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

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 in Case 15-1262, McCrory v. Harris.

5 Mr. Clement.

6 ORAL ARGUMENT OF PAUL D. CLEMENT

7 ON BEHALF OF THE APPELLANTS

8 MR. CLEMENT: Mr. Chief Justice, and may it
9 please the Court:

10 This case involves the -- the
11 constitutionality of two congressional districts in
12 North Carolina that should be familiar to the Court
13 because they've been before the Court on multiple prior
14 occasions.

15 Even though the two congressional districts
16 here -- and they're both North Carolina congressional
17 districts -- the issues presented by the two districts
18 are actually quite distinct.

19 With respect to Congressional District 12,
20 it is different from both the House of Delegates
21 districts in the previous case and Congressional
22 District 1, because this was not a district that was
23 drawn with an avowed intent to create a
24 majority-minority district to comply with the Voting
25 Rights Act; rather, with respect to Congressional

1 District 12, this was avowedly a political draw.

2 Now, if that all sounds familiar, it's
3 because it's the exact same dynamic that was before this
4 Court in Cromartie II. And in Cromartie II, this Court,
5 in reversing a district court on the clear error
6 standard, concluded when the State actually said this
7 was a political draw, that race did not predominate over
8 politics in the drawing of this district.

9 And that is essentially the exact same
10 dynamic that is before this Court now with one major
11 difference. This is a much easier case for this Court
12 to reverse than Cromartie II was, because -- and even
13 before this Court gets to the clear error standard of
14 review, there is a clear legal error here that was
15 created by my friends on the other sides and the
16 district court's failure to abide by the teaching of
17 Cromartie II.

18 I think Cromartie II was about as clear as
19 it could have been, that in a case where you have a
20 majority-minority district or something approximating
21 it, and you have race and politics highly correlated,
22 and you have somebody challenging the State's suggestion
23 that this is a political and not a racial draw, what the
24 plaintiffs must show -- not can show, not may show, not
25 it would be nice that they show -- must show, is that

1 there are alternative ways that the legislature could
2 have accomplished its political goals without a
3 comparable emphasis on race --

4 JUSTICE KAGAN: Mr. Clement, that passage
5 in -- in *Cromartie II* says in a case like this one.
6 And -- and it's pretty clearly following off analysis
7 of -- in a case with purely circumstantial evidence,
8 rather than direct evidence of race-based districting.

9 I think you would have heard it, and it
10 would have sounded different if the Court had really
11 meant that in every case where the question was, is this
12 politics or is this race, there was a requirement to
13 present maps. That passage just would have read a lot
14 differently.

15 MR. CLEMENT: I respectfully disagree,
16 Justice Kagan, for at least two reasons.

17 One is, there was direct evidence in
18 *Cromartie II*; and, indeed, the direct evidence is eerily
19 similar. In *Cromartie II*, you had evidence that the map
20 drawer -- drawer himself had taken race into account
21 with the treatment of the African-American community in
22 Greensboro, which is Guilford County.

23 JUSTICE BREYER: In talking about that, I
24 guess that's why I say I was the problem.

25 (Laughter.)

1 JUSTICE BREYER: What I wrote was in a case
2 such as this one. And then people can argue: What does
3 that mean, "in a case such as this one"?

4 (Laughter.)

5 JUSTICE BREYER: By the time we reach the
6 Alabama case, there is a need seen by a majority of the
7 Court to try to bring clarity. We're speaking as a
8 Court. Not every individual gets his own way, or
9 should.

10 And so if we go back into an area and try to
11 reconcile the cases and try to come up with, in a
12 complicated area, a set of standards that will prevent
13 us from being -- turning into the nineteenth court of
14 evidence to consider some highly detailed matters and so
15 forth, you know, all the problems here, I would take
16 that -- or at least I'd start taking that last case,
17 the -- the -- the Alabama case, as at least trying to
18 set the way in which a district court should go about
19 deciding a case such as this one.

20 MR. CLEMENT: Well, just --

21 JUSTICE BREYER: Do I not do that?

22 MR. CLEMENT: No, in the following respect,
23 which is Alabama and Cromartie II are different cases.

24 JUSTICE BREYER: Uh-huh.

25 MR. CLEMENT: And I'll take your point that

1 Alabama is this Court's last, best guidance on how to
2 deal with a case like Alabama and like Congressional
3 District 1 where you have a State that says, why did we
4 do it? The Voting Rights Act made us do it. We did it.
5 We wanted to draw a majority-minority district.

6 But Cromartie II is this Court's last and
7 best word on cases like this, where the State says, why
8 did we do it? Politics. We don't want to -- we looked
9 at the benchmark map. The benchmark map had
10 Congressional District 1 over, which was here a
11 majority-minority district, or at least close. And we
12 wanted to preserve that as majority-minority district.
13 We know how to tell you when we're taking race into
14 account. We -- we've said we're doing it. We're not
15 playing hide the ball here. We did it with respect to
16 CD1. And when it comes to CD12, we look at the
17 benchmark map. That's a political draw.

18 Would it be --

19 JUSTICE KAGAN: Well, the question is: Is
20 it? Right? I mean, that's the question that the
21 district court was trying to answer. Is it politics or
22 is it race? If it's politics, it's fine; if it's race,
23 it's not.

24 And -- and so let's just take a
25 hypothetical. Not this case, but let's take a

1 hypothetical, which is: A State really does decide to
 2 do race-based districting. Says, we want to segregate
 3 all the African-American voters; this is the way we want
 4 to do it. But then they say, well, we'll -- we'll --
 5 we'll justify it based on politics, because that sounds
 6 better, right?

7 So -- and -- but -- but there's lots of
 8 direct evidence that, in fact, the justification is
 9 politics, but the true reason is race.

10 Now, were you suggesting when you stood --
 11 when -- when -- in -- in -- in your -- in your first
 12 statements there, were you suggesting that even if a
 13 plaintiff comes in and has all this direct evidence that
 14 they are really trying to do race, that the plaintiff
 15 has to present its own maps?

16 MR. CLEMENT: And I would say yes. And I
 17 would say why not? I mean, we're talking about a
 18 situation where the plaintiff is going and asking a
 19 Federal court, in this case after they've already asked
 20 the State court and lost -- I'll get into that later
 21 maybe. But we're asking a Federal court to say and hold
 22 that a sovereign State legislature that says it's
 23 politics was dissembling, and it's actually race.
 24 That's a big thing to ask of a Federal court.

25 It's a unique thing in these *Cromartie II*

1 cases, which is different from what you're asking a
2 Federal court to do, when the State is forthright that,
3 we took race into account to comply with the Voting
4 Rights Act.

5 JUSTICE KAGAN: But it's also a big thing to
6 ask plaintiffs to come in with their own maps, if they
7 have direct evidence that the State is doing race-based
8 rather than politics-based districting.

9 MR. CLEMENT: Well, I'm -- I guess I'm a
10 little less troubled by being demanding of plaintiffs
11 than I am of putting sovereign State legislatures in a
12 difficult position. And if there's all that direct
13 evidence, gosh, I think the alternative map drawing is
14 going to be a breeze. I mean, if -- you know, if there
15 really -- all this direct evidence that this was really
16 about race and -- and -- and the idea that this was
17 about politics is just a pretext, I think it's going to
18 be easy as pie to show, well, actually, right here you
19 could have drawn this map differently and you would not
20 have taken race into account.

21 JUSTICE KAGAN: Not so easy, because we know
22 that race and politics correlate. And the question
23 is -- is not -- I mean, that's just a fact of the
24 matter. But we've said, notwithstanding that, if race
25 is your motive, you get one result; and if politics is

1 your motive, you get another result.

2 So these maps are actually hard to do, given
3 the extent of correlation there is, but direct evidence
4 of race-based -- which, I have to say, there really is
5 some in this case, because the principal line-drawer
6 says, they told me to get above 50 percent BVAP --
7 direct evidence, you know, that basically makes the case
8 for somebody.

