

IN THE SUPREME COURT OF THE UNITED STATES

PRESS ROBINSON, ET AL.,)
Appellants,)
v.) No. 24-110
PHILLIP CALLAIS, ET AL.,)
Appellees.)

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

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 24-109,
5 Louisiana versus Callais, and the consolidated
6 case.

7 Ms. Nelson.

8 ORAL ARGUMENT OF JANAI NELSON

9 ON BEHALF OF APPELLANTS PRESS ROBINSON, ET AL.

10 MS. NELSON: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 A mere two years ago, in Allen versus
13 Milligan, a case nearly identical to Robinson,
14 this Court noted that under certain
15 circumstances, it has authorized race-based
16 districting to remedy state districting maps
17 that violate Section 2.

18 Louisiana affirmed findings that --
19 sorry. Six appellate judges affirmed findings
20 that Louisiana, in the face of extreme racially
21 polarized voting, packed and cracked Black
22 voters, and it rejected seven non-dilutive maps
23 in favor of one that would give its 58 percent
24 declining white electorate entrenched control
25 over 83 percent of the congressional districts.

1 Louisiana's creation of a district to
2 remedy that discrimination and to ensure that
3 Black Louisianans have an equal opportunity to
4 participate in the process is constitutional.
5 Precedent, from Brooks to Milligan, from Ex
6 parte Virginia to SFFA, confirm that.

7 And three facts guard against
8 indefinite use of race. First, not all
9 Section 2 remedies center race. Second, when
10 racialized politics and residential segregation
11 wane, so will the ability to satisfy Gingles.
12 Third, almost every redistricting map is
13 replaced decennially.

14 My opponents' late-breaking and
15 record-less facial and as-applied challenges
16 seek a staggering reversal of precedent that
17 would throw maps across the country into chaos.
18 If SB8 is unsatisfactory, the proper recourse
19 is to remand and adopt one of the many
20 alternative maps that address the Section 2
21 violation and satisfy the Constitution, as this
22 Court noted in Milligan.

23 Congress is undoubtedly aware of
24 Section 2 precedent and can change it if it
25 likes, but, unless and until it does, statutory

1 stare decisis counsels staying the course.

2 I welcome your questions.

3 JUSTICE THOMAS: Counsel, what was the
4 finding or the holding in Robinson and what
5 role does it play in the SB8 map creation?

6 MS. NELSON: The finding in Robinson
7 was that there was a likelihood of succeeding
8 in a Section 2 claim proving that the State of
9 Louisiana violated Section 2 by packing and
10 cracking Black voters. So there was a Section
11 2 liability finding under a preliminary
12 injunction, and there was an ordering of a new
13 map to be drawn.

14 JUSTICE THOMAS: What is the status of
15 that case now?

16 MS. NELSON: Robinson is concluded,
17 and there's now, as we know, the challenge in
18 Callais that suggests that the map that was
19 created out of -- out of Robinson, SB8, is a
20 racial gerrymander. And that's why we're here
21 today.

22 JUSTICE THOMAS: So SB8 was the remedy
23 for the Robinson case? I thought that was a
24 preliminary injunction.

25 MS. NELSON: Yes. There was a

1 preliminary injunction indicating that we were
2 likely to succeed if we continued to pursue a
3 claim. This is after a five-day hearing with
4 21 witnesses and a robust record.

5 So the court found based on that
6 evidence that we were likely to succeed on a
7 liability -- on liability and ultimately
8 instructed the State of Louisiana to draw a
9 correct and constitutional map.

10 JUSTICE THOMAS: But there was never a
11 full merits determination?

12 MS. NELSON: That's correct.

13 JUSTICE THOMAS: SB8 was the --
14 entirely separate, though, from that
15 litigation?

16 MS. NELSON: SB8 came after the
17 litigation. It was in response to the court's
18 order to create an opportunity map -- an
19 opportunity district and a second map that
20 would cure the Section 2 violation.

21 JUSTICE THOMAS: But did the court
22 order this particular map?

23 MS. NELSON: No. The court gave the
24 State of Louisiana an opportunity, as this
25 Court has suggested it do. It gave it broad

1 discretion, gave it wide latitude to create a
2 map that it felt was satisfactory. And,
3 ultimately, that is the map that was in effect
4 and elected a congressional delegation in 2022.

5 JUSTICE THOMAS: Thank you.

6 CHIEF JUSTICE ROBERTS: Counsel, you
7 began with Allen against Milligan. That case,
8 of course, took the existing precedent as a
9 given and considered Alabama's application of
10 the -- its approach to the evidence and all
11 that under that precedent. Is that -- is that
12 your understanding as well?

13 MS. NELSON: That's correct. In fact,
14 the case was stayed because this Court held
15 that case in abeyance until it decided Milligan
16 because it understood Milligan to be important
17 to understanding the case in Robinson.

18 CHIEF JUSTICE ROBERTS: But it was a
19 case in which we were considering Alabama's
20 particular challenge based on its -- what
21 turned out to be an improper evidentiary
22 showing?

23 MS. NELSON: I'm sorry. I --

24 CHIEF JUSTICE ROBERTS: In other
25 words, we were looking at Alabama's suggestion

1 that -- how to apply its body of evidence or
2 which evidentiary considerations we should take
3 into account under the existing precedent?

4 MS. NELSON: That's correct.

5 CHIEF JUSTICE ROBERTS: Thank you.

6 JUSTICE JACKSON: But I -- I would ask
7 you to just expound a little bit on why you
8 think then that Allen versus Milligan is
9 relevant or the fact that we held or what we
10 held in that case is relevant to what we're
11 doing here today.

12 MS. NELSON: Allen versus Milligan is
13 a nearly identical case. There was a similar
14 challenge that -- where -- where we won on a
15 preliminary injunction that there was a Section
16 2 violation because the State of Alabama in
17 that case cracked and Black -- cracked and
18 packed the Black community, cracked the Black
19 Belt, and, ultimately, this Court found that
20 that was a clear violation of Section 2.

21 Similarly, what we have in Louisiana
22 is a circumstance where Louisiana was
23 constructing a map and had a single district
24 that could elect a preferred Black candidate
25 and had an opportunity to draw a second

1 district based on the size and geography of its
2 Black population and chose not to do so in the
3 face of seven illustrative maps that made clear
4 that the -- that they were not -- not -- they
5 were not dilutive.

6 JUSTICE JACKSON: And what we were --
7 what we, in part, were considering in the
8 context of Milligan was whether or not to
9 change the Section 2 criteria, the Gingles
10 criteria. Is that your understanding?

11 MS. NELSON: That's right. The State
12 of Alabama --

13 JUSTICE JACKSON: And we -- and we
14 chose not to. And so --

15 MS. NELSON: The -- the Court was very
16 clear about that.

17 JUSTICE JACKSON: And so the
18 parties -- I mean, I under -- I took your
19 initial starting with Milligan to be a
20 suggestion that we not revisit the
21 determination that we made just two years ago
22 that the Gingles test not be revised.

23 MS. NELSON: That -- that is
24 absolutely correct. And, in fact, Appellees,
25 on page 11 of their supplemental brief, state

1 that they understand that this Court answered
2 that question clearly that results is a -- a
3 constitutional test, that race can be used to
4 remedy violations, and it therefore isn't
5 making that particular argument.

6 In fact, even the SG acknowledged that
7 race can be used in a remedial form when
8 necessary. So those questions have been asked
9 and answered by this Court in Allen versus
10 Milligan, and some parties here recognize that
11 those are closed questions.

12 JUSTICE ALITO: Can I ask you a
13 question about what Milligan means?

14 In -- in Milligan, the Court said that
15 the first Gingles precondition is that "The
16 minority group must be sufficiently large to
17 constitute a majority in a reasonably
18 configured district."

19 And then it went on to say that "A
20 district will be considered reasonably
21 configured if it comports with traditional
22 districting criteria."

23 Would you agree that incumbent
24 protection is one of those?

25 MS. NELSON: Incumbent protection has

1 been considered a traditional districting
2 criteria. However, we know that protecting an
3 incumbent, like core retention, can continue
4 to perpetuate discrimination, and it does not
5 trump the antidiscrimination principle.

6 JUSTICE ALITO: All right. If --
7 if incumbent -- if incumbent protection is a
8 permissible districting criteria, then, under
9 Rucho, isn't seeking partisan advantage also an
10 objective that a legislature may legitimately
11 seek?

12 MS. NELSON: Not if it comes at the
13 cost of the equal protection principle and
14 the Fifteenth Amendment's prohibition on race
15 discrimination in voting. It is not.

16 JUSTICE ALITO: Well, if the objective
17 is simply to maximize the number of
18 representatives of a particular party, that's
19 seeking a partisan advantage, it is not seeking
20 a racial advantage, isn't that right?

21 MS. NELSON: Well, if race is used as
22 a means to seek the partisan advantage, then
23 that is unconstitutional.

24 JUSTICE ALITO: Oh, sure. Sure.

25 MS. NELSON: There's no -- there's no

1 part of --

2 JUSTICE ALITO: If race is -- if race
3 is used as a proxy for partisan affiliation.

4 Let me ask you a related question
5 about block voting, which is the second --
6 figures in the second and third Gingles
7 precondition.

8 If registered Democrats overwhelmingly
9 vote for Democratic candidates regardless of
10 the candidate's race, is that block voting?

11 MS. NELSON: If you're looking at it
12 simply from a party perspective, no. We don't
13 judge block voting based on party, we judge it
14 based on race. Racially polarized voting is
15 measuring racial performance --

16 JUSTICE ALITO: Okay.

17 MS. NELSON: -- and voting behavior.

18 JUSTICE ALITO: If -- and, likewise,
19 if Republican -- registered Republicans
20 overwhelmingly vote for Republican candidates,
21 that's not block voting?

22 MS. NELSON: That's not how we measure
23 voting. We measure voting based on race for
24 purposes of Section 2 because the Constitution
25 forbids race discrimination in voting, not

1 party discrimination.

2 JUSTICE ALITO: All right. So, if
3 it happens to be that people of one race or
4 another race overwhelmingly prefer one of the
5 political parties, does that transform the
6 situation into racial voting, or is it still
7 just partisan voting?

8 MS. NELSON: No. You look at how
9 different races of voters vote and whether they
10 vote in a way that is polarized. And the
11 Gingles test requires us to look not only at
12 that but a number of other features as part of
13 the totality-of-the-circumstances test that
14 suggest that race is playing a role to
15 contaminate the electoral process and submerge
16 minority votes in a way that violates the
17 Constitution. So party cannot explain away
18 a -- a racially polarized circumstance unless
19 we look at the totality of the circumstances.

20 And I will say, in Robinson, for
21 example, the Court entertained testimony along
22 those lines, as it did in Milligan, and found
23 that it wasn't credible, that the extreme
24 racially polarized voting that we have in the
25 State of Louisiana cannot be explained away by

1 party.

2 We're talking about racially polarized
3 voting that is above 84 percent, which is more
4 than what this Court found in Thornburg versus
5 Gingles in 1986 --

6 JUSTICE ALITO: Well, that could be --

7 MS. NELSON: -- when the numbers were
8 70 percent.

9 JUSTICE ALITO: -- I mean, that could
10 be -- that could be easily analyzed by
11 statistics to see whether Black -- whether
12 white Democrats vote for Black Democratic
13 candidates at a lower rate than they do for
14 white Democratic candidates, whether white
15 Republicans vote for -- for Black Republican
16 candidates at a lower rate than they do for
17 white candidates. It's easy to isolate race
18 from that -- from that to see whether there
19 really is racially polarized voting as opposed
20 to partisan polarized voting.

21 MS. NELSON: That's right. And in the
22 State of Louisiana, that -- that analysis was
23 conducted in the Nairne case, and it was clear
24 that regardless of party, white Democrats were
25 not voting for Black candidates, whether they

1 were Democrats or not.

2 And we know that there is such a
3 significant chasm between how Black and white
4 voters vote in Louisiana that there's no
5 question that even if there is some correlation
6 between race and party that race is the driving
7 factor.

8 JUSTICE KAVANAUGH: Can you comment on
9 the solicitor general's suggestion at page 25
10 of its brief that the Court should hold that
11 Plaintiffs' illustrative district cannot
12 disregard the state's political objectives and
13 goes on to say Section 2 plaintiffs cannot
14 claim a lack of equal openness where politics
15 rather than race is the likely reason for the
16 State's refusal to create a majority-minority
17 district?

18 MS. NELSON: Yes. That suggestion
19 would swallow Section 2 whole. As I said,
20 party cannot trump the responsibility of states
21 to ensure that all voters have an equally open
22 electoral process.

23 The fact that Black voters may
24 correlate with voting Democrat or white voters
25 may correlate with voting Republican does not

1 deny the fact that there is racially polarized
2 voting. And the totality of the circumstances,
3 including the inability to elect Black
4 candidates in Louisiana on a statewide basis
5 for a number of offices -- there's never been
6 a Black person in Louisiana elected
7 statewide -- is additional indicia that race is
8 playing an outsized role in the electoral
9 process in Louisiana.

10 And so the idea that you have to show
11 that a party -- that party is the reason for
12 the racially polarized voting would eclipse the
13 entire Section 2 analysis, which is focused on
14 ferreting out and ending race discrimination in
15 the political process.

16 CHIEF JUSTICE ROBERTS: You've said
17 several times that it's playing an outsized --
18 outsized role. Is there -- what's the proper
19 size? In other words, what -- are we -- is it
20 wiggle room we're talking about or a
21 significant percentage? What is meant by
22 "outsized"?

23 MS. NELSON: So this Court has held
24 for -- for a long time, beginning in Shaw and
25 in many cases since, that there's always an

1 awareness of race. There are always racial
2 considerations and even race consciousness in
3 the districting process.

4 What becomes potentially unlawful is
5 when race is the motivating factor. That's
6 what Miller versus Johnson taught us, that's
7 what Milligan reaffirmed, that the line between
8 the appropriate use of race and the use of race
9 that will get us into the strict scrutiny
10 territory is the dividing line between
11 motivation and general awareness.

12 And what I'm explaining here is that
13 when voters are blocked by a -- a -- a white
14 block vote that is so substantial that it
15 usually overrides the politically cohesive vote
16 of Black voters, then we have at least a prima
17 facie case of vote dilution, and then the Court
18 is asked to consider the totality of the
19 circumstances.

20 If I may address the durational limit
21 question which came up. I'd like to talk about
22 the fact that Section 2 is self-limiting. I
23 know that there is a general concern about the
24 indefinite use of race, and there are several
25 reasons why that concern should be allayed.

1 First and foremost, there is no
2 precedent to suggest that a statute must
3 dissolve on its own simply because it may
4 require a race remedy. And, as I've mentioned,
5 race is not required by Section 2, but it can
6 be used if that is necessary to address the
7 Section 2 violation.

8 In addition, the non-discrimination
9 element of the Fifteenth Amendment is a
10 permanent right, and so should be the
11 protection that Section 2 affords.

12 And, finally, this is a significant
13 concern where Congress was very clear that it
14 did not want to include a durational limit.

15 Congress included a durational limit
16 in Section 5 of the Voting Rights Act. It
17 created a mechanism for reauthorization. It
18 decidedly did not do that in Section 2.

19 JUSTICE KAVANAUGH: The issue --

20 JUSTICE BARRETT: Can I --

21 JUSTICE KAVANAUGH: -- as you know, is
22 that this Court's cases in a variety of
23 contexts have said that race-based remedies are
24 permissible for a period of time, sometimes for
25 a long period of time, decades in some cases,

1 but that they should not be indefinite and
2 should have a end point.

3 And what exactly do you think the end
4 point should be or how would we know for the
5 intentional use of race to create districts?

6 MS. NELSON: Well, Justice Kavanaugh,
7 I -- you raised a very important distinction,
8 and that's between remedies and the statute.
9 So a race-based remedy can and should and --
10 and -- and usually does have a time limit and a
11 durational limit. Section 2 court-ordered
12 remedies have a time limit, and so that is
13 something that is grounded in our case law.

14 What is not grounded in case law is
15 the idea that an entire statute should somehow
16 dissolve simply because race may be an element
17 of the remedy. So, for example, this case has
18 affirmed Title VII. It has affirmed Section
19 1982, the Family Medical Leave Act, and also
20 Section 4(e) of the Voting Rights Act in
21 Katzenbach versus Morgan, and never has it
22 suggested that any of those statutes should
23 dissolve in and of themselves --

24 JUSTICE KAVANAUGH: Well, I don't
25 think it's --

1 MS. NELSON: -- as opposed to the
2 remedy.

3 JUSTICE KAVANAUGH: I'm sorry to
4 interrupt. I don't think it's the statute.
5 It's the particular application of the statute
6 that entails the intentional deliberate use of
7 race to sort people into different districts.
8 That particular aspect, I'm guessing -- I'm
9 asking what you think the time limit on that
10 should be, or there really shouldn't be a time
11 limit. I -- I think you might be saying there
12 shouldn't be a time limit unless Congress
13 chooses one.

14 MS. NELSON: I am saying that. I'm
15 saying there should not be a time limit. But
16 I -- I also think it's critical to emphasize
17 that Section 2 does not require a race-based
18 remedy in all circumstances.

19 JUSTICE JACKSON: Is that because --

20 JUSTICE BARRETT: Can I ask --

21 JUSTICE JACKSON: -- is that --

22 JUSTICE BARRETT: I just wanted to
23 follow up on Justice Kavanaugh's question.
24 What if this is an exercise of Congress's
25 enforcement power? If we're looking at the

1 City of Boerne test and we're saying it has to
2 be congruent and proportional, would that
3 affect Justice -- your answer to Justice
4 Kavanaugh's question, that if it's going above
5 and beyond what the Fifteenth Amendment
6 requires of its own force, but Congress has
7 actually chosen the Voting Rights Act as a
8 remedy, does that affect the question of
9 whether it can go on indefinitely or not, that
10 at some point it becomes not congruent and
11 proportional?

12 MS. NELSON: No, I don't think it
13 does. First, Boerne should not apply to
14 Section 2.

15 JUSTICE BARRETT: Just assume --
16 assume --

17 MS. NELSON: Assuming -- assuming that
18 it does.

19 JUSTICE BARRETT: The premise of my
20 question is assume that it does.

21 MS. NELSON: Sure. Assuming that it
22 does, as you know, in Boerne, this Court held
23 up the Voting Rights Act as the paradigmatic
24 example of congruence and proportionality. The
25 fact that the Voting Rights Act at times may

1 require a race-based remedy does not change the
2 fact that Congress, with its enlarged powers as
3 defined by Ex parte Virginia and the line of
4 cases forward, can address conduct that is
5 beyond what the Fifteenth Amendment addresses.

