SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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LOUISIANA,)

Appellant,)

v.) No. 24-109

PHILLIP CALLAIS, ET AL.,)

Appellees.)

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PRESS ROBINSON, ET AL.,)

Appellants,)

v.) No. 24-110

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Washington, D.C.

Wednesday, October 15, 2025

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

APPEARANCES:

JANAI NELSON, ESQUIRE, New York, New York; on behalf of Appellants Press Robinson, et al.

J. BENJAMIN AGUI AGA, Solicitor General, Baton Rouge, Louisiana; on behalf of Appellant Louisiana.

EDWARD D. GREIM, ESQUIRE, Kansas City, Missouri; on behalf of the Appellees.

HASHIM M. MOOPPAN, Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Appellees.

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P R O C E E D I N G S

(10:04 a.m.)

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

Ms. Nelson.

ORAL ARGUMENT OF JANAI NELSON

ON BEHALF OF APPELLANTS PRESS ROBINSON, ET AL.

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

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

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

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

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

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

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

stare decisis counsels staying the course.

I welcome your questions.

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

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

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

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

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

MS. NELSON: Yes. There was a

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

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

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

MS. NELSON: That's correct.

JUSTICE THOMAS: SB8 was on the -- entirely separate, though, from that litigation?

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

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

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

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

JUSTICE THOMAS: Thank you.

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

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

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

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

CHIEF JUSTICE ROBERTS: In other

words, we were looking at Alabama's suggestion that -- how to apply its body of evidence or which evidentiary considerations we should take into account under the existing precedent?

MS. NELSON: That's correct.

CHIEF JUSTICE ROBERTS: Thank you.

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

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

Similarly, what we have in Louisiana is a circumstance where Louisiana was constructing a map and had a single district that could elect a preferred black candidate

and had an opportunity to draw a second district based on the size and geography of its black population and chose not to do so in the face of seven illustrative maps that made clear that the -- that they were not -- not -- they were not dilutive.

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

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

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

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

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

MS. NELSON: That -- that is absolutely correct. And, in fact, Appellees,

on page 11 of their supplemental brief, state that they understand that this Court answered that question clearly that results is a -- a constitutional test, that race can be used to remedy violations, and it therefore isn't making that particular argument.

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

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

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

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

Would you agree that incumbent protection is one of those?

MS. NELSON: Incumbent protection has been considered a traditional districting criteria. However, we know that protecting an incumbent, like core retention, can continue to perpetuate discrimination, and it does not trump the antidiscrimination principle.

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

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

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

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

JUSTICE ALITO: Oh, sure. Sure.

MS. NELSON: There's no -- there's no part of --

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

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

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

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

JUSTICE ALITO: Okay.

MS. NELSON: -- and voting behavior.

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

MS. NELSON: That's not how we measure voting. We measure voting based on race for purposes of Section 2 because the Constitution

forbids race discrimination in voting, not party discrimination.

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

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

And I will say, in Robinson, for example, the Court entertained testimony along those lines, as it did in Milligan, and found that it wasn't credible, that the extreme

racially polarized voting that we have in the State of Louisiana cannot be explained away by party.

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

JUSTICE ALITO: Well, that could be --

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

JUSTICE ALITO: -- I mean, that could be -- that could be easily analyzed by statistics to see whether black -- whether white Democrats vote for black Democratic candidates at a lower rate than they do for white Democratic candidates, whether white Republicans vote for -- for black Republican candidates at a lower rate than they do for white candidates. It's easy to isolate race from that -- from that to see whether there really is racially polarized voting as opposed to partisan polarized voting.

MS. NELSON: That's right. And in the State of Louisiana, that -- that analysis was conducted in the Nairne case, and it was clear

that regardless of party, white Democrats were not voting for black candidates, whether they were Democrats or not.

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

JUSTICE KAVANAUGH: Can you comment on the Solicitor General's suggestion at page 25 of its brief that the Court should hold that "Plaintiffs' illustrative district cannot disregard the state's political objectives" and goes on to say "Section 2 plaintiffs cannot claim a lack of equal openness where politics rather than race is the likely reason for the State's refusal to create a majority-minority district?"

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

The fact that black voters may

correlate with voting Democrat or white voters may correlate with voting Republican does not deny the fact that there is racially polarized voting. And the totality of the circumstances, including the inability to elect black candidates in Louisiana on a statewide basis for a number of offices -- there's never been a black person in Louisiana elected statewide -- is additional indicia that race is playing an outsized role in the electoral process in Louisiana.

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

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

MS. NELSON: So this Court has held

for -- for a long time, beginning in Shaw and in many cases since, that there's always an awareness of race. There are always racial considerations and even race consciousness in the districting process.

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

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

If I may address the durational limit question which came up. I'd like to talk about the fact that Section 2 is self-limiting. I know that there is a general concern about the

indefinite use of race, and there are several reasons why that concern should be allayed.

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

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

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

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

JUSTICE KAVANAUGH: The issue --

JUSTICE BARRETT: Can I --

JUSTICE KAVANAUGH: -- as you know, is that this Court's cases in a variety of contexts have said that race-based remedies are

permissible for a period of time, sometimes for a long period of time, decades in some cases, but that they should not be indefinite and should have a end point.

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

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

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

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

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

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

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

JUSTICE JACKSON: Is that because --

JUSTICE BARRETT: Can I ask --

JUSTICE JACKSON: -- is that --

JUSTICE BARRETT: I just wanted to follow up on Justice Kavanaugh's question.

What if this is an exercise of Congress's enforcement power? If we're looking at the City of Boerne test and we're saying it has to be congruent and proportional, would that affect Justice -- your answer to Justice Kavanaugh's question, that if it's going above and beyond what the Fifteenth Amendment requires of its own force, but Congress has actually chosen the Voting Rights Act as a remedy, does that affect the question of whether it can go on indefinitely or not, that at some point it becomes not congruent and proportional?

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

JUSTICE BARRETT: I just assume -- assume --

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

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

MS. NELSON: Sure. Assuming that it does, as you know, in Boerne, this Court held up the Voting Rights Act as the paradigmatic

example of congruence and proportionality. The fact that the Voting Rights Act at times may require a race-based remedy does not change the fact that Congress, with its enlarged powers as defined by Ex parte Virginia and the line of cases forward, can address conduct that is beyond what the Fifteenth Amendment addresses.

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

JUSTICE JACKSON: So, Ms. Nelson --

MS. NELSON: -- the 1982 amendments.

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

MS. NELSON: That's absolutely

correct.

JUSTICE JACKSON: So it's a law that is just encouraging or requiring a -- a check-in. It's like a tool. It's like a -- a tape measure that we're looking as to whether or not certain circumstances exist, and those circumstances that Congress is worried about is unequal access to electoral opportunity. And Section 2 tells you we have to look for those circumstances, and then the Court says, yep, they exist in this situation under Section 2 and so now a remedy is required.

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

MS. NELSON: That's absolutely correct.

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

something.

MS. NELSON: That's right. And its usage becomes less and less as we see racially polarized voting and residential segregation decreasing. The Katz amicus brief in this case shows that in the past decade, Section 2 cases have decreased by 50 percent.

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

MS. NELSON: They cannot make the showing.

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

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

JUSTICE JACKSON: So, if we're talking

about a time limit, you would say maybe it's with respect to the remedy that is used to respond to the -- to the problem that we've identified under Section 2, but the Section 2 tape measure itself doesn't need a -- a life cycle? It's just --

MS. NELSON: No.

JUSTICE JACKSON: Yeah.

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

JUSTICE JACKSON: Thank you.

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

And the absence of it or -- or the declining ability to show a Section 2 case is because of the success of Section 2 over the past four decades. And we would be reckless if we determined that Section 2 somehow is no longer needed simply because it has been so successful in rooting out racial discrimination in voting.

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

Justice Alito?

JUSTICE ALITO: Yeah. Let me pick up with where you left off, which related to the illustrative map in -- in the Robinson case, and let me go back once again to what we said, what the Court said, in Milligan.

