

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

JOHN H. MERRILL, ALABAMA)
SECRETARY OF STATE, ET AL.,)
Appellants,)
v.) No. 21-1086
EVAN MILLIGAN, ET AL.,)
Appellees.)

JOHN H. MERRILL, ALABAMA)
SECRETARY OF STATE, ET AL.,)
Petitioners,)
V.) No. 21-1087
MARCUS CASTER, ET AL.,)
Respondents.)

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5 Appellants,)
6 v.) No. 21-1086
7 EVAN MILLIGAN, ET AL.,)
8 Appellees.)
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10 JOHN H. MERRILL, ALABAMA)
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12 Petitioners,)
13 v.) No. 21-1087
14 MARCUS CASTER, ET AL.,)
15 Respondents.)
16 - - - - -
17 Washington, D.C.
18 Tuesday, October 4, 2022

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

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24
25

1 APPEARANCES:
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12 Appellees/Respondents.
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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 21-1086, Merrill versus Milligan, and the consolidated case.

Mr. Lacour.

ORAL ARGUMENT OF EDMUND G. LACOUR, JR.
ON BEHALF OF THE APPELLANTS/PETITIONERS

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

Alabama conducted its 2021 redistricting in a lawful, race-neutral manner. The state largely retained its existing districts and made changes needed to equalize population. But that wasn't good enough for the plaintiffs. They argue that Section 2 of the Voting Rights Act requires Alabama to replace its map with a racially gerrymandered plan maximizing the number of majority-minority districts.

But Section 2 requires an electoral process equally open to all, not one that guarantees maximum political success for some over others. Section 2 does not and cannot

1 obligate Alabama to abandon district lines
2 enveloping the undisputed longstanding community
3 of interest in the Gulf to be replaced by
4 district lines dividing black and white with
5 such racial precision that Alabama could never
6 have constitutionally drawn those lines in the
7 first place.

8 Yet, that is what Alabama has been
9 commanded to do here: redraw its districts to
10 subordinate traditional districting principles
11 to race. The only way to add a second
12 majority-minority district to Alabama's plan is
13 to make race the non-negotiable criterion.
14 Plaintiffs' illustrative plans prove the point.
15 They offer only one way to get that second
16 majority-black district: split Mobile County
17 and divide the Gulf by race. Their new versions
18 of Districts 1 and 2 then stretch the width of
19 the state to group together black voters from
20 disparate areas as far west as Mobile and as far
21 east as the Georgia border.

22 The District Court relied on these
23 outlier plans to invalidate the state's
24 neutrally drawn map, and that was legal error.
25 Requiring states to scrap neutral plans in favor

1 of plans drawn on account of race set Section 2
2 at war with itself and with the Constitution.

3 The Court should make clear that if a
4 state's plan is the product of the state's
5 neutral districting principles, the plan is
6 equally open to all voters. Because Alabama's
7 2021 plan is such a plan, Plaintiffs' claims
8 fail.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: What would you use as
11 a comparator? I -- I assume that your problem
12 is that the comparator here was -- had race as a
13 non- -- as non-negotiable. What would you use
14 as a comparator if -- even if you thought that
15 there might be some vote dilution problems with
16 your plan?

17 MR. LACOUR: The -- the plan that
18 would be the adequate comparator would be one
19 that respects all of our traditional districting
20 principles as much as our own map but then has
21 some different racial outcome, similar to what
22 the Court has proposed in *Cromartie 2*, for
23 example. The -- that sort of map can actually
24 show that there's a problem with our map, but if
25 you are discriminating in favor of one racial

1 group, then that map cannot show that our map
2 was discriminating against that group. It --
3 it's a flawed control.

4 JUSTICE THOMAS: Well, don't you think
5 there's an overall problem with -- in these
6 dilution cases of determining at the beginning
7 what the comparator should be?

8 MR. LACOUR: Yes, Your Honor. I
9 think, as this Court noted both in the Holder v.
10 Hall plurality and in Brnovich, benchmarks are
11 critical in any Section 2 case.

12 And we proposed a benchmark to the
13 Court. Plaintiffs have not proposed any
14 benchmark other than perhaps maximization or
15 proportionality. But, of course, Section 2
16 rejects a proportionality baseline, and this
17 Court has wisely rejected maximization and
18 proportionality because they lead to
19 constitutional problems.

20 JUSTICE KAGAN: Do you agree that the
21 benchmark you propose has never been recognized
22 by this Court as the benchmark that's
23 appropriate in these kinds of cases?

24 MR. LACOUR: I -- I don't think so,
25 Justice Kagan. First, I mean, going back to

1 Gingles, I think the benchmark there even for
2 multi-member districts was neutrally drawn
3 single member districts, not racially
4 gerrymandered single member districts.

5 And then, when you continue --

6 JUSTICE KAGAN: Of course, you're
7 requiring that there be that kind of benchmark.
8 The question is not whether it's permissible.
9 You are requiring that there be a race-neutral
10 benchmark, and I'm asking whether that
11 requirement has ever been stated in our
12 precedents.

13 MR. LACOUR: I think that's what Bush
14 v. Vera, what Abrams, and what LULAC were all
15 pushing towards when they said you must account
16 for traditional districting principles. I don't
17 know why you would even account for them except
18 that if a plaintiff's failure to account for
19 them in their map -- if -- if plaintiffs fail to
20 account for them in their map, then their map
21 can't really shed any light --

22 JUSTICE SOTOMAYOR: Counsel --

23 MR. LACOUR: -- on whether there's a
24 problem.

25 JUSTICE KAGAN: I guess I ask because

1 what strikes me about this case is that under
2 our precedent it's kind of a slam dunk if you
3 just take our existing precedent the way it is,
4 and the three judges below all found this. The
5 three judges below said this is an easy case.
6 It's not one of the hard ones. It's not one of
7 the boundary line cases.

8 It was clear that the plaintiffs
9 satisfied the Gingles preconditions. It's --
10 and -- and past that, you know, you're looking
11 at a state where there are -- 27 percent of the
12 population is African American but only one of
13 seven districts where there is incredible
14 racially polarized voting, where there is a long
15 history of racial discrimination in the state.

16 Put all that together and it seems
17 clear that under our existing precedents, the
18 inquiry is complete in just the way that the --
19 that the -- that the court below found.

20 And, you know, it seems to me that
21 you're coming here, and it's totally your right
22 to do it, but really saying, change the way we
23 look at Section 2 and its application.

24 MR. LACOUR: Absolutely not, Your
25 Honor. And, respectfully, I thought this was

1 the -- this is such an edge case. This is a
2 case where the plaintiffs have come forward with
3 an expert who said it's hard to draw a second
4 majority-minority district by accident. It's a
5 case where the named plaintiff, Evan Milligan
6 himself, showed it's hard to do it on purpose.

7 He runs an Alabama-focused
8 redistricting nonprofit. He had a team of
9 trained map drawers try to draw a second
10 majority black district in Alabama and they
11 couldn't do it. That's at page 511 of the Joint
12 Appendix.

13 JUSTICE JACKSON: So, I'm sorry, can I
14 just help? I don't understand. Are you saying
15 that the Gingles preconditions as we ordinarily
16 understand them were not satisfied in this case?

17 MR. LACOUR: Yes, Your Honor. I think
18 that LULAC says --

19 JUSTICE JACKSON: And how so? How so?

20 MR. LACOUR: LULAC says quite clearly
21 account for traditional districting principles,
22 such as maintaining communities of interest and
23 traditional boundaries. There's an undisputed
24 traditional -- rather an undisputed community of
25 interest in the Gulf, the district court found

1 that the Gulf community is a community of
2 interest, and it's not maintained. So I think
3 it's open and shut under LULAC.

4 JUSTICE JACKSON: No, I'm sorry. So
5 you're saying Step 1 was not satisfied in this
6 case because the ordinary redistricting
7 principles -- I thought this was about a
8 race-blind algorithm, so now I'm confused.

9 So what -- what is the problem? And
10 let me just -- let me tell you why I think that
11 matters, because much like what Justice Kagan
12 was suggesting, we have to figure out whether
13 you are claiming that we need to change Gingles
14 in some fundamental way or whether you're just
15 saying that these plaintiffs didn't satisfy
16 Gingles in the way that we normally understand
17 it.

18 I thought you were saying Gingles Step
19 1 needs to be retooled to require some showing
20 of a comparison with a race-neutral -- or,
21 excuse me, a race-blind algorithm.

22 And so then my question was: Okay,
23 well, you would bear the burden, I think, of
24 showing that there's a problem with the way that
25 we're doing it now, that -- the way that Gingles

1 is working, and that a race-blind algorithm
2 actually produces a better result insofar as
3 it's better implementing what Congress intended
4 or it is required by the Constitution.

5 All of those are pretty heavy burdens,
6 I think, in this situation. So are you asking
7 us to reconsider what is happening with Gingles
8 to require that challengers compare their
9 original map at Step 1 with a race-blind
10 algorithm?

11 MR. LACOUR: The -- the algorithms are
12 not essential. They're very helpful and
13 illuminating in this case because the Milligan
14 plaintiffs brought them themselves.

15 JUSTICE JACKSON: What do they
16 illuminate?

17 MR. LACOUR: They show that this is
18 what you would expect a race-neutral map drawer
19 to produce, and --

20 JUSTICE JACKSON: Why does that
21 matter? I thought Congress's statute said we
22 don't care about intent. So the race-neutral
23 nature of this goes to whether or not Alabama
24 intended the result, and I take your point that,
25 no, you didn't. So what difference does it make

1 what a race-neutral algorithm would do?

2 MR. LACOUR: It matters for at least
3 three reasons, Your Honor, and this Court -- I
4 mean, every time that a Section 2 case has come
5 before this Court and you've had to consider
6 that interaction between Section 2 and the equal
7 protection clause, you've reversed for someone
8 using too much race and find too --

9 JUSTICE KAGAN: Do you think that
10 Section 2 sets out an intent standard?

11 MR. LACOUR: Your Honor, I think that
12 obvious -- it's undisputed that intent is
13 relevant. Intent has not been rendered
14 irrelevant.

15 JUSTICE KAGAN: Sure. You know,
16 nobody disputes that intent isn't relevant. The
17 question is, is intent required? And when I
18 read your brief, the -- all over it, you suggest
19 that intent is required. And I thought that we
20 have said on numerous occasions that intent is
21 not required, and the reason we've said it on
22 numerous occasions is because that's what
23 Congress said.

24 We once long ago said that intent was
25 required in Voting Right -- in the Voting --

1 Section 2 of the Voting Rights Act, and Congress
2 immediately slapped us down and said no, we
3 didn't mean that and made clear in the language
4 of the statute that it was incorporating a
5 results test, an effects test.

6 And yet your -- your -- your
7 arguments, as Justice Jackson has suggested,
8 really say that that's wrong and that there
9 needs to be a showing of intent in order to make
10 out a Section 2 violation.

11 MR. LACOUR: Two points on that. I
12 will that recognize there -- there's certainly
13 dicta in the Court, Section 2 precedent
14 suggesting that there doesn't have to be a
15 showing of intent.

16 What we have laid out in the brief is
17 what we think the best reading of the text,
18 which, when the Court -- when Congress decided
19 to put in 2(b), that language from Whitcomb and
20 from White v. Regester, they were importing that
21 invidious discrimination test.

22 JUSTICE KAGAN: I mean, to make this a
23 question of dicta in the cases when you have
24 Congress saying results in and then setting out
25 an entire subsection about what it means to

1 result in unequal access to the political
2 process, and then Gingles says, well, we
3 acknowledge that this was a response to Bolden,
4 where we held that proof of discriminatory
5 intent was required, and we say Congress revised
6 Section 2 to make clear that a violation could
7 be proved by showing discriminatory effect
8 alone.

9 And then we said it in Chisom. And
10 then we said it recently as a year ago -- I
11 dissented from this decision, but Brnovich says
12 the fact that Section 2 does not demand proof of
13 discriminatory purpose is one of the points of
14 law that nobody disputes.

15 MR. LACOUR: Correct. And, Your
16 Honor, our position we've laid out and the Court
17 obviously does not have to reach that in this
18 case because we do think that the plaintiffs
19 have brought such an edge case here that it
20 should be easy to resolve on narrower grounds,
21 but they imported from Witt and from White v.
22 Regester what the Senate factor -- what the
23 Senate report referred to as the White Results
24 Test.

25 Well, if you look back at White and if

1 you look back at Whitcomb, they say invidious
2 discrimination half a dozen times. Justice
3 White explained in his dissent in Mobile that
4 they were requiring -- the plurality was
5 requiring some sort of smoking gun proof
6 identifying the exact official, and Justice
7 White's position was no. Circumstantial
8 evidence can be enough to infer invidious
9 discrimination --

10 JUSTICE SOTOMAYOR: Counsel --

11 MR. LACOUR: -- and that's exactly
12 what he said --

13 CHIEF JUSTICE ROBERTS: Well, I guess
14 --

15 MR. LACOUR: -- in Rogers v. Lodge.

16 CHIEF JUSTICE ROBERTS: -- do you --
17 do you agree with the solicitor general's
18 statement in the government -- the federal
19 government's brief that they -- you can take
20 into account the factors that you're most
21 concerned about, which is the computer
22 simulations that show the effects of
23 race-neutral criteria, that you can take those
24 into account under the totality of the
25 circumstances point, but they do not show any --

1 do not undermine the proposition that there's no
2 requirement of showing intent?

3 MR. LACOUR: I think you can certainly
4 take them into account at the totality of
5 circumstances stage. If you look at the
6 district court's opinion here, though -- and one
7 other thing I'd note, in Brnovich, this Court
8 emphasized that the legitimate state goals are
9 critical at that totality of the circumstances
10 stage.

11 And I think, in a single member
12 districting contest -- context, it's especially
13 important that the Court be putting those
14 legitimate goals front and center for at least
15 two reasons.

16 First, as this Court has said in every
17 redistricting opinion that you've issued,
18 redistricting is one of the most difficult and
19 complex things that a legislature has to
20 undertake and it's an area where courts are not
21 particularly well-suited to come in and
22 second-guess.

