

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GOLDEN BETHUNE-HILL, :

4 ET AL., :

5 Appellants : No. 15-680

6 v. :

7 VIRGINIA STATE BOARD OF :

8 ELECTIONS, ET AL., :

9 Appellees. :

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11 Washington, D.C.

12 Monday, December 5, 2016

13

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

17 APPEARANCES:

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19 Appellants.

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21 General, Department of Justice, Washington, D.C.; for
22 United States, as amicus curiae, supporting vacatur
23 in part and affirmance in part.

24 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of
25 the Appellees.

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

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 15-680,
5 Bethune-Hill v. The Virginia State Board of Elections.
6 Mr. Elias.

7 ORAL ARGUMENT OF MARC E. ELIAS
8 ON BEHALF OF THE APPELLANTS

9 MR. ELIAS: Mr. Chief Justice, and may it
10 please the Court:

11 The district court created out of whole
12 cloth a new legal standard that permitted Virginia to
13 apply a one-size-fits-all, 55 percent racial floor to
14 all 12 of its predominantly black districts. Virginia
15 applied this 55 percent rule to move voters in and move
16 voters out of districts on the basis of race, regardless
17 of the differences in voting patterns, geography,
18 demographics, or the actual interests of black voters in
19 each of those districts.

20 This actual conflict test, which the D.C. --
21 which -- I'm sorry -- which the district court invented
22 for predominance has no basis in this Court's
23 jurisprudence. Instead, it confers a sort of judicial
24 immunity to visually appealing districts that
25 nevertheless were drawn with the predominant purpose of

1 placing voters within and without based solely on the
2 color of their skin.

3 CHIEF JUSTICE ROBERTS: I'm -- I'm not quite
4 sure I understand how you assess predominance, which I
5 think is the challenge here.

6 And to take a hypothetical, let's say you're
7 trying to select people for a particular board or
8 something; and you say they have to come from a city
9 with more than 500,000 people, absolutely. And then you
10 say, and they have to come from such a city in
11 California. Can't be anywhere else.

12 Now, which is the predominant factor? The
13 500,000 or California?

14 MR. ELIAS: Well, in this case, under the
15 jurisprudence of -- of --

16 CHIEF JUSTICE ROBERTS: I don't really
17 care -- I'm not talking about this case. It's a
18 hypothetical.

19 MR. ELIAS: I think that you -- you can set
20 aside the -- the population center, and you would look
21 at the State of California as the predominant factor
22 because it is the criteria to which all others must
23 yield, and in this --

24 CHIEF JUSTICE ROBERTS: Well, how do you
25 know that? I mean, it seems to me that the 500,000 is

1 the criteria which -- to which all others might yield.

2 MR. ELIAS: In -- in -- in that
3 hypothetical, each of them might be an unyielding
4 criteria.

5 CHIEF JUSTICE ROBERTS: Right.

6 MR. ELIAS: In this case, there is only one.

7 CHIEF JUSTICE ROBERTS: Well, no, I know.
8 That's why I'm looking -- that's why this is called a
9 hypothetical, because it's not about the particular
10 case.

11 But I -- I -- obviously, what I'm trying to
12 highlight is, "predominant" means one that dominates
13 over all the others.

14 MR. ELIAS: Right.

15 CHIEF JUSTICE ROBERTS: And it's easy to
16 imagine situations where you cannot say that one
17 dominates over all the others.

18 MR. ELIAS: I think --

19 CHIEF JUSTICE ROBERTS: So what do you do in
20 a situation like that?

21 MR. ELIAS: I think I now understand your --
22 your question.

23 In that case, neither criteria would
24 predominate, because, in fact, neither one controls the
25 other. And in that case, we would not have met our

1 burden of predominance; and as a result, we wouldn't --
2 we -- we wouldn't get to the second step of strict
3 scrutiny.

4 Where you have one criteria, though, then
5 you can fairly say there was predominance, because --

6 CHIEF JUSTICE ROBERTS: Well, if you're
7 still -- you're trying to figure out which -- which
8 predominates. And I think this is where the inquiry or
9 the test that you challenge comes from.

10 One way to tell which is the predominant is
11 to see if they conflict. And if they conflict, then how
12 do you resolve it? And whatever trumps the other,
13 that's the predominant one.