The minority group -- this is the first Gingles precondition. "The minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably [con]figured district."

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

MS. NELSON: All of the seven illustrative maps that we presented to the Robinson court were geographically compact. They met every traditional redistricting criteria. They even beat the State's maps on the very criteria that the State set forth that

it was pursuing in the redistricting process.

JUSTICE ALITO: Well, that wasn't my question. My question was, did the Robinson court find that the minority group was compact as opposed to the district being compact?

MS. NELSON: Yes, it did.

JUSTICE ALITO: There's a very serious --

MS. NELSON: Yes, it did.

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

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

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

JUSTICE ALITO: No, I'm referring to

the illustrative map, although the same may be said about SB8, but I'm referring to the illustrative map. But we can -- we -- we -- we don't need to argue about what was done in the case, but it's my firm recollection that what the district court did and what the Fifth Circuit did on appeal was not to apply the correct standard under Milligan.

Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

MS. NELSON: That's correct.

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

MS. NELSON: Correct.

JUSTICE SOTOMAYOR: All right. Now you have not addressed the issues of the unconstitutionality, which is what this

reargument was about. Justice Barrett mentioned congruence and proportionality. Others have suggested that our Harvard case is appropriate. One, Louisiana has said that the use of race in any way violates the Equal Protection Clause.

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

MS. NELSON: Sure.

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

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

And there are many distinctions between this case and the SFFA case. For example, Section 2 is a decidedly remedial statute. SFFA involved the diversity rationale involving a admissions process with a university, not a statute that is derived from Congress's enforcement powers under the Reconstruction Amendments that deals with remedying discrimination.

That is a very clear distinction. This Court has been clear in Shaw, in SFFA, in Croson, in Fullilove, that you can use race in a limited way to remedy racial discrimination.

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

So, in our view, it is very clear that the case law in -- before this Court supports the use of race as needed once there has been a

showing of specified discrimination. And the Section 2 test gives the Court an inference of intentional discrimination to draw upon.

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

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

CHIEF JUSTICE ROBERTS: Justice Kagan?

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

MS. NELSON: I think the results would be pretty catastrophic. If we take Louisiana as one example, every congressional member who is black was elected from a VRA opportunity district. We only have the diversity that we see across the South, for example, because of litigation that forced the creation of opportunity districts under the Voting Rights Act.

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

We also know that after majority-minority districts have been created, they often no longer need the same population to continue to provide an equally open electoral process for minority voters. So it is an intervention that has been crucial to diversifying leadership and providing an ability of minority voters to have an equal opportunity to participate in the process, but

it also isn't a permanent remedy. It -- it corrects itself over time, and it's only triggered when those extreme conditions exist.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

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

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

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

MS. NELSON: Yes.

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

race?

MS. NELSON: Not -- not in those words. Not for a court to intentionally discriminate, but I think it depends. There may be a circumstance where the only possible remedy is the limited use of race.

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

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

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

MS. NELSON: I don't endorse the concept of discriminating on the basis of race. If discrimination has been established under Section 2 and a state determines that it needs a very precise incision of race in order to remedy that Section 2 violation, then Section 2 and this Court's precedent supports that.

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

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

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

MS. NELSON: Yes.

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

MS. NELSON: I'd -- I'd -- I'd -- I disagree with that formulation. So, first and foremost, states and plaintiffs, as they put

forth illustrative maps, cannot put forth maps that discriminate and that use race in -- in excessive fashion.

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

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

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

JUSTICE GORSUCH: I understand that.

MS. NELSON: -- which sometimes permits race.

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

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

JUSTICE GORSUCH: Okay. Thank you.
CHIEF JUSTICE ROBERTS: Justice Kavanaugh?
JUSTICE KAVANAUGH: I guess the hang-up there is the word "discriminate." But your answer is that they can intentionally use race in those circumstances, correct --
MS. NELSON: That --
JUSTICE KAVANAUGH: -- the federal district court?
MS. NELSON: If -- if needed. If needed.
JUSTICE KAVANAUGH: Yeah.
MS. NELSON: And there are -- there are often a wide range of possibilities and alternatives that don't require that.
JUSTICE KAVANAUGH: And then I think you said so long as it's not excessive, and you mentioned strict scrutiny as well, correct?
MS. NELSON: Correct.
JUSTICE KAVANAUGH: But part of strict scrutiny, again, is the temporal limit that's been part of strict scrutiny for a long time. And I think your answers earlier to that to me and when you were talking with Justice Jackson

were, well, Congress, defer to Congress. But, when we're applying the Equal Protection Clause or, as Justice Barrett said, the Fifteenth Amendment, congruent and proportionality, or Fourteenth Amendment, deferring to Congress is, I think, not what we're supposed do.

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

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

So that sort of runway, that advance notice, that -- that expression of an ability for Congress to intervene if it disagrees with the Court or decides it wants to remedy on its

own, that is the type of guidance I think this Court should consider if it feels that it must pursue a durational limit on -- on Section 2. And, again, we don't believe that's necessary.

JUSTICE KAVANAUGH: Do you -- Justice Kennedy in 1994 in Johnson versus De Grandy said a couple things that I just want to get your reaction to. He said "The sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions," and he added that "explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause."

Do you take issue with what he said there?

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

And, as I mentioned earlier, many of the VRA opportunity districts ultimately

convert to non-majority-minority districts. Not all VRA opportunity districts are majority-minority districts. And, in fact, we see greater racial harmony and less racially polarized voting as a result of Section 2 districts.

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

MS. NELSON: Correct.

JUSTICE BARRETT: And now this is kind of picking up on some of Justice Alito and Justice Thomas's questions earlier. How are we to think about that when we're thinking about the Robinson litigation? Because it was a preliminary injunction, and Louisiana, of

course, argued there that, no, it -- it wasn't a violation of Section 2 to have those maps.

So when -- I mean, I guess, how do we judge the compelling interest in avoiding a violation of Section 2? If the State doesn't really think it violates Section 2 and it hasn't been finally adjudicated yet, how do we approach the -- assuming that -- that compliance with Section 2 is a compelling interest, how do we think about that in a context like Robinson?

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

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

JUSTICE BARRETT: But -- but what if -- I mean, district courts sometimes make errors of law, right? So what if the district court -- I guess I'm trying to figure out how much weight then the district court's finding has in comprising that -- that compelling interest in avoiding the Section 2 violation. Do you see what I mean?

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

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

JUSTICE BARRETT: Okay. Never mind.

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

JUSTICE BARRETT: Right. I mean, it got complicated here because of all of the other litigation. But just why don't you just strip out what happened and answer the question. Like, at the time Robinson was decided, if the -- if Louisiana thought that the Robinson court was wrong, that the district court was wrong, but it didn't -- it wanted to

avoid the court-imposed map, wanted the opportunity to draw its own map, Justice Kavanaugh has been asking you what role race can play without running afoul of the Equal Protection Clause.

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

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

MS. NELSON: It is still a compelling governmental interest. The State can do what it did here, which is to appeal to the Fifth Circuit, and the Fifth Circuit considered the same evidence and unanimously found that the

Robinson court was correct. Yet another Fifth Circuit panel also affirmed that decision.

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: So, in essence, are you saying in response to Justice Barrett that it's a compelling interest nonetheless because the State has an obligation under our Constitution and under Section 2 to provide an equally open electoral process?

MS. NELSON: That's correct.

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

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

I mean, that's what we said in Milligan. We were very clear that individuals lack an equal opportunity to participate when a state's electoral structure operates in a manner that minimizes or cancels out their voting strength. I mean, everybody -- I don't think there's a disagreement that we have this initial goal, which is providing equal opportunity.

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

I guess I don't understand why the Robinson court's decision is before us right now, because what I understood is that as a result of the Robinson court's decision, Louisiana then enacts a map that it believes will remedy the violation that the Robinson court has identified, and we're here on a challenge about that map. That, I think, we call is a Shaw problem. We're --- we're here deciding whether they can use race as a remedy,

as people say they did in the construction of this map.