23 But second and even more importantly,
24 single member districting is uniquely zero sum.

25 So, if someone brings a challenge to

1 an early voting period and says it's 10 days but
2 really should be 20 and they prevail and get 10
3 more days, no one is harmed on account of race.
4 The minority voters who prevailed and the
5 majority voters can both take advantage of that.
6 Similarly, if you challenge multi-member
7 districts and you replace them with neutral
8 single-member districts, no one's worse off on
9 account of race.

10 But, if you have a neutral plan and
11 someone comes in and upsets it to racially
12 gerrymander it in favor of one racial group,
13 well, necessarily you're going to be harming
14 some other group on account of race.

15 JUSTICE JACKSON: Well, why are you
16 saying --

17 JUSTICE ALITO: Counsel --

18 JUSTICE JACKSON: -- it's a neutral
19 plan, counsel? I -- I don't understand. The
20 Gingles preconditions are designed to establish
21 that there may actually be race discrimination
22 working in this particular situation, right? We
23 have, as Justice Kagan pointed out, not just the
24 initial hypothesis, which, by the way, is how I
25 look at the first step. I don't think the first

1 step is, you know, creating some sort of a
2 comparator or anything of the sort.

3 The first step is a burden on the
4 plaintiff, on the challenger, to show that their
5 hypothesis that another district could be drawn,
6 another minority -- majority-minority district,
7 is even feasible given the empirical numbers in
8 the situation, all right?

9 So, if we accept that, that's step
10 number one, and it contains an assessment of
11 things like racial segregation in housing
12 because you have to have enough of these people
13 pushed in, compacted in this district, right?

14 MR. LACOUR: Mm-hmm.

15 JUSTICE JACKSON: So we already have
16 this idea that there's some problem because we
17 have racial segregation in housing at Step 1.

18 Then Step 2 is asking, do we have a
19 problem in the sense that people are voting in
20 racially polarized ways? Step 3 is also that
21 kind of dynamic. Do we have a situation in
22 which the, you know, majority group is always
23 voting in the same way?

24 These are really tough things to
25 establish, and, collectively, they show that

1 it's not neutral, the situation that we are
2 approaching in this situation. We're talking
3 about a situation in which race has already
4 infused the voting system.

5 So can you help me understand why you
6 think that the world of, you know, race-blind
7 redistricting is -- is really the starting point
8 in this situation?

9 MR. LACOUR: Well, let's think about
10 why you have a compactness inquiry in the first
11 place. It's to make sure that no one is being
12 harmed on account of a lack of compactness. And
13 that's why traditional districting principles
14 are part of this inquiry too, so no one is being
15 harmed --

16 JUSTICE JACKSON: I don't think so. I
17 think it's to show that you have racial
18 segregation in housing happening in this
19 situation, that you have enough people who are
20 in, you know, marginalized groups that another
21 district is possible.

22 And why is that happening? Because
23 people are being segregated in effect, in
24 effect, as Judge -- Justice Kagan pointed out,
25 right? We're not talking about intent. We're

1 talking about the effect of what's happening on
2 the ground in these jurisdictions.

3 MR. LACOUR: Two points.

4 First, on the segregation point, if
5 there really was that compact segregated part of
6 Alabama to draw that second black district, they
7 wouldn't have had to split Mobile for the first
8 time ever, gone 170 miles northeast up to
9 Montgomery, and then dipped a hundred miles to
10 the southeast to Dothan, Alabama.

11 JUSTICE KAGAN: Okay. So that's a
12 different argument.

13 JUSTICE ALITO: But, counsel, you
14 have a --

15 CHIEF JUSTICE ROBERTS: Justice Alito.

16 JUSTICE ALITO: Counsel, you have made
17 a number of arguments. Some of them are quite
18 far-reaching, and you've been questioned about
19 some of those already in the argument today, but
20 let me make sure I understand your -- your basic
21 argument, your least far-reaching argument.

22 And as I understood it, the argument
23 is that the first Gingles precondition requires
24 the showing that there can be a reasonably
25 configured majority-minority district. It's not

1 just any old majority-minority district. It has
2 to be reasonably configured. And reasonably
3 configured means something more than just
4 compact. It means a district that is the type
5 of district that would be drawn by an unbiased
6 mapmaker.

7 Now a plaintiff in a case like this
8 can attempt to satisfy that first condition
9 simply by coming forward with a district that is
10 majority-minority, but that doesn't end the
11 inquiry because, if it can be shown, as you
12 claim the computer simulations in this case
13 show, that that is not the kind of district that
14 an unbiased mapmaker would ever draw, then the
15 first Gingles precondition is not satisfied.

16 Now that's how I understood your --
17 your basic argument. Am I right on that?

18 MR. LACOUR: Yes. Yes, Your Honor.
19 But you could also consider that at the totality
20 of the circumstances --

21 JUSTICE ALITO: And you could consider
22 it at the totality of the circumstances.

23 MR. LACOUR: Mm-hmm.

24 JUSTICE ALITO: But your most basic
25 argument is not at war with Gingles. You have

1 quarrels with Gingles, but your most basic
2 argument fits right into Gingles.

3 MR. LACOUR: Absolutely. And in
4 LULAC, the Court recognized the compactness
5 inquiry lacked some precision. Obviously --

6 JUSTICE KAGAN: Well, Mr. Lacour --

7 JUSTICE SOTOMAYOR: Counsel --

8 MR. LACOUR: -- some precision was
9 needed.

10 JUSTICE KAGAN: -- it only -- with
11 Gingles if Gingles meant reasonably configured
12 in the way that Justice Alito suggests.

13 MR. LACOUR: Mm-hmm.

14 JUSTICE KAGAN: But there's no
15 indication in Gingles or in any of our cases
16 that the Court did mean reasonably configured in
17 the way that Justice Alito suggests.

18 Reasonably configured meant take a
19 look at a district. Does the district have sort
20 of reasonable lines, or are you doing something
21 totally crazy? Does the district, you know,
22 incorporate communities of interest? Does it --
23 you know, does it make sure that traditional
24 districting criteria are satisfied?

25 If you can come in with a map that

1 looks like that, which plaintiffs here did --
2 nobody contests that even, or maybe you do. I
3 don't know. Certainly, the judges below found
4 that question very easy.

5 Then you go on. This is just a
6 precondition to show that you have a map that
7 accords with traditional districting criteria.
8 They had that map.

9 MR. LACOUR: With -- with respect,
10 first, again, I'm not sure why the Court has
11 ever spoken about traditional districting
12 principles and reasonable configuration, or at
13 least the Court has never suggested that a map
14 that the state could never enact itself under
15 the Equal Protection Clause is somehow
16 reasonably configured. If they came forward
17 with a Cooper v. Harris map or the Bethune-Hill
18 map --

19 JUSTICE JACKSON: But why is that --

20 MR. LACOUR: -- surely, that's not
21 reasonably configured.

22 JUSTICE JACKSON: -- the question at
23 Step 1, counsel? Why is that the question -- at
24 Step 1, we're not even worried about the state's
25 map. We're asking the -- the -- the

1 challengers, it's a burden on the challengers,
2 can you sustain your hypothesis that under
3 traditional redistricting principles we can have
4 a map that is drawn the way we ordinarily draw
5 maps and has a majority of minorities?

6 It's not about the state's map at 1.
7 So I don't understand why we would have to
8 ensure that the challengers' map conforms with
9 other legal requirements.

10 MR. LACOUR: With respect, this whole
11 case is about the state's map. The whole
12 Section 2 inquiry should be about the state's
13 map. And there's something bizarre with the
14 fact that, like, we have to somehow show that
15 there's something so wrong with their map --

16 JUSTICE JACKSON: No, counsel --

17 MR. LACOUR: -- that our map gets to
18 stand.

19 JUSTICE JACKSON: -- it's like -- it's
20 like -- it's like the burden-shifting tests that
21 this Court has in all kinds of other
22 discrimination. It's like McDonnell-Douglas,
23 right? At Step 1, the challengers have to do
24 something.

25 MR. LACOUR: Mm-hmm.

1 JUSTICE JACKSON: And in this case,
2 they have to do something really hard. They
3 have three different hurdles that they have to
4 jump over in order to even get us to question
5 Alabama's maps. And at Step 1, they have to
6 show this empirical thing. And I don't
7 understand why you are now suggesting that the
8 Step 1 has to also relate to the legality of
9 that map. That's not the ultimate map that it's
10 going to be, right? Even if they win, Alabama
11 has the opportunity to put out its own map. So
12 they're just doing a particular thing at Step 1.
13 And I don't understand your -- your argument.

14 MR. LACOUR: With respect, Your Honor,
15 this Court has said account for traditional
16 districting principles, and if they get to leave
17 a few of those aside, then that hurdle becomes
18 very low. And -- and maps that Evan Milligan
19 himself couldn't have conceived of somehow clear
20 that hurdle --

21 JUSTICE SOTOMAYOR: Counsel, may I?

22 JUSTICE ALITO: Suppose --

23 MR. LACOUR: -- and then state and --
24 sorry, Justice Sotomayor.

25 JUSTICE SOTOMAYOR: Finish answering,

1 but then come to me.

2 MR. LACOUR: And, in effect, in this
3 case and in multiple circuits, lower courts are
4 treating Gingles 1, 2, and 3 as the whole ball
5 game. So, if you're going to leave Gingles 1 as
6 this very easy to satisfy precondition, well,
7 then all the more important for you to consider
8 the state's legitimate purposes --

9 JUSTICE SOTOMAYOR: Counsel?

10 MR. LACOUR: -- at the totality stage.

11 JUSTICE SOTOMAYOR: Now may I get to
12 that?

13 MR. LACOUR: Yes.

14 JUSTICE SOTOMAYOR: All right. First
15 of all, I followed the district court's
16 findings, the three judges, extensive record.
17 They found that the Respondents' maps -- or the
18 Respondents' map respected traditional
19 districting better than the state's map in
20 medium compactness, continuity, respect for
21 political subdivisions, and the desire to keep
22 together existing communities of interest.

23 You dispute that. We can go into the
24 record. There is a fight here, however, over
25 what's a continuing existing community of

1 interest. You sit or you've been arguing that
2 Mobile and what's the other county?

3 MR. LACOUR: Mobile and Baldwin
4 Counties.

5 JUSTICE SOTOMAYOR: Baldwin, that
6 they're a community of interest. Why? They
7 have a, I think it's French and Spanish
8 background. Just so happens that all of those
9 people are white. And you've never split those
10 communities. The Black Belt has all black
11 people or not all but mostly black people.

12 MR. LACOUR: Fifty-six --

13 JUSTICE SOTOMAYOR: So --

14 MR. LACOUR: -- 56.6 percent.

15 JUSTICE SOTOMAYOR: Yeah. Mobile and
16 Baldwin have a majority white. That black
17 community, through the decades, has been split
18 three or four ways. Now the question is, why?

19 What the district court did was to
20 look at that community and say: It may be
21 black, but that's irrelevant to what constitutes
22 a community of interest. It's not merely its
23 race. It's its socioeconomic background, it's
24 educational level, it's occupation. It's all of
25 the things that one would look at to define a

1 community of interest.

2 And that community of interest should
3 be held together because, just like Mobile and
4 Baldwin, assuming -- and the district court
5 didn't -- held that you hadn't met your burden
6 on that actually being a community of interest,
7 but even if you wanted to keep it that way, my
8 question to you is, assume I accept that as a
9 community of interest. Why isn't the map that
10 the district court relying on race-neutral?

11 MR. LACOUR: There's a lot --

12 JUSTICE SOTOMAYOR: It's looking at
13 community of interest. If you -- and I think
14 what the district court said was that
15 historically it -- the maps you've drawn in the
16 past had discrimination sort of built in.

17 MR. LACOUR: Justice Sotomayor,
18 there's a lot to unpack there, a few premises I
19 think I need to clear up as a factual matter,
20 and then I'd be happy to get to the legal point.

21 First, the district court did find at
22 page 180 of the Milligan stay appendix that
23 there is a Gulf Coast community of interest.
24 They found Representative Bradley Bern's
25 testimony to be helpful. That's at page 122.

1 So there's no dispute there that there
2 is a community of interest, nor -- nor could
3 there be.

4 Second --

5 JUSTICE SOTOMAYOR: I -- I think there
6 was a difference of opinion about that, but --

7 MR. LACOUR: I -- I think --

8 JUSTICE SOTOMAYOR: -- we can go -- we
9 can go --

10 MR. LACOUR: -- I think we have two --

11 JUSTICE SOTOMAYOR: -- further
12 assuming that it --

13 MR. LACOUR: -- we have two undisputed
14 communities of interest.

15 JUSTICE SOTOMAYOR: All right.

16 MR. LACOUR: We've got the Gulf.
17 We've the Black Belt.

18 Second, there's --

19 JUSTICE SOTOMAYOR: So why can you not
20 -- why can you put precedents on keeping one
21 together but not keeping the other together --

22 MR. LACOUR: So --

23 JUSTICE SOTOMAYOR: -- breaking it up
24 by three or four?

25 MR. LACOUR: -- two responses to that.

1 One is I don't think courts are very
2 well-positioned to judge how -- which community
3 of interest should be weighed in which way --

4 JUSTICE SOTOMAYOR: Well, if -- if --

5 MR. LACOUR: -- in a particular map.

6 But, second --

7 JUSTICE SOTOMAYOR: -- if -- if the
8 Respondents' maps are better at compactness,
9 continuity, respect for political subdivision,
10 why are they worse than what the state has done
11 or suspect?

12 MR. LACOUR: They -- they are not
13 better. The Districts 1 and 2 are far less
14 compact, and Dr. Duchin testified that the
15 reason for that --

16 JUSTICE SOTOMAYOR: And 1 or 2 might
17 be, but there's always going to be something
18 that's a little less on medium they said it
19 was more compact.

20 MR. LACOUR: Well, on average, and
21 that's because they completely restructured the
22 north of the state, Districts 5 and 4, which are
23 not at issue at all here, to build up a
24 compactness budget that could then be spent at
25 the bottom of the state, which --

1 JUSTICE SOTOMAYOR: That -- that's not
2 what the district court found. I mean, but
3 putting this aside, let's go back to my
4 fundamental question.