14 MR. ELIAS: That -- that --

15 CHIEF JUSTICE ROBERTS: Right?

16 MR. ELIAS: Your Honor, that is one way that
17 evidence is adduced to determine predominance.

18 CHIEF JUSTICE ROBERTS: Uh-huh.

19 MR. ELIAS: But it is not the only way. If,
20 in fact, to use your hypothetical, the legislature of
21 California -- let's assume that they're the ones setting
22 these criteria -- says, our predominant factor, the --
23 the dominant and controlling factor, is that it has to
24 come from the State of California, the fact that it may
25 also come from a -- the members may also come from a

1 city with more than 500,000 members doesn't mean that
2 the first criteria didn't predominate. We know it
3 because the legislature told us, this is the dominant --
4 this is the dominant criteria. And that --

5 JUSTICE ALITO: What if the -- I'm sorry.
6 Finish.

7 MR. ELIAS: I -- and that's what this --
8 that's what happened in this instance.

9 JUSTICE ALITO: What if the legislature
10 says, look, we want to follow all the traditional
11 districting, applying all the traditional districting
12 factors. However, one thing we absolutely do not want
13 is to be held to have violated Section 5 or Section 2 of
14 the Voting Rights Act. So we have these 12
15 majority-African-American districts, and we don't want
16 to do anything to them that results in liability under
17 the Voting Rights Act.

18 Is that predominance?

19 MR. ELIAS: It is predominance if race was
20 the -- was the controlling factor in -- that could not
21 yield in the drawing of the districts.

22 Now, it may very well be that when the Court
23 then completes its inquiry, there will be a strong basis
24 in evidence that -- that drawing the districts that way
25 was to comply with a good faith understanding of the

1 Voting Rights Act, and then the -- the State wins.

2 In this case, though, what the State did is
3 it started with an --

4 JUSTICE ALITO: I didn't really understand
5 the answer to the question.

6 If the court says -- if the State says, the
7 one thing we absolutely do not want is to be found to
8 violate the -- the Voting Rights Act, that is not --
9 that -- that is not necessarily predominance, in your
10 view?

11 MR. ELIAS: That is not necessarily
12 predominance. It is when that is -- because there are
13 any number of ways to comply with the Voting Rights Act
14 that do not require race to be the dominant and
15 controlling factor.

16 For example, you -- you have any number of
17 districts -- I would hazard to guess -- and it is only a
18 guess -- a majority of the districts in this country --
19 that are drawn by legislatures that are
20 majority-minority, where they start with traditional
21 redistricting criteria and the district is over 50
22 percent or over whatever the -- the applicable threshold
23 is, and they never need to trump the traditional
24 redistricting criteria with race.

25 In this instance, they trumped -- and I use

1 that word --

2 JUSTICE BREYER: What -- what is your
3 evidence of that? I mean, look, which I'm sure you've
4 read, in -- in the Alabama Legislative Black Caucus,
5 which I had hoped would end these cases in this Court,
6 which it certainly doesn't seem to have done -- all
7 right? But if you make the comparison, it isn't enough,
8 I don't think, for you to say that they just saw some
9 traditional factors; and they didn't take into account
10 other evidence that they were using race predominantly.

11 Well, if you look at the other evidence on
12 page 1271, you know, the west thing, it was pretty
13 strong evidence. They added 15,785 new voters; and of
14 those, precisely 12 were white. Right?

15 MR. ELIAS: Right.

16 JUSTICE BREYER: Now, is there -- and when
17 you looked at their use of the factors, of the
18 traditional factors, they were pretty irrelevant.

19 MR. ELIAS: Right.

20 JUSTICE BREYER: It makes a point of that in
21 the opinion, and that -- that that's meant to guide the
22 district judges. And so what -- what's the equivalent
23 here? What's the equivalent if -- assuming he didn't
24 say exactly the right words, no one can say exactly the
25 right words, what's his mistake?

1 MR. ELIAS: His mistake is setting an
2 arbitrary threshold at 55 percent.

3 JUSTICE BREYER: No. What is the evidence
4 that you say would show that, in fact, they did use
5 race? What's your strongest one or two pieces of
6 evidence?