9 MR. CLEMENT: Well, Your Honor, just to be
10 clear, that -- that -- the direct evidence of the map
11 drawer actually is incredibly helpful for my clients as
12 to CD12, because the same guy who had no problem saying
13 as to CD1, it's above 50.1 percent, also testified that
14 he had exactly the opposite instructions for drawing
15 CD12, and that when he drew the map he didn't even look
16 at racial data. He looked at the 2008 presidential
17 election and the political results from that, and drew
18 the map in order to bring in Democrat voters and exclude
19 Republican voters. So -- and -- and that's --

20 JUSTICE SOTOMAYOR: Didn't --

21 MR. CLEMENT: I'm sorry.

22 JUSTICE SOTOMAYOR: Didn't he say that he
23 was told specifically to not consider race except with
24 respect to Guilford County?

25 MR. CLEMENT: Well --

1 JUSTICE SOTOMAYOR: Which is probably the
2 most important piece of this discussion.

3 MR. CLEMENT: No, that's not what he said.
4 He didn't say -- he -- he basically was -- said, look,
5 do it as a political draw, and then you're going to have
6 to, essentially, check what you did in Guilford County
7 with the African-American community, because Guilford
8 County is a covered jurisdiction.

9 JUSTICE SOTOMAYOR: We can go back to the
10 original deposition testimony, which is what the
11 district court -- I think what the court below relied
12 on.

13 MR. CLEMENT: Absolutely. But you look at
14 that deposition testimony and you look at his testimony
15 at trial and it all fits together, because he -- and,
16 again, he never says, oh, well, actually, when it came
17 to Guilford County, I turned off the political screen on
18 my map-drawing software and picked up the race-drawing
19 screen.

20 What he did is, the whole time he drew the
21 maps, he had political data up there. Precisely because
22 race and politics are highly correlated, he drew the map
23 to draw the Democrats in and the Republicans out. Then
24 he checked his work specifically with respect to
25 Guilford County, and he did treat Guilford County

1 differently, and he should have because Guilford County
2 is the only covered jurisdiction in CD12. And he looked
3 and he said, all right. I got the African-American
4 community together. I don't have a problem.

5 Well, my friends on the other side want to
6 take -- whatever quibble there is about Guilford County,
7 it's essentially uncontroverted here that with respect
8 to every other part of the map, race wasn't taken into
9 account at all. It's essentially uncontroverted because
10 nobody says he turned the political stuff off for
11 Guilford County. So all he did is he did a crosscheck
12 as to Guilford County to make sure there wasn't a
13 retrogression problem with Guilford County, which is
14 exactly what he should do, by the way. But talk about
15 eerie similarities.

16 I mean, it was Guilford County and it was
17 Greensboro and Cromartie II, and what this Court said in
18 giving that direct evidence relatively minimal weight
19 was to say, well, you know, if you look at the rest of
20 that e-mail, the map drawer was very candid about taking
21 race into account in drawing CD1 and was much -- there's
22 much less race involved in CD12 so it didn't
23 predominate.

24 Again, the -- the similarities could not be
25 more dead-on with this case. So the most you can get

1 out of Guilford County is that race was taken into
2 account in some way that did not make it predominate,
3 and the same evidence here as in Cromartie II, that, if
4 you contrast the way the legislature proceeded with
5 respect to CD1 and CD12, it's virtually impossible to
6 think that this was all a pretext.

7 I mean, you know, I -- I understand why you
8 want to search a little bit more when you have a
9 legislature who comes up with these racial maps and they
10 say, as to all of it, race had nothing to do with it.
11 But when the legislature repeatedly says we treated CD12
12 differently from CD1, I would think that you would want
13 pretty substantial evidence before you second-guess that
14 conclusion and overrode it. And I would think that you
15 would want the maps --

16 JUSTICE KAGAN: But isn't -- isn't it --

17 MR. CLEMENT: You would want the maps. And
18 if I could just --

19 JUSTICE KAGAN: Isn't there substantial
20 evidence that Congressman Watt comes in and he sits on
21 the witness stand and he says, I had a conversation with
22 the map drawer and the map drawer said that my bosses
23 told me I have to get up over 50.1 percent black votes.

24 MR. CLEMENT: So it --

25 JUSTICE KAGAN: That seems like substantial

1 evidence. A Congressman says -- reports on a direct
2 conversation he's had with the map drawer, who -- who --
3 who says he has received orders from on high. And --

4 MR. CLEMENT: Well, no. He -- see, that's
5 the thing. I mean, there's a dispute whether that
6 conversation ever took place.

7 In the -- in the record in this case, you
8 have Senator Rucho, who protests that that's not what
9 happened. You also have another witness. That's all in
10 the record here.

11 JUSTICE GINSBURG: But wasn't there a
12 credibility finding? Didn't the district judge say --
13 the three-justice court say they credited Watt and not
14 Rucho?

15 MR. CLEMENT: They -- they -- they did say
16 that, but that only gets you to the point that -- okay.
17 I mean, maybe -- even if Rucho said that, it didn't get
18 translated to the map drawer. Rucho and Lewis make
19 multiple public statements that say that CD12 is not a
20 racial draw; it's a political draw.

21 You look at all the other evidence here --
22 and let me get back to the maps, because here's the
23 thing. I mean, you didn't just make that stray comment
24 in Cromartie II. You did it after your analysis in the
25 opinion where you looked at the maps, because they --

1 it -- it wasn't like the problem in Cromartie II was
2 they didn't have alternative maps.

3 The problem was in -- in Cromartie II, is
4 they had the alternative maps and they showed that they
5 are very, very useful just because race and politics are
6 so highly correlated. So when you try to draw an
7 alternative map, as in Cromartie II, and it's like, oh,
8 guess what? You can get a better racial balance only if
9 you pair two incumbents? Like --

10 JUSTICE BREYER: I understand the problem of
11 Cromartie II. I understand it. Believe me. And I -- I
12 think that the problem in Cromartie II is it doesn't say
13 in all cases. I mean, it's pretty clear. It's -- I
14 write that for a purpose. You know, the Court writes,
15 when it says in a case like this one, it's a little
16 ambiguous, but it means it.

17 MR. CLEMENT: We --

18 JUSTICE BREYER: By the time as time
19 progresses, as time progresses, we face what you see and
20 I see as the problem right now, which is a set of
21 standards that district courts can't apply, which will
22 try to separate sheep from goats, without us spending
23 the entire term reviewing 5,000-page records. Right?

24 That is a problem that you have by the time
25 we -- pretty clear, by the time we get to the later

1 cases. So I don't know.

2 I understand your argument. I understand
3 your argument. I'll go back and look at it. You think
4 it's absolutely determinative, the Cromartie II. I'm
5 not so sure.

6 MR. CLEMENT: I think it's determinative,
7 because you didn't just say "in a case such as this
8 one." You said "in a case such as this one where" it's
9 a majority-minority district or a close approximation,
10 and race and politics are closely correlated.

11 And I'll even give you a third criteria,
12 which is in the cases where the -- the legislature's
13 stated goal was politics, not race. And so it's -- you
14 absolutely said it, but you are also absolutely right,
15 and before you decide whether it's sheep or goats, I
16 think it's perfectly fair to say that there are two
17 breeds here, generally.

18 There are the cases where -- and the more
19 common ones, the Alabama cases, the Shaw cases, those
20 are all cases where the State comes in and CD1 -- which
21 I'll talk about in a minute. Those are all cases where
22 the State comes in and says, yep, it was race. It was
23 race because of the Voting Rights Act. We don't think
24 race predominated. And if it did, we survived strict
25 scrutiny.

1 But there's a whole separate class of cases,
2 the smaller cases, where the State comes in and says it
3 wasn't race at all; it was politics. And sure, they're
4 highly correlated, but it was politics. And it's very
5 sensitive cases for the State, because if the State does
6 that, as this case shows, if they lose because they --
7 they're found to have disassembled, they don't even get to
8 the second half of the case, because I can't come up
9 here and argue that it was politics, not race. But if
10 you think we're lying, by the way, we narrowly tailored.
11 I mean, you don't have that opportunity. And so there
12 has to be a very high threshold.