So I guess I'm not even clear why the Robinson court's initial identification of the problem is being questioned as a compelling interest because there's an interest in not having an unequal electoral system, right?

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

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Agui aga.

ORAL ARGUMENT OF J. BENJAMIN AGUI AGA
ON BEHALF OF APPELLANT LOUISIANA

MR. AGUI AGA: Thank you, Mr. Chief Justice, and may it please the Court:

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

sufficiently augment their voting strength.

Embedded within these express targets are racial stereotypes that this Court has long criticized. They assume, for example, that a black voter, simply because he is black, must think like other black voters, share the same interests, and prefer the same political candidates.

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

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

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

I welcome the Court's questions.

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

MR. AGUI AGA: Your Honor, we told the Court at pages 1 and 2 of our original opening brief in this case that our predicament in this case presents as good a reason as any for the Court to reevaluate its voting precedents.

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

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

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

JUSTICE THOMAS: I --

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

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

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

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

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

JUSTICE KAGAN: General, I mean, what Gingles does, and, you know, the idea that this

is like 50 years later, this is not a kind of Shelby County thing where one could say that Congress had acted and 50 years later, you know, the conditions on the ground might have changed and there would be no way to respond to that change, because what Gingles does and what these Section 2 suits do is they ask about current conditions and they ask whether those current conditions show vote dilution which is violative of Section 2.

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

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

MR. AGUI AGA: That's correct, Justice Kagan. And I think the two trends that my friends on the other side point to, the rates of residential segregation and the rates of

racially polarized voting, are what allow them to get past the Gingles preconditions. They told you at page 33 of their yellow brief that those things are worse today in Louisiana than they were in the 1980s. And this Court said at page 228 in Northwest Austin that those sorts of factors are not evidence of intentional discrimination.

That's not intentional discrimination, Justice Kagan.

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

And so what Section 2 does is to say, where the effects are discriminatory such that people are not having the same -- African

Americans here are not being given the same voting opportunities as white people are, then a remedy is appropriate.

That remedy doesn't have to be race-based, but sometimes it is race-based in order to correct the racially discriminate -- racially discriminatory situation that exists in the state right now.

MR. AGUI AGA: And, Justice Kagan, if Congress had attempted in 1982 to make a record of intentional discrimination in districting, and today, if there were a record of an intentional -- of intentional discrimination in districting, then there might be a congruence and proportionality argument to sustain race-based redistricting as a remedy.

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

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

And Gingles is, as Justice Kagan

pointed out, what's happening today and are there lingering effects of the past.

The one thing I look at is Alabama's maps for the last 30 years, the map that -- that -- that the Robinson court found cracked and packed voters was a map that's been in effect almost the entire history of Alabama.

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

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

Legislators might try to keep an ethnic community in one district. They might

consider it to get a sense of which district to draw an incumbent into. They might review it to predict what kind of issues a district voter might be particularly interested in. They might use it to inform partisan goals. We permit all of that.

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

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

JUSTICE SOTOMAYOR: But it's not doing that, counsel. The six plaintiffs in this case are white plaintiffs who live in a district with black voters. So no one's keeping them out of that district. No one's stopping them from participating in the voting process. No one is stopping them from trying to run

candidates or support candidates that reflect their views.

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

MR. AGUI AGA: So, Justice Sotomayor, let's look at the facts in this case. My --

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

MR. AGUI AGA: Your Honor, my friends on the other side walked into the Middle District of Louisiana -- may I finish very briefly?

CHIEF JUSTICE ROBERTS: Yes.

MR. AGUI AGA: Walked into the Middle District of Louisiana and demanded a majority-black district.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

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

MR. AGUI AGA: Justice Thomas, Robinson is the only reason SB8 exists. We fought tooth and nail in the Robinson litigation itself to -- in -- in telling the courts that we did not think the Constitution permitted us to draw a second majority-black district. As you know, under protest, we drew SB8 because the threat was that the federal courts were going to do it if we didn't.

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

JUSTICE THOMAS: What were the findings in Robinson?

MR. AGUI AGA: The finding by -- by the Middle District in Robinson was that the plaintiffs in this case were likely to show a violation of Section 2, and the likely violation -- and I'm -- I'm using very broad

terminology because I do not know what the underlying violation is. I can't articulate that for you, Justice Thomas, because I don't think anybody can. But I think the finding in the district court's mind in that case was that the likely -- the likelihood of a Section 2 violation meant that a majority-black district was required, a second one.

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

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

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

And that's what the Middle District in Robinson focused on, is how bad was Louisiana in the 1930s, '40s, '50s, '60s, and, you know, add all that together and, at the end, you have a vote dilution finding that I don't think is clearly articulable in the way that SFFA requires a finding of discrimination to be specified.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Alito?

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

MR. AGUI AGA: That's exactly right, Justice Alito.

JUSTICE ALITO: Which suggested that that prior map was discriminatory. What is -- what was the origin of that prior map? Do I remember correctly that it was pre-cleared by the Justice Department?

MR. AGUI AGA: Twice. That's correct, Justice Alito.

JUSTICE ALITO: So it wasn't --

there -- there is no finding that that map was based on discrimination and that by following that map, you were perpetuating prior discrimination?

MR. AGUI AGA: No, Justice Alito. And I think that's why I firmly have to resist any suggestion that the Louisiana state legislature is out here targeting minority voters and trying to abridge the right to vote. That is just completely unfounded.

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

MR. AGUI AGA: That's correct, Justice Alito.

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

MR. AGUI AGA: That's exactly right, Justice Alito. And if you look at the black population in Louisiana, I mean, it is all over the place. You can identify pockets of black voters, but they are dispersed across the state. There's no way you can conceive of that population as compact.

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: I may be remembering the record wrong on this because it was a while back, but if I recall, the district court looked at the three main parishes that make up District 6 now and looked at it and said they have a commonality of history, many of its residents go from where they live near the Baton Rouge area to work or go to school and they go back to their communities. They have long family ties between the communities and among the communities. There may be a difference in education and -- and some income differences, but that's true of all the districts in Louisiana. You've got the districts that are protecting incumbents where,

in the north, there's less money than in other areas. So those differences are not meaningful.

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

MR. AGUI AGA: Your Honor, no doubt the Middle District purported to run through the Gingles analysis, and it said, you know, it will be the unusual --

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

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

JUSTICE SOTOMAYOR: Counsel, with respect, the last time the SG was here before us on behalf of your state, they said that race

did not predominate just with your creation of District 6 because what you were trying to do and why it's oddly shaped was to protect incumbents. Are you walking that back?

MR. AGUI AGA: Your Honor, our position in our supplemental briefing on racial predominance is as follows: If race is a non-negotiable in the drawing of a new district, we think that should satisfy this Court's --

JUSTICE SOTOMAYOR: Well --

MR. AGUI AGA: -- predominance analysis. And the argument you --

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

MR. AGUI AGA: That's --

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

MR. AGUI AGA: We drew it for partisan reasons, Justice Sotomayor. My point and the point we make at the end of our opening

supplemental brief is to say, when this Court's racial predominance questions ask about non-negotiability, it shouldn't matter if race is the one non-negotiable factor or it's one of 10 non-negotiable factors. In both --

JUSTICE SOTOMAYOR: Well, but we do -- we -- we -- we always talk about what predominates, and what predominated here was politics. That's what you said the last time.

MR. AGUI AGA: And --

JUSTICE SOTOMAYOR: Thank you, counsel.

CHIEF JUSTICE ROBERTS: Justice Kagan?

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

So I'll just run through a few of them. What they said was that the Fifteenth Amendment permits "Congress to legislate against only purposeful discrimination by [the] States." We rejected that. We said, no,

Section 2, which is an effects-based test of vote dilution, is permitted under the Fifteenth Amendment.