5 I thought the issue under Section 2
6 was whether or not a particular racial minority
7 has -- as a result, can equally participate. If
8 that's the case, and on all the factors the
9 district court looked at, it concluded that the
10 Black Belt community, which is a community of
11 interest, was inappropriately cracked --

12 MR. LACOUR: Your Honor --

13 JUSTICE SOTOMAYOR: -- in three or
14 four districts, why isn't that actionable under
15 Section 2?

16 MR. LACOUR: Your Honor, there is no
17 finding -- it shows up a lot in my friend's
18 briefs, but there is no finding that we cracked
19 the Belt -- Black Belt, absolutely not a finding
20 that we cracked the back -- Black Belt.

21 JUSTICE SOTOMAYOR: Well, how can it
22 not be if you're not keeping together a
23 community of interest the way you did --

24 MR. LACOUR: Because --

25 JUSTICE SOTOMAYOR: -- with Mobile and

1 Baldwin?

2 MR. LACOUR: -- Your Honor, the -- the
3 Black Belt, as both plaintiffs and their experts
4 testified, stretches from Texas to Virginia. We
5 can't keep the whole Black Belt together. And
6 those 18 --

7 JUSTICE SOTOMAYOR: You already have
8 one long district in your plan.

9 MR. LACOUR: Yes. And as Bill Cooper,
10 the plaintiffs' expert, the Caster plaintiffs'
11 expert explained, that's because the Tennessee
12 River runs east to west up there. It has always
13 been --

14 JUSTICE SOTOMAYOR: And the Black Belt
15 runs east to west as well.

16 MR. LACOUR: Correct, but the rivers
17 in the southwest of the state, the Tom Bigley,
18 the Alabama, and the Mobile, they run north to
19 south and they drop off in the port. And that's
20 why Shalela Dowdy, one of the Milligan
21 plaintiffs, testified that when Mobile's doing
22 well, then everyone regardless of race in the
23 Mobile area and even in the Black Belt counties
24 directly north of there is doing well. So
25 they're -- they're proving our case for us.

1 JUSTICE ALITO: Are there enough
2 people in the Black Belt to constitute a
3 district by itself or --

4 MR. LACOUR: No, Justice --

5 JUSTICE ALITO: -- was it -- was it
6 necessary in their proposed District 7 to reach
7 up into -- into Montgomery and pick up black
8 areas there in order to get over the 50 percent
9 mark?

10 MR. LACOUR: Yes. That's why it goes
11 up into Jefferson County. As I mentioned, the
12 18 core Black Belt counties are only
13 56.6 percent black, only 566,000 people. So
14 it's very difficult to draw a district. Plus,
15 because it spans the state, you can't draw one
16 district that puts them all in there together.
17 Otherwise, you're going to strand too many
18 people south of there and you can't have
19 contiguous districts.

20 And on this point of who does better
21 or not in the Black Belt, the district court did
22 not find that their plans do better on the Black
23 Belt. They said they do at least as well. It
24 would have been clearly erroneous to find that
25 they do better because our plan puts those 18

1 core counties into three districts. Every one
2 of their plans puts them into at least three
3 districts, with the exceptions of --

4 JUSTICE KAGAN: May I ask for order?

5 CHIEF JUSTICE ROBERTS: Why don't we
6 wait until we get -- get back.

7 Counsel, you've been asked a lot of
8 questions on the nature of your submission. I'm
9 not sure you've had a full opportunity to
10 respond.

11 What exactly is your submission under
12 Section 2 that, in particular, the relation
13 between the computer analysis that you've
14 submitted and why your argument is not an effort
15 to resuscitate the intent test that Congress has
16 rejected under Section 2?

17 MR. LACOUR: Well, Your Honor, we
18 think that, as I mentioned before, intent is not
19 irrelevant. Even the Milligan plaintiffs agree
20 at page -- I don't have the page right in front
21 of me -- page 20 in their brief that Section 2
22 requires evidence relevant to the issue of
23 intentional discrimination.

24 Well, we've got phenomenal evidence
25 that they brought forward, and this was another

1 fact I need to clear up because the United
2 States and both sets of plaintiffs got it wrong
3 in their briefs. But Dr. Imai, he was their --
4 he was the Milligan plaintiffs' expert who was
5 working with the 2020 data.

6 And he drew 10,000 -- three sets of
7 10,000 maps. The third set guaranteed one
8 majority black district of 50 to 51 percent,
9 razor thin, leaving as many black voters as
10 possible to find in the other six districts and
11 form a second majority-minority district, then
12 contiguity equal population, keep counties
13 together, stay relatively compact, don't pair
14 incumbents and then prioritize communities of
15 interest.

16 And they've said again and again that
17 he didn't take into account communities of
18 interest. That is flatly wrong. He did. And
19 so what he was told to do by the Milligan
20 plaintiffs was to prioritize putting the Gulf
21 counties together and prioritize putting the 23
22 Black Belt counties together.

23 When he did that, he had one majority
24 black district that was preprogrammed, and then
25 the second highest BVAP district averaged about

1 36 percent.

2 CHIEF JUSTICE ROBERTS: But I guess,
3 to get to the basic point, in what way do your
4 simulations, which you required to be
5 race-neutral, why does that seem to require an
6 intent test?

7 In other words, you seem to say what
8 was wrong with the other simulations is that
9 they took race into account. And the state
10 rejected that to look for the -- the neutral
11 plans.

12 That sounds to me like something
13 that's looking for intent. You say there was no
14 intent because every time we ran the simulation
15 without taking race into account, this is what
16 it came up with.

17 And my understanding of our -- our
18 cases is that you don't have to show intent. So
19 what is the significance of your computer
20 simulations?

21 MR. LACOUR: Well, a -- a few points,
22 Your Honor. I mean, if you inject race as a
23 traditional districting principle, which is what
24 both plaintiffs' map drawers said they did.
25 They treated race as a traditional districting

1 principle. It's going to have that hydraulic
2 effect and it's going to make it harder to
3 comport with traditional districting principles
4 and you're going to end up with a map that's not
5 going to do as well.

6 Also, I mean, intent is not
7 irrelevant. If we've shown conclusively that
8 we're achieving our legitimate goals, that has
9 to factor in. I think even the dissent in
10 Brnovich said a Section 2 plaintiff needs to
11 show that it's not possible for the state to
12 achieve its legitimate goals in some way.

13 And -- and it's -- we've shown that.
14 It is impossible for us to achieve undisputably
15 legitimate goals of keeping the Gulf together,
16 of maintaining our preexisting district lines in
17 a large amount, and keeping relatively compact
18 districts that someone could look at from
19 Alabama and recognize why they were drawn that
20 way without looking and seeing the price.

21 CHIEF JUSTICE ROBERTS: Thank you.

22 JUSTICE JACKSON: But, counsel, what
23 about the --

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas, it's your turn.

2 Justice Alito?

3 JUSTICE ALITO: No.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor?

6 JUSTICE SOTOMAYOR: I find it
7 interesting that you're touting Dr. Imai's
8 studies when, below, you vehemently objected to
9 his studies on the basis that the studies were
10 incomplete and didn't take into account all of
11 Alabama's guidelines.

12 MR. LACOUR: Yes, Your Honor. And
13 that's a very easy answer to give. We took into
14 account the preexisting district lines as
15 traditional boundaries, so to speak. He did
16 not. And so his map couldn't reveal --

17 JUSTICE SOTOMAYOR: Well, that begs --

18 MR. LACOUR: -- whether race defined
19 things.

20 JUSTICE SOTOMAYOR: -- that begs --

21 MR. LACOUR: But --

22 JUSTICE SOTOMAYOR: -- the question.

23 MR. LACOUR: -- but plaintiffs, none
24 of their map drawers cared at all about
25 preexisting district lines. So they took into

1 account -- he took into account the same things
2 they were taking into account, and when he did,
3 without also putting race into account, that's
4 the one thing he didn't take into account, then
5 you come back with maps that come nowhere close
6 to creating a second majority-black district,
7 which shows that race was the criteria and that
8 could not be compromised. I mean, it's textbook
9 predominance.

10 We could have never drawn those maps
11 constitutionally. And, again, just to get back
12 to, like, the general confusion here, it puts us
13 in an obvious rock and a hard place. They're
14 using maps we could have never drawn to force us
15 to draw maps that, like, again, we couldn't have
16 ever drawn.

17 So that cannot be how the equal
18 openness mandate of Section 2 works. It needs
19 to work in harmony with the equal protection
20 mandate of the Constitution, not in conflict.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

22 JUSTICE KAGAN: General, some of your
23 arguments, I think not all of them, but some of
24 your arguments would strongly indicate that
25 Alabama could enact a plan with no

1 majority-minority districts.

2 Do you think Alabama could do that?

3 MR. LACOUR: Under the current
4 guidelines, I don't think we would be able to
5 because core retention is one of those
6 principles.

7 JUSTICE KAGAN: What do you mean,
8 under the current guidelines?

9 MR. LACOUR: The 2021 guidelines that
10 the bipartisan redistricting committee approved
11 and handed over for our -- for our --

12 JUSTICE KAGAN: On -- on your current
13 guidelines. I'm not interested in Alabama's
14 current guidelines. I'm interested in whether
15 you think, as a matter of federal law, as a
16 matter of the Voting Rights Act, you are
17 prohibited from enacting a plan that has zero
18 majority-minority districts.

19 MR. LACOUR: I think it would depend
20 on sort of the guidelines that are being
21 proposed there and the motivations. This Court
22 said in LULAC breaking up an existing district
23 is -- is inherently suspect. And so that would
24 be a much stronger case.

25 And I'll note LULAC is actually the

1 only published opinion of this Court where you
2 found a Section 2 violation, and --

3 JUSTICE KAGAN: So you think that
4 there are circumstances -- I mean, this is
5 important to me because some of your arguments
6 sweep extremely widely, maybe most of them --
7 that there are circumstances in which a
8 population that is 27 percent of the state's
9 population could essentially be foreclosed from
10 electing a candidate of their choice anywhere?

11 MR. LACOUR: Your Honor, there's
12 always going to be that intensely local
13 appraisal to see what was going on there.
14 Obviously, if we had had these guidelines and we
15 passed a map that took us from one down to zero,
16 where we retained the cores of Districts 1
17 through 6 but not District 7, that would be an
18 easy case. That would be LULAC all over again.
19 It would be an easy case to bring.

20 And, also, I don't think --

21 JUSTICE KAGAN: So it all depends
22 on -- you know, just it all depends?

23 MR. LACOUR: Well, it all depends on
24 what Section 2 is trying to get at. And I don't
25 think --

1 JUSTICE KAGAN: Okay. Well, I think
2 what Section 2 is trying to get at is it's
3 trying to ensure equal political opportunities.
4 That's what -- so let me just use that as a
5 segue to my last question, which is that, you
6 know, this is an important statute. It's one of
7 the great achievements of American democracy to
8 achieve equal political opportunities regardless
9 of race, to ensure that African Americans could
10 have as much political power as -- as -- as
11 white Americans could. That's a pretty big
12 deal.

13 And it was strengthened, this statute,
14 in 1982 when this Court interpreted it too
15 narrowly for Congress's taste, and Congress said
16 no, we didn't mean that at all and made this
17 into a results test.

18 Now, in recent years, this statute has
19 fared not well in this Court. Shelby County
20 looks at Section 5 and it says no, Section 5, we
21 don't need that anymore, and one of the things
22 it says is we have Section 2.

23 And then Brnovich comes along, and
24 that's a Section 2 case, and the Court says:
25 You know what, Section 2, they're really

1 dilution claims. You know, this is a denial
2 claim, and -- and so we can construe that very
3 narrowly. But, of course, there's just all
4 these cases that are dilution claims. That's
5 really what Section 2 is about.

6 And now here we are, Section 2 is a
7 dilution claim, this -- you know, the classic
8 Section 2 dilution claim. And you're asking us
9 essentially to cut back substantially on our 40
10 years of precedent and to make this too
11 extremely difficult to prevail on.

12 So what's left?

13 MR. LACOUR: Justice Kagan, the Voting
14 Rights Act has achieved tremendous gains. In
15 2016, for example, Alabama, black voters turned
16 out at 4.6 points higher than white voters, even
17 though nationwide that gap was 2.3 percent the
18 other direction. In 2018, much the same story.
19 We had the second highest black registration in
20 the country, second only to Mississippi. So I
21 think we need to not lose sight of that.

22 In terms of what Section 2 is supposed
23 to be doing, I think the problem here is we're
24 kind of in like a third generation of vote
25 dilution claims. You have the multi-member

1 districts is generation 1. Generation 2 was
2 getting rid of the racial gerrymanders. But
3 generation 3 is let's impose the racial
4 gerrymanders, which I don't think Section 2 was
5 ever designed to do. It's what's led to all
6 this confusion and this tension between an equal
7 openness statute and equal protection mandate.

8 And we're just saying, like, that
9 cannot be what it means. Whatever it means, it
10 can't be that we have to obliterate
11 longstanding, unprecedented -- I mean undisputed
12 communities of interest in favor of districts
13 that sort of arch across the state to connect
14 people from Mobile and Dothan, which no neutral
15 map drawer would ever do. And, obviously, it
16 was not the concerns of the 1982 Congress.

17 JUSTICE KAGAN: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

20 Justice Kavanaugh?

21 JUSTICE KAVANAUGH: I interpreted your
22 argument in the briefs similarly to Justice
23 Kagan and Justice Alito, that you had a broad
24 argument which struck me as asking us to rewrite
25 Gingles in -- in a variety of ways, and then a

1 narrower argument focused on compactness,
2 whether the new majority-minority district
3 proposed here was reasonably compact.

4 Assume just for the sake of argument
5 that we don't rewrite Gingles and then focus on
6 the compactness of the proposed
7 majority-minority district. I mean, you get to
8 this on page 66 of your brief, and you say with
9 respect to compactness, "the question is whether
10 the newly drawn district alone is sufficiently
11 compact or whether the minority population is so
12 sprawling that any majority-minority district
13 cannot be reasonably configured."

14 I agree completely that that is the
15 question. I did not find much help on the
16 answer. And this is your opportunity to -- to
17 -- to answer that question.

18 Why is it -- why do you think it's so
19 sprawling, given that it does respect a
20 community of interest in the Black Belt, that it
21 can't be a new majority-minority district?

22 MR. LACOUR: Two points on that,
23 Justice Kagan. As I was noting -- I mean
24 Justice Kavanaugh, I apologize.

25 Their maps actually don't do any

1 better for the Black Belt, and that wasn't their
2 goal. So, if you look at Duchin Plan B, I
3 believe it is, that's at 3a of the U.S. brief's
4 appendix, she splits the Black Belt four ways,
5 among four districts, those 18 core counties.
6 And not to be outdone, Mr. Cooper, the Caster
7 plaintiffs' map drawer, in his Plan 6, that's at
8 9a, he splits them five ways.