13 And Cromartie II addresses those cases like
14 a laser beam. If you want to give guidance to the lower
15 courts, don't tell them you faked them out in
16 Cromartie II. I mean, say that you are going to stick
17 with that and identify this class of cases and say
18 that's the test for those kind of cases.

19 And it's -- it's not the world's, you know,
20 biggest burden to come up with an alternative map. And
21 if the alternative map shows that the way that you take
22 race -- rather, politics into account to the same extent
23 without -- with -- with better race is by pairing
24 incumbents or making a district that looks like this
25 look like this -- which is exactly what you found in

1 Cromartie II. You looked at those alternative maps, and
2 they weren't, you know -- I mean, you know, it was not
3 beyond the ken of man to come up with alternative maps
4 in that case. The problem with alternative maps in that
5 case is that they actually showed that the legislature
6 was exactly right.

7 JUSTICE BREYER: What you want me to say is
8 even though the district court listened to the map
9 drawer and believed him, and his statements are pretty
10 much against you, and then they heard two of the State
11 senators, and they were pretty much against you, and
12 it's up to the district court to evaluate the strength
13 of witnesses, and came to the conclusion on the basis of
14 fact that, in fact, it was -- race was really the
15 explanation.

16 Despite that, everyone who comes in has to
17 have an alternative map. And, of course, if we have
18 five intervenors and so forth, we're going to have five
19 or six different alternative maps drawing 400 -- I don't
20 know, a hundred State legislatures and so forth.

21 That's what I'm supposed to say?

22 MR. CLEMENT: Well, first of all, I don't
23 think that the direct evidence here is of a character
24 that is materially different from Cromartie II itself.
25 And I would say that, look, you're trying to give

1 district courts directions for a whole bunch of cases.
2 Everybody is going to be able to say, I have direct
3 evidence. There's obviously going to be some direct
4 evidence. The quality and character of it is going to
5 differ from case to case.

6 But what I think you should do is in this
7 class of cases, where the State's defense is politics
8 not race, is all five intervenors can get together, pool
9 the costs, which are going to be minimal, give me at
10 least one alternative map that shows that you can do the
11 same political thing without a comparable effect on
12 race.

13 I don't think that's too much to ask. I
14 think it would make your jurisprudence much more
15 administrable. It would also have the virtue of
16 applying stare decisis, because you did say it in
17 *Cromartie II*.

18 And again, you know, every one of this
19 Court's cases says that this is an extremely difficult
20 business, that it's an inherently legislative business,
21 that it is a humbling and big thing to have a court
22 second-guess these decisions.

23 So I think in a world like that, especially
24 when you've already said it, to say that there is an
25 alternative map requirement as a gatekeeping function,

1 to guide a district court, to give the district court
2 the same tools you used in *Cromartie II*, to say, ah, you
3 know, it's easy to say that there was a pretext, but
4 when I actually look at this -- you know, and I'm going
5 to -- I'm going to -- at the end of the day, I mean, I'm
6 going to look at the alternative map in conjunction with
7 the direct evidence, the circumstantial evidence, but
8 I'm at least going to be guided by something that says,
9 you know, there was another way to do this, and that
10 really does make me think that this direct evidence is a
11 lot more probative than it might otherwise, because I
12 see there was an easy alternative.

13 JUSTICE SOTOMAYOR: But --

14 MR. CLEMENT: If they really just wanted to
15 help the Democrats hurt the Republicans or vice versa --

16 JUSTICE SOTOMAYOR: Mr. --

17 MR. CLEMENT: -- they could have done it
18 with a completely different racial balance.

19 JUSTICE SOTOMAYOR: What do we do with our
20 statements in *Miller*, that what the evil we're trying to
21 address is the use of race? And once it's met, you
22 don't need a manifestation of it. You need just the use
23 of race. Does it predominate? That's the evil the
24 Constitution is intended to avoid.

25 See, your way is to say that State

1 legislatures go out and always say it's politics,
2 because it's real easy to say politics, even though
3 there's a lot of direct evidence that it really was
4 race, and put the added burden on a plaintiff now to do
5 a map where you'll come up and say on their map, oh, ah,
6 this takes care of this problem, but there's another
7 political reason for not doing it that way. There's
8 another political reason for not doing it this way.
9 It's impossible to ask a plaintiff to come up with a
10 race-neutral map in light of the entire region.

11 The issue is, are the State legislators
12 prohibited from using race predominantly? And if they
13 are and the proof is they have, then they should go back
14 to the drawing board and do it without it.

15 MR. CLEMENT: Well, Your Honor, I think
16 that, sure, at the end of the day in these districts
17 where you basically have one party saying it was
18 politics and the other party is saying it's race, you do
19 ultimately have to have a mechanism for determining
20 which one it was.

21 And our humble point is everybody agrees
22 that they're highly correlated. That certainly creates
23 the possibility for abuse, so we're not saying there
24 shouldn't be any test. What we're saying is that, you
25 know, this is a difficult thing. It is a particularly

1 damning thing to say that a State legislature,
2 especially when they're being candid about their use of
3 race of CD1, to say that they were dissembling is a
4 pretty big thing. And it's going to be the only issue
5 in the case because there isn't going to be any strict
6 scrutiny to fix it on the back end because they're going
7 to say we don't take race into account at all.

8 To simply say -- and it's certainly not
9 beyond the ken of man or woman or anyone else to come up
10 with an alternative map, and it's not just you're doing
11 it to be mean or imposing costs. They're actually
12 exceedingly useful for the analysis. And you only have
13 to look at the Cromartie II opinion to show how they can
14 really show, well, yeah, if you do that, you're going to
15 elongate it. And that's not going to be the case in
16 every case. In some cases, you'll be able to come up
17 with a perfectly functional alternative map.

18 If I could turn my attention now to CD1,
19 which is an issue -- which is a case that is more like
20 the Virginia districts in the sense that here it is, it
21 is the avowed use of race in order to preserve a
22 majority-minority district.

23 Now, as to this one in particular, we think
24 that the district court erred in applying strict
25 scrutiny simply based on essentially the adoption of a

1 BVAP floor of 50.1 percent. But the easiest way to
2 affirm is probably to do what the North Carolina Supreme
3 Court did in the parallel State litigation, which it
4 also confronted a district court that applied strict
5 scrutiny because a BVAP floor was applied. But the
6 lower court there had said, but applying strict
7 scrutiny, we think this is narrowly tailored.

8 The North Carolina Supreme Court said, you
9 know, the district court screwed up on finding strict
10 scrutiny triggered, but nevertheless, we agree this is
11 narrowly tailored. And I think you could do the same
12 thing here, obviously if you're reversing the district
13 court on the legal judgment about narrow tailoring, but
14 it may be the easiest way to decide CD1.

15 Because here, the map drawers -- of course,
16 they admitted they took race into account, but they were
17 dealing with a difficult problem, which is they had a
18 benchmark map that had CD1 as a majority-minority
19 district. Now it was -- to be sure, it was a coalition
20 district. It was at about 48 -- a little bit north of
21 48 percent BVAP, but it had also lost 97,000 votes. And
22 so they want to preserve it as a majority-minority
23 district.

24 Based on their reading of Strickland and
25 some other things, they say, you know, the safest way

1 for us to do this is to get it over 50.01 percent. So
2 we're going to tell the map drawer that we want this
3 over 50.01 percent. The map drawer gets that
4 instruction and draws a district that ends up at about
5 52.6 percent.

6 Now, the very fact that it's at 52 and not
7 50.1 shows that it's not like this ratio was preserved
8 over everything else, but also I think it's worth in
9 this case in particular to understand it's not like
10 there's a myriad ways to do what the map drawer did in
11 this situation. There are really two opportunities.

