5 Defendants' expert in the -- in the process of
6 drawing the map to make sure that they were
7 drawing a permanent, non-flippable gerrymander,
8 and then done again by the experts for the
9 Plaintiffs in this case in court and tested by
10 the court, is a -- a method by which you
11 identify one thing about the map: Does it have
12 a lot of swing districts in it, a lot of
13 competitive districts in it? Because if it
14 does, you can have a map that looks very biased
15 in one year when all those districts go one
16 way, but it might flip over. That was
17 Bandemer. That was Vieth.

18 That is not this case. They spent
19 their entire time in that -- those four months
20 in that locked room doing two things, trying to
21 maximize the amount of bias and eliminating
22 systematically competitive districts, reducing
23 it down to something less than 10 when it had
24 been up around 20, and then even though those
25 10, they tinkered with it and tinkered with it

1 to make sure that even of that 10, they thought
2 they could get at least seven. They ended up
3 getting eight and then eventually all 10.

4 CHIEF JUSTICE ROBERTS: Mr. Smith, I'm
5 --

6 JUSTICE KAGAN: So are you suggesting
7 that we should be looking for outliers or are
8 you suggesting that we should be trying to
9 filter out all manner of partisan
10 consideration, or is it someplace in between?

11 MR. SMITH: Your Honor, the word
12 "outlier" is probably an appropriate one.
13 Certainly, we don't think -- and we've followed
14 the lead of this Court in Justice Kennedy's
15 concurrence and other decisions of this Court
16 -- that all partisanship is unconstitutional.

17 What you need is a method by which the
18 extreme gerrymander, the one that is
19 fundamentally anti-democratic and is going to
20 last for the full decade, can be identified and
21 -- and held unconstitutional. And that --
22 that's the only thing we're asking you to do
23 here.

24 JUSTICE GORSUCH: So, Mr. Smith, what
25 is the formula that achieves that? Because the

1 court below didn't rely on efficiency gap
2 entirely. It looked also at the partisan
3 symmetry test. It reminds me a little bit of
4 my steak rub. I like some turmeric, I like a
5 few other little ingredients, but I'm not going
6 to tell you how much of each.

7 And so what's this Court supposed to
8 do? A pinch of this, a pinch of that? Or are
9 we supposed to actually specify it's going to
10 be the Chief Justice's formula of the
11 efficiency gap of 7 percent for the country?
12 Is that what you're asking us to do? What is
13 it that you want us to constitutionalize?

14 MR. SMITH: Well, Your Honor, the
15 first thing I want to make clear is -- is that
16 symmetry is what's being measured by the
17 efficiency gap, by the other two tests that I
18 mentioned. Symmetry is the underlying
19 substantive --

20 JUSTICE GORSUCH: Well, but there are
21 different tests for measuring symmetry --

22 MR. SMITH: Right.

23 JUSTICE GORSUCH: -- right?

24 MR. SMITH: Right. There are.

25 JUSTICE GORSUCH: There is the test

1 you previously proposed. Now there is the
2 efficiency gap test. And the Court relied on
3 both and said a little bit -- a pinch this and
4 a pinch of that --

5 MR. SMITH: Right.

6 JUSTICE GORSUCH: -- and we're not
7 telling you how much of each. So --

8 MR. SMITH: Well, I think it's fair --

9 JUSTICE GORSUCH: -- so that doesn't
10 seem very fair to the states to me, to -- to --
11 to know how to -- what they're supposed to do
12 to avoid the kind of litigation we're talking
13 about. As I understand the efficiency gap test
14 itself, and tell me if I'm wrong, that it would
15 yield about a third of all the districts in the
16 country winding up in court.

17 MR. SMITH: Not true. Not true.

18 JUSTICE GORSUCH: Now, that's what the
19 other side says. So tell me where that's wrong
20 and tell me what test you'd have this Court
21 adopt.

22 MR. SMITH: Well, first of all, I -- I
23 would go with the -- the screens that Justice
24 Breyer mentioned, the first one being it has to
25 be a one-party state. That one-third figure

1 they keep throwing around ignores the fact that
2 a number of those maps were drawn either by
3 commissions or by courts or by divided
4 legislatures.