There, in Milligan, the state said that the Fifteenth Amendment doesn't authorize race-based redistricting as a remedy for vote dilution Section 2 violations. We said, no, that wasn't correct either. You just repeated it, but we rejected it.

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

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

MR. AGUI AGA: Justice Kagan, the Court has never addressed and rejected the two key parts of our argument here. The first is the Court has always -- has long assumed, without deciding, in cases like Cooper versus Harris, that compliance with Section 2 is in compelling interest. We're asking the Court to finally decide that question and answer it no.

The second question the Allen Court left --

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

MR. AGUI AGA: Your Honor, this is an -- an antecedent question that the Court has routinely left open in its voting precedents, and that's why we're asking the Court to address it here.

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

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

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

Justice Kavanaugh?

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

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

MR. AGUI AGA: I do.

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

MR. AGUI AGA: I do, Justice Kavanaugh. I do think the top-line response is we like the proposal and we don't. I think we like it insofar as you know from our original briefing and our supplemental briefing that the thing we want most as the State is clarity in this area of the law, and so any remodeling of Gingles that brings about that clarity, of course, we're going to like.

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

JUSTICE KAVANAUGH: Well, what's the practical lack of clarity that you see? I -- I guess I would have thought that solves a lot of

the concerns that you've identified and that the amicus briefs that support your side have identified so far.

MR. AGUI AGA: Yes. If I could answer them and then get to the quick doctrinal point.

JUSTICE KAVANAUGH: Yes.

MR. AGUI AGA: On the practical point, I do think that you start to see hints of this in the Robinson Appellants' yellow brief, the supplemental yellow brief, which is there's going to be a lot of -- of disagreement in the lower courts about racial predominance. That is a critical trigger in a lot of this Court's cases, and unless there's absolute clarity about how that analytical framework shakes out, then you're still going to see this onslaught of litigation that you see today in the Section 2 context.

The doctrinal reason, Justice Kavanaugh, why, I -- you know, I -- we're not just, like, totally thrilled with the proposal is I think it's just a half solution to the constitutional problem because, at the end of the day, what the government's asking you to do is keep Gingles in some form. And, as we've

laid out in our supplemental briefs, Gingles I, II, and III are expressly built on the sorts of racial stereotypes that the Court's cases say are impermissible under the Equal Protection Clause.

And so I think that anytime any test, whether it's good or bad as a practical matter, that at the end of the day is asking the government to assign voters to different districts on the basis of their race and is engaged in stereotypes about how members of a race simply by virtue of their membership in that racial class think, I think that's a constitutional problem, and so that's why it's not wholly fulfilling.

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

Do you agree with that?

MR. AGUI AGA: I think, as a practical matter, that's probably true, Your Honor. I

mean, I think pre-Rucho, states were going to be very hesitant to venture out to say, you know, overtly, like, politically, like, here's what we're doing, and so that -- that is, I think, a great explanation of why the Court's cases have treated the -- the political versus racial divide as it does.

JUSTICE KAVANAUGH: And just on common ground here, because I think it's always important in a case like this where there's disputes to identify what's common ground, Justice Jackson said the goal is equal opportunity for all Americans. I think we all agree on that completely.

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

And then Ms. Nelson, I think, suggested, if there is going to be a temporal limit, she doesn't want one at all, but then I

think she said, if there's going to be one there, it should be identified in advance. And I just want to get your response to that.

MR. AGUI AGA: Our response to that is simple, Your Honor. Over three decades, dating back to Shaw I and Miller, the Court has always qualified its voting cases with the caveat that racial stereotyping is bad, the Fourteenth Amendment forbids it, and in all events, it can't persist.

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

JUSTICE KAVANAUGH: In response to Justice Kagan, Ms. Nelson said that -- black representatives and justices in Louisiana have primarily if not exclusively been elected in

majority-minority or majority-minority opportunity districts and that the results would be terrible.

You want to respond to that?

MR. AGUI AGA: Sure, Your Honor. I mean, I -- I think there's been a lot of sky-is-falling rhetoric from the other side in this case. And I just want to give you, like, one political reality, why I think that's a little overstated, which is remember that in a case -- use a state like Louisiana, Republican legislature. If a Republican legislature wants to maximize its political seats, draw a 6-0 map, remember what has to happen with the hundreds of thousands of Democrat voters that currently exist in the majority Democrat districts, District 2 and District 6. They have to go somewhere.

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

I'm not -- I don't know what our

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: I just have a clarifying question to see how I'm thinking about this and -- or -- or the arguments that are being made.

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

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

intentional discrimination is the remedy.

MR. AGUI AGA: I --

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

MR. AGUI AGA: I think that's right, Justice Barrett. I mean, I think the Court's precedents assume that if a plaintiff in a Section 2 case can prove up the preconditions and the totality of the circumstances, the automatic remedy at least in this case is going to be a -- a majority-minority district.

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

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

I think all the other applications of Section 2 that this Court has considered remain

fair game if a plaintiff especially can show intentional discrimination. Of course, that all remains fair game.

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

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

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

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: So where in Section 2 does it mandate another minority district? I

mean, my -- my understanding, as I explored with Ms. Nelson, is that Section 2 is the mechanism by which we determine that equal electoral opportunity is not being provided for a certain minority group.

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

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

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

MR. AGUI AGA: Well, Justice Jackson, I think there's a reason why this Court's voting precedents going all the way back to Shaw I are so tied up with race. It's because the -- the remedy, as parties and the courts have understood Section 2 to operate, is almost

always going to be race-based. That's why they went --

JUSTICE JACKSON: No, they're show -- they're so -- they're so tied up with race because that's the initial problem, right? That's where -- that -- that's the beginning. The beginning is the claim that a person makes under Section 2 that because of their race, they are not being afforded equal electoral opportunity.

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

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

MR. AGUI AGA: Right. And a couple of responses to that, Justice Jackson.

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

MR. AGUI AGA: So --

JUSTICE JACKSON: -- why is that not a compelling state interest to -- to identify

areas in which that problem is occurring?

MR. AGUI AGA: Your Honor, of course, as this Court recognized in SFFA, states can remedy intentional discrimination if they --

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

MR. AGUI AGA: They can identify --

JUSTICE JACKSON: Identify, all right.

MR. AGUI AGA: They -- of course.

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

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

MR. AGUI AGA: Your Honor, I think step zero in all these cases, it was certainly step zero in the Robinson litigation, is the Plaintiffs came in and said we want another

majority-black district. I think the Court --

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

MR. AGUI AGA: Which is the same way of saying we deserve a second majority-black district.

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

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

MR. AGUI AGA: Right. And the problem, Justice -- Justice Jackson, that the

Middle District identified was not intentional discrimination. And, in fact, I think, when I hear my --

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

MR. AGUI AGA: Because, if you're going to use race the way that the Robinson Appellants want the Court to use race in drawing a second majority-minority district, you've got to have a compelling interest.

JUSTICE JACKSON: Thank you.

MR. AGUI AGA: And as --

JUSTICE JACKSON: I understand.

MR. AGUI AGA: Thank you, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Greim.

ORAL ARGUMENT OF EDWARD D. GREIM

ON BEHALF OF THE APPELLEES

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

The Appellees should prevail here regardless of the grounds on which the Court

chooses to rely. In today's America, voters like the Appellees are still being racially stereotyped to place them into single-member districts. If it was ever acceptable under our color-blind Constitution to do this, it was never intended to continue indefinitely.

Section 2 effects findings alone can no longer justify the widespread stereotyping of American voters based on race, in violation of the Fourteenth and Fifteenth Amendments. It is time to reach a question this Court has never reached and hold that Section 2 alone is no compelling interest for racially gerrymandering citizens like the Appellees today.

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

I welcome any questions.

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

Robinson case.

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

MR. GREIM: Well, it has exactly one point of contact, which is the State has admitted that it felt that it had to draw a second majority-minority district because of Robinson to avoid trial in Robinson. They did not want to have a trial during the time it was going to be scheduled, and so they -- they passed the second majority-minority district and they -- they -- race predominated in doing that.