7 MR. ELIAS: I think --

8 JUSTICE BREYER: You saw the 17 -- 15,785.
9 That's pretty strong.

10 MR. ELIAS: I think if you look at
11 District 71 --

12 JUSTICE BREYER: Okay.

13 MR. ELIAS: Okay. What you find is this is
14 an inner city -- just to orient to the Court, this is an
15 inner city district at the core of Richmond.

16 And this is a district that had a 46.3
17 percent BVAP, and because of the 55 percent rule that
18 had been set out, and there's really no dispute, the --
19 the district court agrees that that was a rule that
20 guided the drawing of districts, all of the districts,
21 as a result of that rule, we -- what you see is a racial
22 gerrymandering. You see that that district went from
23 46.3 to 55.3 by essentially raiding every other district
24 around it, essentially the suburbs and the exurbs,
25 raiding those districts and bringing black voters in,

1 notwithstanding the fact that it was a classic crossover
2 district. It was a district in which, essentially,
3 white liberals in -- who had moved to the city were
4 voting in harmony --

5 JUSTICE BREYER: What was the number,
6 roughly, of the new people in the district? How many
7 are black? How many white?

8 Of the people who were moved out of the
9 district, how many were black, how many were white,
10 approximately?

11 MR. ELIAS: They -- they -- the -- I don't
12 have the precise number that were moved in and out, but
13 there were a significant number, in the -- in the many
14 thousands of voters who were moved in and many thousands
15 who were moved out.

16 JUSTICE BREYER: But giving a number
17 matters, because, after all, the -- the -- that was the
18 key factor in Swann.

19 MR. ELIAS: Right, and I think that --

20 JUSTICE BREYER: How do I find that?

21 MR. ELIAS: I think it's on -- it's in the
22 Joint Appendix on 669. It has the -- has the movements.
23 I just -- as I stand here, I don't know them, but it's
24 for all 12 districts. But it is a significant number.
25 It's not -- it's not two or ten or even a hundred. It's

1 several thousand in a district that is only --

2 JUSTICE BREYER: I found what I wanted to
3 know.

4 MR. ELIAS: Okay.

5 JUSTICE BREYER: I just wanted to know where
6 to look.

7 JUSTICE KAGAN: Mr. Elias, could I make sure
8 I understand: What's your view of -- let's -- let's --
9 the policy here says 55 percent, and it says that across
10 the board as to each of these 12 districts, and it says,
11 effectively, this is the most important criteria, in the
12 sense that it will trump other things. All right?

13 So -- but -- but as I understand your
14 argument, you're not resting your case on that fact
15 alone; is that correct?

16 MR. ELIAS: That is correct.

17 JUSTICE KAGAN: And why is that? When would
18 such -- when would such a policy not have the requisite
19 impact on a voting district?

20 MR. ELIAS: Right. Justice Kagan, I think
21 this gets, actually, to Justice Breyer's exact point.
22 If -- if you had a district where it had no impact, it
23 actually didn't cause voters to be moved in significant
24 numbers, then -- then we agree with -- with the
25 Solicitor General's office and this court in Alabama

1 that, if a significant number of voters are not moved as
2 a result of that racial threshold, then -- then strict
3 scrutiny is not triggered.

4 JUSTICE KAGAN: So we really are looking to
5 what Justice Breyer suggested, which is, we're -- we're
6 looking to the movement of voters in and out of a
7 particular district?

8 MR. ELIAS: Yes, and I don't think that that
9 is at -- at -- in dispute. We will hear from my
10 colleague, and maybe I'll be surprised, but I don't
11 think that's the dispute. I think that the issue here
12 is the legal error that was -- that was committed by the
13 district court in saying that, if we find a district
14 that looks like it's abided by traditional districting
15 criteria, that's the end of the inquiry. That's the --

16 JUSTICE KAGAN: Even -- even if we concede
17 that there were -- you know, essentially, all the
18 African-Americans were moved in and all the -- the --
19 the whites were moved out. It's --

20 MR. ELIAS: And even if it was done by an --
21 for an avowedly racial reason. But under the -- under
22 the trial court's test, a -- a -- the legislature of
23 Virginia could say, we want to corral all of the
24 African-Americans we can because we think they all vote
25 alike and we don't want them infecting the neighboring

1 districts, and so we want to get 70 percent of them into
2 a district. And if, lo and behold, they then draw a
3 circle, right, and visually, the most compact district
4 you can, under Judge Payne's opinion below, we don't ask
5 the question about race. We never get to the evidence
6 of --

7 CHIEF JUSTICE ROBERTS: So you're saying --
8 yeah. So you're saying you do not need a conflict
9 between traditional criteria and race?