9 So we do just as well as them with the
10 Black Belt, but we also keep together --

11 JUSTICE KAVANAUGH: But isn't the
12 question --

13 MR. LACOUR: -- the Gulf Coast
14 community of interest.

15 JUSTICE KAVANAUGH: Sorry to
16 interrupt. Isn't the question whether the new
17 district is reasonably compact, reasonably
18 configured?

19 MR. LACOUR: Correct. And as this
20 Court has said --

21 JUSTICE KAVANAUGH: And so, on that,
22 you look at respecting county lines, for
23 example, right? That's an important one. And
24 this did. This new district did just as well,
25 if not better, in respecting county lines. At

1 least that's the argument. So I want to hear
2 your response to that.

3 Then the overall shape of the new
4 district, the argument on the other side is:
5 Well, that looks similar in shape to a lot of
6 other districts that are in the state plan as
7 well.

8 So you don't have the kind of Shaw v.
9 Reno bizarre map, and you don't have county
10 lines being split more -- but respond to this if
11 you want -- split more than the state plan
12 already split county lines.

13 So then the question is, why is this
14 district not reasonably compact? And I will be
15 candid, for both sides, I don't really know how
16 to measure reasonably compact. That's why I'm
17 looking -- I mean, that's very -- there's been a
18 lot written about it and I've read a lot. It's
19 very hard to measure. But county lines are one
20 of the -- one of the measures.

21 MR. LACOUR: Well, three of the Duchin
22 plans split more counties than necessary. The
23 Cooper plans keep them together but the same
24 number of splits. Six is the minimum --

25 JUSTICE KAVANAUGH: Okay. If it's --

1 MR. LACOUR: -- you have to have.

2 JUSTICE KAVANAUGH: -- the same number
3 of splits, why is it not reasonably compact?

4 MR. LACOUR: Because they ignore other
5 traditional districting principles. So like
6 we -- as we noted, preexisting district lines, a
7 core retention has been something the state has
8 given effect to for a long time. This Court in
9 Karcher said that is a legitimate goal in
10 redistricting.

11 And the district court said: Well,
12 you don't have to account for that traditional
13 districting principle because that would make it
14 really hard to satisfy Gingles. Well, but
15 that's the whole point of the traditional
16 districting principles inquiry, is -- is -- is
17 not to make it easy. It's to make sure that
18 what they come up with is essentially playing by
19 similar rules as the state.

20 And -- and they just got to set aside
21 the ones that they didn't like that got in the
22 way. That can't be what reasonably configured
23 means or what account for traditional
24 districting principles means.

25 And they say, well, there's no

1 precedent for taking into account core
2 retention. That's not true. If you go back to
3 Abrams, I mean, after Miller, with the max back
4 -- max black plan foisted upon Georgia in the --
5 after the 1990 census, it was sent back to the
6 district court, who was forced to end up drawing
7 a map for Georgia's 11 congressional districts.

8 Georgia at that time, just like
9 Alabama today, was 27 percent black population.
10 And the judge was trying to comply with Section
11 2, including this compactness inquiry, and so he
12 said let's look at the traditional districting
13 principles of the state. And one of those was
14 retaining the cores of preexisting districts.

15 And so he built that into his
16 compactness analysis and, as a result, concluded
17 it's only possible in Georgia --

18 JUSTICE KAVANAUGH: Doesn't that make
19 it a bit of a non-retrogression principle, which
20 Section 2 really was not designed to do?

21 MR. LACOUR: No, Your Honor. I -- I
22 think, if you can find something wrong with
23 those preexisting cores, then -- then maybe you
24 get to set them aside, and there are some states
25 who don't care about preexisting cores and they

1 couldn't take advantage of this.

2 But, in Georgia, they indisputably did
3 take into account preexisting cores. In
4 Alabama, we indisputably do too. When the
5 Democrats controlled the legislature in 2002 and
6 Senator Hank Sanders from Selma, Alabama,
7 proposed the 2002 map, it looked a lot like the
8 1992 map.

9 JUSTICE KAVANAUGH: Last -- last
10 question. You've referred a couple times to
11 maximization and proportionality, but my
12 understanding is that compactness, the
13 compactness requirement, was the critical part
14 of this inquiry under Gingles that prevents the
15 statute from being maximization or
16 proportionality because you can't just group
17 together people throughout the state in an
18 attempt to maximize or seek proportionality. It
19 has to be reasonably compact.

20 So doesn't the compactness requirement
21 mean that it's not a simple maximization or
22 proportionality requirement if the compactness
23 requirement is properly applied?

24 MR. LACOUR: If it's properly applied
25 and they actually have to take into account our

1 traditional districting principles, but I'd like
2 you to imagine yourself as a legislator --

3 JUSTICE KAVANAUGH: I think I should
4 -- I should let others question now. Thanks.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: Mr. Lacour, I think
8 I'm struggling in the same way that some others
9 have about narrowing down exactly what your
10 argument is. You know, I -- I disagree with you
11 and agree with Justice Kagan's characterization
12 of the intent point. Our precedent and the
13 statute itself says that you don't have to show
14 discriminatory intent, so put that aside.

15 MR. LACOUR: Mm-hmm.

16 JUSTICE BARRETT: I had understood
17 your argument, your primary argument, to be much
18 narrower, and I want to make sure now that I'm
19 understanding it because now I'm questioning
20 exactly where you're going.

21 I had understood you to be saying that
22 the first Gingles factor requiring reasonably
23 configure -- a reasonably configured map that
24 showed more majority-minority districts, that
25 that had to be race-neutral, that it was not

1 reasonably configured if it wasn't, and that our
2 precedents have never -- have left the question
3 open, they've never said one way or another
4 whether you could use race as a prerequisite.

5 Here, you know, there was testimony
6 below that it was impossible to get to the two
7 majority-minority districts if you didn't take
8 race into account. There's the quote from the
9 plaintiffs' expert saying that you can't get
10 there on accident, which is why it's important
11 to do it on purpose.

12 MR. LACOUR: Yes.

13 JUSTICE BARRETT: I understood your
14 argument to be that the first Gingles factor
15 required the plaintiffs to come forward with a
16 racially neutral map showing an increase in
17 majority-minority districts because that was the
18 way to establish a baseline from which equal
19 opportunity could be judged in the totality of
20 the circumstances test.

21 MR. LACOUR: Mm-hmm.

22 JUSTICE BARRETT: And I understood you
23 to be saying that you are being asked, all
24 states are being asked to navigate the rock and
25 the hard place of the Fourteenth Amendment and

1 the Voting Rights Act and that if you were
2 forced to adopt a map proposed by the plaintiffs
3 that was racially gerrymandered because race was
4 predominant in its drawing, that you would be
5 violating the Fourteenth Amendment.

6 Therefore, the first factor of Gingles
7 required to get past the hurdle that Justice
8 Jackson was talking about, to get past that
9 hurdle, it required race neutrality.

10 Is that your central argument?
11 Because you've been talking a lot about the
12 farther-reaching arguments.

13 MR. LACOUR: Yes, that -- that is our
14 core argument that it -- it cannot be that they
15 can come forward with a map that we would never
16 be allowed to draw, call it reasonably
17 configured and then force us to draw a map we
18 would never be allowed to constitutionally draw.

19 You can think of that either -- the
20 problem is either race predominance or the
21 problem is, when race enters in to the equation,
22 then traditional districting principles
23 necessarily have to yield, which is what the
24 district court found on page 214 of the Milligan
25 stay appendix, non-racial considerations had to

1 yield to race.

2 So you -- you -- you can look at
3 either as the problem is race predominance or
4 the problem is you can't maintain -- you can't
5 account -- properly account for traditional
6 districting principles if you treat race as one
7 of those principles and necessarily force the
8 other ones to yield, but I think it's six in one
9 hand, half a dozen in the other.

10 JUSTICE BARRETT: What about our
11 precedents that say that satisfying the Voting
12 Rights Act is a compelling interest on the part
13 of the states? Doesn't that get you out of the
14 Fourteenth Amendment problem?

15 MR. LACOUR: This Court has tellingly
16 only ever assumed that compliance with Section 2
17 is a compelling interest. And we don't think
18 that race-based remedies would be a narrowly
19 tailored remedy for whatever --

20 JUSTICE BARRETT: What if -- what if
21 we -- well, I think we might have done more than
22 assume it. So if -- if we -- let's just stay
23 with me and assume that we have so held.

24 If we have so held, do you lose?

25 MR. LACOUR: I -- I don't think we

1 lose. I think -- I mean, I think there are
2 going to be some cases where Section 2 violation
3 lines up with an equal protection clause
4 violation and might satisfy strict scrutiny.
5 So, for example, if there's race in the lines,
6 then, yeah, you have to have a race-based remedy
7 to take the race out of the lines.

8 But I don't think there's a
9 sufficiently compelling interest here based on,
10 for example, the showing that they made, where
11 they really just showed some broad-based
12 societal discrimination. They didn't show
13 anything wrong with our maps. So it -- it
14 cannot be that that is specifically identified
15 discrimination that could justify using race to
16 change our map.

17 I mean, you can go through that entire
18 250-plus pages of opinion from the district
19 court and really kind of miss our map
20 altogether, other than the fact that it doesn't
21 produce a second black district. And that just
22 shows how far afield the Section 2 inquiry
23 really has come in this case.

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: Yes. I am so, so
3 glad for Justice Barrett's clarification because
4 I had the same thought about what you were
5 arguing, and I'm glad that you clarified that
6 your core point is that the Gingles test has to
7 have a race-neutral baseline or that the -- the
8 first step has to be race-neutral.

9 And -- and what I guess I'm a little
10 confused about in light of that argument is why,
11 given our normal assessment of the Constitution,
12 why is it that you think that there's a
13 Fourteenth Amendment problem? And let me just
14 clarify what I mean by that.

15 I don't think we can assume that just
16 because race is taken into account that that
17 necessarily creates an equal protection problem,
18 because I understood that we looked at the
19 history and traditions of the Constitution at
20 what the framers and the founders thought about
21 and when I drilled down to that level of
22 analysis, it became clear to me that the framers
23 themselves adopted the equal protection clause,
24 the Fourteenth Amendment, the Fifteenth
25 Amendment, in a race conscious way.

1 That they were, in fact, trying to
2 ensure that people who had been discriminated
3 against, the freedmen in -- during the
4 reconstructive -- reconstruction period were
5 actually brought equal to everyone else in the
6 society.

7 So I looked at the report that was
8 submitted by the Joint Committee on
9 Reconstruction, which drafted the Fourteenth
10 Amendment, and that report says that the entire
11 point of the amendment was to secure rights of
12 the freed former slaves.

13 The legislator who introduced that
14 amendment said that "unless the Constitution
15 should restrain them, those states will all, I
16 fear, keep up this discrimination and crush to
17 death the hated freedmen."

18 That's not -- that's not a
19 race-neutral or race-blind idea in terms of the
20 remedy. And -- and even more than that, I don't
21 think that the historical record establishes
22 that the founders believed that race neutrality
23 or race blindness was required, right? They
24 drafted the Civil Rights Act of 1866, which
25 specifically stated that citizens would have the

1 same civil rights as enjoyed by white citizens.
2 That's the point of that Act, to make sure that
3 the other citizens, the black citizens, would
4 have the same as the white citizens. So they
5 recognized that there was unequal treatment,
6 that people, based on their race, were being
7 treated unequally.

8 And, importantly, when there was a
9 concern that the Civil Rights Act wouldn't have
10 a constitutional foundation, that's when the
11 Fourteenth Amendment came into play. It was
12 drafted to give a foundational -- a
13 constitutional foundation for a piece of
14 legislation that was designed to make people who
15 had less opportunity and less rights equal to
16 white citizens.

17 So with that as the framing and the
18 background, I'm trying to understand your
19 position that Section 2, which by its plain text
20 is doing that same thing, is saying you need to
21 identify people in this community who have less
22 opportunity and less ability to participate and
23 ensure that that's remedied, right? It's a
24 race-conscious effort, as you have indicated.
25 I'm trying to understand why that violates the

1 Fourteenth Amendment, given the history and --
2 and background of the Fourteenth Amendment?

3 MR. LACOUR: The Fourteenth Amendment
4 is a prohibition on discriminatory state action.
5 It is not an obligation to engage in affirmative
6 discrimination in favor of some groups vis-à-vis
7 others.

8 JUSTICE JACKSON: No, but as -- the
9 record shows that the reason why the Fourteenth
10 Amendment was enacted was to give a
11 constitutional foundation for that kind of
12 effort, for the Civil Rights Act of 1866, which
13 was doing what the Section 2 is doing here.

14 MR. LACOUR: Right. Which --

15 JUSTICE JACKSON: Which said, by its
16 terms, that other citizens have to be made equal
17 to white citizens, and people were concerned
18 that that didn't have a constitutional basis, so
19 they enacted the Fourteenth Amendment.

20 MR. LACOUR: Well, this Court has
21 specified -- and I don't take the Plaintiffs to
22 be arguing that Shaw should be overruled or that
23 Adarand should be overruled. That -- you have
24 to have -- before the government goes forward
25 and -- and actually uses race to, like, move

1 people around into districts, for example, you
2 have to have specific identified discrimination
3 to justify that. And --

4 JUSTICE JACKSON: And isn't that the
5 work of the Gingles factors? That's what all
6 the factors are trying to do.

7 MR. LACOUR: Not if they're allowed to
8 sacrifice our principles to come up with their
9 maps. And if they're allowed to use race --
10 this is the point I was making earlier -- if
11 they're allowed to use race to create their
12 maps, then their maps can't show discrimination
13 in our map.

14 If you're trying to show that black
15 Alabamians are being treated unequally through
16 the 2021 plan, well, you need a plan that is
17 neutral so you can -- it can be that control
18 group and show you what's wrong with our plan.
19 But if you're coming forth --

20 JUSTICE JACKSON: You're saying you
21 need that as a constitutional matter because
22 that's what the Fourteenth Amendment requires?