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

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

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

MR. GREIM: Well, the -- basically, the State went to the strongest remaining area of minority population, which was east Baton Rouge, and then they looked about the state for

enough majority -- enough minority voters that was still contiguous to the main concentration in east Baton Rouge, and they went to the northwest.

And, again, the goal that could not be compromised, which was the standard here, was that they had to draw a second majority-minority district, and that made race predominate both in the direction and in the details of how the lines were drawn.

JUSTICE KAGAN: Mr. Greim, you and the Solicitor General spoke about stereotyping and how there's no place for stereotyping. But I'm wondering what stereotyping has to do with any of this.

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

So I'm wondering how it is that

stereotyping gets into this case at all.

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

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

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

JUSTICE KAGAN: Well, I -- I -- I think that, you know, we've had several cases up here where we've acknowledged that there's some interaction between racially -- racial -- race and partisan affiliation. Obviously,

that's right. And the task for the courts is to separate those things out, which may be hard in a given case, may be easier in a given case, but the only thing that's at issue, the violation, is where there's racially block voting.

And, again, you know, it's just a there there. There is currently -- in order to prove a Section 2 violation, you have to show that the current conditions, not some old conditions that happened in 1962 or in 1982, but the current conditions are such that there's no equal opportunity for African American voters or some other group because there's racially block voting.

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

MR. GREIM: Well, the -- the problem, though, is in the remedy. The problem is that when you are drawing your remedial district, which is the very first part of Gingles, that may not be the final district you end up with,

but just to -- I'm covering your question and -- and a question Justice Jackson asked. The very first thing the plaintiff shows that -- is here's the community that was cracked or packed.

And so, to undo that, you have to look at the race of the voters all around that area and you've got to make assumptions about them based on statistics, but you've got to make assumptions about what they think and how they vote based on their race, and you've got to -- you're drawing new districts based on that.

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

And the Court says -- said: Of course, you can do something that is race-based, even though not race-predominant, that we're not going to insist that you come in and ignore the factor of race when the only

reason we're here is because race has played such an integral part in the voting process that people are being deprived of their voting rights because of race.

MR. GREIM: Well, Justice Kagan, the plurality in that section of -- of Milligan drew the line between race-conscious and race-predominant districting. "Race-based" appears -- maybe we need to define all of our terms. It appears in the decision, but -- but the -- I think what -- what is clear from that case is that the remedial maps can't allow race to predominate.

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

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

race into account.

MR. GREIM: Well --

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

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

JUSTICE KAGAN: And that wasn't a stereotype issue, and it wasn't a kind of, like, we're based on past conditions issue. We're based on current conditions, which is that we just proved a violation of people's voting rights based on current conditions.

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

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

MR. GREIM: Well --

JUSTICE JACKSON: That's the confusion.

MR. GREIM: Well --

JUSTICE JACKSON: I understood that the illustrative maps that the plaintiffs bring

in the beginning of a Shaw case is part of their showing that we have a problem. They're illustrative. They're not what Louisiana picked in this case. They're not what the Court requires. The Court gives the state, once the violation is established, the opportunity to draw its own map.

So they're just showing -- like, that's just a step that you have to do as a part of your showing that we do have this -- vote dilution problem in this situation. And, as Justice Kagan says, that's all based on current information.

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

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

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

JUSTICE JACKSON: Set aside -- set

aside what the -- what the remedy is. I just need a -- an answer to the initial question, right? If I'm looking only at Section 2 world, we have a mechanism for identifying race-based vote dilution and other kinds of problems.

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

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

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

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

JUSTICE JACKSON: So you don't get a remedy -- for an actual dilution or problem with your vote, the kinds of things that Congress cared about and that the Constitution requires. You don't get a remedy unless this was intentional on the part of the State with

respect to you?

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

Justice Sotomayor?

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

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

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

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

The Gingles factors is looking at

whether these people have -- their vote is being diluted or their vote is being taken away from them merely because they're black. And so, if that's the case, we have always said that remedying discrimination, you can use race.

Now you want to add the qualifier it has to be intentional. But I don't see the Fifteenth Amendment being limited that way. The words of the Fifteenth Amendment are that Congress can stop any practice that dilutes voting. That has an -- "practice" is an act that has an effect. It didn't say intentional, intentional dilution of voting. It talked -- the amendment itself talks about a practice.

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

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

MR. GREIM: And the --

JUSTICE SOTOMAYOR: We just, in Milligan, and we've said in a slew of cases Congress itself said we're not using intent.

We're using effects. And we said that's okay. That's within their power as specified in the Fifteenth Amendment.

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

JUSTICE SOTOMAYOR: No, the discrimination is the practice.

MR. GREIM: The -- the case law going back to Katzenbach and --

JUSTICE KAGAN: But, Mr. Greim, I've -- I mean --

CHIEF JUSTICE ROBERTS: I'm sorry.

JUSTICE KAGAN: Oh, are we --

CHIEF JUSTICE ROBERTS: Yes.

JUSTICE KAGAN: Sorry.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: Well, I'll stop and you can go.

CHIEF JUSTICE ROBERTS: Justice Kagan?

MR. GREIM: Oh, sorry. I thought we were all done.

CHIEF JUSTICE ROBERTS: No, you're not done.

(Laughter.)

MR. GREIM: I'm in no hurry.

JUSTICE SOTOMAYOR: You're not done.

JUSTICE KAGAN: What we've said, and this goes back umpteen years and it was said again in -- in Milligan, is that even if the constitutional prohibition is won on -- on purposeful discrimination, Congress can enforce that prohibition under Section -- under Section 5 of the amendment by way of prohibiting various kinds of effects.

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

And I understand that common ground here, including among the SG, is essentially a -- a desire to take us back to an entirely intent-based world, but that is -- you know, that -- that is the thing that we tried to do, that Congress prevented us from doing, and

that, since the amendments of 1982, have been very clear that -- that you do an effects test for Section 2 in order to vindicate the purposes of the Fifteenth and Fourteenth Amendments.

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

JUSTICE KAGAN: I mean, I'll take that -- I'll take that label. That's fine. But that's --

MR. GREIM: But it was not an --

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

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

And the -- the Court has never held --

JUSTICE KAGAN: And what is this kind of -- was it congruent and proportional in 1982, or is it just, like, suddenly not congruent and proportional because it's 40

years later?

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

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

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

They -- they were using poll taxes and literacy tests, although facially neutral, to purposely discriminate, and they would keep changing them over time to make sure that they kept the discrimination in place. So that was

a very unique circumstance.

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

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

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

Justice Kavanaugh?

Justice Barrett?

Justice Jackson?

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

Congress passed the Americans with

Disabilities Act against the backdrop of a world that was generally not accessible to people with disabilities, and so it was discriminatory in effect because these folks were not able to access these buildings.

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

Congress said the facilities have to be made equally open to people with disabilities if readily possible.

I guess I don't understand why that's not what's happening here. The idea in Section 2 is that we are responding to current-day manifestations of past and present decisions that disadvantage minorities and make it so that they don't have equal access to the voting system, right? They're -- they're disabled. In fact, we used the word "disabled" in Milligan. We say that's a way in which you see that these processes are not equally open.

So I don't understand why it matters whether or not the State intended to do that. What Congress is saying is, if it is happening,

which Section 2 gives us the tools to determine, you've got to fix it.

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

JUSTICE JACKSON: It's not race-based.

MR. GREIM: We --

JUSTICE JACKSON: I -- I take your point. I take your point. But you're saying then that if the problem of no access is about race, it's just too bad because you can't have a remedy that relates to race?

MR. GREIM: Absolutely not, Your Honor.

JUSTICE JACKSON: Okay.

