

1 IN THE SUPREME COURT OF THE UNITED STATES

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4 ROBERT A. RUCHO, ET AL.,)

5 Appellants,)

6 v.) No. 18-422

7 COMMON CAUSE, ET AL.,)

8 Appellees.)

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10

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 gave the -- 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 partisanship, the framers

1 chose a structural solution, by giving --

2 JUSTICE SOTOMAYOR: Mr. Clement --

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

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

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

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

25 Indeed, I took the central lesson of

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

6 JUSTICE GINSBURG: But, Mister --

7 MR. CLEMENT: And I took --

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

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

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

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

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

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

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

25 MR. CLEMENT: I -- I think, Mr. Chief

1 Justice, it would decide -- it would depend on
2 which way you decided the case. I don't -- if
3 you decided the case --

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

7 (Laughter.)

8 MR. CLEMENT: And it would still
9 depend, Your Honor, on whether you decide it in
10 our favor on standing grounds or on
11 justiciability grounds. If you decided it in
12 our favor on justiciability grounds, I think
13 you would have to overrule the Bandemer case.
14 I think the Bandemer case is a case that well
15 deserves overruling, and I'm happy to discuss
16 why that is the case.

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

25 But I also think, if you decided the

1 case on standing grounds, you would really be
2 deciding the grounds -- the case on grounds
3 that are actually interior to anything the
4 Court decided definitively in Bandemer. So I
5 really think it does depend on how you decide
6 the case in our favor as to whether you need to
7 overrule Bandemer.

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

20 MR. CLEMENT: Well, actually, Justice
21 Sotomayor, I -- I think I might say to the
22 particular hypo -- and I think it matters how
23 you frame it, I mean, I do think that if you
24 took a state constitutional provision and tried
25 to have it impose some requirement that's going

1 to apply to every redistricting going forward,
2 there's at least an argument that there's
3 actually an Election Clause problem with that
4 effort to try to control sort of subsequent
5 redistricting efforts.

6 And you may or may not accept that
7 argument, but --

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

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

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

24 An opportunity is different. The way
25 this is structured, there is absolutely no

1 opportunity to -- not none but virtually none
2 -- I'm exaggerating slightly -- but -- but
3 virtually none for maybe a majority party to
4 elect more than or less than a third of the
5 people they voted for.

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

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

20 JUSTICE GORSUCH: Well, Mister --

21 JUSTICE KAGAN: Mr. Clement, can I --
22 can I take --

23 JUSTICE GORSUCH: -- Clement -- no,
24 please.

25 JUSTICE KAGAN: -- can I take you back

1 to Justice -- the Justice Kennedy question that
2 Justice Sotomayor talked about. I wasn't quite
3 sure I understood your answer, and I'll say the
4 question in a little bit of a different way.

5 MR. CLEMENT: Sure.

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

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

24 MR. CLEMENT: So, Justice Kagan, two
25 responses. One is I -- I -- I -- I did notice

1 every time Justice Kennedy asked that question,
2 he did ask it the way that Justice Sotomayor
3 did and built in this notion that you were
4 going to permanently enshrine that preference
5 for future elections.

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

9 JUSTICE KAGAN: This seems pretty
10 enshrined. Go do it --

11 MR. CLEMENT: Well --

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

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

20 And I think the answer -- sort of
21 obviously given who I'm representing -- is
22 absolutely yes, that's not a problem, and, by
23 the way, I think actually being candid about it
24 probably serves accountability principles in
25 the long run, which is to say if you think --

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

10 JUSTICE ALITO: Could I take you back
11 to --

12 JUSTICE KAGAN: Yes, but --

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

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

22 Do the legislatures of the state
23 typically control what is in the state
24 constitution?

25 MR. CLEMENT: They -- they don't,

1 Justice Alito. And that's why I do think it is
2 important to figure out -- I mean, I think
3 Justice Kennedy may have framed that question
4 in a particular way.

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

13 JUSTICE GINSBURG: It can mean the
14 people --

15 MR. CLEMENT: It -- it -- it --

16 JUSTICE GINSBURG: -- when done by
17 referendum.

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

23 JUSTICE GORSUCH: Well --

24 MR. CLEMENT: -- think the result in
25 that case -- I think that case can be taken as

1 a given --

2 JUSTICE GORSUCH: -- along --

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

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

17 And I think, Justice Kagan, the way
18 you read the criteria is exactly right. With
19 respect to partisan advantages, they called it,
20 they said reasonable efforts will be made.

21 With respect to other items on their
22 list of criteria, like -- like contiguity, they
23 said shall. So some things were
24 non-negotiable, like contiguousness and equal
25 population. Other things were negotiable, but

1 reasonable efforts would be made.

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

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

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

23 MR. CLEMENT: That's right. And to
24 the extent it's a problem at all, the scope of
25 the issue, shall we say, is, you know, roughly

1 30 states that don't have some kind of
2 mechanism like you've described or have
3 multiple districts and, you know, I think even
4 when you get to --

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

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

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

24 CHIEF JUSTICE ROBERTS: Well, I
25 suppose the -- I suppose the members of

1 Congress are pretty happy with the way the
2 districting has been done.

3 (Laughter.)

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

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

17 So I just don't know that there really
18 is that much of a problem. And I do think
19 it's, you know, the particular context that
20 arises here is the context of congressional
21 redistricting, and one of the elements of the
22 framers' structural solution was they didn't
23 directly tell Congress: Why don't you district
24 for yourself.

25 They said in the first instance let's

1 have somebody else at the state level closer to
2 the people do the districting and then we'll
3 give Congress a role to supervise that.

4 So they didn't have sort of the same
5 fox guarding the same hen house in this
6 particular context.

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

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

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

20 But what I'm trying to do is to figure
21 out if there's a way to catch real outliers,
22 just you can't go beyond that, I mean, at the
23 moment I'm assuming, the real outliers.

24 So which are the real outliers? Now,
25 if we look at history, there wasn't that much

1 gerrymandering in the past compared to what
2 there might be with computers in the future.
3 Okay? So I've tried to figure out something
4 simple, not going to get all -- every judge in
5 the country mixed up, not going to lead to
6 every election contested and throw it all to
7 the judges instead of the people. Okay?
8 Anybody can figure it out.

9 Now this is what it is, that if a
10 gerrymander, dah-dah-dah, is un -- if -- if
11 there's a -- a commission or something, forget
12 it, you're out of court right away. Okay?

