SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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JOHN H. MERRILL, ALABAMA)

SECRETARY OF STATE, ET AL.,)

Appellants,)

v.) No. 21-1086

EVAN MILLIGAN, ET AL.,)

Appellees.)

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JOHN H. MERRILL, ALABAMA)

SECRETARY OF STATE, ET AL.,)

Petitioners,)

V.) No. 21-1087

MARCUS CASTER, ET AL.,)

Respondents.)

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

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Washington, D.C.

Tuesday, October 4, 2022

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

APPEARANCES:

EDMUND G. LACOUR, JR., Solicitor General, Montgomery, Alabama; on behalf of the Appellants/Petitioners.

DEUEL ROSS, ESQUIRE, Washington, D.C.; on behalf of the Appellees.

ABHA KHANNA, ESQUIRE, Seattle, Washington; on behalf of the Respondents.

GEN. ELIZABETH B. PRELOGAR, Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Appellees/Respondents.

C O N T E N T S

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

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

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

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

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

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

I welcome the Court's questions.

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

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

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

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

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

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

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

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

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

And then, when you continue --

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

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

JUSTICE SOTOMAYOR: Counsel --

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

JUSTICE KAGAN: I guess I ask because

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

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

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

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

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

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

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

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

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

JUSTICE JACKSON: And how so? How so?

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

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

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

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

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

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

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

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

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

JUSTICE JACKSON: What do they illuminate?

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

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

what a race-neutral algorithm would do?

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

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

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

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

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

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

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

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

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

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

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

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

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

Well, if you look back at White and if

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

JUSTICE SOTOMAYOR: Counsel --

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

CHIEF JUSTICE ROBERTS: Well, I guess --

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

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

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

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

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

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

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

So, if someone brings a challenge to

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

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

JUSTICE JACKSON: Well, why are you saying --

JUSTICE ALITO: Counsel --

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

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

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

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

MR. LACOUR: Mm-hmm.

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

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

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

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

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

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

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

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

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

MR. LACOUR: Two points.

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

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

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

CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

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

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

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

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

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

MR. LACOUR: Mm-hmm.

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

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

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

JUSTICE KAGAN: Well, Mr. Lacour --

JUSTICE SOTOMAYOR: Counsel --

MR. LACOUR: -- some precision was needed.

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

MR. LACOUR: Mm-hmm.

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

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

If you can come in with a map that

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

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

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

JUSTICE JACKSON: But why is that --

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

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

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

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

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

JUSTICE JACKSON: No, counsel --

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

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

MR. LACOUR: Mm-hmm.

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

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

JUSTICE SOTOMAYOR: Counsel, may I?

JUSTICE ALITO: Suppose --

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

JUSTICE SOTOMAYOR: Finish answering,

but then come to me.

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

JUSTICE SOTOMAYOR: Counsel?

MR. LACOUR: -- at the totality stage.

JUSTICE SOTOMAYOR: Now may I get to that?

MR. LACOUR: Yes.

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

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

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

MR. LACOUR: Mobile and Baldwin Counties.

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

MR. LACOUR: Fifty-six --

JUSTICE SOTOMAYOR: So --

MR. LACOUR: -- 56.6 percent.

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

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

community of interest.

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

MR. LACOUR: There's a lot --

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

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

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

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

Second --

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

MR. LACOUR: I -- I think --

JUSTICE SOTOMAYOR: -- we can go -- we can go --

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

JUSTICE SOTOMAYOR: -- further assuming that it --

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

JUSTICE SOTOMAYOR: All right.

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

Second, there's --

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

MR. LACOUR: So --

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

MR. LACOUR: -- two responses to that.

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

JUSTICE SOTOMAYOR: Well, if -- if --

MR. LACOUR: -- in a particular map.

But, second --

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

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

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

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

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

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

MR. LACOUR: Your Honor --

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

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

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

MR. LACOUR: Because --

JUSTICE SOTOMAYOR: -- with Mobile and

Baldwin?

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

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

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

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

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

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

MR. LACOUR: No, Justice --

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

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

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

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

JUSTICE KAGAN: May I ask for order?

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

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

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

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

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

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

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

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

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

36 percent.

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, it's your turn.

Justice Alito?

JUSTICE ALITO: No.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

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

JUSTICE SOTOMAYOR: Well, that begs --

MR. LACOUR: -- whether race defined things.