6 It doesn't need to simply parrot the
7 Fifteenth Amendment. It can address conduct
8 that is even considered constitutional in order
9 to ensure that race discrimination in voting
10 does not go undetected, uncorrected, or
11 undeterred, in the words of the Senate report
12 supporting --

13 JUSTICE JACKSON: So, Ms. Nelson --

14 MS. NELSON: -- the 1982 amendments.

15 JUSTICE JACKSON: -- I -- I guess I
16 wonder if it -- if it would be helpful at least
17 as I'm thinking about it, because I think this
18 is a very important question, to -- to
19 understand, I think, that you're saying that
20 Section 2 is not a remedy in and of itself. It
21 is the mechanism by which the law determines
22 whether a remedy is necessary.

23 MS. NELSON: That's absolutely
24 correct.

25 JUSTICE JACKSON: So it's a law that

1 is just encouraging or requiring a check-in.
2 It's like a tool. It's like a -- a tape
3 measure that we're looking as to whether or not
4 certain circumstances exist, and those
5 circumstances that Congress is worried about is
6 unequal access to electoral opportunity. And
7 Section 2 tells you we have to look for those
8 circumstances, and then the Court says, yep,
9 they exist in this situation under Section 2
10 and so now a remedy is required.

11 And in our case law, we then say,
12 okay, State, it's up to you to figure out what
13 that remedy will be. And maybe that remedy
14 involves race consciousness, maybe it doesn't.
15 Whatever. But Section 2 itself is just the
16 measure by which we determine that a remedy is
17 required.

18 MS. NELSON: That's absolutely
19 correct.

20 JUSTICE JACKSON: And so that's why it
21 doesn't need a time limit, because it's not
22 doing any work other than just pointing us to
23 the direction of where we might need to do
24 something.

25 MS. NELSON: That's right. And its

1 usage becomes less and less as we see racially
2 polarized voting and residential segregation
3 decreasing. The Katz amicus brief in this case
4 shows that in the past decade, Section 2 cases
5 have decreased by 50 percent.

6 JUSTICE JACKSON: Because the
7 plaintiffs can't make the showing.

8 MS. NELSON: They cannot make the
9 showing.

10 JUSTICE JACKSON: It's a pretty
11 bare -- it's a pretty significant showing to --
12 to establish that unequal opportunity of
13 electoral processes is happening in a
14 situation.

15 MS. NELSON: That's correct. Gingles
16 is an exacting test. It is data-obsessive. It
17 brings in experts and many other forms of
18 evidence to establish a racial violation.
19 There are many cases where the plaintiffs fail
20 in bringing the Gingles I precondition or
21 Gingles II or Gingles III before they even get
22 to the totality-of-the-circumstances test.

23 JUSTICE JACKSON: So, if we're talking
24 about a time limit, you would say maybe it's
25 with respect to the remedy that is used to

1 respond to the -- to the problem that we've
2 identified under Section 2, but the Section 2
3 tape measure itself doesn't need a -- a life
4 cycle? It's just --

5 MS. NELSON: No.

6 JUSTICE JACKSON: Yeah.

7 MS. NELSON: That's correct. I mean,
8 the Fifteenth Amendment is -- is permanently
9 enshrined in our Constitution, and Section 2 is
10 there to effectuate that prohibition of race
11 discrimination on voting and does not require a
12 time limit.

13 JUSTICE JACKSON: Thank you.

14 MS. NELSON: With the time I have
15 remaining, I'd like to mention that there are
16 many proposals on the table that have been
17 presented by my colleagues on the other side,
18 and a number of them resurrect the intent
19 standard that this Court was very clear about
20 and Congress was extraordinarily clear about
21 knowing that results is key to ensuring that we
22 do not continue to have rampant racial
23 discrimination in voting.

24 And the absence of it or -- or the
25 declining ability to show a Section 2 case is

1 because of the success of Section 2 over the
2 past four decades. And we would be reckless if
3 we determined that Section 2 somehow is no
4 longer needed simply because it has been so
5 successful in rooting out racial discrimination
6 in voting.

7 There's also, as I mentioned at the
8 outset, a very easy and elegant solution to
9 this case. If SB8 is not satisfactory, if the
10 Court believes, as the Callais panel did, that
11 the State violated the Constitution in
12 constructing SB8, it should remand and use one
13 of the many alternatives that are available
14 that meet Section 2 and also comply with the
15 Constitution.

16 The liability finding in Robinson is
17 undisturbed and it must be remedied. If SB8 is
18 the inappropriate remedy, there are many other
19 options for this Court to pursue.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas, anything further?
23 Justice Alito?

24 JUSTICE ALITO: Yeah. Let me pick up
25 with where you left off, which related to the

1 illustrative map in -- in the Robinson case,
2 and let me go back once again to what we said,
3 what the Court said, in Milligan.

4 The minority group -- this is the
5 first Gingles precondition. The minority group
6 must be sufficiently large and geographically
7 compact to constitute a majority in a
8 reasonably configured district.

9 Did the Robinson court apply that, or
10 did the Robinson court simply say that the
11 district in question in the illustrative map,
12 the second minority -- majority-minority
13 district in the illustrative map, was compact?
14 There's a big difference between the
15 compactness of the minority group and the
16 compactness of a district.

17 MS. NELSON: All of the seven
18 illustrative maps that we presented to the
19 Robinson court were geographically compact.
20 They met every traditional redistricting
21 criteria. They even beat the State's maps on
22 the very criteria that the State set forth that
23 it was pursuing in the redistricting process.

24 JUSTICE ALITO: Well, that wasn't my
25 question. My question was, did the Robinson

1 court find that the minority group was compact
2 as opposed to the district being compact?

3 MS. NELSON: Yes, it did.

4 JUSTICE ALITO: There's a very
5 serious --

6 MS. NELSON: Yes, it did.

7 JUSTICE ALITO: I believe it didn't
8 and nor did the -- did the Fifth Circuit on
9 appeal in that. And there's a big difference,
10 and there's a serious question about whether
11 the Black population within the district in
12 question in the illustrative map was
13 geographically compact.

14 You have people from a rural area in
15 the northwest part of the state and you have
16 people from an urban area many miles away
17 combined in a district just for the purpose of
18 getting over the 50 percent BVAP.

19 MS. NELSON: So, Justice Alito, you
20 might be referring to SB8 as opposed to the
21 illustrative maps.

22 JUSTICE ALITO: No, I'm referring to
23 the illustrative map, although the same may be
24 said about SB8, but I'm referring to the
25 illustrative map. But we can -- we -- we -- we

1 don't need to argue about what was done in the
2 case, but it's my firm recollection that what
3 the district court did and what the Fifth
4 Circuit did on appeal was not to apply the
5 correct standard under Milligan.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 JUSTICE SOTOMAYOR: Counsel, I would
10 note that the State's maps join people in
11 districts from the far north all the way down
12 and across the state.

13 MS. NELSON: That's correct.

14 JUSTICE SOTOMAYOR: The -- the map
15 that it put into effect. So the district
16 wasn't compact and neither were the interests
17 necessarily compact, except that they were
18 white voters, correct, and Republican?

19 MS. NELSON: Correct.

20 JUSTICE SOTOMAYOR: All right. Now
21 you have not addressed the issues of the
22 unconstitutionality, which is what this
23 reargument was about. Justice Barrett
24 mentioned congruence and proportionality.
25 Others have suggested that our Harvard case is

1 appropriate. One, Louisiana has said that the
2 use of race in any way violates the Equal
3 Protection Clause.

4 Would you give us a couple of lines on
5 why those -- assuming, as the Chief did, that
6 Mulligan and all of our cases and precedents
7 support you --

8 MS. NELSON: Sure.

9 JUSTICE SOTOMAYOR: -- the others are
10 now saying, the ad -- your adversaries are
11 saying, even if it does, we should still
12 declare this unconstitutional. I don't know
13 that you've addressed that.

14 MS. NELSON: Happy to. So SFFA is an
15 entirely different case from the one before the
16 Court at the moment. SFFA made clear that
17 there's -- it is still constitutional to use
18 race to remedy specified discrimination, which
19 is what we have in the State of Louisiana, what
20 we showed before the Robinson court. So SFFA
21 is, in fact, working more in our favor, we
22 believe, than supporting our opponents.

23 And there are many distinctions
24 between this case and the SFFA case. For
25 example, Section 2 is a decidedly remedial

1 statute. SFFA involved the diversity rationale
2 involving a admissions process with a
3 university, not a statute that is derived from
4 Congress's enforcement powers under the
5 Reconstruction Amendments that deals with
6 remedying discrimination.

7 That is a very clear distinction.

8 This Court has been clear in Shaw, in SFFA, in
9 Croson, in Fullilove, that you can use race in
10 a limited way to remedy racial discrimination.

11 The other factor that makes SFFA
12 reconcilable with Milligan, which is
13 controlling here, is that we know both
14 decisions were issued within three weeks of one
15 another. It is illogical to think that this
16 Court issued the SFFA decision and Milligan in
17 the same term, in the same month even, and
18 somehow those cases work at cross-purposes with
19 one another.

20 So, in our view, it is very clear that
21 the case law in -- before this Court supports
22 the use of race as needed once there has been a
23 showing of specified discrimination. And the
24 Section 2 test gives the Court an inference of
25 intentional discrimination to draw upon.

1 Congress was very intentional in
2 crafting the results test to balance the
3 concerns of getting at all discrimination in
4 our electoral processes but also being mindful
5 of a potential allegation of racism against
6 states and other state actors.

7 And so Section 2 requires neither a
8 confession nor an accusation of racism. It
9 looks strictly at results, which this Court has
10 upheld on numerous occasions, including most
11 recently in Milligan, but before that, in
12 Lopez, in Boerne, in -- in City of Rome written
13 by Justice Marshall for this Court, made very
14 clear that results is constitutional and that
15 the use of race is permissible in remedying
16 discrimination.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?

18 JUSTICE KAGAN: Ms. Nelson, were
19 Section 2 to cease to operate in the way that
20 you just described to prevent vote dilution in
21 districting, what could happen? What would the
22 results on the ground be?

23 MS. NELSON: I think the results would
24 be pretty catastrophic. If we take Louisiana
25 as one example, every congressional member who

1 is Black was elected from a VRA opportunity
2 district. We only have the diversity that we
3 see across the South, for example, because of
4 litigation that forced the creation of
5 opportunity districts under the Voting Rights
6 Act.

7 Every justice in Louisiana has been
8 elected through a VRA opportunity district, and
9 nearly all legislative representatives have
10 been elected on those same districts. So
11 Louisiana alone is an example of how important
12 it is to have Section 2 continue to be enforced
13 to create these opportunities.

14 We also know that after
15 majority-minority districts have been created,
16 they often no longer need the same population
17 to continue to provide an equally open
18 electoral process for minority voters. So it
19 is an intervention that has been crucial to
20 diversifying leadership and providing an
21 ability of minority voters to have an equal
22 opportunity to participate in the process, but
23 it also isn't a permanent remedy. It -- it
24 corrects itself over time, and it's only
25 triggered when those extreme conditions exist.

1 JUSTICE KAGAN: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch?

4 JUSTICE GORSUCH: When it gets to the
5 remedy side, do you think a plaintiff in a
6 Section 2 case has to come up with a -- a map
7 where race doesn't -- isn't the predominant
8 factor in -- in the map, or is it okay for a
9 federal court to use a map on the remedial side
10 that intentionally discriminates on the basis
11 of race?

12 MS. NELSON: You do -- you do not have
13 to use race to create the remedy in a map. And
14 I think that Milligan --

15 JUSTICE GORSUCH: No, I'm asking
16 whether one can. Sometimes you don't have to.

17 MS. NELSON: Yes.

18 JUSTICE GORSUCH: I understand that.
19 I'm asking, is it acceptable under Section 2
20 as -- as you understand it, given our
21 precedents, for a court to intentionally
22 discriminate in a remedial map on the basis of
23 race?

24 MS. NELSON: Not -- not in those
25 words. Not for a court to intentionally

1 discriminate, but I think it depends. There
2 may be a circumstance where the only possible
3 remedy is the limited use of race.

4 I will say that I think those
5 circumstances are rare. And the permissibility
6 of race is constrained by strict scrutiny.
7 This Court has a very clear precedent around
8 ensuring that race does not motivate the line
9 drawer in a way that requires a map to be drawn
10 that isn't narrowly tailored, that uses race
11 for race's sake.

12 There are already constraints between
13 Gingles and Shaw that keep the use of race
14 within constitutional bounds.

15 JUSTICE GORSUCH: I understand that.
16 But, you know, one -- one argument is often,
17 well, once you've found a Section 2 violation,
18 you've got a compelling interest to go ahead
19 and -- and discriminate on the basis of race in
20 your remedial map. And I'm just wondering, do
21 you endorse that view or -- or do you reject
22 that view?

23 MS. NELSON: I don't endorse the
24 concept of discriminating on the basis of race.
25 If discrimination has been established under

1 Section 2 and a state determines that it needs
2 a very precise incision of race in order to
3 remedy that Section 2 violation, then Section 2
4 and this Court's precedent supports that.

5 JUSTICE GORSUCH: So a federal
6 district court can sometimes, to remedy a
7 Section 2 violation --

8 MS. NELSON: Well, not a federal
9 district court. I'm sorry. I'm glad you --
10 I'm glad you emphasized that.

11 JUSTICE GORSUCH: Well, if I might
12 just finish the question.

13 MS. NELSON: Yes.

14 JUSTICE GORSUCH: You know, sometimes
15 federal district courts order maps. And you're
16 saying sometimes acceptable for a federal
17 district court to order a map that
18 intentionally discriminates on the basis of
19 race?

20 MS. NELSON: I -- I -- I -- I disagree
21 with that formulation. So, first and foremost,
22 states and plaintiffs, as they put forth
23 illustrative maps, cannot put forth maps that
24 discriminate and that use race in -- in
25 excessive fashion.

1 The only actor that has broader leeway
2 are states because we give states breathing
3 room, we give states wide latitude in order to
4 balance their political interests and concerns.

5 JUSTICE GORSUCH: So federal district
6 courts can't discriminate on the basis of race
7 and remedies, but states can?

8 MS. NELSON: Federal district courts
9 can only order maps that are constitutional,
10 and, again, the constitutional boundaries are
11 between Gingles and Shaw --

12 JUSTICE GORSUCH: I understand that.

13 MS. NELSON: -- which sometimes permit
14 race.

15 JUSTICE GORSUCH: But you said states
16 have more breathing room. So do they have the
17 breathing room to intentionally discriminate on
18 the basis of race when you are --

19 MS. NELSON: They don't have breathing
20 room to intentionally discriminate on the basis
21 of race. They have breathing room to use race
22 to remedy their own discrimination.

23 JUSTICE GORSUCH: Okay. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh?

1 JUSTICE KAVANAUGH: I guess the
2 hang-up there is the word "discriminate." But
3 your answer is that they can intentionally use
4 race in those circumstances, correct --

5 MS. NELSON: That --

6 JUSTICE KAVANAUGH: -- the federal
7 district court?

8 MS. NELSON: If -- if needed. If
9 needed. And there are -- there are often a
10 wide range of possibilities and alternatives
11 that don't require that.

12 JUSTICE KAVANAUGH: And then I think
13 you said so long as it's not excessive, and you
14 mentioned strict scrutiny as well, correct?

15 MS. NELSON: Correct.

16 JUSTICE KAVANAUGH: But part of strict
17 scrutiny, again, is the temporal limit that's
18 been part of strict scrutiny for a long time.
19 And I think your answers earlier to that to me
20 and when you were talking with Justice Jackson
21 were, well, Congress, defer to Congress. But,
22 when we're applying the Equal Protection Clause
23 or, as Justice Barrett said, the Fifteenth
24 Amendment, congruent and proportionality, or
25 Fourteenth Amendment, deferring to Congress is,

1 I think, not what we're supposed do.

2 So what -- if we're not just deferring
3 to Congress, is there anything you can point us
4 to that would not allow it to extend forever,
5 the -- the intentional use of race, which you
6 acknowledged in response to Justice Gorsuch?

7 MS. NELSON: Sure. Well, we maintain
8 that there does not need to be a durational
9 limit, but there is some guidance that this
10 Court could consider. So, for example, in
11 Grutter, the Court, Justice O'Connor suggested
12 that affirmative action did not need to endure
13 beyond another 25 years. She forecast that
14 another generation might need affirmative
15 action. And, ultimately, this Court thought
16 otherwise in SFFA.

17 So that sort of runway, that advance
18 notice, that -- that expression of an ability
19 for Congress to intervene if it disagrees with
20 the Court or decides it wants to remedy on its
21 own, that is the type of guidance I think this
22 Court should consider if it feels that it must
23 pursue a durational limit on -- on Section 2.
24 And, again, we don't believe that's necessary.

25 JUSTICE KAVANAUGH: Do you -- Justice

1 Kennedy in 1994 in Johnson versus De Grandy
2 said a couple things that I just want to get
3 your reaction to. He said the sorting of
4 persons with an intent to divide by reason of
5 race raises the most serious constitutional
6 questions, and he added that explicit
7 race-based districting embarks us on a most
8 dangerous course. It is necessary to bear in
9 mind that redistricting must comply with the
10 overriding demands of the Equal Protection
11 Clause.

12 Do you take issue with what he said
13 there?

14 MS. NELSON: No. What I think is
15 missing from the understanding of Section 2 is
16 the work that it has done to advance the goal
17 of ridding our electoral process of race. It
18 brings racial groups together.

19 And, as I mentioned earlier, many of
20 the VRA opportunity districts ultimately
21 convert to non-majority-minority districts.
22 Not all VRA opportunity districts are
23 majority-minority districts. And, in fact, we
24 see greater racial harmony and less racially
25 polarized voting as a result of Section 2

1 districts.

2 So Section 2 is addressing a
3 preexisting problem. It is not producing it.
4 And, in fact, it reduces it more broadly across
5 society.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: So we've assumed
10 without deciding -- this is picking up on
11 Justice Gorsuch's questions -- that complying
12 with Section 2 is a compelling interest for
13 purposes of the Fourteenth Amendment.

14 MS. NELSON: Correct.

15 JUSTICE BARRETT: And now this is kind
16 of picking up on some of Justice Alito and
17 Justice Thomas's questions earlier. How are we
18 to think about that when we're thinking about
19 the Robinson litigation? Because it was a
20 preliminary injunction, and Louisiana, of
21 course, argued there that, no, it -- it wasn't
22 a violation of Section 2 to have those maps.

23 So when -- I mean, I guess, how do we
24 judge the compelling interest in avoiding a
25 violation of Section 2? If the State doesn't

1 really think it violates Section 2 and it
2 hasn't been finally adjudicated yet, how do we
3 approach the -- assuming that compliance with
4 Section 2 is a compelling interest, how do we
5 think about that in a context like Robinson?