23 MR. LACOUR: As an evidentiary matter.
24 So --

25 JUSTICE JACKSON: So we don't have a

1 problem that the Constitution is creating. It's
2 as an evidentiary matter, we have to have
3 neutrality.

4 MR. LACOUR: Well, no, Your Honor, if
5 -- if their evidence is bad, then you run the
6 risk of replacing a neutral plan with a plan
7 drawn on account of race, which would create its
8 own Section 2 violations. I think a white
9 Republican in Mobile or a black Republican in
10 Mobile, for that matter, who's gerrymandered
11 into the new District 2 and connected with
12 people on the Georgia border would have a
13 Section 2 claim himself because his vote has
14 been abridged on account of race.

15 So you can't read Section 2 that way.
16 Equal openness and equal protection need to line
17 up. And they don't under Plaintiffs' approach.
18 And we need a benchmark because obviously we
19 need some clarity in this space. We've offered
20 a benchmark. I have seen no benchmark in the
21 briefs from the United States or the Plaintiffs,
22 and -- and maybe they can illuminate that for us
23 in just a moment.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Ross.

2 ORAL ARGUMENT OF DEUEL ROSS

3 ON BEHALF OF THE APPELLEES

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

6 There is nothing race-neutral about
7 Alabama's map. The district court's unanimous
8 and thorough intensely local analysis did not
9 err in finding that the Black Belt is a historic
10 and extremely poor community of substantial
11 significance. Yet, Alabama's map cracks that
12 community and allows white block voting to deny
13 black voters the opportunity to elect
14 representation responsive to their needs.

15 Rather than argue clear error, Alabama
16 asks us to ignore statutory stare decisis and to
17 rewrite Section 2's text. But the Voting Rights
18 Act is a remedial statute that Congress has
19 twice reenacted since Gingles, and its
20 application here raises no constitutional
21 concerns.

22 That is because Plaintiffs' maps show,
23 consistent with Bartlett, that it is possible to
24 draw maps that look very similar to Alabama's
25 own Board of Education map and that increase

1 opportunities for minority voters, while
2 satisfying traditional and state redistricting
3 criteria at least as well as Alabama's map.

4 Nothing in the text of Section 2
5 allows Alabama to avoid liability by offering up
6 these post hoc rationalizations of simulations
7 and core retention for maps that result in
8 discrimination. In fact, Alabama called
9 simulations fundamentally flawed for not
10 reproducing its own map and for not
11 incorporating all traditional redistricting
12 criteria.

13 At Gingles 1, this Court requires us
14 to use sample plans that Alabama is not
15 ultimately obligated to adopt, but those plans
16 need not be the ultimate remedy. And that's
17 because, as this Court said in Brnovich, Section
18 2 looks at the totality of the circumstances,
19 not, as Alabama would have it, the totality of
20 just one.

21 Section 2 is not an intent test or
22 about putting on racial blinders. It is about
23 equal opportunity, opportunity that Alabama's
24 map denies black voters. Thank you.

25 CHIEF JUSTICE ROBERTS: Counsel, do

1 you agree with the Solicitor General's statement
2 in -- in her brief -- I don't know exactly what
3 the page is -- that the argument that your
4 friend on the other side makes about the -- the
5 race-neutral simulations, that argument can be
6 taken into account under the totality of the
7 circumstances?

8 MR. ROSS: Your Honor, I think
9 simulations are about intent and they're not
10 about results. But if it were to be taken into
11 account as a part of the totality of the
12 circumstances, I think it could be a factor that
13 goes to the -- an issue of remedy. And here we
14 know that Dr. Duchin conducted simulations using
15 race as one factor among many others and said
16 that she could create literally thousands of two
17 districts with majority-minority districts. And
18 even Imai, where he used race-blind simulations,
19 came out with plans that looked very similar to
20 the Singleton plan, which allowed for two
21 crossover districts where minority voters would
22 have a fair chance to elect their candidates of
23 choice in at least two districts.

24 JUSTICE ALITO: Can I ask you about --
25 can I ask you about the first Gingles

1 precondition? What the Court -- what the Court
2 said exactly in Gingles was that there must be a
3 sufficiently large -- that the minority group
4 must be "sufficiently large and compact to
5 constitute a majority in a reasonably configured
6 district." It didn't say in a reasonably
7 compact district. It said reasonably
8 configured.

9 So would you agree that whether a
10 district is reasonably configured takes into
11 account more than simply whether it is compact
12 but also whether it is a -- the kind of district
13 that a -- an unbiased mapmaker would draw?

14 MR. ROSS: Your Honor, again, Section
15 2, as you know, is about intent and not --
16 doesn't speak -- or, excuse me, is about results
17 and doesn't speak to intent. And so, you know,
18 with respect to the biases of a mapmaker, I'm
19 not sure if that's relevant.

20 But I will say, as this Court has
21 acknowledged, that Gingles 1 does take into
22 consideration compliance with traditional
23 redistricting criteria. And those redistricting
24 criteria that the state -- that this Court has
25 listed are compactness, contiguity, respect for

1 communities of interest and political
2 subdivisions. And the district court found on
3 all of those that Plaintiffs' plans meet or beat
4 Alabama.

5 JUSTICE ALITO: So even if a computer
6 simulation that takes into account all of the
7 traditional districting standards would almost
8 never, in a million simulations, it would never
9 produce a second majority-minority district,
10 this first Gingles factor is satisfied?

11 MR. ROSS: Your Honor, I -- that's not
12 the case here. Again, Plaintiffs' expert --

13 JUSTICE ALITO: Yeah, it's a
14 hypothetical. If that were the --

15 MR. ROSS: I understand, Your Honor.

16 JUSTICE ALITO: If that were the case.
17 Would the first Gingles criteria be --
18 requirement be satisfied?

19 MR. ROSS: Your Honor, I -- I'm not
20 sure because this Court said in Bartlett that
21 plaintiffs were required to draw an additional
22 majority-minority district. And so perhaps it
23 would go to the fact that -- you know, that
24 maybe you can't have a remedy that meets Gingles
25 1, but I would also say that you have the option

1 of drawing a narrowly tailored district where
2 race may predominate, as this Court recognized
3 in Bethune-Hill.

4 JUSTICE ALITO: So you think that the
5 first factor is satisfied, the first requirement
6 is satisfied, if it's possible -- you set out to
7 draw this Second District, you want to maximize,
8 and if you can do that, you satisfy the first
9 factor?

10 MR. ROSS: Not at all, Your Honor.
11 We're -- we -- we're not saying that satisfying
12 Gingles 1 requires maximization. And as I said,
13 you know, it's certainly possible that if you
14 can show that it's truly impossible to draw a
15 compact district, then, no, you wouldn't get a
16 second -- you wouldn't satisfy Gingles 1.

17 And I think what's important here is,
18 you know, Plaintiffs' expert said it's possible,
19 numerically, to draw three districts, but she
20 didn't set out to do that. What she set out to
21 do was to draw districts that look very much
22 like Alabama's map. And this is not, again, the
23 map that anyone has to adopt. It's an
24 illustrative map. There are maps out there in
25 the Campaign Legal Center amicus brief, in -- in

1 the Singleton plan that -- that don't require
2 maximization.

3 JUSTICE ALITO: Well, if you could --
4 if she could draw three, then why wasn't -- why
5 isn't that required?

6 MR. ROSS: Because this Court has --

7 JUSTICE ALITO: Because that would
8 exceed the proportion of black voters in
9 Alabama?

10 MR. ROSS: Not at all, Your Honor. My
11 point was merely that numerically it's possible
12 to draw more, but plaintiffs aren't asking for
13 that. Plaintiffs aren't even asking for a map
14 --

15 JUSTICE ALITO: Well, suppose you did.
16 Would you satisfy the first Gingles factor?

17 MR. ROSS: I don't think you could.

18 JUSTICE ALITO: Here is a map -- we
19 come forward, here is a map, it produces three
20 majority-minority districts, and it's compact.
21 It's reasonably -- reasonably compact. So
22 you've got to -- you satisfied the first factor.

23 MR. ROSS: No, Your Honor, because you
24 need to look at -- perhaps you could satisfy the
25 first factor, but I don't -- it's unlikely that

1 you would be able to -- to meet the other
2 factors.

3 JUSTICE ALITO: What if you could?

4 MR. ROSS: In De Grandy, this Court
5 said --

6 JUSTICE ALITO: What -- what if you
7 could?

8 MR. ROSS: Your Honor, I don't think
9 that Section 2 of the Voting Rights Act at all
10 requires maximization. And, here, you couldn't
11 meet Gingles 1 and so we're not in any way
12 suggesting that.

13 And one other -- Your Honor, you know,
14 what plaintiffs are really looking for is not
15 any sort of guarantee of a second
16 majority-minority district. As I said, we'd be
17 satisfied with something like the Singleton
18 plan, which Alabama's expert said would give
19 black voters at least a fair chance, not even a
20 guaranteed chance to elect their candidates of
21 choice in the Second District. That's merely
22 what -- what plaintiffs are looking for.

23 JUSTICE SOTOMAYOR: Counsel, if we
24 were to say, as opposing counsel is now
25 claiming, that you have to show the possibility

1 of a Second District on a race-neutral map, do
2 we vacate and remand? Do you have enough below
3 to win even under that standard?

4 MR. ROSS: Your Honor, you know, I'm
5 not sure what Mr. Lacour means by a race-neutral
6 standard. I think, certainly, it is -- this is
7 up on a preliminary injunction. And so, if
8 there were a standard that became a new
9 standard, then we would, you know, like it to be
10 remanded.

11 I think that any standard that
12 requires some sort of race blindness, as Alabama
13 is saying, would not only make it difficult for
14 plaintiffs to satisfy Gingles 1 but would make
15 it difficult for states to draw, you know, the
16 435 congressional maps that we have.

17 JUSTICE SOTOMAYOR: Now opposing
18 counsel in his summation was talking about the
19 idea of race neutrality. Section 2 was really
20 at a -- aimed at a results test, equal
21 opportunity or participation.

22 Section 2 is not being used that
23 widely, is it? I read Amici Chen's brief, and
24 he says that there's only been 31 vote dilution
25 cases that resulted in merits decision over the

1 last two redistricting cycles, that's out of 435
2 plans, and that only eight were successful.

3 MR. ROSS: I believe that that's true.

4 JUSTICE SOTOMAYOR: And Gingles itself
5 makes this remedy available only in an extreme
6 circumstance where voters are polarized
7 completely and where there's no crossover
8 between the races, correct?

9 MR. ROSS: That's correct, Your Honor,
10 and --

11 JUSTICE SOTOMAYOR: And --

12 MR. ROSS: -- where you meet the
13 totality.

14 JUSTICE SOTOMAYOR: -- so Alabama
15 itself is unique in that regard, isn't it?

16 MR. ROSS: Absolutely, Your Honor.
17 There's racially polarized voting in Democratic
18 and Republican primaries, there's racially
19 polarized voting in general elections, and
20 there's a very recent history of racial
21 discrimination in Alabama that may not exist in
22 other states.

23 JUSTICE SOTOMAYOR: That was --

24 JUSTICE JACKSON: And, counsel --

25 JUSTICE SOTOMAYOR: -- that was part

1 of the totality of circumstances, the district
2 court found --

3 MR. ROSS: Yes, Your Honor.

4 JUSTICE SOTOMAYOR: -- to suggest your
5 describing Alabama's cracking of the black
6 district for decades, correct?

7 MR. ROSS: Yes, Your Honor. And I do
8 want to point out that on -- on the stay
9 appendix at page 177, the district court did
10 find that Alabama cracked the Black Belt.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas?

14 MR. ROSS: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice Alito?

16 Justice Sotomayor, anything further?

17 Justice Kagan?

18 Justice Gorsuch?

19 Justice Kavanaugh?

20 JUSTICE KAVANAUGH: The -- the other
21 side says that the proposed districts are not
22 reasonably compact, and, as I was mentioning, I
23 think compactness is the key under our
24 precedents to interpreting Section 2 correctly
25 and the equal protection requirements.

1 And they say the district is too
2 sprawling to be considered reasonably compact or
3 reasonably configured. And I just want to get
4 your response to that because I think that's the
5 critical point here.

6 MR. ROSS: Yes, Your Honor. Again, I
7 think the district court's findings, which are
8 subject to clear error, made clear that
9 plaintiffs' plans met or beat Alabama on the
10 compactness requirement.

11 With respect to, you know, Alabama's
12 allegation that our map goes -- that our plan
13 goes across the state, so does some of Alabama's
14 plan. And, again, Alabama's own Board of
15 Education map, which was drawn at the same time
16 using the same redistricting criteria, which in
17 Alabama's guidelines includes race, created
18 virtually the same district that also spreads
19 across the state.

20 And then, Your Honor, you -- you had a
21 question earlier about, you know, what these
22 traditional redistricting guidelines are. This
23 Court in Perry versus Perez recognized that, you
24 know, they -- when you're drawing remedial maps,
25 that you have to take into consideration state

1 and local redistricting criteria, except those
2 -- to the extent those criteria violate Section
3 2.

4 And, here, core retention is -- is
5 nearly always going to violate Section 2.
6 And -- and our plans tried to take those into --
7 that factor into account as much as possible
8 without perpetuating the violation.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: Just one question.
13 If we interpret Gingles Step 1 as you propose,
14 is the result of the test to say that a state
15 must maximize so long as it can do so in
16 reasonably compact districts?

17 MR. ROSS: Not at all, Your Honor.
18 This Court has recognized for 30 years that
19 maximization is not necessary. And just because
20 you can draw an additional district doesn't mean
21 that you would satisfy any of the other
22 traditional -- or, excuse me, any of the other
23 racial polarization, a totality of the
24 circumstances, and that's why this Court in
25 De Grandy added in proportionality as -- as a

1 part of the totality so that it prevented
2 maximization from being a -- a goal of Section
3 2.

4 JUSTICE BARRETT: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: And I would take it
8 that that is why this whole Gingles scheme has
9 been thought of as self-liquidating in a way.
10 It's because, you know, it -- it only triggers
11 in situations in which you have this
12 compactness, you know, presumably due to the
13 racial polarization or stratification of the
14 kind of district and people are continuing to
15 vote in racial block -- racially blocked ways,
16 but if that stopped happening, if what we all
17 want, which would be people to spread out and
18 live among one another and vote based on their,
19 you know, own views as opposed to along racial
20 lines, then we wouldn't have a Section 2
21 violation, is that correct?