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

19 That would be pretty extreme. But
20 your client might meet it. And the virtue of
21 it, it's absolutely simple. By the way, they
22 can try to justify it and then we can use, you
23 know, the -- Landers -- you know, something
24 like those 5 percent things to test the
25 justifications, but there won't be much can be

1 justified. Now it could be a starting place.

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

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

16 MR. CLEMENT: Well, Justice Breyer, in
17 -- in all candor, there's so much in that that
18 I disagree with that it's a little hard to know
19 where to start.

20 (Laughter.)

21 JUSTICE BREYER: All right, all right.

22 MR. CLEMENT: I'm going to resist at
23 first the temptation to take issue with the
24 premises, though if I have time I'll get back
25 to that. Let me take issue with the two basic

1 prongs of your test.

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

8 So it would be a strike against the
9 state if they actually did what the framers
10 envisioned --

11 JUSTICE BREYER: Wait, wait, wait,
12 wait --

13 MR. CLEMENT: -- which is have a
14 legislature --

15 JUSTICE BREYER: -- one second here.
16 I'm just saying this is perhaps a start. I'm
17 not saying anybody gets a pass. But I'm saying
18 you wouldn't have to go further than that in
19 this case.

20 MR. CLEMENT: Well, I thought I heard
21 you say that if you were a state that used a
22 bipartisan commission, dot, dot, dot --

23 JUSTICE BREYER: Oh, yes, that's
24 right. That's right.

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

1 JUSTICE BREYER: Yeah, yeah, you're
2 right.

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

9 So that's my big objection to the
10 intent prong.

11 JUSTICE GINSBURG: Not if you -- not
12 if you say that for this purpose, the
13 legislature is the people. And that's what
14 Arizona held --- held.

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

22 So it seems to me it's a strike
23 against your test that it identifies as a
24 problem something that the framers would have
25 associated with the primary mechanism they used

1 for redistricting. So on the effects --

2 JUSTICE KAGAN: If I -- if I can just
3 interrupt for one second.

4 MR. CLEMENT: Sure.

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

20 MR. CLEMENT: Well, I -- I would
21 disagree, Justice Kagan. I mean, I took the
22 import of Justice Gorsuch's question being
23 that, you know, maybe we can allow the states
24 to solve this problem for themselves.

25 But I think then, when you get at the

1 starting point of Justice Breyer's question,
2 which is at a certain point --

3 JUSTICE BREYER: Yeah.

4 MR. CLEMENT: -- the federal
5 government through its justices and judges are
6 going to intervene and put limits on what the
7 state does.

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

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

21 Now the next question is all the
22 constitutional arguments you're raising. I'm
23 not pushing those under the rug, but, for
24 present purposes, I want you to see if there's
25 any reaction to the practicality of this

1 standard.

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

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

16 And I take it, implicit in your
17 question and implicit in Justice Sotomayor's
18 question, that what's bothering people is a
19 deviation from a principle of proportional
20 representation.

21 JUSTICE KAGAN: Well, Mr. Clement --

22 JUSTICE SOTOMAYOR: Actually --

23 JUSTICE KAGAN: -- you keep saying
24 that, but I -- I -- I don't quite think that
25 that's right given the statistical analysis in

1 this case.

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

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

19 So there's -- the benchmark is not
20 proportional representation. The benchmark is
21 the natural political geography of the state
22 plus all the districting criteria, except for
23 partisanship.

24 And if you run those maps, right, what
25 did you get? You got 24,000 maps and this --

1 and 99 percent of them, 99 plus percent of
2 them, were on one side of the map that was
3 picked here. All of those maps show that a
4 10/3 configuration is not the natural one. And
5 it's not the natural one not because it's not
6 proportional representation. It's just not the
7 way anybody can district, given the actual
8 political geography on the ground, unless you
9 absolutely try to overrule that political
10 geography.

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

16 JUSTICE BREYER: No, I don't think it
17 does --

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

19 JUSTICE BREYER: -- for this reason.
20 The reason is all it says is a part --

21 JUSTICE KAGAN: Well, yeah, I -- I --
22 wait. Justice Breyer -- I want you to come
23 back to Justice Breyer's question, but --

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

25 JUSTICE KAGAN: -- I want you to ask

1 mine -- answer mine.

2 MR. CLEMENT: -- I hear one-third/
3 two-third, and I -- I sure thought we were
4 talking about proportional representation.

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

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

17 The second thing I found --

18 JUSTICE KAGAN: Well, that's making
19 lemonade out of lemons.

20 MR. CLEMENT: Well, let me -- let me
21 try to make -- can I make --

22 (Laughter.)

23 MR. CLEMENT: -- can -- can I make one
24 quick --

25 JUSTICE KAGAN: You can do it 24,000

1 different ways and 23,999 produce an outcome
2 that's less partisan than the one the
3 legislature picked here.

4 MR. CLEMENT: But, see, what I think
5 is remarkable is actually that what the
6 statistics show, and this is on page 162 of the
7 -- of the -- of the JSA, is that if you run
8 24,000 maps with partisanship taken out
9 entirely and you just use traditional juris- --
10 traditional principles, you get 162 different
11 maps that produce a 10/3 Republican split.

12 So, yeah, it's 1 percent,
13 it's .7 percent -- I mean .7 percent, just to
14 be clear. That's 162 different ways to get to
15 a 10/3 map that didn't take politics into
16 account at all.

17 JUSTICE ALITO: But, if you have
18 24,000 maps that satisfy all of the so-called
19 neutral criteria that you put in your computer
20 program, don't you need a criterion or criteria
21 for deciding which of the 24,000 maps you're
22 going to choose?

23 And implicit in Justice Kagan's
24 comments is the idea, is it not, that you have
25 to choose one that honors proportional

1 representation? You have no other criteria for
2 distinguishing among the 24,000 maps.

3 MR. CLEMENT: I -- I think that's
4 right. And at a bare minimum, it has to be
5 that those 162 --

6 JUSTICE SOTOMAYOR: Why, Mr. Clement?

7 MR. CLEMENT: -- because they're over
8 here, are off limits.

9 CHIEF JUSTICE ROBERTS: Yeah, finish
10 your answer.

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

17 And so the issue is you can -- you can
18 have 162, 164, but what you can't do in picking
19 that 1 percent of a map is discriminate against
20 a group of people based on their political
21 views. We have a legion of cases that say you
22 can't treat political parties differently
23 because it's an equal protection violation.
24 And it's the same thing, whether it's because
25 of their speech or their activities.

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

11 This is what this is about. You're
12 discriminating on the basis of a group's speech
13 and diluting their vote accordingly.