10 MR. ELIAS: Correct.

11 CHIEF JUSTICE ROBERTS: But do you agree
12 with the Solicitor General that say -- who says,
13 nonetheless, that -- that -- quoting on page 8 of their
14 brief -- in the vast majority of cases, a conflict may
15 be necessary evidence to establish racial predominance?

16 MR. ELIAS: I think that that overstates it
17 slightly. I'm not sure that I'd say "in the vast
18 majority of cases."

19 In many cases, you're going to have a
20 correlation; I agree with the Solicitor General.

21 CHIEF JUSTICE ROBERTS: Well, even if you're
22 saying not in the vast majority, but in the majority,
23 or -- why is that?

24 Based on -- on your answer to Justice Kagan,
25 why is it that you're almost -- almost always or vast

1 majority for the SG, or something less than that in
2 your --

3 MR. ELIAS: I -- I -- I think the reason is
4 because in the real world, the way in which population
5 distributes, you're going to need to create bizarre
6 districts in many instances, in many parts of the
7 country. You're going to need to have visually
8 unappealing districts in order to conduct what is
9 essentially a Shaw violation.

10 But that's -- the reason why I pointed to
11 Richmond is that Richmond is exactly the instance of a
12 place where that's not going to be necessary, because
13 you do have a crossover district. You have a district
14 where you have white college students and white young
15 professionals moving into an urban -- a prior urban
16 center, voting in harmony and reinforcing with the
17 African-American population in that area. So it won't
18 necessarily be visually bizarre, but it is nevertheless
19 the destruction of that crossover district to create a
20 55 percent for the sake of 55 percent is -- is not going
21 to be -- even be a --

22 JUSTICE BREYER: We haven't said that for a
23 reason. We haven't said just the use of race is wrong.
24 We've said it has to predominate, as you know.

25 MR. ELIAS: Correct.

1 JUSTICE BREYER: And -- and my problem with
2 your argument here, if you want to go on the -- what the
3 district court said there, which you may be right, but
4 this is such a complicated area that it's the easiest
5 thing in the world to go through a district court
6 lengthy opinion and to find a sentence that's not
7 exactly right.

8 MR. ELIAS: I -- I --

9 JUSTICE BREYER: And that's why it seems to
10 me, if we're going to have a -- ever have districting
11 done back in the legislatures, rather than in the
12 courts, you've got to prove your case that, not only did
13 what he say was wrong, but it mattered, with pretty
14 strong evidence.

15 MR. ELIAS: I -- I agree, Justice Breyer.
16 I -- but -- but I'd make two points in response.

17 Number one, this was not a stray sentence.
18 This is the -- the -- in every one of those hundred-plus
19 pages, this is the test he applies, over and over and
20 over again. You look at the -- page 111 to 115, and
21 he -- there is a -- which is a discussion of this --
22 this -- this same Richmond district, and read that
23 analysis. And he says, well, it's visually appealing;
24 therefore we don't need to -- we don't need to address
25 it, and, by the way, district courts, we shouldn't be in

1 the business of assessing credibility between witnesses.
2 We shouldn't be in the business of assessing credibility
3 between -- between two legislators, because after all,
4 it's visually appealing, and why would we want to do
5 that?

6 This was rife through the opinion, not an
7 isolated statement. It was his holding that where
8 traditional redistricting principles can explain, can
9 explain, then we don't need to actually look at other
10 evidence of what the real motive was, and that error is
11 not something that comes up over and over and over
12 again. That is a unique error in this case.

13 JUSTICE GINSBURG: So are you proposing that
14 we remand, we tell the district court, you applied the
15 wrong standard, and that the right standard is race can
16 predominate, even if there's no distortion of the shape
17 of the district? Is that -- is that the relief
18 you're --

19 MR. ELIAS: I think that -- I think that
20 that is -- that is an appropriate relief, Justice
21 Ginsburg. I think with respect to some of these
22 districts, the Court can simply reverse.