22 MR. ROSS: That's exactly correct,
23 Your Honor. And, you know, I think it's really
24 important to take a look at the Stephanopoulos
25 brief, which -- which makes that point, and also

1 the computational redistricting amicus brief,
2 which makes the point of how, you know, using
3 computer simulations are really not the way to
4 get at the issues that Gingles 1 is -- is
5 concerned with.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 MR. ROSS: Thank you, Your Honor.

9 CHIEF JUSTICE ROBERTS: Ms. Khanna.

10 ORAL ARGUMENT OF ABHA KHANNA
11 ON BEHALF OF THE RESPONDENTS

12 MS. KHANNA: Mr. Chief Justice, and
13 may it please the Court:

14 Alabama seeks to upend the Section 2
15 standard that has governed redistricting for
16 nearly 40 years. But Alabama's novel theories
17 not only defy statutory text and precedent, they
18 would cause profound upheaval for courts,
19 states, and minority voters.

20 Requiring a race-blind demonstration
21 at Gingles 1 would bury courts in litigation, in
22 new litigation challenging maps created in
23 reliance on the existing standard. Make no
24 mistake, nearly every majority-minority district
25 would become a litigation target.

1 Alabama's reliance on untested
2 simulations would unravel decades of progress
3 and take us back to a time with little to no
4 minority representation at the federal, state,
5 and local levels.

6 This Court should reaffirm its
7 established Section 2 standard because it works.
8 It limits the scope of liability and it ensures
9 that with increased progress comes decreased
10 enforcement. In many places, racially polarized
11 voting and racial segregation are declining,
12 making satisfaction of Gingles impossible, but
13 as three judges agreed, that is not yet the case
14 in Alabama.

15 I welcome the Court's questions. And
16 I'll pick up where --

17 JUSTICE KAGAN: Ms. Khanna --

18 MS. KHANNA: Yes?

19 JUSTICE KAGAN: -- is there some
20 scholarship or -- or empirical evidence of,
21 if -- if this -- if the Alabama argument about
22 having to produce a race-neutral map at Gingles
23 1, if that's their core argument, as General
24 Lacour said, and you just suggested that that
25 would lead to a very substantial decrease in

1 majority-minority districts, how substantial?

2 Is there good evidence about that?

3 MS. KHANNA: I believe that the -- the
4 amicus brief from Professors Chen and
5 Stephanopoulos talks about various studies that
6 have been done that would show that if we were
7 to apply these -- these race-blind simulations,
8 they would obliterate a number of
9 majority-minority districts.

10 JUSTICE KAGAN: A number, like how
11 many?

12 MS. KHANNA: I -- I -- I --

13 JUSTICE KAGAN: Or -- or what -- you
14 know, is it half? Is it a quarter? Does
15 anybody know?

16 MS. KHANNA: I don't have the exact
17 numbers in front of me, unfortunately. I do
18 know that at least in the -- for instance, in
19 one of the -- the state houses of Alabama, they
20 mentioned that it would cause a decrease of
21 some, you know, three to seven majority-black
22 districts.

23 JUSTICE KAGAN: Why -- why is it that
24 that happens? I mean, I -- I think, you know,
25 one way, when you read these briefs, that you

1 might react to them is, like, how hard could it
2 be to come up with a race-neutral map, given all
3 these computer simulations? I think that that's
4 a kind of understandable reaction to it.

5 So what's the answer to that?

6 MS. KHANNA: I think there is a couple
7 of answers, Your Honor. First of all, when a
8 lot of these districts were drawn pursuant to
9 the Voting Rights Act, including in Alabama
10 itself, 1992 was a Court-ordered plan where CD 7
11 was created for the first time.

12 So these districts were not
13 necessarily drawn in this -- an idea that they
14 had to be race-blind or race-neutral. They were
15 solving a problem of racial discrimination that
16 they were looking at race in order to solve that
17 problem. They were not necessarily drawn in a
18 race-neutral way.

19 I also think that these -- the fact
20 that these simulations are not capturing these
21 existing -- these communities and these
22 districts, many of which have been in place for
23 many -- for a long time, goes to the fundamental
24 flaw of overly relying on these simulations.
25 And I think that it's important to recognize,

1 you know, a lot of -- a lot of stock has been
2 put in these simulations in the course of this
3 appellate argument, but as -- as my friend
4 recognized, these were -- these were deemed by
5 the state to be fundamentally flawed below.

6 And there's a few reasons why it is
7 just -- in both impractical -- as a practical
8 matter and a policy matter, these simulations
9 just are not any kind of gold standard. They
10 are not this objective race-neutral benchmark
11 that -- that anyone might think that they are.
12 They are the result of a host of very subjective
13 decisions going into the process about which
14 considerations to take into account and how to
15 quantify them.

16 JUSTICE ALITO: Did --

17 JUSTICE BARRETT: But then let --

18 JUSTICE ALITO: -- you understand
19 Alabama's argument to be that the plaintiffs
20 have to show that the map they come forward with
21 is race-neutral or that if the state -- I mean,
22 it may be that the plaintiff can satisfy its
23 burden of production with respect to the first
24 Gingles requirement by coming up with any map
25 that is reasonably -- that can be proffered as

1 reasonably configured, but that if the state
2 then comes up with the sort of simulations that
3 occurred here, which were done, by the way, by
4 Plaintiffs' experts, right, not by the state's
5 experts, then when the Court has to decide
6 whether the first Gingles factor is satisfied,
7 it can take those into account?

8 MS. KHANNA: To answer the question of
9 what do I understand the state's position to be,
10 I have to say I'm not entirely sure. I think it
11 did -- it varies. Perhaps maybe my
12 understanding varies depending on the brief and
13 on what has been argued here today.

14 JUSTICE ALITO: Okay. Well, suppose
15 it is what I just said, that it's not the burden
16 of production; it's the ultimate burden of proof
17 if the state chooses to come forward with this
18 kind of evidence.

19 MS. KHANNA: I think that the -- the
20 problem with this kind of evidence, and -- and
21 setting aside for a second the fact that it
22 doesn't actually purport to do what the state
23 might think it purports to do, is -- is that it
24 really has nothing to do with the Gingles
25 inquiry in some ways. Gingles inquiry is a

1 basic demographic question about how big is the
2 back -- black population and where are they
3 located?

4 And when this Court discussed the
5 Gingles 1 standard in -- in Bartlett, it
6 emphasized that the point of the Gingles 1
7 standard was to create an objective
8 administrable rule not just for courts and
9 litigants but also for states themselves.

10 JUSTICE ALITO: But you think
11 reasonably configured -- this is an important
12 distinction to me, at least, between
13 compactness, which I understand to mean just
14 geography, and configuration. Do you think that
15 the first Gingles factor is just about
16 compactness, or does it take into account other
17 things?

18 MS. KHANNA: I believe the first
19 Gingles factor takes into account a variety of
20 traditional districting criteria --

21 JUSTICE ALITO: Okay.

22 MS. KHANNA: -- just as the district
23 court mentioned below. And here on those --
24 almost every single metric, the illustrative
25 plans meet or beat the enacted plan.

1 Whether or not some hypothetical
2 simulations, many of which are not even in the
3 record, may or may not have come up with that
4 exact configuration doesn't answer the question
5 that -- that Plaintiffs are tasked with, which
6 is, is it possible? We came into court and
7 showed yes, it is possible based on the
8 demography of Alabama.

9 And, again, that is just the initial
10 threshold screening, after which we have to go
11 through a gauntlet of objective and qualitative
12 and quantitative --

13 JUSTICE ALITO: Well -- okay. Put
14 aside whether or not these are good simulations.
15 But if you have a simulation that takes into
16 account all of the traditional districting
17 factors but does not take into account race or
18 any proxy for race, such as a community of
19 interest that is defined by race, and you can't
20 get a majority -- an additional
21 majority-minority district when you do that
22 simulation, what's the consequence?

23 MS. KHANNA: I don't believe there is
24 a consequence at Gingles 1. That would be a
25 wholesale rewrite of the standard just all of a

1 sudden to say that mere -- that coming into
2 court with a map that a district court is able
3 to find is reasonably configured on a variety of
4 metrics is not enough.

5 JUSTICE ALITO: Well, how can it be
6 reasonably configured if you can't get that map
7 with a computer simulation that takes into
8 account all of the traditional race-neutral
9 districting factors? That's -- that's kind of
10 my -- what -- what I don't get -- I can't
11 understand. How can that be reasonably
12 configured?

13 MS. KHANNA: Well, certainly -- I
14 understand the hypothetical is that this -- this
15 is some kind of perfect simulation that is able
16 to separate out race -- race-based criteria or
17 racial proxies. Even if we existed in that
18 world, and I think it's clear we do not,
19 ultimately the -- the test is to show how can
20 you come in with a map, not a million maps, not
21 10 percent of a million maps; it's what is
22 possible, not necessarily what is probable.

23 And as long as plaintiffs are able to
24 show, to meet that -- that basic demographic
25 threshold question, making -- I think turning

1 Gingles 1 into its own trial within a trial,
2 making it a battle of the simulations experts
3 would be entirely contrary to what this Court
4 intended in Bartlett.

5 JUSTICE JACKSON: Ms. Khanna, I
6 thought -- I thought your answer was going to be
7 that the reason why we don't have those
8 simulations or need those simulations or that
9 they have nothing to do with Gingles is because
10 the question of configuration is not about the
11 intent of the mapmaker, that when Justice Alito
12 says we're looking at the configuration that
13 could be drawn by an unbiased mapmaker, the
14 suggestion, I think, is that we care about
15 whether or not the person who's drawing the map
16 is trying to discriminate against the people who
17 are being reconfigured or -- do you understand
18 what I'm saying?

19 MS. KHANNA: Yes, Your Honor.

20 JUSTICE JACKSON: And so the reason
21 why it's irrelevant at Gingles step 1 is because
22 intent is not being considered at Gingles step 1
23 per what Congress has told us about how the
24 Section 2 is supposed to work. Am I right about
25 that?

1 MS. KHANNA: That's absolutely
2 correct, Your Honor. The intent behind a
3 Gingles 1 demonstration has nothing to do with
4 the ultimate finding of liability --

5 JUSTICE ALITO: Well, wait. Well,
6 forget about intent. So you -- we're looking at
7 results. What are the results when you do a
8 computer simulation that takes into account all
9 race-neutral districting factors that have been
10 accepted by this Court? And the result is --
11 not the intent. This is a computer. It doesn't
12 have any intent. The result is that you don't
13 get the second minority -- majority-minority
14 district.

15 MS. KHANNA: I think the reason why
16 that doesn't actually answer the question, Your
17 Honor, is because the simulations actually
18 generate more questions than they answer. Even
19 if you were to charge it with taking into
20 account race-neutral criteria, there is a lot of
21 subjectivity in going into how you even code
22 that.

23 The -- Alabama's expert here below
24 acknowledged that that -- did not testify that
25 our maps were not reasonably compact and

1 acknowledged there is no bright-line rule. So
2 even inputting those criteria into a computer
3 algorithm requires coming up with some
4 bright-line rules that don't currently exist.

5 Instead, what we have is a
6 reasonableness -- reasonableness inquiry that
7 the district court provided here by looking at a
8 variety of criteria to determine whether or not
9 the Gingles 1 test is satisfied.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas, anything further?

13 Justice Alito?

14 JUSTICE SOTOMAYOR: I do, counsel.

15 Justice Alito gave the game away when
16 he said race-neutral means don't look at
17 community of interest because it's a proxy for
18 race. Regrettably, that is what it is in many
19 situations. That's why Mobile and Baldwin are
20 together, no matter what they talk about being
21 around a river or not. That has very little to
22 do with anything other than race, that they come
23 generations later from Germany -- from France or
24 Spain.

25 But the point that he's making turns

1 Section 2 on its head, doesn't it, because
2 there's no such thing as racial neutrality in
3 Section 2. It's explicitly saying that a
4 protected group must be given equal
5 participation, correct?

6 MS. KHANNA: Yes, Your Honor.

7 JUSTICE SOTOMAYOR: And so
8 indifference to racial inequality is exactly
9 what Section 2 is barring or prohibiting,
10 correct?

11 MS. KHANNA: Yes, Your Honor.

12 JUSTICE SOTOMAYOR: Having said that,
13 assuming that you could draw a racially neutral
14 map that did take into account true community of
15 interest, do you believe that the maps, that you
16 didn't meet that burden below?

17 MS. KHANNA: I don't believe that
18 question was ever asked because it's never been
19 posed to plaintiffs, states, or courts that the
20 Gingles 1 standard required a race-blind
21 showing.

22 The Gingles 1 question is a
23 demographic question about where is the minority
24 population, and I think it would be -- it would
25 certainly be the first time this Court has

1 instructed that plaintiffs actually have to tie
2 one hand behind their demographer's back and
3 blind him to the actual demography of the state.

4 JUSTICE SOTOMAYOR: I do -- I do
5 remember the Milligan expert testifying as to
6 whether he could draw a race-blind algorithm and
7 whether it could produce a map with two majority
8 black districts. And the expert testified it
9 certainly could, correct?

10 MS. KHANNA: I think that's right,
11 Your Honor, and that's the -- what goes to show
12 that these algorithms, and as we hear from the
13 Milligan plaintiffs' expert, as well as several
14 of the amici here, the algorithms, when properly
15 interpreted, will -- will encompass what is
16 possible.

17 JUSTICE SOTOMAYOR: The problem you
18 can't do is keep core -- the historically core
19 districts because that's infused with the racial
20 inequality, correct?

21 MS. KHANNA: Yes. The problem with
22 the core preservation is somehow this trump
23 card, is both a practical one and a policy one.

24 As a practical matter, when Gingles
25 and Bartlett require plaintiffs to come into

1 court with a -- with a -- with a new district,
2 it's -- it's by nature a district that has not
3 yet been drawn. It is a new map that's going to
4 be different.

5 And as a policy matter, this goes
6 precisely to why Congress adopted a results test
7 in 1982 to begin with, which was so that we --
8 the states could not utilize old ways of doing
9 things and entrench discriminatory schemes just
10 by perpetuating them over the course.

11 JUSTICE SOTOMAYOR: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 Justice Gorsuch?

14 Justice Kavanaugh?

15 Justice Barrett?

16 JUSTICE BARRETT: I just want to
17 return to the questions about the computer
18 simulators. So you were saying that they're
19 inherently subjective because it depends on how
20 you weight factors and what factors you put in.