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

21 Nobody thinks it's unfair, I don't
22 think, that Republicans in Massachusetts under
23 the current maps are never going to be able to
24 elect somebody to Congress even though there's
25 something like 35 percent of the population,

1 nobody thinks that's unfair, because you really
2 can't draw districts to do it because they're
3 evenly distributed. It might be unfortunate
4 for them, but I don't think it's unfair.

5 And what makes this unfair is some
6 conception of proportional representation and
7 the ability to do it.

8 JUSTICE BREYER: Yes, that's true,
9 but, look, party A gets over and over and over
10 55 percent of the votes. Party B every single
11 time gets 90 percent of the seats.

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

19 MR. CLEMENT: So, Justice Breyer, let
20 me say why I don't think that's such a horrible
21 problem and let me try to put what's on the
22 other side of the ledger.

23 So why I don't think that's a horrible
24 problem is even if it's as you described,
25 what's going to happen in almost every state in

1 the union, if that happens, is the 55 percent
2 majority will elect to statewide office
3 governors, attorneys general, and the like, and
4 the next time around they're not going to be
5 able to pass a map and the next time around
6 it'll probably end up in gridlock and a
7 judicial line drawing.

8 And I don't think that's the happiest
9 result in the world, but it means that you're
10 not going to be able to perpetuate this in the
11 long run.

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

15 JUSTICE KAVANAUGH: May I --

16 JUSTICE KAGAN: Well, let me just give
17 you a different, you know, a 49 percent state,
18 which is more like what North Carolina is, so a
19 48 or 49 percent state might not find it so
20 easy to do that.

21 And yet that 48 or 49 percent in this
22 map is consistently being represented by
23 25 percent, give or take, of the legislature.

24 MR. CLEMENT: Well, and -- and -- and
25 I don't think anybody has a solution. I don't

1 know. Forty-eight percent, I think,
2 gerrymandering is sufficiently unpopular, as
3 proven by history, that the 48 percent might
4 get elected, but if you're 35 percent, nobody's
5 got a solution for you.

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

13 But, on the other side of the lens, on
14 the other side of the weight, rather, if you
15 get in the business of adjudicating these
16 cases, these cases will come, they will come in
17 large numbers, and they will come on your
18 mandatory appellate jurisdiction.

19 And once you get into the political
20 thicket, you will not get out and you will
21 tarnish the image of this Court for the other
22 cases where it needs that reputation for
23 independence so people can understand the
24 fundamental difference between judging and all
25 other politics.

1 JUSTICE GINSBURG: Exactly the same
2 thing was said about --

3 JUSTICE SOTOMAYOR: Mr. Clement, do
4 you seriously --

5 JUSTICE GINSBURG: -- one person/one
6 vote.

7 CHIEF JUSTICE ROBERTS: Justice
8 Ginsburg.

9 MR. CLEMENT: I'm sorry?

10 JUSTICE GINSBURG: Exactly what you
11 said, just what you said now, that was the
12 exact same argument about don't go to one
13 person/one vote, the courts are going to be
14 flooded with cases and they'll never be able to
15 get out of it. That's not what happened.

16 MR. CLEMENT: But, Justice Ginsburg,
17 sometimes an argument that's not a great
18 argument in one context turns out to be pretty
19 darn good in another context. And here is the
20 thing:

21 State legislatures can deal perfectly
22 well with a one-person/one vote requirement.
23 But if you tell state legislators --
24 legislatures that are literally divided down
25 the line in the middle with an aisle, a

1 physical aisle between Democrats and
2 Republicans, that they can't take partisanship
3 into account, then you're really either telling
4 them to get out of the business of
5 redistricting entirely or you're opening
6 yourself up for case after case after case.

7 I'd like to reserve my time.

8 JUSTICE KAVANAUGH: On -- on
9 proportional representation, can I ask a
10 question, which is, first, isn't proportional
11 representation a judicially-manageable
12 standard?

13 MR. CLEMENT: Well, it's -- it's --
14 it's a difficult standard. It would require
15 answering some questions about where it's
16 baseline, what elections do you get the
17 baselines from, but it could be manageable.

18 JUSTICE KAVANAUGH: And the second is,
19 why can't the Equal Protection Clause be
20 interpreted to require something resembling
21 proportional representation?

22 MR. CLEMENT: Because it's entirely
23 ahistorical. And keep in mind, the framers
24 gave state legislatures the choice of ensuring
25 proportional representation by having

1 state-wide elections. But they also gave them
2 the choice to district, which is fundamentally
3 inconsistent with that.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Bondurant.

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

10 MR. BONDURANT: Mr. Chief Justice, and
11 may it please the Court:

12 This case involves the most extreme
13 partisan gerrymander to rig congressional
14 elections that has been presented to this Court
15 since the one-person/one-vote cases.

16 The North Carolina legislature's
17 defense is equally extreme. They take the
18 position that no matter how predominant the
19 intent, no matter how extreme the effects,
20 there are absolutely no constitutional
21 limitations on partisan gerrymander.

22 JUSTICE KAVANAUGH: When you use the
23 word -- when you use the word "extreme," that
24 implies a baseline. Extreme compared to what?

25 MR. BONDURANT: In this case, it is

1 extreme in comparison to any statistical
2 application of neutral redistricting principles
3 in the context of the political geography of
4 North Carolina.

5 It was statistically impossible to
6 come up with an 11/2 plan. As this -- one of
7 the authors said, we're proposing a 10/3
8 partisan gerrymander because it's not possible
9 to do an 11/2 plan. The statistics bear that
10 out.

11 Moreover, Dr. Chen's maps, which took
12 every possible criteria that they used that was
13 legitimate, applied them to 1,000 randomly
14 drawn maps, showed multiple things.

15 First, that you cannot possibly
16 explain the 10/3 advantage based on political
17 geography, democratic clustering, the
18 application of independent redistricting
19 principles, or pure chance. This is not the
20 result of chance.

21 You can only achieve it by making
22 partisan advantage the predominant motivation.

23 JUSTICE KAVANAUGH: Mr. Clement --

24 CHIEF JUSTICE ROBERTS: Well, if the
25 predominant -- I -- I understood your brief and

1 your -- your friend on the other side
2 characterized your brief as saying that any
3 element of partisanship was bad. Is that your
4 position?

5 MR. BONDURANT: No, Your Honor. Our
6 position is that partisanship has to be at
7 least a material factor, as it is in Arlington
8 Heights or Mount Healthy, but in this case, we
9 prove that was a predominant factor and that is
10 the ruling of the lower court.