23 I think with respect to that Richmond
24 district, the analysis is the -- the facts are not
25 genuinely in dispute as to what was going on in that

1 district that I think it can be reversed.

2 CHIEF JUSTICE ROBERTS: It's kind of --

3 JUSTICE GINSBURG: I'm sorry.

4 CHIEF JUSTICE ROBERTS: I was going to say:

5 It's kind of hard to do it just with respect to one,
6 isn't it? Because that means, okay, you can't pull
7 these voters in, so you've got to push them back, and
8 now all of a sudden that other district has an issue.

9 MR. ELIAS: I -- I -- I think,
10 Mr. Chief Justice, that's a -- that's a fair point. I
11 think if you look at the map, what you'll see is, we're
12 actually talking about four geographic pockets.

13 There is a Richmond pocket of districts;
14 there is a south side Virginia, which is up against
15 the -- the border of North Carolina, there are two
16 districts; then there is a Lower Hampton Roads and an
17 Upper Hampton Roads. And each of those pockets really
18 don't impact the other.

19 So, yes, I -- I -- I agree with you, in
20 general, it would cause redistricting around the
21 Richmond area, but if -- if you recall the -- in the --
22 in the Personhuballah case, which this Court heard
23 last -- last term, we dealt with a single district,
24 Bobby Scott's congressional district, which had been
25 racially gerrymandered by the same legislature using the

1 same 55 percent floor, and when they did the
2 redistricting it only affected the two neighboring
3 districts.

4 That -- I'm sorry -- that district and
5 the -- and the -- really, the district next to it, so --
6 but I -- but I understand the point, and it's -- and
7 it's a fair one. And in that sense, remand would not be
8 an unreasonable step to take to apply it correctly.

9 JUSTICE KAGAN: Just if I -- so I can
10 understand your sense of the relative strengths of your
11 arguments, if we did remand, say, this is the wrong
12 standard, go apply the right standard, and -- and that
13 was done fairly, where do you think he would have to
14 change his view, where do you think that there would be
15 a question, and where do you think the same result would
16 probably obtain?

17 MR. ELIAS: So I'd like to say there would
18 be new results everywhere. But to answer your question
19 fairly, as I try to always do, I think in the Richmond
20 area, there is no question that a fair application of
21 the standard would lead to a new districting in -- I'm
22 sorry.

23 In the Richmond area, which are
24 Districts 71, 69, 70, and 74, I think there is no
25 question that it would lead to a -- a new -- it would

1 lead to a -- a different map, a different result.

2 I think in the south side of -- of Virginia,
3 which is two districts, 75 and 63, this was a curious
4 one, because he actually found race did predominate in
5 75 by splitting Dinwiddie County -- Dinwiddie County
6 being a border county of North Carolina -- on a validly
7 racial grounds, but yet did not find race predominated
8 with respect to 63.

9 It's difficult to understand how race could
10 have predominated in the racial division of voters on
11 one side of the line, but not predominate in the racial
12 division of voters on the other.

13 JUSTICE KENNEDY: But -- but as to 75, did
14 he not say that strict scrutiny was met, because other
15 legitimate and -- and conventional factors were
16 considered and were present?

17 MR. ELIAS: He did find --

18 JUSTICE KENNEDY: It seems to me that 75 is
19 the -- is the strongest case for the district court.

20 MR. ELIAS: I think 75 is the strongest case
21 in the sense that the application of the wrong legal
22 test, he still found that we met -- that we met our
23 burden of -- of -- of predominance.

24 I think it is a weak finding on the part of
25 the district court in this regard, Your Honor. If you

1 look at what the actual evidence was to meet the strong
2 base of evidence -- because once -- once we found --
3 once predominance was found and strict scrutiny applied,
4 now the burden shifted to the government to explain why
5 they had a strong basis of evidence in doing what they
6 did.