6 MS. NELSON: So states can, for good
7 reason, draw a map that addresses Section 2
8 prophylactically. Here, we have a finding from
9 a district court based on a robust evidentiary
10 record that we were likely to succeed on our
11 Section 2 claim.

12 This is not the first case. There are
13 many cases that have provided the basis for an
14 opportunity map to be drawn just on a
15 preliminary injunction motion. And, again,
16 that was -- that finding by the lower court was
17 affirmed by two federal panels of the Fifth
18 Circuit. And this Court had an opportunity to
19 revisit the Robinson litigation and did not.

20 JUSTICE BARRETT: But -- but what
21 if -- I mean, district courts sometimes make
22 errors of law, right? So what if the district
23 court -- I guess I'm trying to figure out how
24 much weight then the district court's finding
25 has in comprising that -- that compelling

1 interest in avoiding the Section 2 violation.

2 Do you see what I mean?

3 Like, what if the -- what if the
4 district court was just wrong, and what if the
5 State thinks that the district court was wrong?

6 MS. NELSON: Well, the -- the State
7 has already conceded that it did --

8 JUSTICE BARRETT: Okay. Never mind.

9 MS. NELSON: The State already
10 conceded that it should comply with the
11 Robinson decision.

12 JUSTICE BARRETT: Right. I mean, it
13 got complicated here because of all of the
14 other litigation. But just why don't you just
15 strip out what happened and answer the
16 question. Like, at the time Robinson was
17 decided, if the -- if Louisiana thought that
18 the Robinson court was wrong, that the district
19 court was wrong, but it didn't -- it wanted to
20 avoid the court-imposed map, wanted the
21 opportunity to draw its own map, Justice
22 Kavanaugh has been asking you what role race
23 can play without running afoul of the Equal
24 Protection Clause.

25 And the State would have to say at

1 that point: Well, we're weighting race heavily
2 because we have a compelling interest in
3 avoiding a Section 2 violation. And the
4 State's position might be we don't actually
5 really think that we violated Section 2, but we
6 have a litigation risk. We know that if we
7 don't draw this other map, the court may impose
8 one.

9 On that understanding, on -- on those
10 facts, not concessions and whatever is made, is
11 that then a legitimate compelling state
12 interest when there is the possibility and the
13 State, in fact, thinks that the district court
14 was wrong?

15 MS. NELSON: It is still a compelling
16 governmental interest. The State can do what
17 it did here, which is to appeal to the Fifth
18 Circuit, and the Fifth Circuit considered the
19 same evidence and unanimously found that the
20 Robinson court was correct. Yet another Fifth
21 Circuit panel also affirmed that decision.

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: So, in essence, are

1 you saying in response to Justice Barrett that
2 it's a compelling interest nonetheless because
3 the State has an obligation under our
4 Constitution and under Section 2 to provide an
5 equally open electoral process?

6 MS. NELSON: That's correct.

7 JUSTICE JACKSON: I mean, I guess what
8 I'm trying to really wrap my mind around is the
9 different stages of this case and, like, the
10 different questions at issue because it's
11 complicated.

12 But I think the beginning of the whole
13 thing is the requirement of equal protection in
14 the Constitution and Congress's determination
15 under Section 2 to make sure that that is being
16 provided to minority groups in the electoral
17 process by having a statute that requires
18 states to provide equally open electoral
19 processes.

20 I mean, that's what we said in
21 Milligan. We were very clear that individuals
22 lack an equal opportunity to participate when a
23 state's electoral structure operates in a
24 manner that minimizes or cancels out their
25 voting strength. I mean, everybody -- I don't

1 think there's a disagreement that we have this
2 initial goal, which is providing equal
3 opportunity.

4 And so then the Robinson court is
5 asked under Section 2, is this a situation in
6 which that's not happening? And they go to
7 trial and they bring in a lot of evidence and
8 they do the thing, and the Robinson court says,
9 yes, this is that situation. Fine.

10 I guess I don't understand why the
11 Robinson court's decision is before us right
12 now, because what I understood is that as a
13 result of the Robinson court's decision,
14 Louisiana then enacts a map that it believes
15 will remedy the violation that the Robinson
16 court has identified, and we're here on a
17 challenge about that map. That, I think, we
18 call is a Shaw problem. We're --- we're here
19 deciding whether they can use race as a remedy,
20 as people say they did in the construction of
21 this map.

22 So I guess I'm not even clear why the
23 Robinson court's initial identification of the
24 problem is being questioned as a compelling
25 interest because there's an interest in not

1 having an unequal electoral system, right?

2 MS. NELSON: That's correct. The
3 Robinson decision is absolutely not before this
4 Court. There's no record in the Callais case
5 to support that.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Aguiñaga.

10 ORAL ARGUMENT OF J. BENJAMIN AGUIÑAGA
11 ON BEHALF OF APPELLANT LOUISIANA

12 MR. AGUIÑAGA: Thank you, Mr. Chief
13 Justice, and may it please the Court:

14 Race-based redistricting is
15 fundamentally contrary to our Constitution. It
16 requires striking enough members of the
17 majority race to sufficiently diminish their
18 voting strength, and it requires drawing in
19 enough members of a minority race to
20 sufficiently augment their voting strength.

21 Embedded within these express targets
22 are racial stereotypes that this Court has long
23 criticized. They assume, for example, that a
24 Black voter, simply because he is Black, must
25 think like other Black voters, share the same

1 interests, and prefer the same political
2 candidates.

3 And this stereotyping system has no
4 logical end point. We are 40 years removed
5 from Gingles, and yet, according to my friends
6 on the other side, nothing has changed in the
7 voting and housing patterns in Louisiana that
8 require race-based redistricting.

9 These problems are part of why we
10 never wanted to be here in the first place.
11 They have placed states in impossible
12 situations where the only sure demand is more
13 racial discrimination for more decades.

14 But I think, if anything is clear in
15 this Court's dedication to eliminating all
16 racial discrimination, it is that the
17 Constitution does not tolerate this system of
18 government-mandated racial balancing.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: Why did the State of
21 Louisiana switch sides since our last argument?

22 MR. AGUIÑAGA: Your Honor, we told the
23 Court at pages 1 and 2 of our original opening
24 brief in this case that our predicament in this
25 case presents as good a reason as any for the

1 Court to reevaluate its voting precedents.

2 We told the Court at page 18 of our
3 original reply brief that we thought this would
4 be a different case if the Court thought it was
5 worth revisiting the longstanding assumption
6 that compliance with Section 2 is a compelling
7 interest.

8 Your Honor, we thought all along, and
9 in my colloquy with Justice Kavanaugh back in
10 March, we discussed our longstanding position
11 in our state legislative map litigation where
12 we have taken the position that Section 2,
13 insofar as it requires race-based
14 redistricting, is unconstitutional.

15 This Court's reargument QP squarely
16 tees up that question, and so our duty of
17 candor requires -- requires us to give the
18 Court our honest answer to that question.

19 JUSTICE THOMAS: I --

20 JUSTICE KAGAN: General, the
21 race-based redistricting that you're now
22 objecting to is redistricting designed to
23 remedy a specific, identified, proved violation
24 of law; more, a specific, identified, proved
25 racial discrimination by the State.

1 That's the way in which the race-based
2 districting is coming in. It's coming in as a
3 remedy for specific, proved discrimination on
4 the State's part.

5 How could that possibly fall subject
6 to the categorical rule that you're suggesting?

7 MR. AGUIÑAGA: Your Honor, I
8 respectfully but firmly resist the premise
9 that this comes to the Court on a finding of
10 specific discrimination by the State. I think,
11 if anything is clear about how Gingles plays
12 out on the ground, it is that once you run the
13 three preconditions and get to the totality of
14 the circumstances, it's anyone's guess what the
15 alleged violation is.

16 I mean, I think Justice Thomas's
17 colloquy --

18 JUSTICE KAGAN: General, I mean, what
19 Gingles does, and, you know, the idea that this
20 is like 50 years later, this is not a kind of
21 Shelby County thing where one could say that
22 Congress had acted and 50 years later, you
23 know, the conditions on the ground might have
24 changed and there would be no way to respond to
25 that change, because what Gingles does and what

1 these Section 2 suits do is they ask about
2 current conditions and they ask whether those
3 current conditions show vote dilution which is
4 violative of Section 2.

5 So they say: Is there racial
6 segregation, racial residential segregation
7 now? Is there racially polarized voting now?

8 And when the State fails with respect
9 to those issues, when those conditions obtain
10 now, what our precedents say and what you're
11 asking us now to change what our precedents say
12 is that when those things operate currently
13 right as of now and are proved in a courtroom,
14 that -- that still there can't be a race-based
15 remedy.

16 MR. AGUIÑAGA: That's correct, Justice
17 Kagan. And I think the two trends that my
18 friends on the other side point to, the rates
19 of residential segregation and the rates of
20 racially polarized voting, are what allow them
21 to get past the Gingles preconditions. They
22 told you at page 33 of their yellow brief that
23 those things are worse today in Louisiana than
24 they were in the 1980s. And this Court said at
25 page 228 in Northwest Austin that those sorts

1 of factors are not evidence of intentional
2 discrimination.

3 That's not intentional discrimination,
4 Justice Kagan.

5 JUSTICE KAGAN: It's not intentional
6 discrimination because Section 2 is not about
7 intentional discrimination. Section 2 is about
8 effects discrimination, is about Congress
9 saying, and specifically in response to a
10 decision of this Court, that intentional
11 discrimination and the values behind that
12 prohibition can only be vindicated if Section 2
13 under -- if, under Section 2, the State shows
14 that the effects are not discriminatory. And,
15 you know, Congress put us, this Court, in its
16 place when it said that.

17 And so what Section 2 does is to say,
18 where the effects are discriminatory such that
19 people are not having the same -- African
20 Americans here are not being given the same
21 voting opportunities as white people are, then
22 a remedy is appropriate.

23 That remedy doesn't have to be
24 race-based, but sometimes it is race-based in
25 order to correct the racially discriminate --

1 racially discriminatory situation that exists
2 in the state right now.

3 MR. AGUIÑAGA: And, Justice Kagan, if
4 Congress had attempted in 1982 to make a record
5 of intentional discrimination in districting,
6 and today, if there were a record of an
7 intentional -- of intentional discrimination in
8 districting, then there might be a congruence
9 and proportionality argument to sustain
10 race-based redistricting as a remedy.

11 But I think something that you don't
12 see in the Congressional Record in the 1980s
13 and something that doesn't exist today is that
14 justification. And that's why I think --

15 JUSTICE SOTOMAYOR: I -- I'm sorry,
16 counsel. That's because they weren't dealing
17 with the history of it. They're dealing with
18 the current situation.

19 And Gingles is, as Justice Kagan
20 pointed out, what's happening today and are
21 there lingering effects of the past.

22 The one thing I look at is Alabama's
23 maps for the last 30 years, the map that --
24 that the Robinson court found cracked and
25 packed voters was a map that's been in effect

1 almost the entire history of Alabama.

2 That map was put in effect because
3 of -- of -- of discrimination, so it's going to
4 have a lingering effect. They wanted to pack
5 white voters. They've been doing that. And
6 they wanted to uncrack Black voters as much as
7 they could, and they've done that. And it's
8 only Section 2 and Section 5 that kept them
9 giving for -- creating one majority district.

10 But I -- I -- using race, race is a
11 part of redistricting always. We've said that
12 the only actionable part that's intentional, if
13 it predominates, but race is always a part of
14 these decisions. And my colleagues are trying
15 to tease it out in this intellectual way that
16 doesn't deal with the fact that race is used to
17 help people.

18 Legislators might try to keep an
19 ethnic community in one district. They might
20 consider it to get a sense of which district to
21 draw an incumbent into. They might review it
22 to predict what kind of issues a district voter
23 might be particularly interested in. They
24 might use it to inform partisan goals. We
25 permit all of that.

1 What you're saying to us, if you use
2 it to remedy past lingering discrimination,
3 intentional discrimination, then you can't use
4 it. You can use it to help yourself achieve
5 goals that reduce a particular group's
6 electoral participation, but you can't use it
7 to remedy that situation. That's what you want
8 us to hold.

9 MR. AGUIÑAGA: Justice Sotomayor, my
10 humble point is that the government has no
11 business telling citizens in which districts
12 they may live or what voting power they may --

13 JUSTICE SOTOMAYOR: But it's not doing
14 that, counsel. The six plaintiffs in this case
15 are white plaintiffs who live in a district
16 with Black voters. So no one's keeping them
17 out of that district. No one's stopping them
18 from participating in the voting process. No
19 one is stopping them from trying to run
20 candidates or support candidates that reflect
21 their views.

22 But out -- but this state is stopping
23 Black voters from doing that in many districts
24 because it's packing them into areas that
25 whites overwhelm them. I -- I -- I don't

1 understand this.

2 MR. AGUIÑAGA: So, Justice Sotomayor,
3 let's look at the facts in this case. My --

4 JUSTICE SOTOMAYOR: If you can use
5 race in some ways that are positive, why can't
6 you use it to remedy something in some ways?

7 MR. AGUIÑAGA: Your Honor, my friends
8 on the other side walked into the Middle
9 District of Louisiana -- may I finish very
10 briefly?

11 CHIEF JUSTICE ROBERTS: Yes.

12 MR. AGUIÑAGA: Walked into the
13 Middle District of Louisiana and demanded a
14 majority-Black district.

15 What's the purpose of that kind of
16 district? The valid purpose of drawing a
17 majority-Black district is to diminish the
18 voting strength of some racial groups and
19 augment the voting strength of others. And --

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas?

23 JUSTICE THOMAS: What role did
24 Robinson play in the development of SB8?

25 MR. AGUIÑAGA: Justice Thomas,

1 Robinson is the only reason SB8 exists. We
2 fought tooth and nail in the Robinson
3 litigation itself to -- in -- in telling the
4 courts that we did not think the Constitution
5 permitted us to draw a second majority-Black
6 district. As you know, under protest, we drew
7 SB8 because the threat was that the federal
8 courts were going to do it if we didn't.

9 And that's -- I mean, I think that's
10 the best way to conceive of why SB8 exists. We
11 would never pass SB8 in the first instance
12 without Robinson, Justice Thomas.

13 JUSTICE THOMAS: What were the
14 findings in Robinson?

15 MR. AGUIÑAGA: The finding by -- by
16 the Middle District in Robinson was that the
17 plaintiffs in this case were likely to show a
18 violation of Section 2, and the likely
19 violation -- and I'm using very broad
20 terminology because I do not know what the
21 underlying violation is. I can't articulate
22 that for you, Justice Thomas, because I don't
23 think anybody can. But I think the finding in
24 the district court's mind in that case was that
25 the likely -- the likelihood of a Section 2

1 violation meant that a majority-Black district
2 was required, a second one.

3 And I think, like, that was the bottom
4 line, and when our legislature saw that, we
5 understood the marching order, and that's why
6 you see SB8 as it exists today.

7 JUSTICE THOMAS: Just briefly, what
8 were the findings that led to that conclusion?

9 MR. AGUIÑAGA: Well, Your Honor,
10 running through the preconditions and the
11 totality of the circumstances, I mean, I think
12 the totality of the circumstances did most of
13 the work for the Middle District in -- in
14 Robinson. Senate Factor 1, the official
15 history of past discrimination, Justice Thomas,
16 we can never outrun the bad era of poll taxes,
17 of grandfather clauses, of literacy tests. I
18 think we're always going to lose across the
19 board on that kind of analysis.

20 And that's what the Middle District in
21 Robinson focused on, is how bad was Louisiana
22 in the 1930s, '40s, '50s, '60s, and, you know,
23 add all that together and, at the end, you have
24 a vote dilution finding that I don't think is
25 clearly articulable in the way that SFFA

1 requires a finding of discrimination to be
2 specified.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Alito?

5 JUSTICE ALITO: Can I clear up a
6 couple of factual points that have been brought
7 out by the questioning? Your HB1, enacted in
8 2022, followed to a large extent the map that
9 you had for the prior decade, isn't that right?

10 MR. AGUIÑAGA: That's exactly right,
11 Justice Alito.

12 JUSTICE ALITO: Which suggested that
13 that prior map was discriminatory. What was
14 the origin of that prior map? Do I remember
15 correctly that it was pre-cleared by the
16 Justice Department?

17 MR. AGUIÑAGA: Twice. That's correct,
18 Justice Alito.

19 JUSTICE ALITO: So it wasn't -- there
20 is no finding that that map was based on
21 discrimination and that by following that map,
22 you were perpetuating prior discrimination?

23 MR. AGUIÑAGA: No, Justice Alito. And
24 I think that's why I firmly have to resist any
25 suggestion that the Louisiana state legislature

1 is out here targeting minority voters and
2 trying to abridge the right to vote. That is
3 just completely unfounded.

4 JUSTICE ALITO: And as to the
5 suggestion that there was a proven violation in
6 the Robinson litigation, that was a preliminary
7 injunction, right?

8 MR. AGUIÑAGA: That's correct, Justice
9 Alito.

10 JUSTICE ALITO: So there wasn't a
11 finding that there was a violation. At most, a
12 finding that there was likely to be a violation
13 shown. And is it not correct for the reasons
14 that I brought out in my questioning of
15 Ms. Nelson that what the district court did
16 there was not to ask whether the minority group
17 was sufficiently compact but whether the
18 district itself was sufficiently compact?

19 MR. AGUIÑAGA: That's exactly right,
20 Justice Alito. And if you look at the Black
21 population in Louisiana, I mean, it is all over
22 the place. You can identify pockets of Black
23 voters, but they are dispersed across the
24 state. There's no way you can conceive of that
25 population as compact.

1 JUSTICE ALITO: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Sotomayor?

4 JUSTICE SOTOMAYOR: I may be
5 remembering the record wrong on this because it
6 was a while back, but if I recall, the district
7 court looked at the three main parishes that
8 make up District 6 now and looked at it and
9 said they have a commonality of history, many
10 of its residents go from where they live near
11 the Baton Rouge area to work or go to school
12 and they go back to their communities. They
13 have long family ties between the communities
14 and among the communities. There may be a
15 difference in education and -- and some income
16 differences, but that's true of all the
17 districts in Louisiana. You've got the
18 districts that are protecting incumbents where,
19 in the north, there's less money than in other
20 areas. So those differences are not
21 meaningful.

22 But I thought the district court did a
23 very careful analysis of the commonality of
24 interests of those -- of that Black community.
25 You may disagree with its finding, but it did

1 do that analysis.

2 MR. AGUIÑAGA: Your Honor, no doubt
3 the Middle District purported to run through
4 the Gingles analysis, and it said, you know, it
5 will be the unusual --

6 JUSTICE SOTOMAYOR: You're disagreeing
7 with it, but it did do that?

8 MR. AGUIÑAGA: It did -- it did what
9 this Court's precedents allow lower courts to
10 do. And, Justice Sotomayor, my only point in
11 response to that is to say, when the district
12 court was asking about what the minority group
13 does and thinks and prefers, it is exactly the
14 sort of racial stereotyping that this Court's
15 precedents say is -- is impermissible.