11 CHIEF JUSTICE ROBERTS: Well, I guess
12 it just rephrases the question of what
13 constitutes a material factor.

14 MR. BONDURANT: Well, the difference
15 between material and being immaterial, having
16 no consequence, is a very real difference.

17 CHIEF JUSTICE ROBERTS: So -- so just
18 so I understand, any partisanship that has a
19 consequence is impermissible under your view?

20 MR. BONDURANT: We do not need to go
21 that far in this case because you have evidence
22 of predominance, that is, this objective,
23 partisan advantage, superseded every other
24 conceivable objective.

25 CHIEF JUSTICE ROBERTS: I -- I

1 understand the view that it's -- the reality,
2 that it's an extreme case, but, to state a
3 principle that we're going to be able to apply
4 to other cases, your -- your definition of
5 material is that it has a partisan consequence?

6 MR. BONDURANT: It is a material part
7 of the decision, as in, for example, firing in
8 Mount Healthy. If that was a material part of
9 the decision of the school board to fire the
10 school teacher, then he had made a prima facie
11 case which could then be defended based on
12 either there were intervening causes, that is,
13 the real reason why she didn't show up to
14 teach, or you have legitimate state interests
15 that are being served.

16 In this case, the North Carolina
17 legislature before, below, did not advocate,
18 contend in any way that there is any legitimate
19 state interest of any kind served by partisan
20 gerrymandering.

21 So you're -- you have under any of
22 your analyses, Anderson Burdick, a clear
23 burden. You have clear vote dilution,
24 intentional vote dilution, carefully thought
25 out, skillfully executed.

1 JUSTICE ALITO: Can I take you back to
2 questions that were asked before? If you -- if
3 you make a list of the so-called neutral
4 criteria -- compactness, contiguity, protecting
5 incumbents, if that's really neutral,
6 respecting certain natural features of the
7 geography -- and you have a computer program
8 that includes all of those and weights them
9 all, and let's assume all that is neutral, and
10 at the end, what you get is a large number of
11 maps that satisfy all those criteria.

12 And I think that's realistic. That's
13 what you will get. Then -- and the legislature
14 chooses from among those maps. How do you
15 determine whether that choice is
16 unconstitutional?

17 MR. BONDURANT: The choice would be
18 the standards that the Court has traditionally
19 applied. Picking an example, the Island Trees
20 School case in which the Court said that a
21 Democratic school board could not use its
22 discretionary choices to discriminate based on
23 viewpoint by excluding Republican authors and
24 Republican books.

25 JUSTICE ALITO: No, no, but can you

1 just answer that -- that question, because it's
2 a real puzzle to me. So you've got -- let's
3 say you've got 100 maps or you might even have
4 25. I think you probably have thousands. So
5 you have all of these maps, and you have to
6 choose among them. The legislature chooses
7 among them.

8 And you've already programmed in all
9 of the so-called neutral criteria. How do you
10 -- how does the legislature go about choosing
11 among those maps? Would anything other than
12 just random choice be sufficient -- be
13 satisfactory?

14 MR. BONDURANT: The legislature has
15 wide discretion, as long as it does not attempt
16 to do two things, dictate electoral outcomes,
17 favor or disfavor a class of candidates. That
18 is an easily administered --

19 JUSTICE GORSUCH: But, counsel, that
20 -- that first one, dictate electoral outcomes,
21 I think is going to turn -- turn on -- on
22 numbers, right? How much deviation from
23 proportional representation is enough to
24 dictate an outcome?

25 So aren't we just back in the business

1 of deciding what degree of tolerance we're
2 willing to put up with from proportional
3 representation? We might pluck a number out of
4 the air or see that, you know, maybe two-thirds
5 is used for veto overrides, so we like that.
6 Where are we going to get the number on the
7 business end of this?

8 MR. BONDURANT: The business end of it
9 is looking at how this is done. This was done
10 by looking at voting history as the best
11 predictor of voting behavior.

12 Sorting voters among districts to
13 achieve a particular outcome, to guarantee that
14 in 10 districts, there would be safe Republican
15 majorities in which the general election is
16 essentially irrelevant and the primary election
17 is the determining factor.

18 JUSTICE ALITO: Well, let me try one
19 more time. So we've got -- let's say that you
20 have a range of outcomes with all of these
21 neutral maps that satisfy the neutral criteria,
22 and they extend from 10 to two in favor of
23 Republicans to 10 to two in favor of Democrats.

24 So which one do you choose -- do you
25 have to choose? Nine to three for Republicans?

1 Eight to four? Six to six?

2 MR. BONDURANT: The -- the -- clearly,
3 it's an evidentiary matter in terms of intent.
4 If the predominant intent is to favor one
5 party, to penalize another based on their
6 voting history, that goes too far, but --

7 JUSTICE KAVANAUGH: Isn't that always
8 going to be the case when you deviate too far
9 from six to six, in Justice Alito's
10 hypothetical?

11 MR. BONDURANT: It certainly is going
12 to be a question of factual proof. The closer
13 you come to proportional representation, the
14 harder it's going to be for a plaintiff to
15 prove that there was an intent.

16 JUSTICE GORSUCH: Well, there we go.
17 I think that's the answer to the question,
18 right? Is that we're going to -- that your --
19 you would like us to mandate proportional
20 representation.

21 MR. BONDURANT: Not at all. Our
22 position is you cannot discriminate
23 intentionally against political parties and
24 voters based on their political views and their
25 voting history.

1 JUSTICE GORSUCH: And the further you
2 deviate from proportional representation, the
3 more likely you are to be found guilty of that.

4 MR. BONDURANT: It is purely an
5 evidentiary question. This Court itself said
6 in Reynolds, it said again in LULAC, that in a
7 case in which you look statewide and see
8 proportional representation, it is less
9 likely --

10 JUSTICE GORSUCH: Okay. So as to each
11 -- each case --

12 MR. BONDURANT: -- that you have
13 partisan gerrymandering.

14 JUSTICE GORSUCH: -- we're going to
15 have to, as part of our mandatory jurisdiction,
16 in every single redistricting case, look at the
17 evidence to see why there was a deviation from
18 the norm of proportional representation.
19 That's -- that's -- that's the ask?

20 MR. BONDURANT: You're going to have
21 to look at the case and determine whether or
22 not the plaintiffs proved intentional,
23 predominant, partisan intent to discriminate
24 based on --

25 JUSTICE GORSUCH: I would think that

1 would always be present so long as you're
2 deviating from proportional representation.
3 What good reason could there be but
4 partisanship at the end of the day?