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

JUSTICE JACKSON: So why does -- why do we have to change Section 2? Okay, so fine,

you say if it's a remedy problem, why aren't we just focused on whether the -- whether the remedy here, the particular map in Louisiana is predominant, you know, using race and, if so, strict scrutiny applies and did they narrowly tailor it.

I mean, that seems to me to be the problem that you're identifying. The remedy here, you say, is overbroad, it's not using the right factors, it's using race in a stereotypical way. What does that have to do with Section 2 and changing its criteria and adding intent there?

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

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

MR. GREIM: Okay.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. GREIM: All right.

CHIEF JUSTICE ROBERTS: Mr. Mooppan.

ORAL ARGUMENT OF HASHIM M. MOOPPAN

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE APPELLEES

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

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

So, first, under the Constitution, the problem is not the mere consideration of race in districting. The problem is when race subordinates traditional neutral principles and is the -- factor that cannot be compromised.

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

The Robinson litigation perfectly

exemplifies this. The Robinson plaintiffs could not show a denial of equal openness for black Democrats. What they could show is that Democrats in Louisiana lost a seat.

I -- I welcome this Court's questions.

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

MR. MOOPPAN: So there generally is. The way you would decouple them is you look at primary elections, right? You look to see in the Democratic primary, do white Democrats and black Democrats vote differently. And that did not happen here.

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

opinion.

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

Justice Alito, as you pointed out, incumbency protection has long been recognized as a traditional race-neutral principle while the plaintiffs' illustrative maps in Robinson totally departed from incumbency protection because every map they provided would take the state from a 5-1 map to a 4-2 map and require displacing some Republican incumbent.

JUSTICE SOTOMAYOR: Counsel --

CHIEF JUSTICE ROBERTS: Counsel --

JUSTICE SOTOMAYOR: -- we're -- we're -- Justice Kavanaugh pointed to page 24, 25 of your brief as well. We didn't grant cert on redoing Gingles. We granted cert on a totally different question. And we have said over and over ago -- again that statutory precedents are entitled to far greater stare

decisis protection.

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

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

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

JUSTICE SOTOMAYOR: -- when --

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

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

MR. MOOPPAN: Okay. So --

JUSTICE SOTOMAYOR: Tell me, did the

district court here apply Gingles?

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

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

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

JUSTICE SOTOMAYOR: Right.

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

JUSTICE SOTOMAYOR: But we have --

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

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

MR. MOOPPAN: Not as --

JUSTICE SOTOMAYOR: We have --

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

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

MR. MOOPPAN: Your Honor --

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

MR. MOOPPAN: Your Honor, that's contrary to this Court's holdings in Miller, in Shaw II, and in Cooper. This Court has repeatedly said that if you have an incorrect reading of Section 2, that -- or Section 5 of the Voting Rights Act, that is not a compelling interest.

The Court has applied the good-faith standard under strict scrutiny to errors of fact, not errors of law. In -- in Miller and Shaw, the DOJ browbeat states into creating multiple majority-minority districts, and they all thought they were doing it under Section 5. They were acting in good faith. The DOJ was browbeating them. But this Court said that was

not a compelling interest because DOJ was wrong about what --

JUSTICE SOTOMAYOR: Well, that --

MR. MOOPPAN: -- Section 5 meant.

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

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

Again, Justice Alito, three points.

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

Two, they did the exact thing that this Court held in LULAC is not a compact district. As you said, they took blacks from Baton Rouge and blacks at the north of the state and jammed them together. Yeah, it's a

nice rectangular district, it's very pretty, but it's not compact.

And then, third, they didn't control for racially polarized voting. So they just said that blacks vote differently from whites, which just basically means Democrats in Louisiana vote differently from Republicans in Louisiana. That's not racially polarized voting.

That is not the proper interpretation of Section 2, and it is exactly why Section 2 is leading to racially predominant results where you're essentially using Section 2 to undo political outcomes, and that is an unconstitutional reading of the statute.

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

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

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

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

MR. MOOPPAN: So incumbency protection is a traditional neutral principle. Robinson found liability by requiring the State to discard their race-neutral --

JUSTICE JACKSON: But I thought you said Robinson was wrong, so then we just change that understanding.

MR. MOOPPAN: But --

JUSTICE JACKSON: Why does -- why does that create a constitutional problem?

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

JUSTICE JACKSON: And we say -- and Gingles requires that?

MR. MOOPPAN: So the way --

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

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

The fundamental problem is, when this Court said in Milligan that as long as the plaintiffs' illustrative map is roughly equivalent to the state's map, that's enough to satisfy Gingles.

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

Let me give you an analogy I -- I think will make this a little bit clearer. Imagine if Congress had passed a statute that said, LSU, if you have a white student and a

black student who are roughly equivalent on your admissions criteria, you must pick the black student. Of course, that would be unconstitutional. That would be subordinating their --

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

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

JUSTICE JACKSON: If that's the case, then it doesn't matter that the Section 2 analysis is showing you that there could be another way to do this.

MR. MOOPPAN: It depends --

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

MR. MOOPPAN: It depends what you define as the problem. And the problem with Section 2 as construed in Gingles and Milligan is they are defining as a problem that there's another way of drawing the district that would help blacks, even though there's no reason to

think that it's either intentionally discriminatory or even a significant risk of intentional discrimination.

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

MR. MOOPPAN: Because the Constitution prohibits intentional discrimination, and, Justice Barrett, as you pointed out, this is enforcement legislation. So we agree it's not an intent test. But it has to at least be smoking out conduct that presents a significant risk of intentional discrimination. That's the phrase that this Court used in Boerne. It's the Court -- the phrase that this Court used in -- in Katzenbach too.

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

percentage of the state.

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

CHIEF JUSTICE ROBERTS: Thank --

MR. MOOPPAN: And that is a constitutional problem. And the test we have identified in our brief would solve that problem.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

MR. MOOPPAN: Yeah.

CHIEF JUSTICE ROBERTS: I wonder if you could explain that a little further, to what extent it's consistent --

MR. MOOPPAN: Yeah.

CHIEF JUSTICE ROBERTS: -- and to what extent it's not.

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

The -- one aspect that's inconsistent is what I was discussing earlier. The part of Milligan where it said that it's reasonably configured so long as it's roughly equivalent, we think that that is wrong. And we think that that aspect of the opinion is what causes all the racial predominance because, again, I -- if you take a step back and think about two possibilities, Possibility 1 is the plaintiffs come in and their map is superior to the state's map on the state's own principles.

Then we think it's okay to have a results test because, in that circumstance, you're not -- telling the state they have to subordinate their race-neutral principles. You're essentially enforcing their own race-neutral principles in a situation where

there is either intentional discrimination or at least a significant risk of intentional discrimination.

CHIEF JUSTICE ROBERTS: Thank you.

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

But --

CHIEF JUSTICE ROBERTS: Thank -- thank you.

Justice Thomas?

Justice Alito?

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

MR. MOOPPAN: I agree, Your Honor. And that's why I started my answer to the Chief Justice by saying all the arguments we're

making here were not made by Alabama. Alabama made a series of much broader arguments about how you can't consider race at all, the plaintiffs have to draw their maps race blind, you ultimately have to find intent. We're not arguing any of that.

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

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

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

And since Rucho seeking a partisan

manages a permissible legislative objective just like a partisan -- just like incumbent protection, so, therefore, that should figure in the first Gingles precondition.

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

JUSTICE ALITO: And then again on block voting, again, the Rucho issue was not involved in -- in Milligan, but if black -- if -- if block voting is understood properly to mean voting on the basis of race but not on the basis of partisan politics, then -- then that must also be considered under Gingles, right?

MR. MOOPPAN: Absolutely. And this is -- it matters, right, because, on our position, again, we agree that Section 2 can have a constitutional scope. And our view of the results test would apply in exactly the

situation where racially polarized voting properly understood exists.

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

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

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

But what you can't have is merely just showing that a Republican legislature favored

Republicans with whether or not they're white or black. And there's just no reason in the world to think that the Louisiana legislature would have done anything different in this case if every black Democrat in Louisiana was a white Democrat.