16 JUSTICE SOTOMAYOR: Counsel, with
17 respect, the last time the SG was here before
18 us on behalf of your state, they said that race
19 did not predominate just with your creation of
20 District 6 because what you were trying to do
21 and why it's oddly shaped was to protect
22 incumbents. Are you walking that back?

23 MR. AGUIÑAGA: Your Honor, our
24 position in our supplemental briefing on racial
25 predominance is as follows: If race is a

1 non-negotiable in the drawing of a new
2 district, we think that should satisfy this
3 Court's --

4 JUSTICE SOTOMAYOR: Well --

5 MR. AGUIÑAGA: -- predominance
6 analysis. And the argument you --

7 JUSTICE SOTOMAYOR: Well, but -- but
8 that's just it, which is was it? What really
9 was non-negotiable for you was nonpartisanship.

10 MR. AGUIÑAGA: That's --

11 JUSTICE SOTOMAYOR: You could have
12 picked -- you could have picked one of the
13 other maps, the illustrative map, you didn't
14 have to, but you drew this because of your
15 partisan needs more than because of race.

16 MR. AGUIÑAGA: We drew it for partisan
17 reasons, Justice Sotomayor. My point and the
18 point we make at the end of our opening
19 supplemental brief is to say, when this Court's
20 racial predominance questions ask about
21 non-negotiability, it shouldn't matter if race
22 is the one non-negotiable factor or it's one of
23 10 non-negotiable factors. In both --

24 JUSTICE SOTOMAYOR: Well, but we do --
25 we -- we -- we always talk about what

1 predominates, and what predominated here was
2 politics. That's what you said the last time.

3 MR. AGUIÑAGA: And --

4 JUSTICE SOTOMAYOR: Thank you,
5 counsel.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

7 JUSTICE KAGAN: General, a couple of
8 years ago when we decided Milligan, the party
9 there, the state there, made several arguments
10 that we specifically rejected. And in the
11 answers that you just gave to me, it seems to
12 me that you repeated each and every one of
13 those arguments that we rejected.

14 So I'll just run through a few of
15 them. What they said was that the Fifteenth
16 Amendment permits Congress to legislate against
17 only purposeful discrimination by the states.
18 We rejected that. We said, no, Section 2,
19 which is an effects-based test of vote
20 dilution, is permitted under the Fifteenth
21 Amendment.

22 There, in Milligan, the state said
23 that the Fifteenth Amendment doesn't authorize
24 race-based redistricting as a remedy for vote
25 dilution Section 2 violations. We said, no,

1 that wasn't correct either. You just repeated
2 it, but we rejected it.

3 And -- and they said that we should
4 adopt an interpretation of Section 2 -- and I'm
5 quoting here -- "that would revise and
6 reformulate the Gingles threshold inquiry that
7 has been the baseline" of our Section 2
8 jurisprudence for several decades. And we
9 rejected that as well.

10 So each of the propositions that
11 you're putting forward here that Section 2 has
12 to be limited in some way just to purposeful
13 discrimination, that it doesn't authorize
14 race-based redistricting as a remedy, and that
15 we need to fundamentally overhaul the Gingles
16 threshold inquiry was rejected, I don't know,
17 three years ago, two years ago, by a majority
18 of this Court.

19 MR. AGUIÑAGA: Justice Kagan, the
20 Court has never addressed and rejected the two
21 key parts of our argument here. The first is
22 the Court has always -- has long assumed,
23 without deciding, in cases like Cooper versus
24 Harris, that compliance with Section 2 is a
25 compelling interest. We're asking the Court to

1 finally decide that question and answer it no.

2 The second question the Allen Court
3 left --

4 JUSTICE KAGAN: Well, but you're
5 answering -- you're asking us based on
6 arguments that have been specifically rejected
7 by this Court over many decades and three years
8 ago.

9 MR. AGUIÑAGA: Your Honor, this is an
10 antecedent question that the Court has
11 routinely left open in its voting precedents,
12 and that's why we're asking the Court to
13 address it here.

14 If I could answer the second question
15 that the Court has left open, in Allen, the
16 Court left open the question of whether a
17 logical end point is identifiable in the
18 race-based redistricting context.

19 And our submission to the Court is
20 it's time to answer that question and answer no
21 because there is no logical end point to
22 race-based redistricting under Section 2 as the
23 Court has construed it.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch?

1 Justice Kavanaugh?

2 JUSTICE KAVANAUGH: I'd like to get
3 your views on pages 25 and 26 of the Solicitor
4 General of the United States' brief, where they
5 say that this Court should hold that the
6 Plaintiffs' illustrative district cannot
7 disregard the State's political objectives and
8 further say that Section 2 plaintiffs cannot
9 claim a lack of equal openness where politics
10 rather than race is the likely reason for the
11 state's refusal to create a majority-minority
12 district.

13 Do you have thoughts about the S --
14 the Solicitor General's approach? And then, in
15 the course of answering that, do you see
16 differences between your basic submissions and
17 the federal government's submissions?

18 MR. AGUIÑAGA: I do.

19 JUSTICE KAVANAUGH: I'm going to ask
20 them that too.

21 MR. AGUIÑAGA: I do, Justice
22 Kavanaugh. I do think the top-line response is
23 we like the proposal and we don't. I think we
24 like it insofar as you know from our original
25 briefing and our supplemental briefing that the

1 thing we want most as the State is clarity in
2 this area of the law, and so any remodeling of
3 Gingles that brings about that clarity, of
4 course, we're going to like.

5 I think the reason we don't like it,
6 there's a practical reason and a doctrinal
7 reason. I think the practical reason with the
8 proposal is that you're probably going to see a
9 new front of Section 2 litigation over what any
10 new test means and how it plays out on the
11 ground. And so I think the upshot is the
12 courts are going to continue to be inundated
13 with Section 2 cases under this new test if it
14 exists. So, as -- as a practical matter, I
15 don't know that we give it --

16 JUSTICE KAVANAUGH: Well, what's the
17 practical lack of clarity that you see? I -- I
18 guess I would have thought that solves a lot of
19 the concerns that you've identified and that
20 the amicus briefs that support your side have
21 identified so far.

22 MR. AGUIÑAGA: Yes. If I could answer
23 then and get to the quick doctrinal point.

24 JUSTICE KAVANAUGH: Yes.

25 MR. AGUIÑAGA: On the practical point,

1 I do think that you start to see hints of this
2 in the Robinson Appellants' yellow brief, the
3 supplemental yellow brief, which is there's
4 going to be a lot of -- of disagreement in the
5 lower courts about racial predominance. That
6 is a critical trigger in a lot of this Court's
7 cases, and unless there's absolute clarity
8 about how that analytical framework shakes out,
9 then you're still going to see this onslaught
10 of litigation that you see today in the Section
11 2 context.

12 The doctrinal reason, Justice
13 Kavanaugh, why, you know, we're not just, like,
14 totally thrilled with the proposal is I think
15 it's just a half solution to the constitutional
16 problem because, at the end of the day, what
17 the government's asking you to do is keep
18 Gingles in some form. And, as we've laid out
19 in our supplemental briefs, Gingles I, II, and
20 III are expressly built on the sorts of racial
21 stereotypes that the Court's cases say are
22 impermissible under the Equal Protection
23 Clause.

24 And so I think that anytime any test,
25 whether it's good or bad as a practical matter,

1 that at the end of the day is asking the
2 government to assign voters to different
3 districts on the basis of their race and is
4 engaged in stereotypes about how members of a
5 race simply by virtue of their membership in
6 that racial class think, I think that's a
7 constitutional problem, and so that's why it's
8 not wholly fulfilling.

9 JUSTICE KAVANAUGH: I think the reason
10 they say we haven't really addressed their
11 proposal before in the -- in our jurisprudence,
12 in part, because, before Rucho, states wouldn't
13 articulate that objective explicitly and,
14 therefore, it's an open question.

15 Do you agree with that?

16 MR. AGUIÑAGA: I think, as a practical
17 matter, that's probably true, Your Honor. I
18 mean, I think pre-Rucho, states were going to
19 be very hesitant to venture out to say, you
20 know, overtly, like, politically, like, here's
21 what we're doing, and so that -- that is, I
22 think, a great explanation of why the Court's
23 cases have treated the -- the political versus
24 racial divide as it does.

25 JUSTICE KAVANAUGH: And just on common

1 ground here, because I think it's always
2 important in a case like this where there's
3 disputes to identify what's common ground,
4 Justice Jackson said the goal is equal
5 opportunity for all Americans. I think we all
6 agree on that completely.

7 And the goal, of course, is racial
8 non-discrimination, but at the same time, given
9 history and given Congress's action, the goal
10 is making sure that there have been sufficient
11 remedies for the history of discrimination in
12 the United States. And we've seen that in the
13 school desegregation context, in the college
14 admissions context, and a variety of contexts.

15 And then Ms. Nelson, I think,
16 suggested, if there is going to be a temporal
17 limit, she doesn't want one at all, but then I
18 think she said, if there's going to be one
19 there, it should be identified in advance. And
20 I just want to get your response to that.

21 MR. AGUIÑAGA: Our response to that is
22 simple, Your Honor. Over three decades, dating
23 back to Shaw I and Miller, the Court has always
24 qualified its voting cases with the caveat that
25 racial stereotyping is bad, the Fourteenth

1 Amendment forbids it, and in all events, it
2 can't persist.

3 I think anybody remotely involved in
4 redistricting knows those caveats and has been
5 on notice since the 1990s. And so, you know,
6 as recently as this Court's plurality opinion
7 in Shady and then SFFA, where the Court again
8 reproduced that blackletter law that racial
9 stereotyping is not permitted under the
10 Fourteenth Amendment, the warning bells have
11 been sounding for decades, and I think that's a
12 long enough notice for anybody involved, Your
13 Honor.

14 JUSTICE KAVANAUGH: In response to
15 Justice Kagan, Ms. Nelson said that Black
16 representatives and justices in Louisiana have
17 primarily if not exclusively been elected in
18 majority-minority or majority-minority
19 opportunity districts and that the results
20 would be terrible.

21 You want to respond to that?

22 MR. AGUIÑAGA: Sure, Your Honor. I
23 mean, I -- I think there's been a lot of
24 sky-is-falling rhetoric from the other side in
25 this case. And I just want to give you, like,

1 one political reality, why I think that's a
2 little overstated, which is remember that in a
3 case -- use a state like Louisiana, Republican
4 legislature. If a Republican legislature wants
5 to maximize its political seats, draw a 6-0
6 map, remember what has to happen with the
7 hundreds of thousands of Democrat voters that
8 currently exist in the majority Democrat
9 districts, District 2 and District 6. They
10 have to go somewhere.

11 And that means that if the -- if the
12 legislature wants to take the risk of
13 maximizing, what they're doing is turning safe
14 districts for high-profile political incumbents
15 purple, and that, I think, is a very dangerous
16 political risk.

17 I'm not -- I don't know what our
18 legislature would do if the Court rules in our
19 favor, but I'm just saying that's one political
20 reality that makes me pause and say I don't
21 think the sky is going to fall.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: I just have a

1 clarifying question to see how I'm thinking
2 about this and -- or -- or the arguments that
3 are being made.

4 Would you say that Section 2, insofar
5 as it goes beyond just intentional
6 discrimination because, as Justice Kagan said,
7 Congress amended it when we said that before,
8 is itself an exercise of the enforcement power,
9 Judge -- I'm going to assume here that
10 Congress's enforcement power is necessary and
11 the congruence-and-proportionality test applies
12 to Section 2.

13 Do you agree with that conception?
14 And I guess just to tell you where I'm coming
15 from, I mean, it's one thing to say that the
16 map itself is the remedy. But it might also be
17 that the statute itself insofar it goes beyond
18 intentional discrimination is the remedy.

19 MR. AGUIÑAGA: I --

20 JUSTICE BARRETT: Is that a way to
21 think about it, or is that how the arguments
22 are going?

23 MR. AGUIÑAGA: I think that's right,
24 Justice Barrett. I mean, I think the Court's
25 precedents assume that if a plaintiff in a

1 Section 2 case can prove up the preconditions
2 and the totality of the circumstances, the
3 automatic remedy at least in this case is going
4 to be a -- a majority-minority district.

5 And I think the Court's precedents
6 assume that that is statutorily mandated.
7 Like, that's -- that's just the natural follow,
8 the consequence of a violation finding. So I
9 do think it's built into the statute.

10 Now there was a lot of discussion
11 earlier about whether we're attacking Section 2
12 itself, like, facially. And that's just not
13 true. The -- the reargument QP and our
14 briefing has been focused solely on this use of
15 race-based redistricting as a remedy.

16 I think all the other applications of
17 Section 2 that this Court has considered remain
18 fair game if a plaintiff especially can show
19 intentional discrimination. Of course, that
20 all remains fair game.

21 But I think we're narrowly focused
22 here on the use of race to draw district lines
23 insofar -- insofar as the Court has understood
24 that to be mandated by Section 2 to remedy an
25 alleged violation.

1 JUSTICE BARRETT: So you don't
2 understand yourself to be arguing that any part
3 of Section 2 is itself unconstitutional but
4 simply is the way that courts have been
5 applying it goes beyond?

6 MR. AGUIÑAGA: That's correct, Justice
7 Barrett. I mean, this Court's precedents
8 culminating in SFFA have said, if the racial
9 classification that a government's employing to
10 allegedly remedy a violation is what's at
11 issue, like, that's the constitutional problem.
12 And that's where we focused our briefing.

13 JUSTICE BARRETT: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

16 JUSTICE JACKSON: So where in Section
17 2 does it mandate another minority district? I
18 mean, my -- my understanding, as I explored
19 with Ms. Nelson, is that Section 2 is the
20 mechanism by which we determine that equal
21 electoral opportunity is not being provided for
22 a certain minority group.

23 And we've interpreted in Gingles,
24 we've given some flesh to how one goes about
25 identifying that set of circumstances.

1 But I thought that's the end of it in
2 terms of the Court's announcement under Section
3 2, and the Court then turns to the state and
4 says: How do you want to remedy this? We've
5 got a problem.

6 And sometimes the state might draw a
7 second minority district. Sometimes it might
8 not. And yet your answer to Justice Barrett
9 was: Well, everybody just knows that that's
10 the automatic remedy. So can -- can you help
11 me figure out that disconnect?

12 MR. AGUIÑAGA: Well, Justice Jackson,
13 I think there's a reason why this Court's
14 voting precedents going all the way back to
15 Shaw I are so tied up with race. It's because
16 the -- the remedy, as parties and the courts
17 have understood Section 2 to operate, is almost
18 always going to be race-based. That's why they
19 went --

20 JUSTICE JACKSON: No, they're show --
21 they're so -- they're so tied up with race
22 because that's the initial problem, right?
23 That's where -- that -- that's the beginning.
24 The beginning is the claim that a person makes
25 under Section 2 that because of their race,

1 they are not being afforded equal electoral
2 opportunity.

3 It is a separate question as to how we
4 go about remedying that and the extent to which
5 we need to use race as a remedy. That's the
6 question we're here on today.

7 But the Section 2 issue is just what
8 circumstances do we look at to determine
9 whether this problem of unequal electoral
10 opportunity on the basis of race is occurring.

11 MR. AGUIÑAGA: Right. And a couple of
12 responses to that, Justice Jackson.

13 JUSTICE JACKSON: Wait. So can I just
14 ask --

15 MR. AGUIÑAGA: So --

16 JUSTICE JACKSON: -- why is that not a
17 compelling state interest to -- to identify
18 areas in which that problem is occurring?

19 MR. AGUIÑAGA: Your Honor, of course,
20 as this Court recognized in SFFA, states can
21 remedy intentional discrimination if they --

22 JUSTICE JACKSON: No, I'm not talking
23 about the remedy. I'm not talking -- I'm
24 talking about the --

25 MR. AGUIÑAGA: They can identify --

1 JUSTICE JACKSON: Identify, all right.

2 MR. AGUIÑAGA: They -- of course.

3 JUSTICE JACKSON: So, if -- if I'm
4 right that Section 2 is about identifying the
5 problem and then requiring some remedy, I don't
6 understand why your answer to Justice Kagan's
7 question about is this a compelling state
8 interest is no. The answer is obviously yes,
9 that you have an interest in remedying the
10 effects of racial discrimination that we
11 identify using this tool.

12 Whether you go too far in your remedy
13 is another issue, right?

14 MR. AGUIÑAGA: Your Honor, I think
15 step zero in all these cases, it was certainly
16 step zero in the Robinson litigation, is the
17 Plaintiffs came in and said we want another
18 majority-Black district. I think the Court --

19 JUSTICE JACKSON: I thought they came
20 in and said we are not receiving equal
21 electoral opportunity because our votes are
22 being diluted.

23 MR. AGUIÑAGA: Which is the same way
24 of saying we deserve a second majority-Black
25 district.

1 JUSTICE JACKSON: No, it's not because
2 that -- again, just trust me on this -- the --
3 the second electoral -- or second district is a
4 remedy that one could offer for a problem that
5 we've identified. And the whole Robinson
6 litigation was about identifying the problem.
7 Is this really happening?

8 In many, many Section 2 cases, the
9 court says you're wrong, you're fine, there --
10 there is not an electoral opportunity being
11 denied to you, go away. In this case, the
12 court said, I see, I'm looking at the factors,
13 I appreciate what you're saying, you've proven
14 that we have this problem, and so the next
15 question is, how do we go about remedying it?

16 MR. AGUIÑAGA: Right. And the
17 problem, Justice -- Justice Jackson, that the
18 Middle District identified was not intentional
19 discrimination. And, in fact, I think, when I
20 hear my --

21 JUSTICE JACKSON: Why do you need
22 intentional discrimination to remedy a problem
23 like the one that I've identified?

24 MR. AGUIÑAGA: Because, if you're
25 going to use race the way that the Robinson

1 Appellants want the Court to use race in
2 drawing a second majority-minority district,
3 you've got to have a compelling interest.

4 JUSTICE JACKSON: Thank you.

5 MR. AGUIÑAGA: And as --

6 JUSTICE JACKSON: I understand.

7 MR. AGUIÑAGA: Thank you, Mr. Chief
8 Justice.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Greim.

12 ORAL ARGUMENT OF EDWARD D. GREIM

13 ON BEHALF OF THE APPELLEES

14 MR. GREIM: Mr. Chief Justice, and may
15 it please the Court:

16 The Appellees should prevail here
17 regardless of the grounds on which the Court
18 chooses to rely. In today's America, voters
19 like the Appellees are still being racially
20 stereotyped to place them into single-member
21 districts. If it was ever acceptable under our
22 color-blind Constitution to do this, it was
23 never intended to continue indefinitely.