5 MR. BONDURANT: Not at all. If -- the
6 legislature in North Carolina could have picked
7 any -- among hundreds of maps that would have
8 produced either a 7/6, a 6/7, maybe a -- an 8/5
9 representation, but, here, that is not this
10 case.

11 JUSTICE GORSUCH: What do we do as
12 well about the -- the fact that about 20
13 states, as I understand it, from -- from your
14 friend on the other side, have dealt with this
15 problem through citizen initiatives as a remedy
16 to deal with this, including, I think, five of
17 them just this last election and a bunch more
18 on the ballot in the coming election.

19 Why should we wade into this --

20 MR. BONDURANT: The simple --

21 JUSTICE GORSUCH: -- when that
22 alternative exists?

23 MR. BONDURANT: -- the simple answer,
24 Justice Gorsuch, is this: The vast majority of
25 states east of the Mississippi, including

1 specifically North Carolina, do not have
2 citizen initiative.

3 JUSTICE GORSUCH: Can you amend your
4 constitutions? That -- that has happened in a
5 lot of states too.

6 MR. BONDURANT: You can only amend the
7 constitution with the approval of the
8 legislature, in proposing an amendment that
9 gets to the ballot and is then ratified. And
10 that is not an effective remedy.

11 And the states in which you have
12 independent redistricting commissions are
13 states in which those commissions were adopted
14 over the dead bodies of the legislators by
15 citizen initiative, passed overwhelmingly by
16 the citizens and in the face of legislative
17 opposition.

18 CHIEF JUSTICE ROBERTS: Mr. Bondurant,
19 what do you do with the fact that partisan
20 identification is not the only basis on which
21 people vote? Do you see electoral results
22 change dramatically depending, for example, on
23 the particular appeal of individual candidates,
24 turning on who's at the -- the head of the
25 ticket rather than down ticket?

1 And how do you deal with that -- those
2 factors that depart from the arguments about
3 the inevitability of electoral results based on
4 partisan identification?

5 MR. BONDURANT: Your Honor, the social
6 science and the experts in this field, which
7 included Dr. Hofeller, who designed this plan,
8 was the Republican Party's leading
9 redistricting expert -- he testified that based
10 on social science and his 20 years of
11 experience in redistricting in North Carolina,
12 he could demonstrate that how a small, what are
13 called voter tabulation districts had voted in
14 past elections, whether Democratic or
15 Republican, was the best predictor of how they
16 would vote in future elections and that all
17 partisan gerrymandering in the modern era is
18 based on that kind of social science.

19 CHIEF JUSTICE ROBERTS: Well, but the
20 one thing that -- I forget where the -- which
21 brief it is -- but it turns out that a lot of
22 the predictions in this area, and I don't know
23 if this applies to North Carolina or not, prove
24 to be very, very wrong very often.

25 I mean, you have the famous example in

1 the Vieth case where the argument was this --
2 this change would -- or the method under
3 challenge would never allow the election of
4 Republican judges. And 15 days after the
5 opinion came down, all the judges were
6 Republican.

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

10 MR. BONDURANT: In this case, on this
11 undisputed record, the way this was done was
12 that Dr. Hofeller used a composite of seven
13 statewide elections over four election cycles
14 to come up with a calculation of partisan
15 advantage and predict -- predictability.

16 And it predicted 10 Republican
17 districts, and the Republicans won all 10. It
18 predicted three democratic districts. The
19 Democrats won all 10. In 2-18, they did the
20 same thing. He used the same methodology in
21 2-11 to design the districts that were in 2-12.

22 JUSTICE SOTOMAYOR: Counsel, the
23 reality is that with all statistical models --
24 and we spend our lives based on them, insurance
25 is paid on statistical models, health insurance

1 premiums are based on statistical models. I'm
2 given to understand by the amicus briefs in
3 this case that nuclear plants are built based
4 on statistical models.

5 The one thing about statistical models
6 is there's always the possibility of an
7 aberration, correct?

8 MR. BONDURANT: There is a remote
9 possibility sometimes.

10 JUSTICE SOTOMAYOR: And the sometimes
11 happen; that's why they're a probability,
12 right -- a possibility?

13 MR. BONDURANT: Correct.

14 JUSTICE SOTOMAYOR: So the fact that
15 you have one exception doesn't disprove the
16 rule?

17 MR. BONDURANT: Certainly not 100 maps
18 out of 24,000 maps.

19 JUSTICE BREYER: Yes, but the -- the
20 -- the -- the problem I think your side
21 throughout this morning has to deal with, a
22 problem, is from this side of the bench, to
23 some people looking at the prior cases, there
24 is a great concern that unless you have a very
25 clear standard, you will turn many, many

1 elections in the United States over to the
2 judges. There's always someone who wants to
3 contest it. They will always find experts of
4 all kinds. And what you'll discover is judges
5 simply deciding too much.

6 Now I'm -- that's -- I've written
7 about why I don't take that position, et
8 cetera, but I'm not -- I'm not speaking for
9 myself here. I'm speaking as a reader and an
10 understander of what's on the other side, at
11 least one thing.

12 And I -- and I think it's important
13 for you and the others to deal square on with
14 that question.

15 MR. BONDURANT: And our square-on
16 answer to that question is in this case we
17 prove beyond a reasonable doubt a predominant
18 partisan intent that was admitted on this
19 record, and demonstrated statistically beyond
20 any possibility of dispute, and we have proved
21 an extreme partisan effect, not only on a
22 state-wide level, but on a district-specific
23 level.

24 In Dr. Mattingly's charts, six of the
25 districts are extreme statistical outliers that

1 would not be achieved in even one, in some
2 instances, of 24,000 plans. That is this case.

3 Moreover, this Court has held that the
4 Elections Clause is, Number 1, intended to
5 provide limits on partisan gerrymandering.
6 Justice Scalia said that in *Vieth*.

7 And this Court has said the Elections
8 Clause was a limited delegation of power to dot
9 procedural rules for time, place, and manner,
10 but was not to provide power to dictate
11 electoral outcomes or favor or disfavor a class
12 of candidates.

13 That is an understandable standard
14 that legislators throughout this country can
15 understand. They already are told that you
16 can't discriminate based on political
17 viewpoint. They are already told in
18 redistricting you can't discriminate
19 predominantly based on race. They're --

20 JUSTICE ALITO: Suppose the
21 legislature had said we have all these maps we
22 can choose from, but we don't want to be too
23 greedy, so we're going to pick a map solely for
24 the purpose of giving us an advantage. We're
25 going to pick a map that builds in a seven to

1 five advantage for us.