7 Their strong basis of evidence was the
8 following: Number 1, that the elected official felt
9 like she would want more -- she -- she needed more
10 African-Americans in her district. Well, with all due
11 respect to Delegate Tyler, most incumbents feel like
12 they would like more voters in their district who -- who
13 are going to support them. And that's not a -- that's
14 not a -- that -- that -- it can't be a strong basis in
15 evidence.

16 The second is they alluded to the fact that
17 there were prisons in the district. And this is
18 interesting, because this is, Your Honor, exactly the
19 kind of racial stereotyping that the Voting Rights Act
20 is intended to avoid. There is nothing in the record as
21 to the racial demographics of those prisons. There is
22 nothing to believe that those prisons included or
23 excluded, raise or lower, the overall black voting age
24 population of the district. They assumed that if a
25 prison had 8,000 people, it had 8,000 black people. And

1 that is -- that is exactly the kind of racial
2 stereotyping that cannot form the basis.

3 JUSTICE ALITO: Wasn't there a primary in
4 2005 in that district where Representative Tyler won
5 over a white candidate by less than 300 votes?

6 MR. ELIAS: Yes, Your Honor. And I'm glad
7 you raise that, because that's the third one, and that
8 is the most important one.

9 Let us take a step back, because it's --
10 it's interesting that he -- that he -- he won by more --
11 she won by more than -- by -- by only 300 votes.

12 The districts were drawn in two thousand --
13 in -- in two -- following 2000. In 2001, there was an
14 incumbent who had been there 30-some-odd years who was
15 a -- a candidate of choice of the African-American
16 community who won. That candidate won again in a
17 landslide in 2003. That candidate then retired, and it
18 was then an open primary. And in that open primary,
19 Delegate Tyler won by five percentage points.

20 Now, what's interesting is that 300 votes is
21 five percentage points. This was a 6,000-vote primary.
22 Five-way. So to say she won by 300 votes and that
23 proves predominance, well, she won in a landslide. She
24 won five -- by five percentage points as a non-incumbent
25 in a multiple-primary field.

1 JUSTICE KAGAN: I thought she won by only,
2 like, 1 1/2 percentage points in the general.

3 MR. ELIAS: In the general.

4 So what happened next is that the incumbent,
5 who had retired, whose son had run against her in the
6 primary, who she had beaten, he then endorses the
7 Republican opponent. So you have this long-time
8 incumbent who endorses the Republican opponent, and she
9 wins by 1.3 percent of the vote in the general.

10 JUSTICE ALITO: But these -- these districts
11 are going to last for a decade, are they not?

12 MR. ELIAS: Correct.

13 JUSTICE ALITO: And -- and there's no
14 guarantee that these same candidates are going to be
15 running throughout that decade.

16 MR. ELIAS: I agree.

17 JUSTICE ALITO: So you think they have to
18 take into account this very complicated analysis: Well,
19 it was the -- the person is an incumbent, and therefore
20 is going to have the incumbent's advantage, and --

21 MR. ELIAS: No, Your Honor, I'm saying the
22 complete opposite.

23 I'm saying that in 2001, 2003, 2007, 2009,
24 this was -- this performed without a close election. In
25 2005 the primary was not close; it was a five-point

1 election. So that leaves us one election, which was the
2 2005 general where she won by 1.3 percent of the vote.

3 JUSTICE KAGAN: Which you're saying,
4 essentially, is idiosyncratic.

5 MR. ELIAS: It's -- it's an idiosyncratic
6 one election. But also, this Court has never said that
7 it is a guarantee that they will win. It -- in fact, in
8 Gingles itself, there was a statement that it is not a
9 guarantee -- that no one election controls.

10 JUSTICE ALITO: Well, I mean, that gets to
11 an interesting point. What -- to what -- what degree of
12 confidence that it will remain a -- a majority-minority
13 district is necessary to have a strong basis in
14 evidence?

15 MR. ELIAS: I think it -- yeah, I --

16 JUSTICE ALITO: I don't want to take up your
17 response.

18 MR. ELIAS: I think it is likely.

19 If there are no other questions, I'd like to
20 reserve the remainder of my time.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Gornstein.