21 I just want to be sure I understand
22 what you mean by that, because it seems to me
23 that, if you can generate, if there's no limit
24 on how many maps the computer simulator can
25 generate, surely that gives them the option to

1 weigh in all kinds of different ways.

2 And it also seems to me, and maybe I'm
3 misunderstanding Alabama's proposal, but it also
4 seems to me that under Alabama's view of the
5 statute, the plaintiff satisfies Gingles 1 by
6 coming in with one map that was drawn without
7 taking race into account.

8 So why, if there's no limit to the
9 number of maps you can generate and the
10 different factors you can weigh so long as race
11 isn't one, why would that be an unreasonable
12 burden for a plaintiff to shoulder?

13 MS. KHANNA: For several reasons, Your
14 Honor.

15 First, I think it's important to
16 recognize that there are a handful of college
17 professors who even have the expertise to run
18 these simulations in the first place.

19 So, if you're all of a sudden going to
20 infuse what was supposed to be an objective and
21 administrable test at the outset with this
22 highly specific and highly technical
23 requirement, that would essentially be
24 delegating VRA enforcement to the handful of --

25 JUSTICE BARRETT: Well -- well, let me

1 just be clear. I don't -- I would not propose
2 and I don't understand Alabama to propose either
3 that you have to use these maps at Step 1.

4 I mean, it seems to me that you could
5 satisfy that race-neutral test by just having a
6 map drawer come in and say, I drew this and I
7 didn't do it in an effort to get two
8 majority-minority districts. That wasn't my
9 non-negotiable goal. So I don't -- I don't -- I
10 wasn't suggesting that.

11 I was just asking the technical
12 question. You said that these computer
13 simulations are not neutral by definition
14 because they require subjective judgments in the
15 programming. So if you could answer that.

16 MS. KHANNA: Yes, Your Honor.

17 The subjective judgments in the
18 programming are basically about what
19 considerations to have in the first place. We
20 know that the ones at issue here did not include
21 a host of considerations. How do you quantify
22 some of those considerations, like communities
23 of interest and compactness?

24 It's not like we have a bright-line
25 rule that says a point 3 district is or is not

1 compact. You have to come to some kind of
2 agreement or decision among the experts or among
3 the Court on what these factors are.

4 How do we weight the various factors?
5 Do some get more importance depending on
6 their -- where they fall in the state's
7 traditional districting criteria, as well as put
8 it in their guidelines or something else?

9 How do we interpret the results? Does
10 it need to be a million, 2 million, 3 trillion?
11 As we learned from the computer scientists'
12 amicus brief, there could be trillions and
13 trillions, that certainly will at some point
14 come up with at least one possible
15 configuration.

16 Or we can just use this test that this
17 Court has always established, which is as long
18 as you come into court with a map that shows the
19 potential to draw a majority black district that
20 is reasonably configured according to the
21 state's traditional districting principles, then
22 that is sufficient to get past just the first
23 post and not the gauntlet of remaining factors
24 after that.

25 JUSTICE BARRETT: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Jackson?

3 JUSTICE JACKSON: Yes. So following
4 up on Justice Barrett's question, setting aside
5 the practicalities of the map-making process,
6 which is basically what you've been focusing on,
7 I think the question is, why should we make the
8 Gingles 1 challengers do that?

9 In other words, it seems as though
10 some of my colleagues are asking the question
11 if -- you know, if you have a million maps and
12 you can generate a million maps, why shouldn't
13 we require that one map be drawn in a
14 race-neutral way?

15 And I actually think the question is,
16 why should we require at Gingles Step 1 that a
17 map be drawn in a race-neutral way? And there
18 are two possibilities, right?

19 It's -- one possibility is because
20 that's what Congress would have wanted, but when
21 I read Section 2, I don't see that Congress is
22 requiring race neutrality.

23 In fact, the language beyond equally
24 open is equally open by participation of members
25 in a particular class of citizens in that its

1 members have less opportunity than other
2 members. So it seems as though Congress is
3 authorizing the consideration of race.

4 And then the second question is, all
5 right, why should we do this? Because the
6 Constitution requires some sort of race
7 neutrality, and based on my colloquy with --
8 with -- with your friend on the other side, I
9 think that the Constitution doesn't require it.

10 So am I -- do I have the question
11 right, why should we require this, or does
12 Justice Barrett have the question right, why
13 shouldn't we?

14 MS. KHANNA: I -- I think all of the
15 questions are correct. Fundamentally, there's
16 no basis --

17 (Laughter.)

18 MS. KHANNA: -- for -- there's no
19 basis for injecting this new -- this new
20 simulation standard or race-neutral standard
21 into Gingles 1. It was not the purpose of -- of
22 the Section 2 standard that's created by
23 Congress. It is not at all required under the
24 Constitution.

25 It would be a brand-new principle that

1 really doesn't serve any end, the end result
2 is -- the end result gets us to the exact same
3 place that we have right now, which is, is it
4 possible to show up in court with a district
5 that meets these criteria?

6 And to, you know -- and, here, where
7 we talk about what does -- what does the usual
8 map drawer in Alabama draw, what's considered a
9 sprawling district in Alabama, the best place to
10 look is to the very guidelines that -- that my
11 friend on the other side specifically mentioned.

12 And those guidelines take into account
13 contiguity, compactness, political subdivision
14 boundaries, precincts, all of these things that
15 our maps performed as good or better and they
16 also take into account race, and they say that
17 complying with the Voting Rights Act shall come
18 before anything else and specifically including
19 core preservations and communities of interest.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 MS. KHANNA: Thank you, Your Honor.

23 CHIEF JUSTICE ROBERTS: General
24 Prelogar.

25

1 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE APPELLEES/RESPONDENTS

4 GENERAL PRELOGAR: Mr. Chief Justice,
5 and may it please the Court:

6 The district court's factual findings
7 make this an extreme and atypical case of vote
8 dilution. Voting in Alabama is intensely
9 racially polarized, about as stark as anywhere
10 in the country.

11 The history and effects of racial
12 discrimination in the state are severe. Black
13 voters are significantly underrepresented and
14 they're sufficiently numerous and compact to
15 form a majority in a reasonably configured
16 district, as the district court specifically
17 found.

18 Section 2's results test was designed
19 for this kind of case. For that reason, Alabama
20 isn't asking the Court to apply Section 2 as
21 it's been applied for the past 40 years.
22 Instead, Alabama is asking the Court to
23 radically change the law by inserting this
24 concept of race neutrality and effectively
25 limiting Section 2 to intentional

1 discrimination.

2 That approach would delete the text
3 that Congress added in 1982 to cover results.
4 It disregards nearly four decades of this
5 Court's precedent, and it would have drastic
6 real-world consequences.

7 Under the state's approach, nothing
8 would stop Alabama and many other states from
9 dismantling their existing majority-minority
10 districts, leaving black voters and entire
11 swaths of the country with no ability to elect
12 their preferred representatives.

13 The Court should reject that
14 destabilizing and atextual interpretation of
15 Section 2.

16 I'd like to turn if I could to the
17 questions that Justice Barrett and Justice
18 Jackson were just asking about the narrower form
19 of Alabama's argument and specifically whether
20 it makes sense to put plaintiffs to the burden
21 of showing that they can draw their maps in a
22 race-neutral way.

23 And I think the problem with that
24 approach is that it's contrary to the text,
25 would be unworkable in practice, and it also is

1 unnecessary to address the concern Alabama's
2 raising about unconstitutional districts.

3 So if I could just unpack that a
4 little bit. Specifically, with respect to the
5 text, the problem with using race neutrality as
6 the touchstone here is that's inherently focused
7 on motives or purposes in designing the
8 districts, and I think one thing that has been
9 clear for the past four decades, ever since
10 Congress amended the statute, is that that is no
11 longer the necessary requirement under Section
12 2.

13 JUSTICE BARRETT: Well, what about
14 equal opportunity? So that's my concern. You
15 know, as Judge Easterbrook said in the Seventh
16 Circuit, that you have to have a baseline.
17 Equal as to what? And if the vote is going to
18 be diluted, you know, it's diluted as compared
19 to what, to the opportunity? I mean, I think --
20 I think that's the part of the statute that
21 concerns me, thinking about neutrality.

22 Because I -- I agree with you that it
23 does not require intent. I agree with you about
24 the results test. But the equal opportunity is
25 what I'm thinking of.

1 GENERAL PRELOGAR: So I think -- to
2 focus on that in particular, the statute goes on
3 specifically to define what it means by equal
4 opportunity, Justice Barrett. And it's setting
5 up a comparison between two groups of voters.
6 Specifically, do minority voters have less
7 opportunity than other members of the
8 electorate? So it's right there in the statute
9 creating the -- the baseline or the comparison
10 group.

11 Now, I get that that's what I think is
12 the easy part of the equation, and then it just
13 raises the question of when you can say that
14 minority voters have less opportunity within the
15 terms of the statute. And there I think the
16 Gingles framework already guides courts to the
17 relevant factors to take into account. It's the
18 three preconditions and then the rigorous
19 analysis of the totality of the circumstances
20 that's critical to making that quintessentially
21 legal judgment of when there's less opportunity.

22 But if I could pick up on the idea as
23 well of why I think it would be so unworkable in
24 practice to try to inject this idea of race
25 neutrality, you know, the whole function of the

1 first Gingles precondition is to require
2 plaintiffs to show that you can intentionally
3 create a majority-minority district. And if
4 they have to do that without taking any account
5 of race, then they effectively have to kind of
6 stumble into the district by accident.

7 And I think that will inevitably lead
8 to running these kinds of simulations that have
9 been discussed at length this morning that are
10 incredibly complicated to try to operationalize
11 --

12 CHIEF JUSTICE ROBERTS: What --

13 GENERAL PRELOGAR: -- in practice.

14 CHIEF JUSTICE ROBERTS: If -- if the
15 race neutral simulations are as bad as you say,
16 why do you say they should be taken into account
17 at the totality of the circumstances inquiry?

18 GENERAL PRELOGAR: Well, I think it's
19 a really critical distinction, Mr. Chief
20 Justice, because what I'm pushing back on here
21 is the idea that you should transform Gingles 1
22 by always requiring this as necessary evidence
23 in every case. But -- but --

24 CHIEF JUSTICE ROBERTS: But you
25 haven't really --

1 GENERAL PRELOGAR -- as we said in our
2 brief --

3 CHIEF JUSTICE ROBERTS: -- said you
4 shouldn't make this necessary but you can still
5 consider it because it shows this or this.
6 You've really said it doesn't show anything at
7 all and, in fact, it is bad.

8 So how does it -- in other words, it's
9 not much of a sop to them to say, oh, we'll look
10 at that in the totality of the circumstances
11 case.

12 GENERAL PRELOGAR: Well, I think it
13 can be relevant in the totality of the
14 circumstances specifically to push back against
15 any allegations of intentional discrimination
16 that might have been made in a case and because
17 it tracks the factor that this Court already
18 enumerated as one relevant consideration, which
19 is whether the state's policy is tenuous.

20 So this is a totality test, a
21 statutorily prescribed totality test. We're not
22 suggesting that the evidence would be wholly
23 irrelevant, but I do think that it would be a --
24 an incredibly complicated obstacle to try to
25 litigate these cases if it were necessary at

1 Gingles step 1 for the plaintiffs to duke it out
2 amongst their experts and debate about all of
3 the things to feed into the algorithm to -- to
4 identify whether it's --

5 JUSTICE ALITO: You're --

6 GENERAL PRELOGAR: -- truly race
7 neutral.

8 JUSTICE ALITO: You're suggesting that
9 the -- the argument is that the plaintiff has to
10 run these simulations and show that the district
11 that they proffer is race neutral. But why is
12 that the argument? Why isn't -- why -- why
13 isn't the argument that the plaintiff can
14 satisfy its burden of production by coming
15 forward with the kind of maps that they came
16 forward here, but that's not the end of the
17 court's consideration of the first Gingles
18 factor? And if there is other evidence showing
19 that this map is not the kind of map that would
20 be drawn based on other traditional -- based on
21 traditional race-neutral factors, then the
22 Gingles -- and the court is persuaded of that,
23 then the Gingles -- the first Gingles condition
24 is not satisfied?

25 GENERAL PRELOGAR: Well, our concern

1 is with packing this into the first Gingles
2 precondition itself because that is meant to
3 function as a relatively straightforward
4 threshold screen on the plaintiffs' allegations,
5 essentially to pressure-test whether the
6 plaintiffs can even draw a reasonably configured
7 district --

8 JUSTICE ALITO: Well, isn't --

9 GENERAL PRELOGAR: -- to ask --

10 JUSTICE ALITO: As -- as a practical
11 matter, in every place in the south, and maybe
12 in other places, if the first Gingles factor,
13 first Gingles condition, can be satisfied, will
14 not the plaintiffs always run the table? Where
15 -- where can they win? They're not going to win
16 on whether the minority group is politically
17 cohesive. They're not going to win on whether
18 the majority votes as a bloc, which may be due
19 to ideology and not have anything to do with
20 race. It may be that black voters and white
21 voters prefer different candidates now because
22 they have different ideas about what the
23 government should do. Where is the -- where can
24 the state win once it gets past -- once it loses
25 on the first Gingles condition?

1 GENERAL PRELOGAR: I think the state
2 can win on any other of the relevant factors in
3 the totality of the circumstances. And I want
4 to resist strongly this idea that any time
5 plaintiffs have been able to satisfy that first
6 Gingles precondition, they automatically prove
7 their case.

8 This is a rigorous burden on
9 plaintiffs. Of course, they have to show the
10 patterns of racially polarized voting in the
11 second and third preconditions, and courts then
12 go on to look at all of the relevant
13 circumstances in the totality analysis.

14 And if you actually look at actual
15 results in these cases, there are -- are
16 steadily decreasing Section 2 claims that are
17 filed in the first place. And then it's not as
18 though plaintiffs always prevail in those
19 claims. Courts routinely reject them because
20 the other factors aren't satisfied.

21 So I think it would just be incorrect
22 to suggest at the outset that simply by virtue
23 of showing that first threshold screen the
24 plaintiffs are going to be able to run the
25 table. And I want to make clear that the

1 Gingles preconditions only screen out meritless
2 cases. They're never dispositive of liability
3 in and of themselves.