2 Would there be a problem with that?

3 MR. BONDURANT: It would be very
4 difficult to prove predominant partisan intent.

5 JUSTICE ALITO: What if they said it
6 outright: The only reason why we're picking
7 this map is we want to build in a seven to five
8 advantage?

9 MR. BONDURANT: If -- to take your
10 hypothetical example -- if in North Carolina
11 the legislature said we in our wisdom have
12 decided that the people in Charlotte are going
13 to be represented by a Democrat, the people in
14 Asheville are going to be represented by a
15 Republican, that we're going to split Guilford
16 County and North Carolina A&T to ensure that
17 the students in that school are going to be
18 represented by a Republican in one district and
19 a Republican in another, they would be
20 dictating electoral outcomes even if it were
21 seven/six.

22 The whole idea of the democratic
23 process in a general election is the people
24 elect a member of Congress in a general
25 election in which everybody can vote. And when

1 you rig the districts in that manner, you are
2 making the general election irrelevant. You
3 are making the primary election in which only
4 some people can vote --

5 JUSTICE ALITO: So even if --

6 MR. BONDURANT: -- outcome
7 determinative.

8 JUSTICE ALITO: So even if the map
9 provides only a very small partisan advantage,
10 that would be subject to challenge in
11 litigation?

12 MR. BONDURANT: If in the facts that I
13 posited you had the legislature essentially
14 deciding that the people in X part of the state
15 were going to be represented by a Democrat, and
16 the people in Y part of the state were going to
17 be represented by a Republican, that the people
18 in those respective districts of the other
19 persuasions were not going to have a choice,
20 were not going to have an opportunity, that
21 would clearly violate every principle for which
22 this Court has stood.

23 JUSTICE ALITO: When you say that,
24 aren't you answering Justice Breyer's question
25 yes, all of these things are going to

1 potentially end up in court?

2 MR. BONDURANT: No.

3 JUSTICE ALITO: Where --

4 MR. BONDURANT: I -- I --

5 JUSTICE ALITO: -- judges are going to
6 have to decide what's the right answer.

7 MR. BONDURANT: Quite the contrary.
8 As with the one-person/one-vote rule, if the
9 Court says, as this Court said in Term Limits
10 and in Cook v. Gralike, that the Elections
11 Clause means that the legislature can't put its
12 thumb on the scale and pick winners and losers,
13 dictate electoral outcomes, favor or disfavor a
14 class of candidates, that is a standard that
15 can be understood. That is a standard that
16 legislators will obey. And that is a standard
17 that will reduce, not increase, litigation.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Ms. Riggs.

21 ORAL ARGUMENT OF ALLISON J. RIGGS ON
22 BEHALF OF THE APPELLEES LEAGUE OF WOMEN
23 VOTERS OF NORTH CAROLINA, ET AL.

24 MS. RIGGS: Mr. Chief Justice and may
25 it please the Court:

1 The North Carolinians who are
2 plaintiffs in this case come before this Court
3 today seeking relief because when the General
4 Assembly enacted an allegedly remedial plan in
5 2016, its leadership essentially bragged to
6 these voters and the public at large that by
7 enacting a 10/three plan, it was punishing
8 voters who supported democratic candidates and
9 it was going to create districts that would not
10 allow voters in those districts any meaningful
11 ability to use normal democratic processes to
12 redress infringements on their individual
13 constitutional rights.

14 This case is not the first North
15 Carolina voting case to reach this Court this
16 decade, but it represents the most extreme
17 example of a non-responsive legislature that
18 believes that this Court will implicitly
19 endorse unfettered partisan manipulation in
20 redistricting by declining to rein in this most
21 egregious example.

22 The vote dilution test presented to
23 this Court today is a limited and precise test
24 designed only to impose liability on the worst
25 of the worst cases, thus limiting the number of

1 partisan gerrymandering cases that this Court
2 will see.

3 And under this very limited and
4 precise vote dilution test, a lower court will
5 apply a three-prong test where all three prongs
6 must be satisfied in an -- and under many of
7 those prongs there are multiple screens to
8 limit the number of plans subject to liability.

9 First, partisan intent has to be
10 proven on a district-specific basis, that is,
11 proving that district lines were drawn to
12 subordinate the adherence of one political
13 party and entrench the power of the party
14 drawing the lines.

15 Second, partisan effect has to be
16 shown at the district-specific and plan-wide
17 levels. The district-specific effect inquiry
18 looks at intentional cracking, the cracking and
19 packing of Democratic clusters or Republican
20 clusters, as it will, and the state-wide, the
21 plan-wide inquiry is whether the map as a whole
22 creates a severe and durable effect on the
23 disfavored party.

24 Then, finally, the Court asks whether
25 there is any justification at the

1 district-specific level for the cracking and
2 packing observed and whether plan-wide the map
3 as a whole is more biased than you would expect
4 given the state's political geography and use
5 of legitimate non-discriminatory criteria.

6 JUSTICE ALITO: But do you deny that
7 built into this is the idea that we should at
8 least have proportional representation light?
9 Proportional representation is in a sense that
10 -- is in some way the baseline against which
11 all of this is measured?

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

15 JUSTICE ALITO: A degree. I mean, you
16 can -- you don't have to have strict
17 proportional representation, but that's --
18 that's the baseline. That's what you're
19 measuring.

20 Was there a partisan effect? Well,
21 there's a partisan effect because it deviates
22 from some notion of proportional
23 representation.

24 MS. RIGGS: The -- the effects prong
25 and the justification prong do real work to

1 prevent that situation from happening, from
2 this being just a measurement from the
3 deviation --

4 JUSTICE GORSUCH: Well, how --

5 MS. RIGGS: -- of the --

6 JUSTICE GORSUCH: How can that be
7 because I would have thought under the effects
8 prong there has to be at least some effect,
9 right?

10 MS. RIGGS: There has to be --

11 JUSTICE GORSUCH: There's not --

12 MS. RIGGS: -- a district-specific and
13 severe and durable statewide.

14 JUSTICE GORSUCH: I got it. I got it.
15 So we have to measure effect from what?

16 MS. RIGGS: So there --

17 JUSTICE GORSUCH: So -- so every --
18 every test that's been presented to this Court,
19 last year and this year, we talked a lot about
20 last year the efficiency gap, which is how far
21 a deviation from proportional representation.
22 And we were told, I think, six or seven percent
23 of deviation would be okay, and that would not
24 be an untoward effect. But anything above six
25 or seven percent.