12 You could either draw the district to get
13 part of Wake County, and that would get you over
14 50 percent, or you could go into the city of Durham and
15 get over 50 percent that way. The first time the map
16 drawer drew the map, he drew it in Wake County; got to
17 50 percent that way. There was some back-and-forth with
18 Representative Butterfield and the like, and they
19 decided, you know, okay, we'll do the Durham County.

20 JUSTICE KENNEDY: To what extent and what
21 circumstances does Section 5 of the Voting Rights Act
22 require that a contiguous district be drawn in order to
23 comply with strict scrutiny? Assume that you're using
24 race and then you have to comply with strict scrutiny.
25 To what extent do you think the VRA requires a compact

1 or contiguous district?

2 MR. CLEMENT: I think it requires a
3 reasonably contiguous district. And I think -- I mean,
4 this is a situation where, you know, this was -- you had
5 a -- you had a more compact district. And in order to
6 get either Wake County or Durham, you'd essentially have
7 to extend the district to capture those territories.

8 The one thing I'd say before I sit down,
9 additional thing I'd say before I sit down about CD1 is
10 I think very telling to look at Representative
11 Butterfield's testimony in the record here, because what
12 the lower court found is that the reason that we lost on
13 strict scrutiny was there was not racially polarized
14 voting in CD1, or more particularly, the State hadn't
15 done enough to show that.

16 Now, nobody thinks that there isn't racially
17 polarized voting in CD1. They don't think that. They
18 think we didn't do enough to prove it, but they don't
19 think. Representative Butterfield doesn't think that,
20 and he was the incumbent in that district.

21 The dispute is not over whether there's
22 racially polarized voting. It's whether, well, you
23 know, as -- as Representative Butterfield testified,
24 it's -- it's -- it's got to be at least 45 percent. 46
25 or 47 is probably better. It couldn't go south of

1 45 percent.

2 Representative Butterfield says that fully
3 two-thirds of white voters will never vote for a
4 African-American candidate in CD1. So he admits this
5 racially polarized voting.

6 So all this comes down to, it's not about
7 whether we like racial targets or we don't like racial
8 targets. It's whether you're going to give the
9 legislature the flexibility to choose between 47 or 48,
10 on the one hand, or 50.1 or 52, on the other. And the
11 deference to legislature means anything that has to be
12 within the deference -- the -- the zone of deference.

13 Thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Mr. Elias, welcome back.

16 ORAL ARGUMENT OF MARC E. ELIAS

17 ON BEHALF OF THE APPELLEES

18 MR. ELIAS: Feel like I never left.

19 Mr. Chief Justice, and may it please the
20 Court:

21 I'd like to actually jump in and just go
22 through District 12, as -- as my colleague did, and then
23 talk about CD1.

24 The problem that the State has in CD12 is
25 that the finding of predominance was more than amply

1 supported by the record that the trial court found, and
2 we are under a clear error standard.

3 The question as, Justice Breyer, you -- you
4 pointed out is whether race was a dominant and
5 controlling factor in moving a significant number of
6 voters in or out. And it seems that the primary defense
7 that the -- that the State has, in trying to overturn
8 the decision of the lower court, is that an alternative
9 map was not introduced.

10 While certainly an alternative map is a way
11 to adduce evidence, it can't be that it's the only way
12 to adduce evidence. There are all manner of ways to
13 prove that race predominated. I would point out that we
14 offered no alternative map in the last case. I would
15 point out that we offered no alternative map in
16 Personhuballah, which was the case you heard earlier
17 this year.

18 JUSTICE KAGAN: Well, why not?

19 MR. ELIAS: Because in each of these cases,
20 and in Alabama, they offered no alternative map. In
21 each of these cases, there was no need to provide an
22 alternative map to prove circumstantially what amply
23 existed directly. It is not true that the State of
24 Alabama, in that case, or the State of Virginia, in this
25 case, did not assert political motives as a defense to

1 some of the districts. I actually --

2 JUSTICE BREYER: Did they -- did they in
3 respect to this district, District 12? Because when I
4 go back to Cromartie II, I think he's right. It does
5 say that at least where the evidence is close, where
6 it's a close question, where one side is saying it's
7 racial, the other side is saying it's political, then it
8 says the party attacking the legislature's boundaries
9 has to show that the legislature could have achieved its
10 legitimate political objectives in alternative ways that
11 are equally consistent with traditional principles.

12 Now, it does say that.

13 MR. ELIAS: It does, Your Honor.

14 JUSTICE BREYER: So what -- what -- what is
15 it that you suggest? My having been quite strong for
16 following stare decisis in this, but what do you suggest
17 about that? Are you going to say this isn't a close
18 case?

19 MR. ELIAS: I --

20 JUSTICE BREYER: Are you going to say we
21 should overrule that? What -- what is it you want to
22 say?

23 MR. ELIAS: I would say two things, Justice
24 Breyer.

25 The first is, I'm taking issue when they

1 suggest that trial courts are confused and that this is
2 a reversal on trial -- of the trial courts. The trial
3 court in North Carolina was not confused that a map was
4 not required. The trial court in Virginia was not
5 confused.

6 JUSTICE BREYER: Explain why isn't -- not a
7 map, but some kind of -- of evidence that they could
8 have achieved their political objectives with less
9 reliance on race. That's what it seems to say.

10 MR. ELIAS: I think, Your Honor --

11 JUSTICE BREYER: Are you saying it doesn't
12 really say that? You could say -- I mean, there are
13 many things you might say. I'm not suggesting the
14 answer. I want to know what you do say. Or you could
15 say, it doesn't matter because we have a -- a -- giving
16 weight to the district court doesn't matter, isn't that
17 important. But I don't want to suggest something. I'm
18 not.

19 MR. ELIAS: Your -- Your --

20 JUSTICE BREYER: I want to hear what you
21 think.

22 MR. ELIAS: Yes, Your Honor. I think that
23 Cromartie -- the language in Cromartie that is being
24 focused on is discussing the -- the -- that case, the
25 case in which, as you say, there were lots of maps.

1 That was a -- fundamentally a maps case, where there --
 2 where each side is proving their case through maps,
 3 principally through circumstantial evidence of what was
 4 in various versions of maps.

5 In that case, where we're offering a lot of
 6 maps on both sides, you at least have to offer one that
 7 shows you -- you achieved the -- the goals, the
 8 political goals, without -- without -- without race
 9 predominating.

10 I would point out as a -- as an important
 11 footnote, the State -- on remand, the State of North
 12 Carolina actually did draw a remedial map in this case.
 13 So it's not a hypothetical whether they could draw a map
 14 that achieved their political goals that did not
 15 gerrymander based on race, because, in fact, the State
 16 of North Carolina, after this, drew a map of -- validly
 17 on political data, not using race data, and, in fact,
 18 drew this district at a lower BVAP and yet protected the
 19 Republican nature of the district.

20 JUSTICE ALITO: Did they say that that map
 21 served political ends to the same degree as the map
 22 that's before us?

23 MR. ELIAS: I don't know what it -- Your
 24 Honor --

25 JUSTICE ALITO: If they -- if they didn't

1 say, then --

2 MR. ELIAS: That's --

3 JUSTICE ALITO: -- the fact they were able
4 to draw another map doesn't -- doesn't really prove
5 anything.

6 If -- if a legislature says, this was done
7 on -- based on politics, and there's no way we could
8 have achieved our political objective without doing
9 this, they can't prove a negative.

10 So it makes sense to turn to the other side
11 and say, prove that that's wrong. Prove that the
12 political ends could be served without taking -- without
13 drawing the map that was -- that was before -- that --
14 that -- that was drawn.

15 MR. ELIAS: Your Honor, I think the problem
16 with the reading -- that reading and the reading that's
17 being offered, is it puts the constitutional cart before
18 the horse. The -- the -- the harm is in using race as
19 the predominant factor. There is no constitutional
20 right to political gerrymandering that has to be
21 protected. What has to be protected is voters'
22 rights --

23 JUSTICE ALITO: No, but the question is,
24 what was the basis for it? Was it politics, as they
25 say, or was it race?