JUSTICE SOTOMAYOR: -- that begs --

MR. LACOUR: But --

JUSTICE SOTOMAYOR: -- the question.

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Kagan?

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

majority-minority districts.

Do you think Alabama could do that?

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

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

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

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

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

And I'll note LULAC is actually the

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

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

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

And, also, I don't think --

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

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

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

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

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

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

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

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

So what's left?

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

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

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

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

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

Justice Kavanaugh?

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

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

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

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

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

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

Their maps actually don't do any

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

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

JUSTICE KAVANAUGH: But isn't the question --

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

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

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: Okay. If it's --

MR. LACOUR: -- you have to have.

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

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

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

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

And they say, well, there's no

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

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

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

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

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

couldn't take advantage of this.

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

MR. LACOUR: Mm-hmm.

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

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

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

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

MR. LACOUR: Yes.

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

MR. LACOUR: Mm-hmm.

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

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

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

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

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

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

yield to race.

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

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

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

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

If we have so held, do you lose?

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

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

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

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

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice

Jackson?

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. LACOUR: Right. Which --

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

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

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

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

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

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

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

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

JUSTICE JACKSON: So we don't have a

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Ross.

ORAL ARGUMENT OF DEUEL ROSS

ON BEHALF OF THE APPELLEES

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Counsel, do

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

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

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

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

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

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

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

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

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

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

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

MR. ROSS: I understand, Your Honor.

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

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

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

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

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

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

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

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

MR. ROSS: Because this Court has --

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

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

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

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

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

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

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

JUSTICE ALITO: What if you could?

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

JUSTICE ALITO: What -- what if you could?

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: And --

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

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

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

JUSTICE SOTOMAYOR: That was --

JUSTICE JACKSON: And, counsel --

JUSTICE SOTOMAYOR: -- that was part

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

MR. ROSS: Yes, Your Honor.

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

MR. ROSS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Alito?

Justice Sotomayor, anything further?

Justice Kagan?

Justice Gorsuch?

Justice Kavanaugh?

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

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

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

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. ROSS: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Ms. Khanna.

ORAL ARGUMENT OF ABHA KHANNA

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

JUSTICE KAGAN: Ms. Khanna --

MS. KHANNA: Yes?

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

majority-minority districts, how substantial? Is there good evidence about that?

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

JUSTICE KAGAN: A number, like how many?

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

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

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

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

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

So what's the answer to that?

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

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

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

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

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

JUSTICE ALITO: Did --

JUSTICE BARRETT: But then let --

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: Okay.

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

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

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

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

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

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

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

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

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

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

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

MS. KHANNA: Yes, Your Honor.

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

Justice Alito?

JUSTICE SOTOMAYOR: I do, counsel.

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

But the point that he's making turns

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

MS. KHANNA: Yes, Your Honor.

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

MS. KHANNA: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

Justice Kavanaugh?

Justice Barrett?

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

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

weigh in all kinds of different ways.

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

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

MS. KHANNA: For several reasons, Your Honor.

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

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

JUSTICE BARRETT: Well -- well, let me

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

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

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

MS. KHANNA: Yes, Your Honor.

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

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

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

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

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

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

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

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

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

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

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

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

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

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

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

(Laughter.)

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

It would be a brand-new principle that

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MS. KHANNA: Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: General Prelogar.

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

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

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

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

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

discrimination.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: What --

GENERAL PRELOGAR: -- in practice.

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: You're --

GENERAL PRELOGAR: -- truly race neutral.

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

GENERAL PRELOGAR: Well, our concern

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

JUSTICE ALITO: Well, isn't --

GENERAL PRELOGAR: -- to ask --

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

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

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

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

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

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

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

GENERAL PRELOGAR: Go ahead, Justice Kavanaugh.

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

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

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

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

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

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

JUSTICE KAVANAUGH: When you --

GENERAL PRELOGAR: -- well as --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE JACKSON: And not just

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

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

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

Am I right about that or --

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito, anything further?

Justice Sotomayor?

Justice Kagan?

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

(Laughter.)

GENERAL PRELOGAR: I'll do what I can.

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

Justice Kavanaugh?

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

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

This Court has emphasized that stare

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

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

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

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

Justice Jackson?

Thank you, counsel.

Mr. Lacour, rebuttal?

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

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

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

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

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

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

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

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

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

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

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

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

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

opinion below. You would be completely in the dark.

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

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

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

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

Neither the text nor purpose of the

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

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

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

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