24 Section 2 effects findings alone can
25 no longer justify the widespread stereotyping

1 of American voters based on race, in violation
2 of the Fourteenth and Fifteenth Amendments. It
3 is time to reach a question this Court has
4 never reached and hold that Section 2 alone is
5 no compelling interest for racially
6 gerrymandering citizens like the Appellees
7 today.

8 The Court should affirm and direct the
9 district court to order a remedial map in time
10 for the 2026 elections.

11 I welcome any questions.

12 JUSTICE THOMAS: The last time we had
13 this case and in the materials that we have,
14 there was quite a bit of discussion in the
15 debate surrounding SB8 that this district had
16 to be drawn this way, the second district,
17 because of the litigation earlier in the
18 Robinson case.

19 What's your view of the role of
20 Robinson in the development of SB8?

21 MR. GREIM: Well, it has exactly one
22 point of contact, which is the State has
23 admitted that it felt that it had to draw a
24 second majority-minority district because of
25 Robinson to avoid trial in Robinson. They did

1 not want to have a trial during the time it was
2 going to be scheduled, and so they -- they
3 passed the second majority-minority district
4 and they -- they -- race predominated in doing
5 that.

6 JUSTICE THOMAS: When you say "race
7 predominated," what exactly do you mean by
8 that?

9 MR. GREIM: I just mean to apply the
10 standard from -- from Cooper and --

11 JUSTICE THOMAS: Well, I mean
12 practically, how is it used in -- in your -- in
13 your mind or in your thinking?

14 MR. GREIM: Well, the -- basically,
15 the State went to the strongest remaining area
16 of minority population, which was east Baton
17 Rouge, and then they looked about the state for
18 enough majority -- enough minority voters that
19 was still contiguous to the main concentration
20 in east Baton Rouge, and they went to the
21 northwest.

22 And, again, the goal that could not be
23 compromised, which was the standard here, was
24 that they had to draw a second
25 majority-minority district, and that made race

1 predominate both in the direction and in the
2 details of how the lines were drawn.

3 JUSTICE KAGAN: Mr. Greim, you and the
4 solicitor general spoke about stereotyping and
5 how there's no place for stereotyping. But I'm
6 wondering what stereotyping has to do with any
7 of this.

8 The requirements of a Section 2 vote
9 dilution claim are essentially that there's
10 residential segregation by race. That's not
11 stereotyping. That's just where people live.
12 And that there is racial block voting,
13 essentially that whites won't vote for a Black
14 candidate. That's not stereotyping either.
15 That's just what the data shows about race --
16 racially block voting.

17 So I'm wondering how it is that
18 stereotyping gets into this case at all.

19 MR. GREIM: Well, Your Honor, two --
20 two points. First of all, stereotyping is the
21 remedy that occurs when race predominates and
22 is used to sort voters into one district or the
23 other. And -- and the reason that's important
24 is to go back to the -- the second kind of
25 predicate to your question.

1 In a Gingles showing, the showing
2 that's made is not that white voters or
3 majority voters won't vote for the minority
4 candidate. The only showing that's currently
5 being made is correlation.

6 And so what we're not seeing in cases
7 today is a showing that we can separate out
8 partisan politics, any partisan motivations
9 that the majority or minority voters have. And
10 so that case could come along, but that's not
11 part of the required showing of Gingles the way
12 courts are applying it.

13 JUSTICE KAGAN: Well, I -- I think
14 that, you know, we've had several cases up here
15 where we've acknowledged that there's some
16 interaction between racially -- racial -- race
17 and partisan affiliation. Obviously, that's
18 right. And the task for the courts is to
19 separate those things out, which may be hard in
20 a given case, may be easier in a given case,
21 but the only thing that's at issue, the
22 violation, is where there's racially block
23 voting.

24 And, again, you know, it's just a
25 there there. There is currently -- in order to

1 prove a Section 2 violation, you have to show
2 that the current conditions, not some old
3 conditions that happened in 1962 or in 1982,
4 but the current conditions are such that
5 there's no equal opportunity for African
6 American voters or some other group because
7 there's racially block voting.

8 And I guess I don't see what --
9 where -- where stereotyping comes into that.
10 It's just there's a there there that African
11 Americans can't elect candidates of their
12 choice.

13 MR. GREIM: Well, the -- the problem,
14 though, is in the remedy. The problem is that
15 when you are drawing your remedial district,
16 which is the very first part of Gingles, that
17 may not be the final district you end up with,
18 but just to -- I'm covering your question
19 and -- and a question Justice Jackson asked.
20 The very first thing the plaintiff shows is
21 here's the community that was cracked or
22 packed.

23 And so, to undo that, you have to look
24 at the race of the voters all around that area
25 and you've got to make assumptions about them

1 based on statistics, but you've got to make
2 assumptions about what they think and how they
3 vote based on their race, and you've got to --
4 you're drawing new districts based on that.

5 JUSTICE KAGAN: Yeah. I mean, this is
6 the -- the thing that we decided in Milligan,
7 because what the state said in Milligan was
8 that the plaintiffs could not use a map that
9 was at all race-based themselves in order to
10 show that there was a way out of this kind of
11 vote dilution -- these kind of vote dilution
12 practices.

13 And the Court says -- said: Of
14 course, you can do something that is
15 race-based, even though not race-predominant,
16 that we're not going to insist that you come in
17 and ignore the factor of race when the only
18 reason we're here is because race has played
19 such an integral part in the voting process
20 that people are being deprived of their voting
21 rights because of race.

22 MR. GREIM: Well, Justice Kagan, the
23 plurality in that section of -- of Milligan
24 drew the line between race-conscious and
25 race-predominant districting. "Race-based"

1 appears -- maybe we need to define all of our
2 terms. It appears in the decision, but -- but
3 the -- I think what -- what is clear from that
4 case is that the remedial maps can't allow race
5 to predominate.

6 I mean, the -- the Court said that the
7 remedial map, the illustrative map, can't
8 violate the Court's redistricting decisions.
9 And, of course, there's the entire Shaw line.

10 JUSTICE KAGAN: I don't think that
11 there's any dispute as to that point, but
12 there's -- but, you know, we're a long way from
13 racial predominance to have the plaintiffs come
14 in with a map that, in order to remedy the
15 race-based problem that exists, the violation
16 of voting rights based on race, itself takes
17 race into account.

18 MR. GREIM: Well --

19 JUSTICE KAGAN: That's what Milligan
20 said three years ago.

21 MR. GREIM: -- the -- the problem -- I
22 mean --

23 JUSTICE KAGAN: And that wasn't a
24 stereotype issue, and it wasn't a kind of,
25 like, we're based on past conditions issue.

1 We're based on current conditions, which is
2 that we just proved a violation of people's
3 voting rights based on current conditions.

4 MR. GREIM: Stereotyping is always the
5 main injury in a Shaw case. It's always the
6 injury when race predominates. And there's --
7 there's --

8 JUSTICE JACKSON: But you're asking
9 for changes to Section 2, which is not a Shaw
10 case.

11 MR. GREIM: Well --

12 JUSTICE JACKSON: That's the
13 confusion.

14 MR. GREIM: Well --

15 JUSTICE JACKSON: I understood that
16 the illustrative maps that the plaintiffs bring
17 in the beginning of a Shaw case is part of
18 their showing that we have a problem. They're
19 illustrative. They're not what Louisiana
20 picked in this case. They're not what the
21 Court requires. The Court gives the state,
22 once the violation is established, the
23 opportunity to draw its own map.

24 So they're just showing -- like,
25 that's just a step that you have to do as a

1 part of your showing that we do have this vote
2 dilution problem in this situation. And, as
3 Justice Kagan says, that's all based on current
4 information.

5 MR. GREIM: Well, but the question is
6 what's the "that" that is based on current
7 information. It's not a showing of intentional
8 discrimination.

9 JUSTICE JACKSON: Why does it need
10 to be? Is your suggestion that the only thing
11 that's worthy of remedying is the intentional
12 discrimination by the State?

13 MR. GREIM: If you are -- if the
14 remedy is stereotyping and race-based, which
15 would trigger --

16 JUSTICE JACKSON: Set aside -- set
17 aside what the -- what the remedy is. I just
18 need an answer to the initial question, right?
19 If I'm looking only at Section 2 world, we have
20 a mechanism for identifying race-based vote
21 dilution and other kinds of problems.

22 Is your view that you only are
23 entitled to some remedy for that if the --
24 if -- if you demonstrate that the State
25 intentionally is causing this to happen to you?

1 MR. GREIM: Well, that -- that's
2 not -- that's not current doctrine under
3 Gingles, but the problem is go back to LULAC --

4 JUSTICE JACKSON: Is that your
5 argument? Is that what you're saying we have
6 to do?

7 MR. GREIM: Our argument is that
8 if you're going to allow race-based -- a
9 race-based remedy, it must be in response to
10 intentional discrimination.

11 JUSTICE JACKSON: So you don't get a
12 remedy for an actual dilution or problem with
13 your vote, the kinds of things that Congress
14 cared about and that the Constitution requires.
15 You don't get a remedy unless this was
16 intentional on the part of the State with
17 respect to you?

18 MR. GREIM: Which is a constitutional
19 vote dilution claim which people always can be
20 bringing.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas?

24 Justice Alito?

25 Justice Sotomayor?

1 JUSTICE SOTOMAYOR: So I'm assuming
2 that the ban on poll taxes, literacy -- well,
3 not poll taxes because those have been
4 eliminated by the Twenty-Sixth Amendment, but
5 that the literacy ban that we have will sunset
6 too?

7 MR. GREIM: Those are not stereo --
8 those remedies don't require racial
9 stereotyping. They're nothing like that.

10 JUSTICE SOTOMAYOR: Well, they do
11 because, to prove them, you have to prove that
12 it affects the races.

13 I mean, I -- I -- I just don't
14 understand the stereotyping concept in -- in
15 the Gingles factors.

16 The Gingles factors is looking at
17 whether these people have -- their vote is
18 being diluted or their vote is being taken away
19 from them merely because they're Black. And
20 so, if that's the case, we have always said
21 that remedying discrimination, you can use
22 race.

23 Now you want to add the qualifier
24 it has to be intentional. But I don't see the
25 Fifteenth Amendment being limited that way.

1 The words of the Fifteenth Amendment are that
2 Congress can stop any practice that dilutes
3 voting. That has an -- "practice" is an act
4 that has an effect. It didn't say intentional,
5 intentional dilution of voting. It talked --
6 the amendment itself talks about a practice.

7 MR. GREIM: Your Honor, this Court has
8 never held that the Fifteenth Amendment
9 addresses anything other than intentional
10 discrimination.

11 JUSTICE SOTOMAYOR: No, it does.
12 That's just not true.

13 MR. GREIM: And the --

14 JUSTICE SOTOMAYOR: We just, in
15 Milligan, and we've said in a slew of cases
16 Congress itself said we're not using intent.
17 We're using effects. And we said that's okay.
18 That's within their power as specified in the
19 Fifteenth Amendment.

20 MR. GREIM: But -- but, Your Honor,
21 you can only catch the effects as part of an
22 enforce -- that's just the enforcement power at
23 that point. So you're using the enforcement
24 power based on a showing --

25 JUSTICE SOTOMAYOR: No, the

1 discrimination is the practice.

2 MR. GREIM: The -- the case law going

3 back to Katzenbach and --

4 JUSTICE KAGAN: Mr. Greim, I mean --

5 CHIEF JUSTICE ROBERTS: I'm sorry.

6 JUSTICE KAGAN: Oh, are we --

7 CHIEF JUSTICE ROBERTS: Yes.

8 JUSTICE KAGAN: Sorry.

9 CHIEF JUSTICE ROBERTS: Justice

10 Sotomayor?

11 JUSTICE SOTOMAYOR: Well, I'll stop

12 and you can go.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 MR. GREIM: Oh, sorry. I thought we

15 were all done.

16 CHIEF JUSTICE ROBERTS: No, you're not

17 done.

18 (Laughter.)

19 MR. GREIM: I'm in no hurry.

20 JUSTICE SOTOMAYOR: You're not done.

21 JUSTICE KAGAN: What we've said, and

22 this goes back umpteen years and it was said

23 again in -- in Milligan, is that even if the

24 constitutional prohibition is won on -- on

25 purposeful discrimination, Congress can enforce

1 that prohibition under Section -- under
2 Section 5 of the amendment by way of
3 prohibiting various kinds of effects.

4 And -- and so, in Milligan, we said a
5 ban on discriminatory effects is an appropriate
6 method of promoting the purposes of the
7 Fifteenth Amendment. And, as I said, that goes
8 back to Katzenbach, it goes back to City of
9 Rome.

10 And I understand that common ground
11 here, including among the SG, is essentially
12 a desire to take us back to an entirely
13 intent-based world, but that is -- you know,
14 that -- that is the thing that we tried to do,
15 that Congress prevented us from doing, and
16 that, since the amendments of 1982, have been
17 very clear that -- that you do an effects test
18 for Section 2 in order to vindicate the
19 purposes of the Fifteenth and Fourteenth
20 Amendments.

21 MR. GREIM: It's clear what Congress
22 did, I mean, but it was using its enforcement
23 power only. It doesn't have the power to
24 change what the Fifteenth Amendment says.

25 JUSTICE KAGAN: I mean, I'll take

1 that -- I'll take that label. That's fine.

2 But that's --

3 MR. GREIM: But it was not an --

4 JUSTICE KAGAN: Congress has
5 enforcement power under the Fifteenth
6 Amendment.

7 MR. GREIM: But it was not an
8 appropriate use of the enforcement power. And
9 even if it was then, it's not appropriate today
10 because it's not congruent and proportional.

11 And the Court has never held --

12 JUSTICE KAGAN: And what is this kind
13 of -- was it congruent and proportional in
14 1982, or is it just, like, suddenly not
15 congruent and proportional because it's 40
16 years later?

17 Like, I never understood our
18 congruence-and-proportionality test, which, by
19 the way, we have never applied to voting, but
20 even if you were to apply it to voting, I've
21 never understood it to have a kind of: Oh, you
22 know, Congress has to re-up its congruence and
23 proportionality findings every 10 years or
24 every six months or every whatever you want
25 to say it.

1 MR. GREIM: Well, City of Boerne, that
2 decision holds up Katzenbach and City of Rome
3 as sort of paradigmatic exercises of this sort
4 of scrutiny, although they're much older.

5 But -- but the point is this. Those
6 cases were based on a strong factual record
7 about very particular effects-based
8 prohibitions that had just been used for
9 purposeful discrimination.

10 They -- they were using poll taxes and
11 literacy tests, although facially neutral, to
12 purposely discriminate, and they would keep
13 changing them over time to make sure that they
14 kept the discrimination in place. So that was
15 a very unique circumstance.

16 And Congress recognized that in 1982.
17 It said: We don't have the same kind of record
18 that we built in 1965 under Section 4A to get
19 rid of a literacy test in a certain area or,
20 you know, when we expanded that in '70 and '75.
21 People were actually using literacy tests and
22 they were using them in a discriminatory
23 fashion.

24 So that's -- but none of those
25 remedies stereotyped.

1 JUSTICE KAGAN: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch?

4 Justice Kavanaugh?

5 Justice Barrett?

6 Justice Jackson?

7 JUSTICE JACKSON: So going back to
8 this discriminatory intent point, I guess I'm
9 thinking of it -- of the fact that remedial
10 action absent discriminatory intent is really
11 not a new idea in the civil rights laws, and --
12 and my kind of paradigmatic example of this is
13 something like the ADA.

14 Congress passed the Americans with
15 Disabilities Act against the backdrop of a
16 world that was generally not accessible to
17 people with disabilities, and so it was
18 discriminatory in effect because these folks
19 were not able to access these buildings.

20 And it didn't matter whether the
21 person who built the building or the person
22 who owned the building intended for them to be
23 exclusionary. That's irrelevant.

24 Congress said the facilities have
25 to be made equally open to people with

1 disabilities if readily possible.

2 I guess I don't understand why that's
3 not what's happening here. The idea in Section
4 2 is that we are responding to current-day
5 manifestations of past and present decisions
6 that disadvantage minorities and make it so
7 that they don't have equal access to the voting
8 system, right? They're -- they're disabled.

9 In fact, we used the word "disabled" in
10 Milligan. We say that's a way in which you see
11 that these processes are not equally open.

12 So I don't understand why it matters
13 whether or not the State intended to do that.
14 What Congress is saying is, if it is happening,
15 which Section 2 gives us the tools to
16 determine, you've got to fix it.

17 MR. GREIM: The -- the difference is
18 that the remedy under the ADA and other
19 antidiscrimination laws is not stereotyping.
20 We don't then treat --

21 JUSTICE JACKSON: It's not race-based.

22 MR. GREIM: We --

23 JUSTICE JACKSON: I -- I take your
24 point. I take your point. But you're saying
25 then that if the problem of no access is about

1 race, it's just too bad because you can't have
2 a remedy that relates to race?

3 MR. GREIM: Absolutely not, Your
4 Honor.

5 JUSTICE JACKSON: Okay.

6 MR. GREIM: It's not whether it
7 relates to race. It's whether the remedy that
8 relates to race involves stereotyping voters
9 and making assumptions about their politics and
10 their views and their thoughts based on their
11 race, and that's the problem. It doesn't exist
12 in those other civil rights statutes.

13 JUSTICE JACKSON: So why does -- why
14 do we have to change Section 2? Okay, so fine,
15 you say if it's a remedy problem, why aren't we
16 just focused on whether the -- whether the
17 remedy here, the particular map in Louisiana is
18 predominant, you know, using race and, if so,
19 strict scrutiny applies and did they narrowly
20 tailor it.

21 I mean, that seems to me to be the
22 problem that you're identifying. The remedy
23 here, you say, is overbroad, it's not using the
24 right factors, it's using race in a
25 stereotypical way. What does that have to do

1 with Section 2 and changing its criteria and
2 adding intent there?

3 MR. GREIM: Well, Your Honor, you have
4 to break the link between only using effects on
5 the front end and, on the back end, using race
6 and stereotyping. That's what you have to
7 break. And so, I mean, this Court warned about
8 that problem, this problem, in -- in --

9 JUSTICE JACKSON: Okay. I don't see
10 the link, but I'm out of time. Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 MR. GREIM: All right.

14 CHIEF JUSTICE ROBERTS: Mr. Mooppa.

15 ORAL ARGUMENT OF HASHIM M. MOOPPAN
16 FOR THE UNITED STATES, AS AMICUS CURIAE,
17 SUPPORTING THE APPELLEES

18 MR. MOOPPAN: Mr. Chief Justice, and
19 may it please the Court:

20 I think this Court's predominance
21 standard will help clarify a lot of the issues
22 that have been discussed this morning and will
23 also show why the arguments we're pressing here
24 were neither raised nor rejected in Milligan.