1 MR. ELIAS: Precisely, Your Honor.

2 JUSTICE ALITO: So if there isn't -- if no
3 one can point to a way of achieving the political
4 objective, other than through the map that was drawn,
5 then that's evidence that politics was the reason for
6 it.

7 MR. ELIAS: It -- Your Honor, it may be
8 evidence of it. It may also be evidence of race serving
9 as a proxy for partisanship, which is not permissible.
10 But even if it's not that, Your Honor, it may be
11 evidence. But that doesn't mean there can't be other
12 evidence --

13 JUSTICE ALITO: Okay. Well, would you --

14 MR. ELIAS: -- on the other side.

15 JUSTICE ALITO: Would you accept that a map
16 is necessary, except in a case where there is quite
17 strong evidence --

18 MR. ELIAS: I don't -- I --

19 JUSTICE ALITO: -- that race was the basis?

20 MR. ELIAS: I don't think that this Court
21 needs to define out the strength of the evidence. I
22 think it's evidence. I think a map is evidence. I
23 think direct testimony is evidence. I think, like most
24 trials, it's a mosaic. It's not a -- it's not a smoking
25 gun. It's a mosaic of evidence. And the mosaic of

1 evidence in this case --

2 JUSTICE ALITO: Well, how much weight do you
3 think the absence of a map is entitled to?

4 MR. ELIAS: I think the absence of a map is
5 entitled to no weight. I think that the fact that there
6 is a -- that there is a map that -- that was enacted is
7 obviously -- is obviously -- and the evidence that they
8 adduced at trial that race and party correlate to a
9 large degree is obviously evidence that it was -- that
10 it was political.

11 But in this case, look at what it is that
12 Rucho and Lewis said. Before we get to Hofeller, the
13 map drawer, let's talk about what they said, what the
14 sponsors said. Quote, "Because of the presence of
15 Guilford County" -- this is not descriptive. This is
16 because, but for. "Because of the presence of Guilford
17 County in the 12th District, we have drawn our proposed
18 12th District at a black voting age level that is above
19 the percentage of black voting age population found in
20 the current 12th District."

21 That is the statement from the sponsors that
22 it was race.

23 What did -- what did the expert say? The
24 expert said in his expert report -- and this is
25 JA1103 -- "The General Assembly, mindful that Guilford

1 County was covered by Section 5 of the Voting Rights
2 Act, determined that it was prudent to reunify the
3 African-American community in Guilford County. This
4 could avoid the possibility of a charge of fracturing
5 that" -- "fracturing our community and inhibiting
6 preclearance by the Department of Justice under
7 Section 5. This extension of the New 12th District
8 further to the northeast into Guilford County caused" --
9 "caused the circumscribing circle around the district to
10 increase in diameter and lower the Reock Score."

11 JUSTICE ALITO: I think the -- the evidence
12 with respect to Guilford County is your strongest
13 evidence; but beyond that, the rest of it is not very
14 strong.

15 MR. ELIAS: Your Honor, but that is
16 where the -- where race predominated. Race
17 predominated -- your -- in a district -- Justice Breyer,
18 to a question you asked in the last -- in the last case,
19 this was a district that was overpopulated by 2,800
20 people. 2,800 people. This was -- this was almost
21 spot-on one-person, one-vote. And yet they moved 75,000
22 African-Americans into the district.

23 So to say, well, Guilford County, is that my
24 strongest case -- yes, that is, in fact, where they
25 moved.

1 JUSTICE KAGAN: Did the State ever put on
2 any evidence that that was necessary to avoid a
3 retrogression problem under Section 5?

4 MR. ELIAS: No. No. They offered no
5 evidence that it was to comply with the Voting Rights
6 Act at all.

7 JUSTICE KAGAN: And why is that? I mean, it
8 seems like -- as though that's what they would say.
9 Why -- why wasn't that at issue?

10 MR. ELIAS: Whether it was a strategic
11 litigation decision made by the trial lawyers that they
12 wanted to put all of their eggs in the -- so to speak,
13 in the politics, not race basket, or whether their
14 expert wouldn't support that this was actually necessary
15 to comply with the Voting Rights Act, I don't know. But
16 they -- but that was not their argument.

17 It's also important, Your Honor, though to
18 realize that the evidence doesn't stop there. You have
19 Mel Watt, who it did -- who by the time he testifies
20 before the district court, he's out of Congress. He has
21 no stake in this district one way or the other for
22 himself. Okay. He has moved on to the administration
23 and -- and -- and an after -- and a life after electoral
24 politics. And he says he's told that the reason why
25 this happened was that -- that -- that it had to ramp up

1 to over 50 percent to comply with the Voting Rights Act.

2 JUSTICE BREYER: I think they -- they did
3 make the case. They said, yeah, we did that, and the
4 reason we did it is most of the African-American voters
5 vote for Democrats --

6 MR. ELIAS: Well --

7 JUSTICE BREYER: -- and we want to get all
8 the Democratic voters in one district, so the 15 that
9 are Republican. That's just what the Democrats did last
10 time. And yet that -- that's the kind of argument that
11 they make.

12 MR. ELIAS: What it -- what --

13 JUSTICE BREYER: What about that?

14 MR. ELIAS: What Mel Watt was told is that
15 he, as a respected African-American, was going to be
16 expected to sell to the African-American community.
17 That's what he said.

18 He's going to be expected to sell to the
19 African-American community that this needed to be over
20 50 percent to comply with the VRA. And you know what
21 Mel Watt said in his testimony? You should read it. He
22 laughed. And he said it's not possible, because the
23 people in this district will know that there isn't a
24 reason why this has to go above 50 percent to comply
25 with the Voting Rights Act.

1 The trial court also discounted the
2 testimony that you -- that -- that my -- my good friend
3 and colleague has -- has suggested was offered by the
4 map drawer, Mr. Hofeller, about what he was told and
5 that he only used -- that he turned off race and he only
6 used partisanship. That whole -- that whole analysis,
7 the district court didn't credit. Didn't credit. Said
8 that I -- I heard the testimony. I did what a trier of
9 fact did. I listened to the live witnesses, and I
10 didn't credit it. It wasn't believable.

11 JUSTICE ALITO: Well, can I go back to -- to
12 Congressman Watt's testimony? Now, you referred to
13 something other than what I thought you highlighted in
14 your brief.

15 What you highlight in your brief is double
16 hearsay: Congressman Watt said Rucho told him that
17 somebody else told him something, and none of those
18 people is actually the person who drew the map. Now, I
19 don't even know whether any of that is admissible to
20 prove the truth of the matter. But if it is, it's
21 pretty weak evidence.

22 MR. ELIAS: Well, Your Honor, it was
23 admitted. All -- there was no objection to the
24 evidence. And it is evidence that the trial court, in
25 viewing the witnesses and laying all the evidence in

1 front of it, credited as important evidence.

2 So I understand -- obviously, the Supreme
3 Court, you can -- you can do whatever you want, but I
4 think that the role of an appellate court is to look at
5 the triers of fact and say, look, you weighed the
6 credibility of this, and whether it sounded like
7 attenuated double hearsay or whether it sounded --
8 against all of the rest of the evidence, it sounded like
9 something that is believable when judging demeanor and
10 the -- and the like.

11 The other thing that I think is -- here,
12 that is -- that is overlooked is, look at what the
13 actual number came in at. Right? Isn't it coincident
14 that politics drove the map, and yet it wound up with
15 a -- with a -- with a BVAP of 50.66. Isn't that
16 coincident? Shocking that they turned off political --
17 they turned off racial data, and they drew a map, and it
18 just so happened that it came in at 50.66. That's not a
19 coincidence. And the trial court was entitled to not
20 find it to be a coincidence.