1 Today we're talking about two-thirds
2 is an effect. We need to have a number or some
3 formula to determine what effect is enough to
4 state a claim and what isn't, otherwise every
5 case is going to come to this Court.

6 And I'm -- I'm -- I'm still waiting to
7 hear what that might -- what that number, what
8 that formula might be, other than proportional
9 representation, and we're not going to tell you
10 today just how far deviation will be
11 permissible because that would expose the
12 problem.

13 MS. RIGGS: The -- several points in
14 response, Justice Gorsuch. The legal standard
15 in question is severe and durable effect. All
16 of the social science is just an evidentiary
17 tool, not a legal tool.

18 Two categories of social science
19 evidence were brought to bear on this question
20 of severe and durable effect. The simulations
21 didn't set a numerical threshold baseline
22 because you see a range of produced plans with
23 Democrat -- varying Democrat/Republican splits
24 using these simulations and we're giving the
25 legislatures breathing room.

1 The -- the -- all of the simulations

2 --

3 JUSTICE GORSUCH: But -- but --

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

5 JUSTICE GORSUCH: -- but with -- with
6 respect, counsel, and I'm sorry to interrupt,
7 but breathing room from what?

8 MS. RIGGS: Breathing room to --

9 JUSTICE GORSUCH: From -- how much
10 breathing room, from what standard? And isn't
11 the -- isn't the answer that you just -- I
12 understand you don't want to give it, but isn't
13 the real answer here breathing room from
14 proportional representation up to maybe
15 7 percent?

16 MS. RIGGS: No.

17 JUSTICE GORSUCH: Just -- if it's not
18 that, then what is this breathing room and what
19 -- where does it exist?

20 MS. RIGGS: Breathing room exists in
21 -- in the Bell curve of expected and reasonable
22 map allocations of representation. It's
23 breathing room to employ some political
24 consideration. It's breathing room --

25 JUSTICE KAGAN: Well, why -- why isn't

1 the answer to Justice Gorsuch's question that
2 what's not allowed is deviation from whatever
3 the state would have come up with, absent these
4 partisan considerations? In other words, the
5 state can do whatever it wants, it can depart
6 from proportional representation however much
7 it wants to, however much the natural features
8 of the state would suggest, and it can come up
9 with something that's not proportional
10 representation at all.

11 What it can't do is deviate from that
12 based on partisan considerations. Isn't that
13 what this test is essentially driving at?

14 MS. RIGGS: It -- that gets at the
15 effects prong. I think that's a grading
16 calculation.

17 JUSTICE KAGAN: Yes, that's what I was
18 talking about.

19 MS. RIGGS: But you would still
20 potentially lack discriminatory effect, and it
21 really is a question of whether the
22 line-drawing party is imposing upon a
23 disfavored party a severe and durable effect.
24 And that's the legal --

25 CHIEF JUSTICE ROBERTS: Counsel, what

1 -- what is --

2 JUSTICE GORSUCH: Well, counsel, I get
3 -- I get that, you know, you've -- you've
4 wisely adopted a very fine answer, given for
5 you. But I guess my question is, once we
6 control for geography, once we control for all
7 those things, we're going to have hundreds and
8 hundreds of maps, as Justice Alito has pointed
9 out. Computers spit them out infinitely now.

10 And once we say, okay, all these other
11 factors are controlled for, we can -- we can do
12 a regression analysis, control for geography
13 and all these things, we're still going to have
14 hundreds of maps. And the legislature is going
15 to choose one.

16 And at that point, we have to say,
17 what's the range of permissible options? And
18 that -- from that, we need a baseline. And the
19 baseline, I still think, if it's not
20 proportional representation, what is the
21 baseline that you would have us use?

22 MS. RIGGS: There is no --

23 JUSTICE GORSUCH: Controlling for
24 geography and everything else.

25 MS. RIGGS: Well, the geography is

1 baked into that Bell curve.

2 JUSTICE GORSUCH: It's baked in, I
3 accept that. We agree on that. You and I
4 actually agree on that. So, after that, when
5 we're left with -- we've thrown out millions of
6 -- of maps; we're only left with a mere few
7 thousand, okay? What -- what deviation? From
8 what to what?

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

13 CHIEF JUSTICE ROBERTS: Counsel, what
14 is -- what is wrong with proportional
15 representation?

16 MS. RIGGS: There are -- there are
17 certainly states where the -- the natural
18 geography of the state doesn't lend itself to
19 proportional representation. We -- we live in
20 a system with single-member --

21 CHIEF JUSTICE ROBERTS: If you -- if
22 you were cracking or packing to get to
23 proportional representation, would that in your
24 view be unconstitutional?

25 MS. RIGGS: This Court has endorsed

1 that kind of activity in Gaffney, where a
2 legislature is striving for proportional
3 representation. Our test would not invalidate
4 a plan like Gaffney because it would not have a
5 statewide severe and durable effect and it
6 would be something that you would see within
7 the simulations.

8 JUSTICE KAVANAUGH: Do you agree with
9 Mr. Clement that the Constitution does not
10 require proportional representation or require
11 something close to proportional representation?

12 MS. RIGGS: The Constitution does not
13 require it. But what we see here in this test
14 that we've employed, Justice Roberts, to get to
15 one of your earlier questions, is a test that
16 employs a durability inquiry and sensitivity --
17 sensitivity testing, technology that was not in
18 existence in Vieth and Bandemer and the
19 Republican judges case in the 1990s, and that
20 map drawers are using right now.

21 If there is a plan where, under any
22 plausible shift of voter sentiment, the bias
23 across the plan would disappear, that plan
24 would not be unconstitutional. Again, this is
25 a -- an enormous screen to the kinds of plans

1 that would be subject to liability.

2 Our proposed test, the one adopted by
3 the district court, is so exacting that it
4 narrows dramatically the number of plans
5 subject to -- to scrutiny and leaves
6 legislatures lots of breathing room. And --
7 and --

8 CHIEF JUSTICE ROBERTS: Am I right to
9 understand that your -- your test allows a
10 greater degree of partisanship in redistricting
11 than Mr. Bondurant's?

12 MS. RIGGS: I think they're -- they're
13 complementary tests depending on how you
14 understand the constitutional harm, where we
15 see vote -- the vote dilution tests based on
16 the one-person, one-vote and the racial vote
17 dilution frameworks, we see those tests as
18 allowing room for some political
19 considerations, particularly the ones endorsed
20 by this Court. But it -- it's just a different
21 approach to the same problem.