4 JUSTICE KAVANAUGH: You -- you -- I'm
5 sorry.

6 GENERAL PRELOGAR: Go ahead, Justice
7 Kavanaugh.

8 JUSTICE KAVANAUGH: You said the
9 Gingles first precondition is straightforward.
10 Compactness is, I think, the central issue in
11 the first precondition, and I find that not
12 always so straightforward. And I wanted you to
13 tell me why you think this proposed district or
14 they've proposed something that is reasonably
15 compact or reasonably configured.

16 In your brief on 16 and 17, I think
17 you identify it lacks the bizarre shapes that
18 the Court has found problematic and performs at
19 least as well as the plan in respecting existing
20 political subdivisions, so kind of a comparison
21 to the state's plan.

22 Anything else you would identify that
23 should be part of the compactness inquiry?
24 Because the states and the plaintiffs and the
25 district courts are all struggling, I think,

1 with how do you measure compactness? And that's
2 why I think this is such a difficult inquiry
3 under -- just taking current law.

4 GENERAL PRELOGAR: I think it is
5 certainly the case that it's an inherently
6 factual question, and it requires, as this Court
7 has said, an intensely local appraisal of all
8 the facts and circumstances in the jurisdiction.

9 But I would point, in particular, to
10 the district court's comprehensive analysis of
11 this. And what the court did is look at every
12 traditional redistricting criteria in Alabama,
13 compactness, contiguity, equalizing population
14 across districts, respect for the political
15 subdivision boundary lines, municipalities, not
16 splitting counties, as you mentioned, and
17 protecting communities of interest as --

18 JUSTICE KAVANAUGH: When you --

19 GENERAL PRELOGAR: -- well as --

20 JUSTICE KAVANAUGH: When you use
21 "compactness" there as the first of those, were
22 you referring to how big the district is?

23 GENERAL PRELOGAR: Yes, it's generally
24 a geographic compactness inquiry, both of the
25 district itself but also of the minority

1 population that would be drawn together within
2 that district. And the -- the court here
3 applied a number of different measures.

4 As your question indicated, there are
5 several different metrics in how to measure
6 compactness in redistricting litigation. The
7 court here went through all of them, and it said
8 that down the line looking at the traditional
9 districting criteria, these districts, as my
10 friend said, performed as well or better than
11 the enacted plan on nearly all of the relevant
12 criteria.

13 And that's, of course, something this
14 Court has recognized as reviewable only for
15 clear error. So to the extent that you think
16 that this is a tough question and maybe a
17 different fact finder could have reached a
18 different result, I think that's precisely why
19 the Court has recognized that the district
20 court's decision merits a substantial amount of
21 deference in this kind of area.

22 I'd like to, if I could, try to
23 complete my answer on why I think trying to
24 incorporate race neutrality into the first
25 Gingles precondition is also unnecessary. If I

1 understand the state's argument correctly, the
2 state is suggesting that this is the way to
3 ensure that a state is not required to draw an
4 unconstitutional racial gerrymander on the back
5 end at the remedial stage.

6 And I think the problem with that
7 argument is it ignores that there are already, I
8 would say, four independent checks in existing
9 doctrine that ensure the state will never be put
10 in that position.

11 The first thing is the fact that the
12 Gingles first precondition already requires that
13 the district not be bizarrely shaped. It has to
14 be reasonably configured. So we're in a world
15 where there would never be a -- a illustrative
16 plan that itself constituted that kind of
17 behemoth district that the Court disapproved in
18 cases like Shaw.

19 The second thing I would point to is
20 that the state is wrongly equating any use of
21 race in the redistricting process with an
22 unconstitutional action. And that ignores the
23 careful lines this Court has drawn in the Shaw
24 line of cases to make clear that it's only when
25 race predominates, when it's the overriding and

1 dominant rationale, that the state has to
2 justify its map under strict scrutiny. And --
3 and here it bears emphasis the district court
4 specifically found race did not predominate.
5 And that's another thing that's reviewed for
6 clear error.

7 JUSTICE ALITO: Well, if -- if a
8 computer simulation can produce this second
9 majority-minority district only by insisting
10 that -- that that district be created,
11 subordinating all the other districting factors
12 to race, isn't that predominance?

13 GENERAL PRELOGAR: Well, the way that
14 this Court has described the predominance
15 standard is that the -- the state has basically
16 subjugated all other traditional districting
17 criteria. It's often revealed by the fact that
18 the district is bizarre by any measure and is
19 irregularly shaped, although that's not an
20 absolute requirement.

21 But I think that the first Gingles
22 precondition already guards against that
23 because, of course, to satisfy Step 1 of the
24 framework, the plaintiff has to come in with a
25 reasonably configured district at the outset.

1 JUSTICE ALITO: I don't really
2 understand your answer to my question. If a
3 computer program can produce this district only
4 by making the creation of that district the sine
5 qua non and subordinating everything else, isn't
6 that the very definition of -- of predominance?

7 GENERAL PRELOGAR: I -- I think not as
8 this Court has articulated the standard. So the
9 Court has recognized, for example, or has never
10 suggested that simply because you intentionally
11 create a majority-minority district, that
12 automatically means in every case that race
13 predominated. And in the Bethune-Hill case, the
14 Court specifically remanded a case where there
15 had been a 55 percent target used for the
16 district court to make a finding on
17 predominance.

18 So I don't think that that is
19 inevitably the answer. And the reason for that
20 is because it's often possible to give great
21 attention and weight to other districting
22 criteria. That's specifically what the
23 plaintiffs' experts did here according to the
24 district court's factual findings.

25 JUSTICE JACKSON: And not just

1 possible, required. I mean, there's not a
2 subordination of the other districting criteria.
3 It's as if -- you know, in a hypothetical world,
4 it's as if there are 50 normal, you know,
5 regular traditional criteria, and the computer
6 runs the 50, and the challenger's experts run
7 the 50 and they add race, and the question -- as
8 -- as criteria 51.

9 And the question I would think from
10 the standpoint of predominance would be, is the
11 consideration of that one additional factor,
12 which would necessarily produce different maps
13 because, if you change one small part of an
14 algorithm, you would see that you might have
15 different results.

16 So, fine, we have different results
17 because the experts use 51 criteria and the
18 computer used 50, but the question I think is
19 whether just the use of that extra one, because
20 it differentiates, means that it predominates.
21 And I don't think that's what -- what Shaw means
22 when it says predominant.

23 Am I right about that or --

24 GENERAL PRELOGAR: Yes, I think you're
25 exactly right, Justice Jackson. And the Court,

1 in fact, in this line of cases has said that
2 legislators are always aware of race when they
3 draw district lines.

4 That alone isn't a basis to condemn
5 their maps or even subject it to strict scrutiny
6 specifically to ensure that federal courts
7 aren't too readily called in to superintend the
8 state line-drawing process.

9 And so I think that this Court's
10 precedents rightly recognize that states deserve
11 a measure of flexibility in managing all of the
12 competing interests that go into districting
13 decisions, and that can quite properly include
14 obligations under the Voting Rights Act.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 Justice Alito, anything further?

19 Justice Sotomayor?

20 Justice Kagan?

21 JUSTICE KAGAN: Do you -- do you --
22 I'm going to ask you a question about Alabama's
23 argument, and maybe I should have asked it to
24 Alabama's lawyer, but he can listen, and you're
25 there. So --

1 (Laughter.)

2 GENERAL PRELOGAR: I'll do what I can.

3 JUSTICE KAGAN: -- do you understand
4 why Alabama should be satisfied with this idea
5 if you can just produce one race-neutral map? I
6 mean, if the theory here is that you can run
7 millions of these programs and that we care
8 about race neutrality for any of the reasons
9 that Alabama suggests we ought to at the first
10 step of Gingles, at the first precondition, why
11 would one be enough?

12 If you ran one, shouldn't the state
13 come back and say, well, you need more than one
14 in a million? Surely, like, you should have a
15 hundred. Surely, you should have a thousand.
16 Surely, it should be the median map. I mean,
17 why one?

18 GENERAL PRELOGAR: I think this is
19 exactly the undertheorized aspect of Alabama's
20 approach here because they don't try to answer
21 any of those questions either about how you
22 operationalize the standard and agree upon how
23 to program the algorithm to take account of all
24 of the complex constellation of redistricting
25 criteria or how you interpret the results along

1 the lines you were suggesting. Is -- is one map
2 enough? Do you need a hundred, a thousand?
3 They don't say.

4 And I think that that just
5 demonstrates that this is an incredibly untested
6 form of evidence. It's never been required in
7 Section 2 litigation. And I think trying to
8 insert this as an insuperable requirement in
9 Gingles Step 1 would cause all kinds of
10 complicated litigation and battles of the
11 experts about how to even interpret and run
12 those types of simulations.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch?

15 Justice Kavanaugh?

16 JUSTICE KAVANAUGH: Are you aware of
17 any efforts in Congress to alter how the first
18 Gingles precondition applies in redistricting
19 cases?

20 GENERAL PRELOGAR: I'm not aware of
21 any current proposals in Congress to do that.
22 And, actually, I think this is a critically
23 important point, Justice Kavanaugh, because, of
24 course, this is a statutory interpretation case.

25 This Court has emphasized that stare

1 decisis considerations have their greatest force
2 here. And it's the Voting Rights Act. It's not
3 an area where the Court's decisions have flown
4 under the radar or escaped notice.

5 Congress has not hesitated to step in
6 and alter the statute when it's been
7 dissatisfied with this Court's interpretation.
8 That was the whole point of the 1982 amendments.
9 So I think that's Exhibit A of the principle
10 here.

11 And far from disrupting or disturbing
12 the Gingles framework in any way, Congress has
13 repeatedly left Section 2 untouched while it's
14 amended other aspects of the statute.

15 And in the 2006 amendments, the House
16 report specifically noted that Congress did not
17 intend any departure from Gingles or its
18 progeny.

19 So I think that those stare decisis
20 considerations really weigh heavily in the
21 balance here.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 Justice Jackson?

1 Thank you, counsel.

2 Mr. Lacour, rebuttal?

3 REBUTTAL ARGUMENT OF EDMUND G. LACOUR, JR.

4 ON BEHALF OF THE APPELLANTS/PETITIONERS

5 MR. LACOUR: Thank you. I've got five
6 quick points. I'll try to get through all of
7 them.

8 Justice Kavanaugh, to your point, it
9 is not a departure from Gingles to clarify.
10 This Court didn't depart from Gingles and
11 De Grandy when it recognized the importance of
12 proportionality. You didn't depart from Gingles
13 when you added traditional districting
14 principles to the analysis when the Court
15 started focusing on single member districts. So
16 we are not asking for Gingles to be overruled or
17 changed in any dramatic way. We just need some
18 clarification.

19 And a couple points about the clear
20 error or the standard of review. When it comes
21 to compactness, that was a legal error because
22 they left out important traditional districting
23 principles and -- and said that's fine, you only
24 have to account for some of the traditional
25 districting principles, not all of them.

1 It's -- it's very easy to satisfy
2 Gingles if you get to play by completely
3 different rules, and Gingles just isn't going to
4 do anything useful if that's the case.

5 When it comes to predominance, that's
6 a legal error. Just like in Bethune-Hill, just
7 like in ALBC, that's reviewed de novo.

8 Now the main point, I mean, courts can
9 -- the Court can resolve this case by clarifying
10 that race cannot be the non-negotiable principle
11 as part of Section 2 liability.

12 Simulations are not required. We just
13 need to make sure that plaintiffs are coming
14 forward with some sort of evidence that
15 resembles what you would think a race-neutral
16 map drawer would do within the confines of the
17 equal protection clause because, if you read
18 Section 2 to be inconsistent with Cooper and
19 Bethune-Hill, then our maps are always going to
20 be in court.

21 And we've got a real live example of
22 this with the Louisiana case that's pending
23 before this Court as well. Back in the '90s,
24 they drew two majority black districts. Twice
25 district courts said that's racial

1 gerrymandering and tossed them out. So then
2 they drew one majority black district, and now
3 this year they were -- their -- their map is
4 again preliminarily enjoined for failure to draw
5 two majority black districts. I think it's a
6 perfect example of just how the states are
7 caught in the middle here.

8 And it's because the plaintiffs don't
9 have a clear test. We -- we -- maximization is
10 not the test. Proportionality is not the test.
11 Some smattering of seven factors doesn't provide
12 sort of guidance we need either. That only
13 identifies broad societal discrimination, not
14 the sort of discrimination needed to justify
15 race-based map drawing.

16 So, if you return to the text, there
17 really is no better test that ensures equal
18 opportunity and equal openness than a map that
19 looks like what you would expect a neutral map
20 drawer to draw, consistent with the equal
21 protection clause.

22 I mean, imagine for a second that you
23 are a member of the Georgia legislature and all
24 your guidance on Section 2 and the equal
25 protection clause comes from the district court

1 opinion below. You would be completely in the
2 dark.

3 You know that you can account for
4 traditional districting principles, but,
5 apparently, one of your most important
6 communities of interest there in the Gulf is not
7 a sufficient community of interest to justify
8 drawing a neutral map.

9 You know that you've maintained cores
10 of your districts and that Supreme Court in
11 Abrams even said that's fine as part of the --
12 the Gingles 1 analysis, but the district court
13 said, well, here, it's not going to be the case.

14 So your map is going to end up in
15 court again and again. That cannot be the case.
16 We need some sort of guidance from this Court.

17 In sum, the purpose of the Voting
18 Rights Act is to prevent discrimination and to
19 foster our transformation to a society that is
20 no longer fixated on race, but plaintiffs would
21 transform that statute into one that requires
22 racial discrimination in districting and carries
23 us further from the goal of a political system
24 in which race no longer matters.

25 Neither the text nor purpose of the

1 Act supports that vulcanizing approach, and the
2 Constitution forbids it. If Section 2 is to
3 apply to single member districts, then only a
4 race-neutral benchmark furthers the VRA's goals
5 of -- and its equal openness touchstone.

6 And because Alabama's neutrally drawn
7 plan is equally open to all voters, it complies
8 with Section 2. Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. Thank you, other counsel. The case is
11 submitted.

12 (Whereupon, at 11:58 a.m., the case
13 was submitted.)

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Official - Subject to Final Review

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