21 But the fact that the number that ultimately
22 came in was -- was just a hair above, above -- a hair
23 above the threshold for a Section 2 VRA district is not
24 coincidence. It's further evidence that race -- that
25 race predominated.

1 JUSTICE GINSBURG: Mr. Elias, I'd like to
2 ask you about the procedural issue in this case.

3 MR. ELIAS: Yes.

4 JUSTICE GINSBURG: There was another case --
5 it was in the State court -- the same issues; just
6 decided the opposite way. We're hearing this case, and
7 you are urging that the plain error to your error is
8 the -- is the legal standard by which we should judge
9 what the three-judge court did. But if we had the State
10 case before us, I suppose their findings would also be
11 judged by the clear error standard.

12 It's just -- isn't that so? That if the --
13 if the -- if the State case that went the other way came
14 to us, we would look at that and say, no clear error?

15 MR. ELIAS: Your Honor, I think two
16 responses. First is, the -- the Court applies clear
17 error to the case before it where there's a finding of
18 fact by the trier of fact. And that's the -- that's the
19 rules of -- of appellate procedure. That's what this
20 Court has done for many, many years, and it is what my
21 clients are entitled to.

22 This is their case. They brought this case.
23 They are entitled to have it adjudicated under the
24 normal rules, the well-established principles of this
25 Court.

1 JUSTICE KENNEDY: Well, but Justice Ginsburg
2 can pursue and protect her own question. What's
3 sustained is a matter of just luck of the draw and --
4 and it's true that the State case was first.

5 MR. ELIAS: Well, so -- and the -- the
6 second point I would make -- I said there were two
7 points.

8 The second point I would make, Justice
9 Kennedy, is that the State case was really quite a
10 different case, in several respects.

11 First of all, the State case was
12 predominantly -- to use a word that's come up a lot, was
13 predominantly about the State lines. Yes, they were
14 challenging the congressional districts, but most of the
15 testimony in that case actually didn't relate to these
16 two congressional districts. It actually related to the
17 State districts, number one.

18 Number two is, there are not the findings of
19 fact in the Dixon case, the case -- the State case.
20 There are not the specific findings of fact about the
21 credibility of witnesses that are found in this opinion.
22 So this -- this -- this trial court was very meticulous
23 in laying out what facts they found most credible, what
24 they were relying upon.

25 The -- the State court action was much more

1 conclusory in that regard, in part because, frankly, it
2 was dealing with a mountain of evidence around the State
3 legislative and the State Senate -- the State Senate
4 districts.

5 And then finally I would say, Your Honor,
6 there are other judicial mechanisms available to this
7 Court and to district courts generally to control --
8 to -- to handle the question of -- of multiple cases
9 moving through the system.

10 Congress made a -- a decision that in the
11 cases of statewide redistricting, there would be a
12 expedited process for cases to move up through the
13 Federal system to the Supreme Court. Whether that was
14 good policy on the part of Congress or bad policy on the
15 part of Congress, it was a policy decision on the part
16 of Congress, that those -- that cases that come up out
17 of the Federal courts come from a three-judge panel on
18 direct appeal to this Court.

19 And the other -- the other case -- the other
20 case goes through the normal cert channel, and this
21 Court might choose to hear it; it might not to choose to
22 hear it. But that's not an accident. That's not
23 fortune. That is actually a deliberate decision that
24 Congress made in structuring -- structuring the review.

25 And then finally I'd say is that this is a

1 question of the application of Federal law and the
 2 Federal Constitution. Our -- our claims are, in fact,
 3 Federal constitutional claims. The defenses are largely
 4 under the Voting Rights Act, and it -- there is no
 5 reason why this Court wouldn't give the same normal
 6 weight to a Federal three-judge panel in the finding of
 7 facts in those kinds of case -- cases and somehow defer
 8 to -- defer to --

9 CHIEF JUSTICE ROBERTS: It's not a question
 10 of deferring. It's a recognition that the State courts
 11 have an obligation to construe the Federal Constitution
 12 to the same extent the Federal courts do. I would have
 13 thought that was a pretty well-established principle.

14 MR. ELIAS: They do, Mr. Chief Justice, but
 15 it is also an equally well-established principle that
 16 this Court judges findings the fact by lower courts
 17 under clear error.

18 Whatever the State of North Carolina --

19 CHIEF JUSTICE ROBERTS: Well, it doesn't
 20 seem responsive to the point you just made, which I
 21 understood to be that we ought to give greater deference
 22 to the Federal court's findings and rulings than we
 23 would with respect to a decision from a State court.

24 MR. ELIAS: Then I misspoke, Your Honor.
 25 I'm not saying we should give greater deference. I'm

1 saying we should follow the rules. We should follow the
2 ordinary rules, the ordinary course, which is the case
3 that is before you is the -- is the case before you, and
4 the findings of fact by the trial court in this case are
5 the findings of fact that are entitled to clear error.

6 What I was -- what I think I was trying to
7 address is, there are circumstances, for example, in
8 the -- in the grow situation where you have a deadlock
9 where there is no map before a State court. I'm sorry.
10 There's no map because the map's either been deadlocked
11 or it's been thrown out. There, the -- the Court has
12 said, well, let's let the State courts go first, because
13 they're exercising a policy judgment in the State.

14 That's not present here. Here, it's the
15 Federal Constitution and it's the Federal -- Federal
16 Voting Rights Act. So there really is no unique State
17 perspective that ought to cause you to overturn
18 100-plus, 200-plus years of jurisprudence about
19 plaintiffs having a right to have their case heard.

20 JUSTICE ALITO: Do you think we should give
21 any consideration to the State court decision, or should
22 we proceed as if it never occurred?

23 MR. ELIAS: I think you can read that
24 decision in the way in which you would read any other
25 decision of a lower court that may be of interest to the

1 Court. So I don't think it is entitled to any more or
 2 less deference than a -- you know, than a -- the
 3 decision of the North Carolina Supreme Court that it may
 4 have had in a -- in a racial gerrymandering case from
 5 1998. You know, it -- it -- it certainly can -- can
 6 inform you, but it is -- you know, can inform your
 7 thinking of the -- of -- of the case, but I don't think
 8 the findings of fact are entitled to any weight in this
 9 case. I think the clear error standard applies.

10 With respect to a seat in Congressional
 11 District 1, I just, because my time is about to expire,
 12 want to make the point that this was just a clear error
 13 of law. The Court found -- the Court relied on an
 14 incorrect reading of Bartlett. That led it to believe
 15 that it needed to destroy a crossover district, which
 16 is -- which is what it did, where there was no evidence
 17 of racially polarized voting actually preventing
 18 African-Americans from electing a candidate of their
 19 choice.

20 I appreciate your indulgence. Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Ms. Saharsky.

23 ORAL ARGUMENT OF NICOLE A. SAHARSKY

24 FOR UNITED STATES, AS AMICUS CURIAE,

25 SUPPORTING THE APPELLEES

1 MS. SAHARSKY: Mr. Chief Justice, and may it
2 please the Court:

3 I'd like to start with Congressional
4 District 12. This is the serpentine district, the one
5 that basically everyone agrees looks terrible, and the
6 question is whether race was the predominant motive or
7 whether it was politics.

8 Now, this determination, the Court has said
9 on numerous occasions, is one that's reviewed for clear
10 error. And the district had a lot of evidence before
11 it. It went through a three-day trial. And I just want
12 to highlight some of the key evidence that it relied
13 upon in making credibility determinations and in finding
14 that race was the predominant motive.

15 And that starts with Congressman Watts'
16 testimony that Rucho, who was one of the architects of
17 the plan, told him that they had to ramp up the minority
18 voting percentage in the district to over 50 percent.
19 So that's the racial target at the starting point in
20 order to comply with the Voting Rights Act.