22 We do believe that our test does give
23 -- is narrow and descriptive enough that it
24 gives legislatures guidance on what to do to
25 make sure that they stay on the right side of

1 the Constitution, and limits -- gives -- gives
2 lower courts something very manageable to -- to
3 apply and to grapple with, and that the
4 pleading standards are going to be very high.
5 To prove a severe and durable effect is not to
6 just allege it. It's to come forward with
7 rigorous statistical evidence that supports
8 this situation.

9 JUSTICE KAVANAUGH: I took -- I took
10 some of your argument in the briefs and the
11 amicus briefs to be that extreme partisan
12 gerrymandering is a real problem for our
13 democracy -- and I'm not going to dispute that
14 -- and that the Court, even though it might be
15 a problem to get involved in all these cases,
16 should, in essence, recognize the emergency
17 situation from your perspective.

18 But what about, to pick up on
19 something Justice Gorsuch said earlier, that
20 there is a fair amount of activity going on in
21 the states on redistricting and attention in
22 Congress and in state supreme courts?

23 In other words, have we reached the
24 moment, even though it would be a -- have we
25 really reached the moment, even though it would

1 be a big lift for this Court to get involved,
2 where the other actors can't do it?

3 MS. RIGGS: The North Carolinian
4 plaintiffs in front of you can do nothing to
5 solve this problem. And --

6 JUSTICE KAVANAUGH: But I'm thinking
7 about more nationally. Your -- your -- the
8 amicus briefs are certainly referencing a -- a
9 problem in many states. And the idea, I think
10 in the briefs, is this Court and this Court
11 alone can step in. And -- and there is a fair
12 amount of activity going on in the states,
13 recognizing the same problem that you're
14 recognizing.

15 MS. RIGGS: And as Mr. Bondurant
16 acknowledged, east of the Mississippi there's a
17 very small number of states where this is a
18 possibility. This Court has rightfully been
19 concerned about the burden on the Court and the
20 reputation of the Court, but --

21 JUSTICE GORSUCH: Well, but that --
22 that's on -- that's on initiatives, right? And
23 even -- even there, I mean, there are -- I
24 mean, New Jersey, Michigan, Ohio, have -- have
25 -- have dealt with this in some way, just to

1 pick a few that I -- I've got in front of me.

2 MS. RIGGS: And --

3 JUSTICE GORSUCH: But -- but you also
4 have the state supreme court option, as -- as
5 Justice Kennedy -- Kavanaugh pointed out. And
6 we often overlook that possibility in -- in our
7 -- in our federal system.

8 What do we -- what do we do about
9 that?

10 MS. RIGGS: Other options don't
11 relieve this Court of its duty to vindicate
12 constitutional rights. And, certainly, while
13 the -- the reputation of the Court as an
14 independent check is an important
15 consideration, understand that on the facts of
16 this case, the reputational risk to the Court
17 of doing nothing when -- when David Lewis says,
18 I'm going to draw a 10/3 plan and if I could
19 drew an 11/2 plan, I would, the reputational
20 risk of doing something is much, much less than
21 the reputational risk of doing nothing, which
22 will be read as a green light for this kind of
23 discriminatory rhetoric and manipulation in
24 redistricting from here on out.

25 This is -- this is a situation where,

1 with all due respect, Justice O'Connor was not
2 correct. This isn't self-correcting. Voters
3 in North Carolina, no matter how hard -- no
4 matter what level they turn out -- this was a
5 swing election in 2018 for North Carolina
6 voters, and they were not able to eliminate the
7 bias in the plans.

8 This -- the techniques are so
9 sophisticated now that there's no room for
10 self-correction. And these voters --

11 JUSTICE ALITO: If we look at the --
12 the popular vote for the House of
13 Representatives nationally in the 2018 election
14 and compare that to the percentage of seats won
15 by the two parties, what -- to what degree do
16 they diverge?

17 MS. RIGGS: I don't know the answer to
18 that question off -- off the top of my head. I
19 know there was a 5 point advantage for North
20 Carolina Democrats in -- in 2018.

21 JUSTICE ALITO: But, if this is a
22 great national problem, is there -- would we
23 see a great divergence there if we look at the
24 statistics across the whole country?

25 MS. RIGGS: There's not gerrymandering

1 in every state. In fact, our brief points out
2 the fact that most plans are symmetrical.
3 Gerrymandering isn't in every state. And so I
4 don't think that metric is particularly
5 informative on that front.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Two minutes, Mr. Clement.

9 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
10 ON BEHALF OF THE APPELLANTS

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

13 First, I do think at a very
14 fundamental level my friends on the other side
15 are the victim of their own technology because
16 they have produced 24,000 maps that are
17 permissible maps that don't take partisanship
18 into account at all.

19 And their submission is that a
20 legislature organized on partisanship lines
21 cannot take partisanship into account to any
22 material degree in picking among the 24,000
23 maps.

24 And that's just an argument ultimately
25 to reassign this authority away from state

1 legislatures into somebody else who doesn't
2 have a partisanship interest --

3 JUSTICE SOTOMAYOR: I'm sorry --

4 MR. CLEMENT: -- or a partisanship
5 organization.

6 JUSTICE SOTOMAYOR: -- that's --
7 that's just not true because what they have
8 shown is, if you don't use partisanship as the
9 predominant factor, then you can produce a lot
10 of maps that are not this one. That's what
11 they have shown.

12 MR. CLEMENT: Right. But you can also
13 pick 162 that are this map and how is a
14 partisan legislature supposed to choose from
15 among those maps if they can't --

16 JUSTICE SOTOMAYOR: Don't use --

17 MR. CLEMENT: -- take partisan --

18 JUSTICE SOTOMAYOR: -- the one
19 criteria that intentionally and invidiously
20 looks to exclude the other party. That's their
21 basic point. That was the basic point of the
22 judge below.

23 MR. CLEMENT: That's right. So you're
24 basically asking state legislatures not to act
25 as state legislatures.

1 And let me just finish with this
2 observation, which is a lot of hard
3 constitutional issues come before this Court
4 because you are dealing with something that was
5 unknown to the framing generation.

6 But the framing generation understood
7 partisan gerrymandering firsthand. James
8 Madison was the intended target of a partisan
9 gerrymander by Patrick Henry. He complained
10 about it bitterly. So did George Washington.
11 Neither of them contemplated suit.

12 Hamilton actually suggested to John
13 Jay that the Federalists ought to partisanly
14 gerrymander the electoral college for the 1800
15 Presidential election. John Jay said it wasn't
16 such a good idea.

17 All three authors of the Federalist
18 Papers knew about this and didn't think there
19 was a judicial solution.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. The case is submitted.

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

25

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