5 And so they get -- those all get taken
6 off the table from the very beginning. If you
7 have a one-party state, you then have to
8 measure whether it's unusually asymmetrical,
9 pretty extreme, and we --

10 JUSTICE GORSUCH: How? I am still
11 stuck on Justice Breyer's question.

12 MR. SMITH: You can use the -- you can
13 use any of those three tests that were all
14 applied here.

15 JUSTICE GORSUCH: Any of them?

16 MR. SMITH: Yes.

17 JUSTICE GORSUCH: Any -- any of the
18 three?

19 MR. SMITH: And if they don't -- I --
20 I would suggest you apply all of them, and --

21 JUSTICE GORSUCH: All of them?

22 MR. SMITH: -- if they disagree, that
23 would -- that would tell you maybe this isn't
24 the right case to be holding something
25 unconstitutional. That might be a fly in the

1 ointment. But the court below did not set the
2 --

3 JUSTICE ALITO: Excuse me. Isn't it
4 true that --

5 MR. SMITH: -- the line -- I'm sorry.

6 JUSTICE ALITO: Just on that, isn't it
7 true that you could -- you can get very high
8 levels of -- very high EG based on factors that
9 have nothing to do with gerrymandering? The --
10 the political geography can lead to it;
11 protection of incumbents, which has been said
12 to be a legitimate factor, can lead to a high
13 EG; compliance with the Voting Rights Act can
14 affect that?

15 MR. SMITH: Certainly, there are
16 various factors that -- that -- other than
17 partisan bias that can lead you to draw a map
18 that does not have a zero EG.

19 In our test, with the intents
20 requirement, the effects requirement, and the
21 justification requirement, all of those
22 problems are taken care of either at the intent
23 stage or at the justification stage.

24 JUSTICE ALITO: How are they taken
25 care of at the justification stage? The

1 proposal is to run many -- you know, millions
2 of -- of alternative maps to see whether using
3 some traditional districting requirements, you
4 can produce a map that has a lower -- a lower
5 EG. But my understanding is that when that's
6 done, those maps do not take into account
7 either incumbent protection or compliance with
8 the Voting Rights Act, both of which can have a
9 very big effect. It's just one of the dozens
10 of uncertainties about this whole process.

11 MR. SMITH: Actually, they do -- they
12 do take into account the Voting Rights Act.
13 The Chen study that was discussed in one of the
14 amicus briefs and is discussed somewhat in the
15 merits briefs here, where they -- he produced
16 200 randomly generated maps of Wisconsin using
17 all the state's traditional criteria, he
18 started with the minority districts that were
19 already drawn by the state in Act 43 and kept
20 those in place.

21 And so then he generated -- randomly
22 generated maps, and he found that the degree of
23 bias created by the political geography in
24 Wisconsin is minute, modest, a little bit,
25 something -- just like what the District Court

1 found, maybe 1 or 2 percent, not even remotely
2 like what they have in the map. And so --

3 JUSTICE KAGAN: Would it be fair to
4 require plaintiffs to provide those maps, many,
5 many of them, so that one can tell whether the
6 actual map is an outlier?

7 MR. SMITH: Well, I think in -- in the
8 cases going forward after this -- these
9 technologies are there, they will be in the
10 record in almost every case. It has become the
11 state of the art.

12 Whether it ought to be something that
13 the plaintiffs have to produce as part of their
14 initial case, I'd have to think about it. It
15 certainly could be done that way.

16 There are -- as the Lander brief and
17 the -- and a couple of other briefs and -- and
18 the -- the political geographers' brief all
19 show, people who have developed a capacity for
20 generating random maps that teach you a lot of
21 lessons about the effects of neutral criteria
22 -- of where people live and allow you to say
23 that has nothing to do with the degree of bias
24 that we have here. And I think it will become
25 a part of how these cases are decided at the

1 justification stage. It may also become
2 evidence of intent or of -- of how severe the
3 effects are.

4 It can be useful in a whole variety of
5 ways. Now that, again, social science has
6 stepped up to the challenge.

7 JUSTICE KAGAN: So, for an example,
8 that becomes a way to filter out the effects of
9 geography from the effects of partisan
10 advantage?