21 And then as counsel mentioned, we have that
22 target being hit on the nose, 50.66 percent. And then
23 we have evidence, direct evidence, of the way that the
24 State did it. And that came from the mapmaker. And he
25 said -- although he did also say, first, that he did not

1 use -- he only used politics, did not use race, he made
2 contradictory statements and said that he did use race
3 with respect to Guilford County in that he pulled the
4 black population from Guilford County in order to comply
5 with the Voting Rights Act.

6 And I think if you looked at the record,
7 Justice Breyer, you would see exactly what you
8 anticipated, which is that the -- that the State was
9 pulling in concentrations of the black voting age
10 population. And the concentrations were so high that
11 that supported this inference that they really were
12 using race. And there's a chart in the -- the
13 plaintiff's briefs and there's evidence cited in our
14 brief that shows that you really had that concentrated
15 pulling in. That's how it was done with respect to
16 Guilford County.

17 And then the last thing, and I think that
18 this is important, is that the district court made
19 credibility findings that the political motive had been
20 discredited. Mr. Clement is right: There is evidence
21 that was there about political motive, but the district
22 court found that it just wasn't credible in light of
23 Congressman Watt's testimony, which the court credited,
24 about the target, and in light of the fact that the
25 political testimony, which was mostly put on by the

1 mapmaker, had been contradicted by the mapmaker himself
2 when he said that he used race and also contradicted by
3 the two architects of the plan, who kept trying to
4 downplay politics in their statements.

5 And so when we look at this, and
6 particularly in light of the clear error standard, you
7 have a -- a three-judge panel that went through three
8 days' worth of evidence, made credibility findings, went
9 through volumes of evidence. And even the one judge
10 that disagreed with respect to this particular holding
11 recognized that what the majority did was reasonable,
12 referred to it as eminently reasonable, the
13 well-reasoned opinion of the majority. And in those
14 cases, I just don't think that you can find clear error.

15 CHIEF JUSTICE ROBERTS: What -- what do you
16 have to say about the Voting Rights -- I mean, the clear
17 error standard with respect to the State court decision
18 as well? I mean, it is certainly something of a
19 fortuity that we have the Federal case before us and not
20 the State case. And if it were the State case, we'd be
21 reviewing their factual findings on the same question
22 for clear error. And now you're saying, well, this one
23 is here, so we should apply clear error. It seems to me
24 that that response is not terribly helpful in addressing
25 the -- the conflict that's before us.

1 MS. SAHARSKY: Well, a couple of responses.

2 First of all, the way that the Court deals
3 with potential two-bites-at-the-apple problems is
4 through the Res Judicata/Claim Preclusion and issue
5 preclusion doctrine. So to the extent that you're
6 trying to figure out what weight, if any, the State
7 court decision has, we think that that is the
8 appropriate lens because this Court --

9 CHIEF JUSTICE ROBERTS: What does that mean?
10 Whichever one was decided first, or whichever one
11 arrives here first?

12 MS. SAHARSKY: Well, I think you would have
13 to ask whether the -- the res judicata principles had --
14 it -- it would have been the State court being decided
15 first, but you have to ask whether res judicata
16 principles were met.

17 CHIEF JUSTICE ROBERTS: So you're saying we
18 should apply the res judicata principles, and that leads
19 us to favor the State court?

20 MS. SAHARSKY: No, I'm not saying that.

21 CHIEF JUSTICE ROBERTS: Well, what -- I
22 don't understand.

23 MS. SAHARSKY: I --

24 CHIEF JUSTICE ROBERTS: State court was
25 decided first.

1 MS. SAHARSKY: Right.

2 CHIEF JUSTICE ROBERTS: And then you say we
3 should apply res judicata. So what does that mean?

4 MS. SAHARSKY: Well, the -- the application
5 of res judicata would depend on North Carolina law in
6 this instance because it was a case out of the North
7 Carolina courts. And we don't have a position on the
8 application of North Carolina law. I'm just saying that
9 the way that you deal with this question is through
10 application of the res judicata framework, as opposed to
11 doing something different like saying, now we won't use
12 clear error anymore. We'll go to de novo review or
13 something like that.

14 CHIEF JUSTICE ROBERTS: You want us to apply
15 res judicata to decide this question, and you don't have
16 a position on what the answer is?

17 MS. SAHARSKY: Well, I think if the Court
18 worried about the State court having some effect, that
19 it would ask there whether there was a res judicata bar.
20 And there would be three hurdles, I think, that the
21 State would have to overcome in order to prove -- in
22 order to show that there was a res judicata bar: First
23 of all, whether the argument was waived. That's
24 addressed in the briefs.

25 Second of all, whether the factual predicate

1 for privity that the State claims is there. There's
2 also a substantial question on that.

3 And then, third, whether North Carolina law
4 uses a concept of privity that is very expansive, really
5 beyond where this Court was in the Taylor v. Sturgell
6 decision.

7 My point is not that you need to resolve
8 that or that you need to decide it a certain way. It's
9 just that if you're asking about, how do I -- what do I
10 do with the State court decision, the way that you
11 figure out what to do is by using those principles.
12 What you don't do is simply defer to the State court
13 findings. I don't see how you would do that, because
14 this case is here on appellate jurisdiction. You need
15 to decide the case before you. And we don't think you
16 would do something like use de novo review, because,
17 after all, Rule 52, which mandates clear error factual
18 findings, applies to this Court. So I think this Court
19 should decide this case as it comes to it, and with --
20 that is with the clear error standard with respect to
21 District 12.

22 JUSTICE KAGAN: What do you mean, you would
23 have --

24 JUSTICE KENNEDY: Just on District -- just
25 on District 12, you say there was racial predominance.

1 Strict scrutiny fails because?

2 MS. SAHARSKY: Because the State didn't give
3 any reason to pass strict scrutiny. The only potential
4 reason would be Section 5 that the State had, I think,
5 suggested, and that that wouldn't make sense because
6 Section 5 is to prevent retrogression, and here they
7 increased the black voting age population by 7 percent.
8 So it wasn't a matter of preventing retrogression.

9 JUSTICE KAGAN: What is your view of when
10 maps should be required?

11 MS. SAHARSKY: So we don't read the Court's
12 decision in *Cromartie II* to require a map any time a
13 political motive is asserted. We take the Court at its
14 word in a case like this one, and that was a case of
15 circumstantial evidence of race. There really was very
16 little direct evidence of race. The Court even put
17 "direct" in quotes because it thought the direct
18 evidence was so insubstantial.

19 But there was strong evidence of politics
20 and a correlation between race and politics. So when
21 you have the strong evidence of politics, little
22 evidence of race, and the correlation, then we think it
23 made sense in the context of that particular case for
24 the Court to say, particularly since the maps were put
25 in. Like, give us a -- give us an alternative that

1 really shows this.

2 But when you have a case, conversely, which
3 is a strong direct evidence of a racially predominant
4 motive, it just doesn't make sense to require the map,
5 because what the Equal Protection Clause gives you is --
6 is not having race being used for an unjustified reason.
7 It's not -- the map isn't a per se. It's just the map.
8 It's just an evidentiary thing that you could have or
9 not have. It's one type of evidence.

10 JUSTICE ALITO: But if there's not strong
11 direct evidence, would a map be necessary?

12 MS. SAHARSKY: Well, we think that this
13 Court has tried to give flexibility in terms of proving
14 racial predominance. So we see Cromartie as a strong
15 direct evidence of politics case.

16 And -- and maybe one other thing that I
17 might say is that we just don't think that the Court --
18 we think the Court if it were adopting a map requirement
19 for some clear set of cases, that it would have
20 explained it in its opinion, and it would have done
21 something with its prior cases.

22 JUSTICE BREYER: But, what -- what exactly
23 is going on, in part, is a very tough matter. And
24 years -- go back years ago.

25 MS. SAHARSKY: Yes.

1 JUSTICE BREYER: There were many States that
2 had many black citizens and had no black representation,
3 and there was a thing called -- let's have
4 majority-minority districts.