25 So, first, under the Constitution, the

1 problem is not the mere consideration of race
2 in districting. The problem is when race
3 subordinates traditional neutral principles and
4 is the factor that cannot be compromised.

5 Second, the problem with Section 2 and
6 Gingles is not that it's an effects test. The
7 problem with those -- with the statute is, as
8 construed in Gingles, it's reaching far beyond
9 anything that can reasonably present a risk of
10 intentional discrimination as, in fact, making
11 race predominant, is requiring states to
12 subordinate their principles to find a result.

13 The Robinson litigation perfectly
14 exemplifies this. The Robinson plaintiffs
15 could not show a denial of equal openness for
16 Black Democrats. What they could show is that
17 Democrats in Louisiana lost a seat.

18 I welcome this Court's questions.

19 JUSTICE THOMAS: You -- in one of your
20 suggestions in your brief, you mention
21 decoupling race and party. One, is there a
22 correlation, particularly among Black voters,
23 and, two, how do you decouple them?

24 MR. MOOPPAN: So there generally is.
25 The way you would decouple them is you look at

1 primary elections, right? You look to see in
2 the Democratic primary, do white Democrats and
3 Black Democrats vote differently. And that did
4 not happen here.

5 If you look at the Robinson district
6 court opinion, when they do steps 2 and 3 of
7 Gingles and they analyze racially polarized
8 voting, the court expressly said that they
9 didn't need to try to decouple race, and they
10 did that because, in Gingles, the Court never
11 resolved the issue. Justice Brennan said you
12 didn't need to do it, but Justice White refused
13 to join that part of his opinion.

14 And so that's part of the problem
15 here, is that what's going on under Gingles now
16 is it's not actually figuring out whether
17 there's an unfair effect based on race. It's
18 figuring out whether there's an unfair effect
19 based on party. And, again, the Robinson case
20 perfectly illustrates this.

21 Justice Alito, as you pointed out,
22 incumbency protection has long been recognized
23 as a traditional race-neutral principle while
24 the plaintiffs' illustrative maps in Robinson
25 totally departed from incumbency protection

1 because every map they provided would take the
2 state from a 5-1 map to a 4-2 map and require
3 displacing some Republican incumbent.

4 JUSTICE SOTOMAYOR: Counsel --

5 CHIEF JUSTICE ROBERTS: Counsel --

6 JUSTICE SOTOMAYOR: -- we're --

7 we're -- Justice Kavanaugh pointed to page 24,
8 25 of your brief as well. We didn't grant cert
9 on redoing Gingles. We granted cert on a
10 totally different question. And we have said
11 over and over again that statutory precedents
12 are entitled to far greater stare decisis
13 protection.

14 Our -- whatever mistakes we have in
15 Gingles, Congress has had 40 years to fix them
16 and it hasn't done it. In fact, when they
17 thought we did something wrong, they overruled
18 it and passed Section 2. I don't know how we
19 get to redo Gingles when this case didn't
20 involve Gingles. The district court in this
21 case didn't apply Gingles. It was the district
22 court in the Robinson case. And it's not the
23 Robinson case that's before us; it's this case.

24 And so I'm a little bit confused. How
25 do we enter redoing Gingles --

1 MR. MOOPPAN: So the reason you're
2 there --

3 JUSTICE SOTOMAYOR: -- when --

4 MR. MOOPPAN: -- is -- is -- so
5 I'll -- you asked two questions. One is why
6 it's relevant, and the second is can you do it
7 under stare decisis, so let me address those in
8 turn.

9 JUSTICE SOTOMAYOR: You -- you can do
10 it in whatever order.

11 MR. MOOPPAN: Okay. So --

12 JUSTICE SOTOMAYOR: Tell me, did the
13 district court here apply Gingles?

14 MR. MOOPPAN: No, because this case
15 comes up as a racial gerrymandering case
16 brought by the Callais plaintiffs. They showed
17 that race predominated, at which point --

18 JUSTICE SOTOMAYOR: But that has
19 nothing to do with what the court did here.

20 MR. MOOPPAN: It does. The reason it
21 does is because, once they showed that race
22 predominated, the burden flipped to the
23 Robinson Appellants to show that they had a
24 compelling interest.

25 JUSTICE SOTOMAYOR: Right.

1 MR. MOOPPAN: They asserted the
2 compelling interest with Section 2, but if they
3 misapplied Section 2 --

4 JUSTICE SOTOMAYOR: But we have --

5 MR. MOOPPAN: -- then they don't have
6 a compelling interest.

7 JUSTICE SOTOMAYOR: But we have said
8 over and over again that the compelling
9 interest is in a state believing that it should
10 remedy something, and it can be wrong.

11 MR. MOOPPAN: Not as --

12 JUSTICE SOTOMAYOR: We have --

13 MR. MOOPPAN: -- a matter of law, no.

14 JUSTICE SOTOMAYOR: -- said that -- we
15 have said that over and over again.

16 MR. MOOPPAN: Your Honor --

17 JUSTICE SOTOMAYOR: Counsel, you're
18 wrong sometimes on a factual basis, sometimes
19 on a legal basis. Wrong is wrong. Whatever
20 you think might be the error, if you still
21 think that it's something that's in your best
22 interest to do, you do it.

23 MR. MOOPPAN: Your Honor, that's
24 contrary to this Court's holdings in Miller, in
25 Shaw II, and in Cooper. This Court has

1 repeatedly said that if you have an incorrect
2 reading of Section 2, that -- or Section 5 of
3 the Voting Rights Act, that is not a compelling
4 interest.

5 The Court has applied the good-faith
6 standard under strict scrutiny to errors of
7 fact, not errors of law. In -- in Miller and
8 Shaw, the DOJ browbeat states into creating
9 multiple majority-minority districts, and they
10 all thought they were doing it under Section 5.
11 They were acting in good faith. The DOJ was
12 browbeating them. But this Court said that was
13 not a compelling interest because DOJ was wrong
14 about what --

15 JUSTICE SOTOMAYOR: Well, that --

16 MR. MOOPPAN: -- Section 5 meant.

17 JUSTICE SOTOMAYOR: -- that hasn't
18 been the allegation here.

19 MR. MOOPPAN: That is the allegation
20 here. The allegation here is that the Robinson
21 court was wrong about what Section 2 meant.
22 They completely misapplied Section 2 even
23 actually under Gingles -- under Milligan, let
24 alone under the proper way to interpret Section
25 2.

1 Again, Justice Alito, three points.

2 First, they ignored incumbency
3 protection. If you look at what the district
4 court said, they said they protected incumbency
5 because Julia Letlow could still live in her
6 district. She would lose, but she could still
7 live there. That's not incumbency protection.

8 Two, they did the exact thing that
9 this Court held in LULAC is not a compact
10 district. As you said, they took Blacks from
11 Baton Rouge and Blacks at the north of the
12 state and jammed them together. Yeah, it's a
13 nice rectangular district, it's very pretty,
14 but it's not compact.

15 And then, third, they didn't control
16 for racially polarized voting. So they just
17 said that Blacks vote differently from whites,
18 which just basically means Democrats in
19 Louisiana vote differently from Republicans in
20 Louisiana. That's not racially polarized
21 voting.

22 That is not the proper interpretation
23 of Section 2, and it is exactly why Section 2
24 is leading to racially predominant results
25 where you're essentially using Section 2 to

1 undo political outcomes, and that is an
2 unconstitutional reading of the statute.

3 And so the reason, to get to your
4 first part of your question, why should you
5 revisit Gingles, because we don't think it's
6 consistent with stare decisis to say, well, we
7 misinterpreted the statute 40 years ago, so now
8 the statute's unconstitutional. Stare decisis
9 is about respect for Congress and respect for
10 stability. If this Court has created a
11 constitutional problem with the statute, this
12 Court should fix it.

13 JUSTICE JACKSON: Can you say more
14 about why there's a constitutional problem with
15 the statute?

16 MR. MOOPPAN: Yes. So, for -- as I
17 was saying, the problem here is Gingles, as
18 it's been interpreted, essentially imposes
19 liability based on making the State take race
20 and predominate over race-neutral criteria,
21 again, using Robinson as an example.

22 JUSTICE JACKSON: I don't understand.
23 I'm sorry.

24 MR. MOOPPAN: So incumbency protection
25 is a traditional neutral principle. Robinson

1 found liability by requiring the State to
2 discard their race-neutral --

3 JUSTICE JACKSON: But I thought you
4 said Robinson was wrong, so then we just change
5 that understanding. Why does -- why does that
6 create a constitutional problem?

7 MR. MOOPPAN: So the -- no. It's --
8 it's -- the way it was wrong is it required the
9 State to subordinate race-neutral principles to
10 race. And let me use Milligan --

11 JUSTICE JACKSON: And you say Gingles
12 requires that?

13 MR. MOOPPAN: So the way --

14 JUSTICE JACKSON: So it was -- it
15 was -- it was consistent with Gingles and
16 Gingles is wrong, or it was inconsistent with
17 Gingles and we should say that?

18 MR. MOOPPAN: It's the interpretation
19 of Gingles that was adopted in this -- in
20 Milligan, is the real problem here. And so
21 this is the -- the pages in our brief that
22 Justice Kavanaugh has cited a couple times.

23 The fundamental problem is, when this
24 Court said in Milligan that as long as the
25 plaintiffs' illustrative map is roughly

1 equivalent to the state's map, that's enough to
2 satisfy Gingles.

3 What that meant is you're basically
4 telling the state that you have to subordinate
5 your weighing of your neutral principles and go
6 a different direction just because of race.

7 Let me give you an analogy I -- I
8 think will make this a little bit clearer.
9 Imagine if Congress had passed a statute that
10 said, LSU, if you have a white student and a
11 Black student who are roughly equivalent on
12 your admissions criteria, you must pick the
13 Black student. Of course, that would be
14 unconstitutional. That would be subordinating
15 their --

16 JUSTICE JACKSON: Yeah, but do you --
17 do you agree with my view that under Section 2,
18 you're not alone mandating a particular result,
19 that Section 2 is just about identifying the
20 problem?

21 MR. MOOPPAN: And my -- I agree with
22 that, but the --

23 JUSTICE JACKSON: If that's the case,
24 then it doesn't matter that the Section 2
25 analysis is showing you that there could be

1 another way to do this.

2 MR. MOOPPAN: It depends --

3 JUSTICE JACKSON: It's -- it's -- go
4 ahead.

5 MR. MOOPPAN: It depends what you
6 define as the problem. And the problem with
7 Section 2 as construed in Gingles and Milligan
8 is they are defining as a problem that there's
9 another way of drawing the district that would
10 help Blacks, even though there's no reason to
11 think that it's either intentionally
12 discriminatory or even a significant risk of
13 intentional discrimination.

14 JUSTICE JACKSON: But why is
15 intentional discrimination the bedrock?
16 They're not just -- you're reducing what is
17 happening to Section 2 to something that I
18 don't think is consistent with what Gingles is
19 actually requiring.

20 MR. MOOPPAN: Because the Constitution
21 prohibits intentional discrimination, and,
22 Justice Barrett, as you pointed out, this is
23 enforcement legislation. So we agree it's not
24 an intent test. But it has to at least be
25 smoking out conduct that presents a significant

1 risk of intentional discrimination. That's the
2 phrase that this Court used in Boerne. It's
3 the Court -- the phrase that this Court used
4 in -- in Katzenbach too.

5 Again, one way of thinking about this
6 is, when you -- if you think there's a problem
7 here, white Democrats in West Virginia, they
8 don't get districts drawn for them. White
9 Democrats have zero representation in West
10 Virginia even though they're a significant
11 percentage of the state.

12 The reason why Section 2 as be -- it's
13 being construed in Gingles is a problem is it's
14 saying that you have to create a district for
15 Black Democrats that you would never create for
16 white Democrats in a Republican state. It's
17 essentially being used as a reverse partisan
18 gerrymander on purely racial grounds.

19 CHIEF JUSTICE ROBERTS: Thank --

20 MR. MOOPAN: And that is a
21 constitutional problem. And the test we have
22 identified in our brief would solve that
23 problem.

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 You began, if I'm remembering
3 correctly, suggesting that Milligan was
4 consistent with your position in this case.
5 And then, of course, you mentioned its
6 discussion of Gingles is not.

7 MR. MOOPPAN: Yeah.

8 CHIEF JUSTICE ROBERTS: I wonder if
9 you could explain that a little further, to
10 what extent it's consistent and to what extent
11 it's not.

12 MR. MOOPPAN: Yeah. So most of the
13 arguments we're making in this case were not
14 made in that case and were not rejected in that
15 case. There is one aspect of our argument that
16 is inconsistent with Gingles -- with Milligan.

17 The -- one aspect that's inconsistent
18 is what I was discussing earlier. The part of
19 Milligan where it said that it's reasonably
20 configured so long as it's roughly equivalent,
21 we think that that is wrong. And we think that
22 that aspect of the opinion is what causes all
23 the racial predominance because, again, if you
24 take a step back and think about two
25 possibilities, Possibility 1 is the plaintiffs

1 come in and their map is superior to the
2 state's map on the state's own principles.

3 Then we think it's okay to have a
4 results test because, in that circumstance,
5 you're not telling the state they have to
6 subordinate their race-neutral principles.
7 You're essentially enforcing their own
8 race-neutral principles in a situation where
9 there is either intentional discrimination or
10 at least a significant risk of intentional
11 discrimination.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 MR. MOOPPAN: But, conversely, in the
14 situation where it's equivalent, you're
15 basically telling the state, look, you could
16 have done this either way. You want to do it
17 Way A? You have to do it Way B. Why? Only
18 because of race. That's what makes it
19 predominant, and that was the -- that's the one
20 aspect of Milligan that we disagree with.

21 But --

22 CHIEF JUSTICE ROBERTS: Thank -- thank
23 you.

24 Justice Thomas?

25 Justice Alito?

1 JUSTICE ALITO: Well, I think you may
2 be too hard on Milligan because Alabama in
3 Milligan did not argue that it had drawn those
4 maps based on seeking partisan advantage,
5 right?

6 MR. MOOPPAN: I agree, Your Honor.
7 And that's why I started my answer to the Chief
8 Justice by saying all the arguments we're
9 making here were not made by Alabama. Alabama
10 made a series of much broader arguments about
11 how you can't consider race at all, the
12 plaintiffs have to draw their maps race blind,
13 you ultimately have to find intent. We're not
14 arguing any of that.

15 And I agree with you, Alabama for
16 whatever reason didn't argue that incumbency
17 protection and partisan advantage were the
18 reasons for their map. And after Rucho, it's
19 clear that those are traditional race-neutral
20 principles that cannot be subordinated by
21 Section 2.

22 JUSTICE ALITO: Yeah. And I think
23 that's consistent with the fundamental analysis
24 in Milligan for reasons that I tried to bring
25 out during my questioning of Ms. Nelson.

1 The first Gingles precondition, as
2 described correctly in Milligan, is that the --
3 the -- the minority group must be sufficiently
4 large and geographically compact to constitute
5 a majority in a reasonably configured district
6 and the district is reasonably configured if it
7 comports with traditional districting criteria.

8 And since Rucho seeking a partisan
9 manages a permissible legislative objective
10 just like a partisan -- just like incumbent
11 protection, so, therefore, that should figure
12 in the first Gingles precondition.

13 MR. MOOPPAN: It absolutely should and
14 in this case -- in Robinson in particular,
15 the -- the state did argue incumbency
16 protection. And if you look at what the
17 Robinson district court said, it actually said
18 that, oh, we satisfied incumbency protection.
19 She still lives in the district. She's going
20 to lose, but she still lives there. That can't
21 possibly be right.

22 JUSTICE ALITO: And then again on
23 block voting, again, the Rucho issue was not
24 involved in -- in Milligan, but if Black --
25 if -- if block voting is understood properly to

1 mean voting on the basis of race but not on the
2 basis of partisan politics, then -- then that
3 must also be considered under Gingles, right?

4 MR. MOOPPAN: Absolutely. And this
5 is -- it matters, right, because, on our
6 position, again, we agree that Section 2 can
7 have a constitutional scope. And our view of
8 the results test would apply in exactly the
9 situation where racially polarized voting
10 properly understood exists.

11 So think of an area like Harlem, for
12 example. You've got white Democrats, Black
13 Democrats, and Hispanic Democrats who all live
14 around the same area and who probably have at
15 least sometimes different candidates of choice.

16 If the State of New York was to draw a
17 map in a way that departs from their normal
18 principles and favors one of those racial
19 groups, that's the sort of situation where
20 Section 2 could come in and say, well, there's
21 racially polarized voting, you've departed from
22 traditional principles, there's a reason to be
23 worried. And this isn't just a partisan thing.
24 You can imagine the same thing on the
25 Republican side. Imagine Florida.

1 If you have a part of Florida where
2 you have white Republicans and Hispanic
3 Republicans and same thing, the Florida
4 legislature draws it in a way that departs from
5 traditional principles and favors one or the
6 other racial group.

7 But what you can't have is merely just
8 showing that a Republican legislature favored
9 Republicans with whether or not they're white
10 or Black. And there's just no reason in the
11 world to think that the Louisiana legislature
12 would have done anything different in this case
13 if every Black Democrat in Louisiana was a
14 white Democrat.

15 JUSTICE ALITO: Let me ask you about
16 congruence and proportionality. So the
17 Fifteenth Amendment pretty clearly requires
18 intentional discrimination. And the 1982
19 amendment to the Voting Rights Act walked away
20 from intentional discrimination.

21 But my reading of your position is
22 that Congress's enforcement power under Section
23 2 of the Fifteenth Amendment allows it to go
24 beyond intentional discrimination for -- for
25 this reason: Proving intentional

1 discrimination is difficult in part because
2 it's really hard -- it's always hard to figure
3 out what legislative intent is. What was the
4 intent of the legislature in enacting a map?
5 Do you look at stray statements here or there
6 by legislators? Plus, a finding of intentional
7 discrimination accuses the state of a serious
8 wrongdoing.

9 So it's permissible to go beyond
10 intentional discrimination to this extent, to
11 identify factors that strongly support a
12 finding of intentional discrimination. And
13 that's what was involved in White versus
14 Regester, which figure very prominently in the
15 drafting of the 1982 amendments.

16 So, to that -- to -- if that's what
17 you're doing, it is congruent and proportional
18 in that respect. Is that a correct
19 understanding?

20 MR. MOOPPAN: That is. And if I can
21 just amplify a couple of points. So we agree
22 the Constitution prohibits intent. Congress's
23 enforcement power can let them go beyond that
24 to an in effects test, a properly tailored one
25 that gets at a significant risk, and that

1 avoids a lot of the difficulties of actually
2 having to prove intent by a preponderance of
3 the evidence.