11 MR. SMITH: Yes, Your Honor. I would
12 say that at the remedy stage, if they -- if
13 they come back with a remedy map that matches
14 the sort of neutral geography, even if it's
15 somewhat favorable to the -- the party that's
16 in charge, that should be okay. They don't
17 have to go to zero just to -- at the remedy
18 stage, but they have to come up with something
19 much less extreme than their intentional
20 gerrymandering, one that basically makes
21 democracy no longer function because,
22 basically, gerrymanders now are not your
23 father's gerrymander. These are going to be
24 really serious incursions on democracy if this
25 Court doesn't do something. And this is really

1 the last opportunity before we see this huge
2 festival of new extreme gerrymanders all done
3 along the model of Wisconsin but probably even
4 more serious.

5 I -- I would commend the political
6 scientists' brief, which talk about the
7 revolution in data analytics that has happened
8 since this map was drawn. You're going to see
9 people coming in and -- and slicing and dicing
10 a very polarized electorate to the point where
11 one -- one-party control will be guaranteed.
12 That's going to become the norm. Indeed, in
13 any one-party state, if you don't do it that
14 way, they're going to say, you know, that's
15 malpractice. Why aren't you doing what
16 Wisconsin did?

17 JUSTICE GINSBURG: Mr. Smith, will you
18 clarify what you mean by one-party state?
19 Here, we know that the maps were drawn by the
20 Republicans and every -- everybody else was
21 excluded, even some Republicans were excluded.

22 But suppose the legislature has a
23 Republican majority, but there are Democrats,
24 say it's 60/40, 40 percent Democrat, and the
25 redistricting is done by the legislature. Does

1 -- does that count? Would you count that as
2 one party?

3 MR. SMITH: I do, Your Honor. I think
4 if there's a majority, one party has a majority
5 in both houses of the legislature and the
6 governorship, the fact that there -- there are
7 some representatives of the other party in a
8 minority status would not negate the
9 possibility that the thing was --

10 JUSTICE GORSUCH: Mr. Smith, is that a
11 -- is that a republican form of government
12 claim?

13 MR. SMITH: I think it's a First
14 Amendment claim and an equal protection claim.
15 I -- I'm not going to try to revive the
16 republican form of government clause at this
17 late stage of --

18 JUSTICE GORSUCH: Isn't that -- isn't
19 that exactly what you're trying to do, though?

20 MR. SMITH: No.

21 JUSTICE GORSUCH: You're saying it's a
22 one-party rule and that would violate a
23 republican form of government guarantee.
24 Wouldn't that be the more specific
25 constitutional provision to look to, rather

1 than the generic equal protection clause?

2 MR. SMITH: Well, I --

3 JUSTICE GORSUCH: For that matter,
4 maybe we can just for a second talk about the
5 arcane matter, the Constitution.

6 And where exactly do we get authority
7 to revise state legislative lines? When --
8 when the Constitution authorizes the federal
9 government to step in on state -- state
10 legislative matters, it's pretty clear. If you
11 look at the Fifteenth Amendment, you look at
12 the Nineteenth Amendment, the Twenty-Sixth
13 Amendment, and even the Fourteenth Amendment,
14 Section 2, says Congress has the power, when
15 state legislators don't provide the right to
16 vote equally, to dilute congressional
17 representation. Aren't those all textual
18 indications in the Constitution itself that
19 maybe we ought to be cautious about stepping in
20 here?

21 MR. SMITH: Well, I don't think
22 there's anything unusual about using the First
23 Amendment and the Fourteenth Amendment to
24 regulate the abusive management of state
25 elections by state government. That's what the

1 Court has been doing.

2 JUSTICE GINSBURG: Where did
3 one-person/one-vote come from?

4 MR. SMITH: That's what Reynolds
5 versus Sims and Baker versus Carr did and a
6 number of other cases that have followed along
7 since. And the fact that Congress could
8 conceivably regulate this problem under the
9 Fourteenth Amendment does not mean that the
10 Court should not.