5 And the problem is, how does the law permit
6 the creation of that, and at the same time, prevent the
7 kind of packing that might appear in other cases, which
8 is gerrymandering? And -- and no one, I think, has a
9 good answer to that question. There is just slightly
10 better, slightly worse.

11 So if you're too tough in this case in
12 rejecting the notion that it was politics, which is
13 correlated with race, then what's going to happen out
14 there to a successful effort to create majority-minority
15 districts where matters change, times change, oceans
16 rise, you know, et cetera? And how do we keep -- how --
17 how -- how -- do you see the problem?

18 MS. SAHARSKY: Yes. I mean, we're very
19 sympathetic to the States' interests. And we think that
20 the Court has tried to be sympathetic to the States'
21 interests. And we think the Court has done it in
22 decisions like Alabama. And there's two things in
23 particular that the Court has done --

24 JUSTICE BREYER: It's not just the States'
25 interest. It's the constitutional interest in seeing

1 that minorities have representation in reality in the
2 legislatures.

3 MS. SAHARSKY: Right. And so what this
4 Court has done, first of all, is to ask about racial
5 predominance, the first question being, was race really
6 the predominant motive; not just one factor, but the
7 predominant motive? Show us your evidence. And here,
8 the district court had the evidence.

9 But then the second thing is when we get to
10 strict scrutiny, the Court has said, give us your
11 justification. And that's really, I think, the problem
12 with the 1st Congressional District in this case, is
13 that the State was operating on an error of law, first
14 of all; and second, that it just did not provide the
15 justification. And that's what the Voting Rights Act
16 Section 2 and Section 5 focus on.

17 It's not just -- as you said in Alabama for
18 the Court, not just picking a number out of thin air,
19 but showing us there's a problem here with --
20 potentially with respect to retrogression. There's a
21 problem here with respect to vote dilution.

22 And with respect to the 1st Congressional
23 District in this case, there just wasn't evidence of a
24 potential problem with vote dilution, because at the
25 lower percentage, not being a majority-minority

1 district, the African-American community was able to
2 elect its candidate of choice, really, on a -- on a
3 sustained basis over a period of many years and by wide
4 margins, so -- and this is on page 49A of the District
5 Court's opinion -- it said, look, the State just didn't
6 make the case. It also said the State was operating on
7 a mistake of law.

8 And so just getting back to your question,
9 you know, we -- we -- we understand that this is a
10 somewhat delicate balance, and we think that the Court
11 has attempted to balance the important interests
12 protected by the Equal Protection Clause against the
13 concern that States have and the flexibility that States
14 need by adopting these two different parts of the
15 standard racial predominance, and then the strong basis
16 in evidence for strict scrutiny.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Clement, you have four minutes
19 remaining.

20 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

21 ON BEHALF OF THE APPELLANTS

22 MR. CLEMENT: Thank you, Mr. Chief Justice.

23 A few points in rebuttal.

24 First of all, it is worth recognizing that
25 six trial court judges looked at Congressional

1 District 12, and four out of the six said that politics,
2 not race, prevailed. So it's a funny sort of law that's
3 going to defer to the minority of two. I don't think
4 you can just ignore the State court decision on the
5 grounds that, well, they weren't specific enough or
6 something.

7 I would point you to Appendix B, 161 through
8 163, which are the relevant fact findings of the State
9 trial court, where they were unanimous in finding, among
10 other things, quote, "Dr. Hofeller constructed the 2011
11 12th Congressional District based on whole voter
12 tabulation districts in which President Obama received
13 the highest voter totals during the 2008 election."

14 The only information on the computer screen
15 used by Dr. Hofeller in selecting the VTDs for inclusion
16 the 12th District was the percentage by which President
17 Obama won or lost a particular VTD.

18 And that -- of course, that gets to the need
19 for an alternative map and the difficulty here, because
20 it's all well and good to say, well, we looked at it
21 afterwards, and they pulled in all these
22 African-Americans. But guess what? They pulled them
23 all as Democrats, too, because the African-Americans are
24 Democrats.

25 And if you're -- and what they could have

1 done, which would have been simple enough if it were
2 true, is to draw a map that shows, actually, Hofeller is
3 a liar. He wasn't using the 2008 presidential election
4 results, because if he had used those, he would come up
5 with a different map. That would have been easy to do.
6 They didn't do that. Any alternative map would have
7 easy to do here, and they didn't do it.

8 Now, they say they didn't do it in other
9 cases as well, and I think there are two reasons that
10 explain that, neither of which reflect particularly well
11 on the idea we should get rid of the map requirement.

12 One reason they didn't do it is because in
13 all of these cases, they thought that as long as they
14 could get the State to say, we had a BVAP floor of 50.1,
15 or 55 point -- percent, we've off the strict scrutiny
16 land, so we don't need a map on predominance.

17 That's actually wrong, and I think this
18 Court will say that's wrong.

19 The second reason is, most of these
20 challenges are brought by people who are at least as
21 concerned about Democratic political prospects as they
22 are about avoiding race. And the problem with putting
23 an alternative map together is, should you actually
24 prevail, those no-good, dirty Republicans on the other
25 side could use the map and then say, well, look, you

1 can't really complain about that being a partisan
2 gerrymander, because it was your map.

3 So if you really want people to bring race
4 claims and not dressed-up partisan claims, make them --
5 put them to their proof. Make them put together an
6 alternative map that works.

7 Now, as to Guilford County, there are
8 several responses here.

9 First of all, it's all well and good to say
10 they pulled in 75,000 African-Americans or hauled in all
11 these African-Americans. They were all Democrats, as
12 well. And that's why, even there, if you had an
13 alternative map that showed, oh, there's a different way
14 to do Guilford County, and that would prove -- bring in
15 Democrats and not bring in African-Americans, then you'd
16 have something.

17 But just the fact that they brought in a
18 bunch of African-Americans because they were trying to
19 bring in Democrats is about as interesting as the sun
20 coming up in North Carolina, because everybody agrees
21 there's about a 90 percent correlation between race and
22 partisan identity.

23 The second thing is, there's a very good
24 reason, Justice Kagan, that we didn't make a Section 5
25 defense, because this wasn't a case about Guilford

1 County. Their theory is not that we did something
2 nefarious in Guilford County to overly comply with
3 Section 5. Their theory is that CD12 was drawn as a
4 majority-minority district. And the problem is,
5 nothing was --

6 JUSTICE KAGAN: But I think they would --
7 they did present both theories. They said, proposed
8 findings in McCrory, that it was purposely -- they
9 purposely included a substantial number of
10 African-American residents of Guilford County in CD12.
11 The intentional placement of a significant number of
12 black voters within CD12 establishes racial
13 predominance.

14 MR. CLEMENT: If I may respond: To get them
15 to 50 percent.

16 And here's the thing: If they focused on
17 Guilford County, they would have had two problems. One,
18 we would have had a Section 5 defense, if that's the way
19 they actually conduct the --

20 JUSTICE SOTOMAYOR: Yeah, but the other --

21 JUSTICE KAGAN: But because Senator Rucho
22 apparently believed doing so was necessary to avoid
23 retrogression for Section 5 purposes. Is that --

24 MR. CLEMENT: Exactly, Your Honor. Exactly,
25 Your Honor. If you look at everything --

1 JUSTICE KAGAN: You didn't respond to it.

2 MR. CLEMENT: Everything that they said
3 about CD12 was a concern about retrogression, which is
4 why, when Senator Rucho talked about CD12 and -- and --
5 and Guilford County, he didn't say, and so we drew it as
6 a majority-minority district. He said, and we avoided
7 any problem by making sure that we had at least a higher
8 BVAP percentage than in the benchmark map. And that
9 avoids any potential Section 5 concern with splitting
10 that county and putting the African-Americans in
11 Guilford County in the neighboring CD6, which a
12 Republican-leaning district. And they'd be the first to
13 complain about that.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 The case is submitted.

17 (Whereupon, at 12:08 p.m., the case in the
18 above-entitled matter was submitted.)

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