4 And if it is actually tailored, if the
5 statute itself is tailored, to things that have
6 a significant risk, then we don't actually
7 think you necessarily need to have a temporal
8 limit in the statute itself. So that's why,
9 Justice Sotomayor, for example, the bans on
10 tests, literacy tests. We think those are fine
11 even though there's no end date in that statute
12 because those are well-known, highly likely to
13 be intentionally discriminatory laws even if
14 they're not always.

15 But the problem we have here is that
16 the way Section 2 has been construed under
17 Gingles and its progeny is so far from the
18 things that are likely intentionally
19 discriminatory and, indeed, are affirmatively
20 compelling gerrymanders that are
21 unconstitutional. If that is ever permissible,
22 it could only have been based on the centuries'
23 worth of discrimination that existed in 1965 --

24 JUSTICE ALITO: One -- one final
25 question. I'm -- I'm sorry to take up so much

1 time, but I would like you to address what
2 Solicitor General Aguiñaga said about the
3 practical problems he fears your approach would
4 take -- would -- would cause.

5 MR. MOOPPAN: So I'm not sure I really
6 understand what his concerns are. I think
7 the -- the way we've articulated the test, the
8 plaintiffs have to come in and show that they
9 have a map that is superior on -- to the
10 state's map on the state's own race-neutral
11 principles, including its political objectives.

12 I think the thing that the solicitor
13 general primarily focused on is confusion about
14 what it means to be predominant. We -- I think
15 we agree completely with them that the phrasing
16 of the standard is, is race a criteria that
17 could not be compromised? Have you
18 subordinated race to traditional principles?

19 And if you apply that test, I'm not
20 saying that there won't be difficulties on the
21 margins of how to apply it. There will be new
22 cases. You know, Your Honor wrote the opinion
23 for this Court in Brnovich. It was the first
24 time that the Court had ever adopted the test
25 for vote denial under Section 2. I'm sure

1 there were cases afterwards, but that test was
2 well tailored to the text of the statute and
3 its purposes.

4 And what we're essentially saying in
5 this case is you should do to Section 2 as
6 opposed to vote dilution what the Court has
7 already done as applied to vote denial. It
8 should --

9 JUSTICE ALITO: Thank you.

10 MR. MOOPPAN: -- adopt a test that's
11 tailored.

12 JUSTICE ALITO: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

15 JUSTICE SOTOMAYOR: The bottom line is
16 just get rid of Section 2 because the test
17 you're providing doesn't do anything for the
18 effects test that Congress identified. We did
19 say in Katzenbach, we've said it repeatedly,
20 that legislation need only be plainly adapted
21 to addressing discrimination --
22 discrimination practices in voting, right?

23 MR. MOOPPAN: Yes.

24 JUSTICE SOTOMAYOR: All right. The
25 standard that you're setting is a much

1 different one. It has to substantially be
2 addressing this issue.

3 Number two, what you're suggesting is
4 that people of one race, Blacks in Louisiana,
5 who will have to be some 51 percent of the
6 population before they'll be able to elect
7 another Black candidate because what you're
8 saying is partisanship is non-negotiable, you
9 have to create maps where you're going to have
10 six districts out of seven always white because
11 that's our partisanship. That means Blacks
12 never have a chance, no matter what their
13 number is, until they reach more than
14 51 percent.

15 MR. MOOPPAN: So I don't think that's
16 true for a lot of reasons, Your Honor. So the
17 first is, as I think the general pointed out,
18 even without Section 2, there's no reason to
19 assume that states are going to try to crack
20 every single --

21 JUSTICE SOTOMAYOR: Well, this --

22 MR. MOOPPAN: -- majority-minority
23 district. And the reason --

24 JUSTICE SOTOMAYOR: -- this -- the
25 illustrative maps show that a map drawn without

1 looking at race and partisanship together would
2 have created two districts.

3 MR. MOOPPAN: Your Honor --

4 JUSTICE SOTOMAYOR: Compact in all
5 traditional ways, it would have been District 2
6 and District 6 around the Baton Rouge and two
7 other counties that were tied historically and
8 otherwise. And politics, you say, not race, is
9 what led the State not to give them another
10 district.

11 MR. MOOPPAN: So I'll say several
12 things, Your Honor. First, I don't agree with
13 your characterization that the illustrative
14 maps were compact. They combined Blacks in
15 different parts of the state, just the way this
16 Court said you can't do that.

17 JUSTICE SOTOMAYOR: No, you're talking
18 about the last -- the State's chosen map.

19 MR. MOOPPAN: No, I'm not.

20 JUSTICE SOTOMAYOR: The map that --
21 the map that the --

22 MR. MOOPPAN: The latest illustrative
23 map. If you look at District 5 --

24 JUSTICE SOTOMAYOR: The illustrative
25 map was better -- the illustrative map, 2 and 6

1 were combined, but 2, even in the original map,
2 was not all that -- that compact.

3 MR. MOOPPAN: Justice Sotomayor,
4 you're -- as Justice Alito pointed out, I'm not
5 disputing the compactness of the district. I
6 agree they drew a very pretty rectangle. The
7 problem is that in the very pretty rectangle,
8 the Blacks lived in the south and the north.
9 And they took two very different groups of
10 Black people --

11 JUSTICE SOTOMAYOR: Well --

12 MR. MOOPPAN: -- and put them
13 together.

14 JUSTICE SOTOMAYOR: -- the problem is
15 that all of this map is that way, north and
16 south, east and west.

17 MR. MOOPPAN: Right, but they did it
18 for racial reasons, and the State did it for
19 non-racial reasons.

20 JUSTICE SOTOMAYOR: Well, really, in
21 excluding the Blacks, they did it for racial
22 reasons.

23 MR. MOOPPAN: No, Your Honor. There's
24 no argument for that, as Justice Alito pointed
25 out. The State's maps have been pre-cleared

1 twice by the Department of Justice. So the
2 suggestion that the fact that the prior maps
3 were 5-1 maps is not -- there's no basis to say
4 that that was for racial reasons.

5 And, again, West Virginia, zero
6 Democratic districts. There is a lot of white
7 Democrats in -- in West Virginia. There's just
8 no reason to assume that because there's a
9 large Democratic population in Louisiana that
10 doesn't have a district, that that's a racial
11 reason rather than a partisan reason.

12 JUSTICE SOTOMAYOR: If you can't
13 separate out the two, it's impossible.

14 MR. MOOPPAN: But you can separate out
15 the two. You can control for party and you can
16 require them to draw a map that meets the
17 political objectives.

18 And, again -- and the last thing that
19 you said earlier, that means Section 2 has no
20 effect, that's not true. The examples I gave
21 you earlier about areas like Harlem and in
22 Florida where you have, of the same party and
23 of the state that controls that party,
24 differences in the races, that's where Section
25 2 does work.

1 And, by the way, that was sort of in
2 Gingles. In Gingles, there was a showing that
3 you could control for partisan effect. There
4 was racially polarized voting even within the
5 Democratic Party. That's where Section 2
6 matters, where you have a reason to think that
7 a racial group --

8 JUSTICE SOTOMAYOR: You have some of
9 that here too.

10 MR. MOOPPAN: -- is being treated --

11 JUSTICE SOTOMAYOR: You have proof of
12 that here too.

13 MR. MOOPPAN: No, you don't. What you
14 have here is that Republicans and Democrats are
15 different. There's no --

16 JUSTICE SOTOMAYOR: No, you have some
17 that -- even white Republicans or white
18 Democrats won't -- won't vote for Black
19 candidates.

20 MR. MOOPPAN: Right. But, if these
21 were white Democrats, there's no reason to
22 think they would have a second district. None.
23 And so what is happening here is their argument
24 is, because these Democrats happen to be Black,
25 they get a second district. If they were all

1 white, we all agree they wouldn't get a second
2 district. That is literally the definition of
3 race subordinating traditional principles.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: Mr. Mooppan, just a
6 quick possibly digressive question. You're --
7 you're not contesting that if a state uses and
8 predominantly uses race-based criteria in order
9 to achieve partisan goals, that that's
10 impermissible?

11 MR. MOOPPAN: Agreed. That's
12 impermissible under Cooper and a bunch of
13 cases. We agree with that.

14 JUSTICE KAGAN: Okay. That's all I
15 wanted to know.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

18 JUSTICE GORSUCH: Just a couple of
19 questions about the practical implications that
20 Justice Alito was touching on and some of your
21 colleagues have as well.

22 How do we control for state political
23 objectives? I mean, you say, well, that's easy
24 to do. Is it the number of incumbent seats
25 that they want to protect? Is it the level at

1 which they think protection is appropriate?
2 Say, I need 55 percent of the population to be
3 registered Republicans or Democrats? Do they
4 get to say that? Does the state get to say, I
5 not only want five incumbents protected, but I
6 want them really protected?

7 That's one example. You know, does a
8 state have to say that when it's legislating,
9 or can it come in later in the litigation and
10 say that? Can a court -- and I'm just spitting
11 out a few things for you.

12 MR. MOOPPAN: Sure.

13 JUSTICE GORSUCH: You can just respond
14 to them how you want. Can a court second-guess
15 those and say how those are not really the
16 state's purposes, that they're just litigation
17 positions? How do we -- how is a court
18 supposed to handle that? And then I've got
19 some more for you.

20 MR. MOOPPAN: So the same way this
21 Court already handles that in racial
22 gerrymandering cases like Alexander. Yes, the
23 state can come in with whatever their political
24 objectives are. If they want to say it's not
25 just a 6-1 map, it's a 6-and-1 map with a

1 certain percentage because we want to make sure
2 certain people are safe, really safe, and we're
3 willing to tolerate a little bit more risk
4 elsewhere, it's up to them to set what their
5 political objectives are as long as they are
6 race-neutral.

7 Now can a court second-guess that?

8 Yes. If -- if -- if they say, look, these are
9 our interests and the map as drawn is
10 inconsistent with that in a bunch of ways, a
11 court could say we don't believe that the --

12 JUSTICE GORSUCH: Well, what if the
13 map is consistent with it? Can I still try and
14 disprove it?

15 MR. MOOPPAN: Well, no. It --

16 JUSTICE GORSUCH: Say that wasn't -- I
17 mean, that -- that's what the map does, but
18 that's not really what they were after.

19 MR. MOOPPAN: So, if -- if you -- you
20 could try if -- you could try to bring an
21 intentional discrimination case --

22 JUSTICE GORSUCH: Okay.

23 MR. MOOPPAN: -- and say that it's
24 pretextual.

25 JUSTICE GORSUCH: How about cohesion?

1 Right? You know, you -- you say, well, you've
2 got to segregate out members of one race or
3 another based on their party affiliations and
4 crossover voting and how much they really won't
5 vote for somebody of the other race even if
6 they're the same party.

7 How much cohesion is enough? I mean,
8 you never -- very rarely is it going to be that
9 there's zero crossover voting and a hundred
10 percent cohesion and vice versa. It's going to
11 be areas of gray. And are we then into the
12 business perhaps of stereotyping?

13 MR. MOOPPAN: So the Court has never
14 made clear what level of cohesion --

15 JUSTICE GORSUCH: I know.

16 MR. MOOPPAN: -- is necessary. I
17 think the right way --

18 JUSTICE GORSUCH: That's why I'm
19 asking you.

20 MR. MOOPPAN: Right. I think the
21 right way to think about it analytically is, if
22 the plaintiffs have an illustrative map that
23 satisfies our first criteria, right, that they
24 are --

25 JUSTICE GORSUCH: No, this is another

1 criteria.

2 MR. MOOPPAN: Right. Right. So
3 assuming they've satisfied that, then the
4 question is: Is there enough Black
5 cohesiveness that they can win the district?
6 So you would have to look to see how much Black
7 cohesion is there and how much white crossover
8 voting is there, and if, together, they can
9 predictively and safely win the district, then
10 they've satisfied --

11 JUSTICE GORSUCH: What's predictive --
12 predictably and safely? I mean, those are nice
13 qualifying words. I mean, does it have to be
14 just 50 plus one, does it have to be 60, you
15 know, I mean --

16 MR. MOOPPAN: Well, so I think --

17 JUSTICE GORSUCH: -- and how does a
18 judge make that decision?

19 MR. MOOPPAN: -- I think the courts,
20 what they've usually done is looked at how the
21 map would have performed in prior elections.
22 You don't just look at one because there can be
23 outlier --

24 JUSTICE GORSUCH: Oh, you can run
25 thousands of these things. I mean, we've got

1 computers now. I mean, goodness, of course.

2 And you're going to have data points all over
3 the place.

4 But a judge is going to have to draw a
5 line, and I'm wondering how the judge draws
6 that line.

7 MR. MOOPPAN: So we have lots of
8 concerns with how Gingles is applied over time,
9 but this isn't one of them. This seems to have
10 been a --

11 JUSTICE GORSUCH: Well, this will be
12 the next problem if we go your way is all I'm
13 saying.

14 MR. MOOPPAN: I don't -- I don't think
15 so, Your Honor. And I -- if your concern is,
16 well, instead, let's just scrap Section 2
17 entirely --

18 JUSTICE GORSUCH: No, I'm not asking
19 that. That isn't my question. I'm asking --
20 I -- I -- I -- I'm listening to everything
21 everybody is telling me. I'm asking you about
22 your proposal.

23 MR. MOOPPAN: Right. Right. And so,
24 if -- I guess my point is, if the concern with
25 our proposal is that you will have to answer

1 cohesiveness questions that require some amount
2 of empirical showing, what's the alternative?

3 JUSTICE GORSUCH: Okay.

4 MR. MOOPPAN: And --

5 JUSTICE GORSUCH: I got it. It's
6 always the bear. It's -- I'm just -- I'm
7 outrunning a bear. I got it. Okay.

8 Predominance, what does that mean? I
9 know it's throughout our case law, and I know
10 you say it can't be compromised.

11 Is that a but-for causation test? Is
12 that a proximate causation test? What is it?

13 MR. MOOPPAN: I don't think it's
14 but-for. I think --

15 JUSTICE GORSUCH: Well, but-for can't
16 be compromised. It means it's an essential
17 component, it wouldn't have happened but-for.
18 Okay. So it's not but-for.

19 MR. MOOPPAN: It's not but-for. The
20 way the Court has described it as --

21 JUSTICE GORSUCH: Is it a proximate
22 cause?

23 MR. MOOPPAN: I don't think that's the
24 right way of thinking about it.

25 JUSTICE GORSUCH: It's not a proximate

1 cause? So what is it?

2 MR. MOOPPAN: I -- I think the -- the
3 way the Court has described it is it's the
4 factor that -- a factor that could not be
5 compromised and where race-neutral principles
6 were subordinated to it.

7 So this case is a very easy case to
8 analyze that because the race-neutral
9 principles of incumbency protection were --

10 JUSTICE GORSUCH: I -- I -- I'm not
11 worried --

12 MR. MOOPPAN: Okay.

13 JUSTICE GORSUCH: I'm focusing on your
14 test going forward.

15 MR. MOOPPAN: Yes.

16 JUSTICE GORSUCH: Not this case.

17 MR. MOOPPAN: So let me help you this
18 way then because I think the question is when
19 is it -- when is predominance not satisfied
20 where race is considered.

21 Here's -- I'll give you two examples.

22 JUSTICE GORSUCH: Yeah. I mean, under
23 our normal equal protection jurisprudence, we
24 don't ask --

25 MR. MOOPPAN: Sure.

1 JUSTICE GORSUCH: -- whether race
2 predominated. We say you don't discriminate on
3 the basis of race, period.

4 MR. MOOPPAN: Right. So let me give
5 you two examples where race is considered, but,
6 under the predominance test, it wouldn't be
7 satisfied. And that's why, for example, this
8 Court has said that the intentional creation of
9 a majority-minority district does not alone
10 show predominance, and we agree with them about
11 that.

12 So here is one example. The map
13 drawer doesn't consider race at all, uses
14 race-neutral principles. The computer spits
15 out two maps that are totally equivalent. To
16 pick between them, they say: Okay. We'll use
17 the one that has the majority-minority.

18 JUSTICE GORSUCH: But that gives rise
19 to an inference of intentional discrimination.
20 There's no other explanation that can be
21 provided in your hypothetical. That's
22 intentional discrimination. That's not
23 predominance. That's -- that's choosing on the
24 basis of race.

25 MR. MOOPPAN: Again, the -- neither of

1 this Court's formulations of predominance are
2 met on that fact pattern. You can't say that
3 race-neutral principles were subordinated.
4 They weren't. And you can't say that the race
5 was non-negotiable. It wasn't. So that's one
6 example.

7 Another example would be if you use
8 race-neutral principles and the best map
9 happens to be a majority-minority district, and
10 then someone tries to say: Don't draw that
11 map, draw a different map for some other
12 reason. And they say: No, we don't want to do
13 that. We don't want to get rid of a Black
14 district.

15 JUSTICE GORSUCH: That's intentional
16 as well. Okay. All right.

17 MR. MOOPPAN: Again, I -- I -- I agree
18 with you. My whole point is what this Court
19 has said again and again and again.

20 JUSTICE GORSUCH: Oh, I know what it
21 said. I just don't know what it means.

22 (Laughter.)

23 MR. MOOPPAN: I think it means exactly
24 what I'm saying, that it -- it's not enough for
25 it to be intent.

1 JUSTICE GORSUCH: Okay.

2 MR. MOOPPAN: It has to be that race,
3 race-neutral principles are subordinated to
4 race.

5 JUSTICE GORSUCH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Kavanaugh?

8 JUSTICE KAVANAUGH: Well, I'm going to
9 pick up right there because I had a lot of
10 questions about your use of the word
11 "predominance" as well, which the amicus briefs
12 on your side say that word has been hopeless, I
13 think, in trying to figure out what it means.

14 What I've understood it to mean over
15 time in the jurisprudence in this area is that
16 race does not predominate if the district, even
17 though drawn based on race, is reasonably
18 configured and compact.

19 Is that what you think?

20 MR. MOOPPAN: Yes and no, right?

21 So --

22 (Laughter.)

23 JUSTICE KAVANAUGH: That's not -- not
24 as helpful.

25 MR. MOOPPAN: I know. And so here is

1 the issue. This Court has recognized -- the
2 test is whether race-neutral principles are
3 subordinated to race.

4 If you don't comply with traditional
5 principles, then, clearly, you have
6 subordination. But what this Court held in
7 cases like Bethune-Hill and Cooper, and we
8 agree with that, is, if you just are dead set
9 on drawing a 55 percent Black district, but you
10 manage to do it in a way that's consistent with
11 traditional principles, that is still racial
12 subordination.

13 But here's the really important point
14 for this case. We are not arguing, absolutely
15 not arguing what Alabama argued in Milligan,
16 which is that the plaintiffs can't consider
17 race and that the plaintiffs can't have
18 55 percent.

19 JUSTICE KAVANAUGH: I understand that.

20 MR. MOOPPAN: And what does matter to
21 what the Court --

22 JUSTICE KAVANAUGH: But it -- but it
23 seems like your position is you can use -- the
24 State can use race a little bit.