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

But my reading of your position is that Congress's enforcement power under Section 2 of the Fifteenth Amendment allows it to go beyond intentional discrimination for -- for this reason: Proving intentional discrimination is difficult in part because it's really hard -- it's always hard to figure out what legislative intent is. What was the intent of the legislature in enacting a map? Do you look at stray statements here or there by legislators? Plus, a finding of intentional discrimination accuses the state of a serious wrongdoing.

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

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

MR. MOOPPAN: That is. And if I can just amplify a couple of points. So we agree the Constitution prohibits intent. Congress's enforcement power can let them go beyond that to an in effects test, a properly tailored one that gets at a significant risk, and that avoids a lot of the difficulties of actually having to prove intent by a preponderance of the evidence.

And if it is actually tailored, if the statute itself is tailored, to things that have a significant risk, then we don't actually think you necessarily need to have a temporal limit in the statute itself. So that's why,

Justice Sotomayor, for example, the bans on tests, literacy tests. We think those are fine even though there's no end date on -- in that statute because those are well-known, highly likely to be intentionally discriminatory laws even if they're not always.

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

JUSTICE ALITO: One -- one final question. I'm -- I'm sorry to take up so much time, but I would like you to address what Solicitor General Agui aga said about the practical problems he fears your approach would take -- would -- would cause.

MR. MOOPPAN: So I'm not sure I really understand what his concerns are. I think the -- the way we've articulated the test, the plaintiffs have to come in and show that they

have a map that is superior on -- to the state's map on the state's own race-neutral principles, including its political objectives.

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

And if you apply that test, I'm not saying that there won't be difficulties on the margins of how to apply it. There will be new cases. You know, the -- Your Honor wrote the opinion for this Court in Brnovich. It was the first time that the Court had ever adopted the test for vote denial under Section 2. I'm sure there were cases afterwards, but that test was well tailored to the text of the statute and its purposes.

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

JUSTICE ALITO: Thank you.
MR. MOOPPAN: -- adopt a test that's tailored.
JUSTICE ALITO: Thank you.
CHIEF JUSTICE ROBERTS: Justice Sotomayor?
JUSTICE SOTOMAYOR: The bottom line is just get rid of Section 2 because the test you're providing doesn't do anything for the effects test that Congress identified. We did say in Katzenbach, we've said it repeatedly, that legislation need only be plainly adapted to addressing discriminatation -- discrimination practices in voting, right?
MR. MOOPPAN: Yes.
JUSTICE SOTOMAYOR: All right. The standard that you're setting is a much different one. It has to substantially be addressing this issue.
Number two, what you're suggesting is that people of one race, blacks in Louisiana, who will have to be some 6 -- 51 percent of the population before they'll be able to elect another black candidate because what you're saying is partisanship is non-negotiable, you

have to create maps where you're going to have six districts out of seven always white because that's our partisanship. That means blacks never have a chance, no matter what their number is, until they reach more than 51 percent.

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

JUSTICE SOTOMAYOR: Well, this --

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

JUSTICE SOTOMAYOR: -- this -- the illustrative maps show that a map drawn without looking at race and partisanship together would have created two districts.

MR. MOOPPAN: Your Honor --

JUSTICE SOTOMAYOR: Compact in all traditional ways, it would have been District 2 and District 6 around the Baton Rouge and two other counties that were tied historically and otherwise. And politics, you say, not race, is

what led the State not to give them another district.

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

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

MR. MOOPPAN: No, I'm not.

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

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

JUSTICE SOTOMAYOR: The illustrative map was better -- the illustrative map, 2 and 6 were combined, but 2, even in the original map, was not all that -- that -- compact.

MR. MOOPPAN: Justice Sotomayor, you're -- as Justice Alito pointed out, I'm not disputing the compactness of the district. I agree they drew a very pretty rectangle. The problem is that in the very pretty rectangle, the blacks lived in the south and the north.

And they took two very different groups of black people --

JUSTICE SOTOMAYOR: Well --

MR. MOOPPAN: -- and put them together.

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

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

JUSTICE SOTOMAYOR: Well, really, in excluding the blacks, they did it for racial reasons.

MR. MOOPPAN: No, Your Honor. There's no argument for that, as Justice Alito pointed out. The State's maps have been pre-cleared twice by the Department of Justice. So the suggestion that the fact that the prior maps were 5-1 maps is not -- there's no basis to say that that was for racial reasons.

And, again, West Virginia, zero Democratic districts. There is a lot of white Democrats in -- in West Virginia. There's just no reason to assume that because there's a

large Democratic population in Louisiana that doesn't have a district, that that's a racial reason rather than a partisan reason.

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

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

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

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

JUSTICE SOTOMAYOR: You have some of

that here too.

MR. MOOPPAN: -- is being treated --

JUSTICE SOTOMAYOR: You have proof of that here too.

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

JUSTICE SOTOMAYOR: No, you have some that -- even white Republicans or white Democrats won't -- won't vote for black candidates.

MR. MOOPPAN: Right. But, if these were white Democrats, there's no reason to think they would have a second district. None. And so what is happening here is their argument is, because these Democrats happen to be black, they get a second district. If they were all white, we all agree they wouldn't get a second district. That is literally the definition of race subordinating traditional principles.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: Mr. Mooppan, just a quick possibly digressive question. You're -- you're not contesting that if a state uses and predominantly uses race-based criteria in order

to achieve partisan goals, that that's impermissible?

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

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

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

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

How do we control for state political objectives? I mean, you say, well, that's easy to do. Is it the number of incumbent seats that they want to protect? Is it the level at which they think protection is appropriate? Say, I need 55 percent of the population to be registered Republicans or Democrats? Do they get to say that? Does the state get to say, I not only want five incumbents protected, but I want them really protected?

That's one example. You know, does a state have to say that it -- when it's

legislating, or can it come in later in the litigation and say that? Can a court -- and I'm just spitting out a few things for you.

MR. MOOPPAN: Sure.

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

MR. MOOPPAN: So the same way this Court already handles that in racial gerrymandering cases like Alexander. Yes, the state can come in with whatever their political objectives are. If they want to say it's not just a 6-1 map, it's a 6-and-1 map with a certain percentage because we want to make sure certain people are safe, really safe, and we're willing to tolerate a little bit more risk elsewhere, it's up to them to set what their political objectives are as long as they are race-neutral.

Now can a court second-guess that? Yes. If -- if -- if they say, look, these are

our interests and the map as drawn is inconsistent with that in a bunch of ways, a court could say we don't believe that the --

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

MR. MOOPPAN: Well, no. It --

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

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

JUSTICE GORSUCH: Okay.

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

JUSTICE GORSUCH: How about cohesion? Right? You know, you -- you say, well, you've got to segregate out members of one race or another based on their party affiliations and crossover voting and how much they really won't vote for somebody of the other race even if they're the same party.

How much cohesion is enough? I mean, you never -- very rarely is it going to be that

there's zero crossover voting and a hundred percent cohesion and vice versa. It's going to be areas of gray. And -- and are we then into the business perhaps of stereotyping?

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

JUSTICE GORSUCH: I know.

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

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

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

JUSTICE GORSUCH: No, this is another criteria.

MR. MOOPPAN: Right. Right. So assuming they've satisfied that, then the question is: Is there enough black cohesiveness that they can win the district? So you would have to look to see how much black cohesion is there and how much white crossover voting is there, and if, together, they can

predictively and safely win the district, then they've satisfied --

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

MR. MOOPPAN: Well, so I think --

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

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

JUSTICE GORSUCH: Oh, you can run thousands of these things. I mean, we've got computers now. I mean, goodness, of course. And you're going to have data points all over the place.

But a judge is going to have to draw a line --

MR. MOOPPAN: Well --

JUSTICE GORSUCH: -- and I'm wondering how the judge draws that line.