11 There's a number of cases, the term
12 limits case, Cook versus Gralike, where
13 Congress could have used the elections clause
14 to fix a problem, but the Court said, well, in
15 the absence of Congressional action, we're --
16 we're going to regulate an abusive, a misuse of
17 the power to run federal elections, and in this
18 case, it's state elections, you'd have to rely
19 on, Congress would have to rely on Section 5 of
20 the Fourteenth Amendment, and maybe they could
21 in theory, but this is a problem which --

22 JUSTICE GORSUCH: Do you see any
23 impediment to Congress acting in this this
24 area?

25 MR. SMITH: Other than the fact that

1 politicians are never going to fix
2 gerrymandering. They like gerrymandering.

3 (Laughter.)

4 MR. SMITH: This is -- the problem in
5 this area is if you don't do it, it's locked
6 up. The voters of Wisconsin can't get it on
7 the ballot without the legislature's consent.
8 And that's true in most of the states that
9 don't have commissions now.

10 And so you have -- we're here telling
11 you you are the only institution in the United
12 States that can do -- that can solve this
13 problem just as democracy is about to get worse
14 because of the way gerrymandering is getting so
15 much worse.

16 JUSTICE ALITO: You -- you paint a
17 very dire picture about gerrymandering and its
18 effects, but I was struck by something in the
19 seminal article by your expert, Mr. McGhee, and
20 he says there, "I show that the effects of
21 party control on bias are small and decay
22 rapidly, suggesting that redistricting is at
23 best a blunt tool for promoting partisan
24 interests."

25 So he was wrong in that. He's right

1 with the EG. That's the Rosetta Stone, but
2 he's wrong in that.

3 MR. SMITH: Your Honor, I'd have to
4 see what that sentence is saying in context.
5 I'm quite confident Mr. McGhee does not think
6 that redistricting is not a -- is a non-problem
7 or that --

8 JUSTICE ALITO: Well, that's what he
9 said.

10 MR. SMITH: -- or that gerrymandering
11 is a non-problem. Thank you, Your Honor.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.
13 Smith.

14 Mr. Tseytlin, you have five minutes
15 remaining.

16 REBUTTAL ARGUMENT BY MISHA TSEYTLIN
17 ON BEHALF OF APPELLANTS

18 MR. TSEYTLIN: I'd like to begin by
19 answering Justice Kennedy's question.

20 A facially discriminatory law in a
21 state would violate the First Amendment because
22 it would stigmatize that party. This case --
23 this Court's cases could not be clearer that
24 when you have neutral lines -- neutrally,
25 facially neutral lines, the question is not of

1 partisan intent, because there will always be
2 partisan intent.

3 The question is have the Plaintiffs
4 presented a -- a burden on representational
5 rights based upon a limited, precise,
6 judicially amenable standard. There has been
7 nothing new presented to this Court.

8 Basically, what the Plaintiffs have
9 done here is they've taken Professor King's
10 amicus brief from LULAC, they have taken the
11 exact same central concept, partisan asymmetry,
12 and they've recycled it here. There is nothing
13 new before this Court.

14 Second, we've heard something about
15 the various tests that they're now proposing.
16 There was only one test that was subjected to
17 adversarial scrutiny in this case, in a
18 four-day trial. That efficiency gap test
19 proved so fatally flawed that the District
20 Court rejected it as the test and Plaintiffs
21 abandoned it as the primary test on appeal.

22 And then my final point about the
23 scare tactics, about what will happen next.
24 Plaintiff's expert did a comprehensive study
25 from 1972 at the -- when the Baker

1 redistricting had happened, to 2014. And he --
2 and you can look at that study. The chart on
3 that study is on Supplemental Appendix 227.

4 It shows that the asymmetry was worse,
5 was worse in 1972 than in 2014. You're always
6 going to have scare tactics. You're always
7 going to have partisan intent.

8 We have not had any advancement in
9 terms of what has been presented to this Court
10 since LULAC, where this Court properly
11 criticized partisan asymmetry as not a neutral
12 standard that has uniform acceptance.

13 And we are asking for those reasons
14 for this Court to reverse the District Court.
15 Thank you, Your Honors.

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

18 (Whereupon, at 11:03 a.m., the hearing
19 was concluded.)

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