25 MR. MOOPPAN: If we're talking about

1 the State acting --

2 JUSTICE KAVANAUGH: It's kind of like
3 the Bakke kind of thing. It's race -- race --

4 MR. MOOPPAN: Yes, if you're talking
5 about the --

6 JUSTICE KAVANAUGH: Some -- some --

7 MR. MOOPPAN: If you're talking about
8 the State acting in the first instance wholly
9 apart from Section 2, yes, our position and
10 this Court's position has been you can consider
11 race, and the reason why is because
12 redistricting is a complicated multi-factor
13 inquiry where lots of the permissible factors
14 highly correlate to race.

15 And if you don't have a standard like
16 predominance, as this Court recognized in
17 Alexander, every partisan gerrymander case will
18 become a racial gerrymander case because they
19 will always come in and say: Aha, you must
20 have considered --

21 JUSTICE KAVANAUGH: But where it
22 predominates, I'm repeating myself now, is
23 where the district becomes not compact, not
24 reasonably configured basic -- basically?

25 MR. MOOPPAN: That is one -- that is

1 one way it becomes -- race doesn't predominate.
2 The other way is if they just set out to say:
3 I'm going to draw a 55 percent Black district
4 and then they backfill from there because --

5 JUSTICE KAVANAUGH: That's race
6 predominated.

7 MR. MOOPPAN: Exactly.

8 JUSTICE KAVANAUGH: Yeah.

9 MR. MOOPPAN: But importantly for our
10 purposes, in a Section 2 case, when we say that
11 race can't predominate in the step 1 of
12 Gingles, we are not focused on what the
13 plaintiffs do.

14 JUSTICE KAVANAUGH: Right.

15 MR. MOOPPAN: The plaintiffs can
16 absolutely consider race.

17 JUSTICE KAVANAUGH: Okay. I got that.

18 MR. MOOPPAN: The Court has to
19 conclude that their map is better than the
20 State's map.

21 JUSTICE KAVANAUGH: Okay.

22 MR. MOOPPAN: And then you avoid
23 predominance.

24 JUSTICE KAVANAUGH: I got that. Okay.
25 So then what I viewed as the real innovation of

1 your brief that we have not considered before,
2 as you point out, is this -- the material on
3 page 25, the political objectives.

4 MR. MOOPPAN: Yes.

5 JUSTICE KAVANAUGH: And that strikes
6 me as new, but also new because we haven't
7 considered it before.

8 MR. MOOPPAN: So I think that's right.
9 I don't think this Court has ever squarely
10 considered it. I think part of the reason the
11 Court has not --

12 JUSTICE KAVANAUGH: What's the
13 rationale for why it's consistent for what we
14 have allowed before?

15 MR. MOOPPAN: Because it is another
16 traditional race-neutral principle. It is one
17 that hasn't been urged as frequently, in part,
18 because it was unclear whether partisan
19 gerrymandering --

20 JUSTICE KAVANAUGH: Because of Rucho.
21 I mean, pre-Rucho.

22 MR. MOOPPAN: Right, pre-Rucho.

23 But post-Rucho, it is totally clear
24 that that is a permissible criteria. Indeed,
25 in Rucho, the Court described it as ignoring

1 the good-faith inference that the legislatures
2 do to not consider their political objectives.

3 JUSTICE KAVANAUGH: Got it. And is it
4 also, though, part of constitutional avoidance?

5 MR. MOOPPAN: Yes. Again, because --

6 JUSTICE KAVANAUGH: So there are
7 two things. There's it hasn't been considered
8 before and it avoids constitutional problems if
9 we fold page 25?

10 MR. MOOPPAN: That's absolutely right.
11 Again, I think one thing to remember here is
12 Gingles was written in 1985. It was 10 years
13 before this Court wrote Shaw and Miller and all
14 the predominance cases. There is just no way
15 Gingles would have ever been written the way it
16 was if it was decided after those cases.

17 JUSTICE KAVANAUGH: Okay.

18 MR. MOOPPAN: That is an intervening
19 change in law that has created constitutional
20 issues, and I think the Court should modify
21 Gingles to reflect that.

22 JUSTICE KAVANAUGH: Got it.

23 Two more. Sorry.

24 Do you agree with Louisiana on the
25 Constitution?

1 MR. MOOPPAN: In part but not
2 entirely. We --

3 JUSTICE KAVANAUGH: Can you explain
4 that?

5 MR. MOOPPAN: Yeah. So we don't think
6 that it is unconstitutional for Congress to
7 have any results test or that the current
8 results test can't survive if it's construed
9 the way we've proposed it.

10 JUSTICE KAVANAUGH: What if it were
11 not construed the way you want it to be
12 construed?

13 MR. MOOPPAN: Then we think that --

14 JUSTICE KAVANAUGH: What -- what is
15 your position on the temporal point?

16 MR. MOOPPAN: So, if it was construed
17 differently than we've proposed, we do think
18 it's unconstitutional both because of the
19 temporal point and because of its scope just to
20 begin with, right?

21 JUSTICE KAVANAUGH: And to be clear,
22 you're not saying Section 2 is
23 unconstitutional. Section 2 as applied to
24 redistricting, to the extent it requires the
25 intentional use of race to create districts,

1 if there's no change in Gingles, that's your
2 position?

3 MR. MOOPPAN: I agree with all that
4 except, instead of the word "intentional," I
5 would say use the word "predominant." But,
6 with that caveat, yes.

7 JUSTICE KAVANAUGH: Yes. Got that.

8 Okay. Last, this is picking up on
9 Justice Gorsuch, I think your Harlem hypo is
10 very challenging because, I mean, you get into
11 elections and you're micro-analyzing the data.
12 White Democrats and Black Democrats are not
13 necessarily -- there's going to be a lot of
14 times differences in that, and you say that
15 triggers the finding of polarization, correct?

16 MR. MOOPPAN: Yeah. If there is
17 different --

18 JUSTICE KAVANAUGH: I mean, how big
19 a difference does it have to be?

20 MR. MOOPPAN: Again, I think the right
21 way of --

22 JUSTICE KAVANAUGH: Like, a 10-point
23 difference?

24 MR. MOOPPAN: I think the right way of
25 thinking about it is, if you start with their

1 step 1, which is what would the map look like
2 if they'd done it on race-neutral grounds, and
3 then say is there enough polarization that the
4 minority group who would have been in that
5 district could have won, then they can satisfy
6 steps 1 and 2.

7 JUSTICE KAVANAUGH: Thank you.

8 MR. MOOPPAN: If there's one last
9 point I can make, Your Honor?

10 JUSTICE KAVANAUGH: Yeah.

11 MR. MOOPPAN: You had asked a question
12 earlier about the practical consequences of our
13 opinion --

14 JUSTICE KAVANAUGH: Yes.

15 MR. MOOPPAN: -- position. I just do
16 want to emphasize one thing about that, which
17 is, if you look at Congress today, there are
18 roughly 60 Black representatives. If you look
19 at the districts, there are only 15
20 majority-Black districts. So, even if
21 Section -- we're not even urging Section 2 to
22 be eliminated, but even if you eliminated
23 Section 2 entirely, fully 75 percent of the
24 Black congressmen in this country are in
25 districts that are not protected by Section 2.

1 So it is simply not the case that adopting any
2 of the positions on this side, let alone our
3 position --

4 JUSTICE KAVANAUGH: Just to be fair,
5 they're not arguing for eliminating Section 2
6 entirely. I think they would disagree with --

7 MR. MOOPPAN: Right.

8 JUSTICE KAVANAUGH: -- that
9 characterization.

10 MR. MOOPPAN: But, under any view of
11 it, none of these positions can -- is going to
12 lead to there being no Black representation in
13 Congress or anything remotely approaching that.

14 JUSTICE KAVANAUGH: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Barrett?

18 JUSTICE BARRETT: Mr. Mooppan, I have
19 one hopefully very straightforward question.
20 It's really just to clarify.

21 You've -- you've said, and you said
22 just now to Justice Kavanaugh, and, you know, I
23 take this to be in your brief too, that your
24 position would require a modification of
25 Gingles. Is that necessarily true? Is there a

1 way to say it's a clarification of Gingles?

2 I mean, Gingles is a, you know,
3 40-year-old precedent.

4 MR. MOOPPAN: So --

5 JUSTICE BARRETT: A big ask to -- to
6 change it.

7 MR. MOOPPAN: Yeah. So most of what
8 we are urging, I think, could be described as
9 clarification.

10 So we have three key points in our
11 brief. One is about how you do reasonably
12 configured. The second is about how you do
13 racially polarized voting. And the third is
14 how do you the totality-of-circumstances
15 inquiry.

16 The last two I think can fairly be
17 described as a clarification because the Court
18 has never really grappled with exactly how the
19 totality works, and it has expressly left open
20 the question of racially polarized voting.

21 As to the first part, the reasonably
22 configured, most of what we're saying is
23 consistent with most of this Court's cases, but
24 after Milligan, I do have to acknowledge that
25 that aspect of what we're urging, that it

1 can't -- it's not enough that it be reasonably
2 equivalent, that the Plaintiffs' map has to be
3 superior, that is undoubtedly a modification.

4 But I would say it is no greater of a
5 modification than, for example, what this Court
6 did in Kisor when it retained Auer but tweaked
7 it in various ways.

8 (Laughter.)

9 MR. MOOPPAN: So I certainly think
10 it's consistent with stare decisis.

11 JUSTICE BARRETT: Okay. Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 JUSTICE KAGAN: That was a tweaking.

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: Sorry, Justice
17 Jackson.

18 JUSTICE BARRETT: Sorry.

19 JUSTICE JACKSON: The Plaintiffs' map
20 has to be superior in your view under this new
21 part insofar as it's race -- it uses
22 race-neutral criteria? Is that what you mean?

23 MR. MOOPPAN: Yes.

24 JUSTICE JACKSON: And that's what was
25 asked for by Alabama, and so you'd be saying

1 that that would require a change to what we
2 said.

3 MR. MOOPPAN: No, Alabama didn't argue
4 that. The problem with what Alabama argued is
5 Alabama basically said the plaintiffs have to
6 come up in court and, without considering race
7 at all, somehow magically show up with a
8 50 percent district. We're not arguing that.
9 It didn't make much sense, so it's not
10 surprising that --

11 JUSTICE JACKSON: Oh, I thought they
12 were saying you had to have a race-neutral
13 drawing. That was the whole thing about the
14 computers and --

15 MR. MOOPPAN: No. So they had some
16 weird thing about computers, which, again, is
17 not what we're arguing.

18 JUSTICE JACKSON: No, but it -- but --
19 but it's crucial to this point. Their weird
20 thing about computers was you have to
21 demonstrate as the plaintiff that you have a
22 race-neutral map. And that's what you're
23 saying right now.

24 MR. MOOPPAN: It's a very different
25 thing. Yes, they both used the word

1 "race-neutral," but what Alabama did was
2 something about computers that I, frankly,
3 don't understand. What we are arguing is
4 simply, under the state's own principles --

5 JUSTICE JACKSON: Right.

6 MR. MOOPPAN: -- their map has to be
7 better. That I do understand.

8 JUSTICE JACKSON: All right. And then
9 my final question just goes to that point
10 because I'm struck by your -- the degree to
11 which your analysis relies on the State's
12 departing from traditional principles. You say
13 you get to Section 2 when they -- a Section 2
14 violation when they do that.

15 And I guess I just wonder why that
16 doesn't leave us in a position where you really
17 cannot remedy the effects of race
18 discrimination operating in a district based on
19 past discriminatory choices.

20 In other words, we -- we -- you're
21 still bringing in intent because you're saying
22 you have to intentionally depart from your
23 traditional principles on the basis of race,
24 and that's what's going to trigger Section 2.
25 And I have, for example, the Louisiana

1 historians' brief where it talks about how the
2 reason why you have Blacks in different places
3 is because the residential patterns in the
4 state are still reflective of where enslaved
5 communities lived along this particular river
6 system and that residential segregation, along
7 with disparities in political power, economic
8 status, health outcomes, all of these things
9 are existent today because they reflect
10 institutional choices that are traceable to Jim
11 Crow and reproduced through contemporary
12 practices. That last part is a quote from
13 them.

14 So I appreciate that you want to say,
15 when the State comes with their new map, we
16 have to look at the extent to which, in drawing
17 it, they have departed from particular -- from
18 traditional principles on racial grounds. What
19 I'm suggesting is, what do we do with the
20 situation in which the State keeps presenting
21 the same map? They're not departing. Their
22 map looks fine, but because of all of these
23 race-based effects, because of the history of
24 Jim Crow, which I appreciate happened a long
25 time ago, but I'm positing and Gingles allows

1 for us to see where those effects are still
2 occurring.

3 I hear your test not allowing us to
4 solve for that problem when the State is
5 continuing to present the same map under
6 circumstances in which people are not actually
7 being able to have equal electoral opportunity.

8 MR. MOOPPAN: So I guess I'll say
9 three things about that, Your Honor. The first
10 is, again, our position does not require
11 intent. I agree that at step 1, we're saying
12 you have to consider race-neutral principles,
13 but if they've departed from them, we think you
14 could find liability based on the effect
15 without making a finding that they did it for
16 intentional discriminatory reasons.

17 Now, second, you pointed to the fact
18 that it's possible that there are -- these
19 effects stem from long distance, and --

20 JUSTICE JACKSON: Can I just ask you,
21 why do they have to depart? What if they just
22 keep on doing the same thing? They're not
23 changing the map. I thought Section 2's whole
24 point was that you've got to offer a remedy,
25 you've got to have a remedy where this thing is

1 happening.

2 So the -- the well-intentioned state,
3 with no intent to discriminate, says the census
4 has changed, this is where people live, but
5 we're just going to provide our same map. And
6 if we can determine that that map under those
7 circumstances is not providing for electoral
8 opportunity, regardless of whether they
9 departed from traditional principles, I thought
10 you -- you had to solve for that.

11 MR. MOOPPAN: And I guess our point is
12 you don't.

13 JUSTICE JACKSON: You don't. It's
14 only where they depart from traditional
15 principles?

16 MR. MOOPPAN: It's only where you
17 could say that it's either intentionally or
18 likely intentionally discriminatory.

19 JUSTICE JACKSON: So intent does come
20 in?

21 MR. MOOPPAN: You don't have to prove
22 it by a preponderance of the evidence.

23 JUSTICE JACKSON: I see.

24 MR. MOOPPAN: It's any other results
25 test.

1 JUSTICE JACKSON: Thank you.

2 MR. MOOPPAN: Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Rebuttal, Ms. Nelson?

6 REBUTTAL ARGUMENT OF JANAI NELSON
7 ON BEHALF OF APPELLANTS PRESS ROBINSON, ET AL.

8 MS. NELSON: Twenty-eight months ago,
9 this Court made it pellucidly clear that
10 Section 2 is constitutional and that there need
11 not be a race-neutral map that is presented as
12 part of the illustrative maps. Many questions
13 that are presented by my opponents on the other
14 side have been asked and answered in Milligan.

15 What is also clear is that Louisiana
16 is emblematic of the ongoing need for Section
17 2. For example, we're talking about how close
18 this may come to intent or results. If we look
19 simply at the evidence here in Louisiana, we
20 see that Louisiana had shifting justifications
21 for its map. Whenever it was presented with a
22 map that met or beat its criteria and gave
23 Black voters an equal opportunity to
24 participate in the process, it rejected those
25 maps.

1 The court in Robinson also relied on
2 the fact that there has never been a Black
3 candidate elected on a statewide basis. Even
4 when white Democrats won an election in 2019,
5 Black Democrats lost. My opponents here would
6 like to make this a partisan issue because they
7 believe the case law will enable their case to
8 prevail. But it does not. This is about race.

9 Section 2 in the Voting Rights Act is
10 laser-focused on eliminating racial
11 discrimination from our electoral process
12 regardless of party. And if we look at many of
13 the Black Congress people who were elected,
14 they came out of Section 2 opportunity
15 districts. They don't have to be
16 majority-minority districts. Many of them are
17 crossover districts.

18 And so, if we remove Section 2, we
19 also recognize that there will likely be a
20 resurgence of discrimination because Section 2
21 plays a deterrent effect. States are drawing
22 maps with Section 2 in mind. In fact, Local
23 Rule 21 in Louisiana says that the State must
24 comply with Section 2. The fact that HB1,
25 which was the original map, was pre-cleared by

1 the Department of Justice means very little.

2 Retrogression is an entirely different
3 standard from what Section 2 is looking at.

4 Retrogression means the State of Louisiana
5 cannot go backwards. Section 2 is talking
6 about whether there is active discrimination
7 right now preventing the additional
8 opportunities for Black voters who meet all of
9 the Gingles preconditions to have an equal
10 opportunity to participate in the process.

11 Requiring plaintiffs to control for
12 party is helpful if that evidence exists, and
13 it did to some extent in Robinson, where we put
14 on evidence about Democratic elections and the
15 preferences of white voters that still
16 preferred white Democrats over Black Democrats.
17 But that is not the only question.

18 If that evidence is available, and I
19 will remind the Court it's not often available
20 if there aren't primary elections or if we are
21 looking at more down-ballot elections, not just
22 the congressional elections at issue here, that
23 evidence is useful, but if there is significant
24 racially polarized voting, that has already
25 been shown to be probative of intentional -- of

1 discrimination that comes very close to
2 intentional discrimination.

3 What Congress did in Section 2 was
4 strike a very careful balance of using factors
5 like *White v. Regester*, like the *Zimmer*
6 factors, to bring us as close to a finding of
7 intent without making the full accusation and
8 without requiring that conclusion on the part
9 of courts.

10 So we should not downplay, as my
11 opponents have, the robust nature and exacting
12 requirements of a Gingles test and also remind
13 ourselves that the City of Rome in 1980 made
14 very clear that Congress can address effects
15 beyond what the Fifteenth Amendment requires.

16 I'll close by saying that in *Bush v.*
17 *Vera*, this Court said that it must be
18 particularly concerned about changing its
19 decisions or rejecting *stare decisis* in cases
20 that involve a sensitive political context like
21 the one -- like this one.

22 That calls the Court's legitimacy into
23 question in a new unique way. My opponents
24 here have not done the labor of showing that
25 precedents should be overturned. They haven't

1 addressed Janus. They haven't addressed Ramos.
2 They've simply said that we should overturn or
3 tweak the precedent that governs Section 2.

4 And I would say that there's no record
5 to support that in this case, and this Court
6 would be remiss to not require that if it is
7 entertaining any significant modifications of
8 Section 2.

9 Any further neutering of Section 2
10 would resurrect the Fifteenth Amendment as a
11 mere parchment promise, and we ask the Court to
12 remand.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 The case is submitted.

17 (Whereupon, at 12:35 p.m., the case
18 was submitted.)
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Official - Subject to Final Review

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