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

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

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

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

MR. MOOPPAN: Right. Right. And so, if -- I guess my point is, if the concern with our proposal is that you will have to answer cohesiveness questions that inquire some amount of empirical showing, what's the alternative?

JUSTICE GORSUCH: Okay.

MR. MOOPPAN: And --

JUSTICE GORSUCH: I got it. It's always the bear. It's -- I'm just -- I'm

outrunning a bear. I got it. Okay.

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

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

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

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

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

JUSTICE GORSUCH: Is it a proximate cause?

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

JUSTICE GORSUCH: It's not a proximate cause? So what is it?

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

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

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

MR. MOOPPAN: Okay.

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

MR. MOOPPAN: Yes.

JUSTICE GORSUCH: Not this case.

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

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

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

MR. MOOPPAN: Sure.

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

MR. MOOPPAN: Right. So let me give you two examples where race is considered, but, under the predominance test, it wouldn't be

satisfied. And that's why, for example, this Court has said that the intentional creation of a majority-minority district does not alone show predominance, and we agree with them about that.

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

JUSTICE GORSUCH: But that gives rise to an inference of intentional discrimination. There's no other explanation that can be provided in your hypothetical. That's intentional discrimination.

MR. MOOPPAN: Again --

JUSTICE GORSUCH: That's not predominance. That's -- that's choosing on the basis of race.

MR. MOOPPAN: I -- again, the -- neither of this Court's formulations of predominance are met on that fact pattern. You can't say that race-neutral principles were subordinated. They weren't. And you can't say

that the race was non-negotiable. It wasn't. So that's one example.

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

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

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

JUSTICE GORSUCH: Oh, I know what it said.

MR. MOOPPAN: Okay.

JUSTICE GORSUCH: I just don't know what it means.

(Laughter.)

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

JUSTICE GORSUCH: Okay.

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

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

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

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

Is that what you think?

MR. MOOPPAN: Yes and no, right? So --

(Laughter.)

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

MR. MOOPPAN: I know. And so here is the issue. This Court has recognized -- the

test is whether race-neutral principles are subordinated to race.

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

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

JUSTICE KAVANAUGH: I understand that.

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

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

MR. MOOPPAN: If we're talking about the State acting --

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

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

JUSTICE KAVANAUGH: Some -- some --

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

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

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

MR. MOOPPAN: That is one -- that is one way it becomes -- race doesn't predominate.

The other way is if they just set out to say: I'm going to draw a 55 percent black district and then they backfill from there because --

JUSTICE KAVANAUGH: That's race predominated.

MR. MOOPPAN: Exactly.

JUSTICE KAVANAUGH: Yeah.

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

JUSTICE KAVANAUGH: Right.

MR. MOOPPAN: The plaintiffs can absolutely consider race.

JUSTICE KAVANAUGH: Okay. I got that.

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

JUSTICE KAVANAUGH: Okay.

MR. MOOPPAN: And then you avoid predominance.

JUSTICE KAVANAUGH: I got that. Okay. So then what I viewed as the real innovation of your brief that we have not considered before,

as you point out, is this -- the material on page 25, the political objectives.

MR. MOOPPAN: Yes.

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

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

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

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

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

MR. MOOPPAN: Right, pre-Rucho.

But post-Rucho, it is totally clear that that is a permissible criteria. Indeed, in Rucho, the Court described it as ignoring the good-faith inference that the legislatures

do to not consider their political objectives.

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

MR. MOOPPAN: Yes. Again, because --

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

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

JUSTICE KAVANAUGH: Okay.

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

JUSTICE KAVANAUGH: Got it.

Two more. Sorry.

Do you agree with Louisiana on the Constitution?

MR. MOOPPAN: In part but not

entirely. We --

JUSTICE KAVANAUGH: Can you explain that?

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

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

MR. MOOPPAN: Then we think that --

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

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

JUSTICE KAVANAUGH: And to be clear, you're not saying Section 2 is unconstitutional. Section 2 as applied to redistricting, to the extent it requires the intentional use of race to create districts, if there's no change in Gingles, that's your

position?

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

JUSTICE KAVANAUGH: Yes. Got that.

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

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

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

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

JUSTICE KAVANAUGH: Like, a 10-point difference?

MR. MOOPPAN: I think the right way of thinking about it is, if you start with their step 1, which is what would the map look like

if they'd done it on race-neutral grounds, and then say is there enough polarization that the minority group who would have been in that district could have won, then they can satisfy steps 1 and 2.

JUSTICE KAVANAUGH: Thank you.

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

JUSTICE KAVANAUGH: Sorry. Yeah.

MR. MOOPPAN: Which is -- you had asked a question earlier about the practical consequences of our opinion --

JUSTICE KAVANAUGH: Yes.

MR. MOOPPAN: -- position. I just do want to emphasize one thing about that, which is, if you look at Congress today, there are roughly 60 black representatives. If you look at the districts, there are only 15 majority-black districts. So, even if Section -- we're not even urging Section 2 to be eliminated, but even if you eliminated Section 2 entirely, fully 75 percent of the black congressmen in this country are in districts that are not protected by Section 2. So it is simply not the case that adopting any

of the positions on this side, let alone our position --

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

MR. MOOPPAN: Right.

JUSTICE KAVANAUGH: -- that characterization.

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Barrett?

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

You've -- you've said, and you said just now to Justice Kavanaugh, and, you know, I -- I take this to be in your brief too, that your position would require a modification of Gingles. Is that necessarily true? Is there a way to say it's a clarification of Gingles?

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

MR. MOOPPAN: So --

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

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

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

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

As to the first part, the reasonably configured, most of what we're saying is consistent with most of this Court's cases, but after Milligan, I do have to acknowledge that that aspect of what we're urging, that it can't -- it's not enough that it be reasonably

equivalent, that the Plaintiffs' map has to be superior, that is undoubtedly a modification.

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

(Laughter.)

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

JUSTICE BARRETT: Okay. Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE KAGAN: That was a tweaking.

(Laughter.)

CHIEF JUSTICE ROBERTS: Sorry, Justice Jackson.

JUSTICE BARRETT: Sorry.

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

MR. MOOPPAN: Yes.

JUSTICE JACKSON: And that's what was asked for by Alabama, and so you'd be saying that that would require a change to what we

said.

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

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

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

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

MR. MOOPPAN: It's a very different thing. Yes, they both used the word "race-neutral," but what Alabama did was

something about computers that I, frankly, don't understand. What we are arguing is simply, under the state's own principles --

JUSTICE JACKSON: Right.

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

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

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

In other words, we -- we -- you're still bringing in intent because you're saying you have to intentionally depart from your traditional principles on the basis of race, and that's what's going to trigger Section 2. And I have, for example, the Louisiana historians' brief where it talks about how the

reason why you have Blacks in different places is because the residential patterns in the state are still reflective of where enslaved communities lived along this particular river system and that residential segregation, along with disparities in political power, economic status, health outcomes, all of these things are existent today because they reflect institutional choices that are traceable to Jim Crow and reproduced through contemporary practices. That last part is a quote from them.

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

effects are still occurring.

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

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

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

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

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

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

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

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

JUSTICE JACKSON: So intent does come in?

MR. MOOPPAN: It -- you don't have to prove it by a preponderance of the evidence.

JUSTICE JACKSON: I see.

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

JUSTICE JACKSON: Thank you.

MR. MOOPPAN: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Ms. Nelson?

REBUTTAL ARGUMENT OF JANAI NELSON

ON BEHALF OF APPELLANTS PRESS ROBINSON, ET AL.

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

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

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

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

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

the Department of Justice means very little.

Retrogression is an entirely different standard from what Section 2 is looking at. Retrogression means the State of Louisiana cannot go backwards. Section 2 is talking about whether there is active discrimination right now preventing the additional opportunities for black voters who meet all of the Gingles preconditions to have an equal opportunity to participate in the process.

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

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

discrimination that comes very close to intentional discrimination.

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

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

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

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

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

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:35 p.m., the case was submitted.)

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