23 ORAL ARGUMENT OF IRVING L. GORNSTEIN

24 FOR UNITED STATES, AS AMICUS CURIAE,

25 SUPPORTING VACATUR IN PART AND AFFIRMANCE IN PART

1 MR. GORNSTEIN: Mr. Chief Justice, and may
2 it please the Court:

3 The district court was right to hold that
4 the use of a racial target is not sufficient to trigger
5 strict scrutiny, but it was wrong to hold that a
6 conflict with traditional redistricting principles is an
7 essential element of a racial gerrymandering claim.

8 On the use of a racial target, the Court's
9 cases have drawn a distinction between the use of race
10 as a factor and the predominant use of race in drawing
11 district lines, and the use of a racial target shows
12 that race was used. But as the Court explained in
13 Alabama, the -- when -- the critical question is whether
14 it was predominantly used. And as to that, evidence
15 that a racial target is used is evidence, but not
16 conclusive proof.

17 To take one example that I think you asked
18 for, if a district starts out 75 percent black voting
19 age population before it's redistricted, and that's
20 based on general demographic patterns, and then the
21 target is set at "don't drop below 50 percent," then
22 it's just not the case that district lines that are then
23 drawn to bring the district into compliance with
24 one-person, one-vote are necessarily going to be based
25 predominantly on race rather than traditional

1 districting principles.

2 And if a racial target was alone sufficient
3 to trigger strict scrutiny, it would deprive the States
4 of the flexibility that they need to comply with the
5 Voting Rights Act. So it's --

6 CHIEF JUSTICE ROBERTS: Maybe I missed
7 your -- you're saying, if it was 75, and it's down to
8 50, that does not necessarily mean --

9 MR. GORNSTEIN: No, I -- I -- I did not say
10 that. I -- I said if the target was that it shouldn't
11 go below 50, not that the target was it had to get to
12 50.

13 CHIEF JUSTICE ROBERTS: Okay. So it's at
14 75. And they say, what we're going to do, we draw this
15 as not yet below 50 --

16 MR. GORNSTEIN: Right.

17 CHIEF JUSTICE ROBERTS: And then they --

18 MR. GORNSTEIN: And so they could end up
19 anywhere between 70 and 50. So it's just -- they could
20 end up right at 70, or at 65, or at 60, or at wherever
21 there is in between.

22 So it's just not necessarily the case that
23 the use of a target may have had little or nothing to --
24 a target that that's -- that's so low at 50 percent when
25 you started up here at 75, then this -- the lines that

1 you're drawing are probably likely to be drawn based
2 predominantly on traditional districting factors. It's
3 just not necessarily the case that you're going to have
4 to predominantly use race, because no matter what you
5 do --

6 JUSTICE KAGAN: So are those --

7 MR. GORNSTEIN: -- you're going to end up
8 above 50 percent.

9 JUSTICE KAGAN: Are these the only kind of
10 districts where you would say that a target would not
11 have an impact on district lines? In other words, where
12 the district has a population that's so far above the
13 target that nothing that they're doing on the margins is
14 affected by the target, are those the only kind?

15 MR. GORNSTEIN: No, I would not say that,
16 because I -- I would say districts, for example, like in
17 this case where you start at 60, there's no -- no
18 reason, necessarily, to think that race is going to
19 predominate in order to bring the districts into
20 compliance with the Voting Rights Act. They started out
21 at 60. And let's assume, based on traditional
22 redistricting factors and not on race, there's no reason
23 that it couldn't end up on -- at 60 for the same
24 reasons.

25 JUSTICE ALITO: What if you started at 53

1 and you brought it up to 55?

2 MR. GORNSTEIN: Again, I -- I'm -- I'm with
3 you on there. It doesn't necessarily -- you would need
4 more evidence than that.

5 Now, the one that raises the biggest --

6 JUSTICE ALITO: More evidence of what?
7 That --

8 MR. GORNSTEIN: Well, so -- so the most
9 important evidence, Justice Alito, would be a conflict
10 with traditional redistricting principles. And if you
11 could establish that and -- and that it went up to that
12 degree and it affected a substantial number of voters,
13 then I think you could make out a case.

14 JUSTICE ALITO: What if they said, well,
15 we're at 53; we have a 55 percent floor. We want to
16 bring this up to 55, and we can do that by drawing a
17 district that's even more compact than the district that
18 we had before?

19 MR. GORNSTEIN: So, ordinarily speaking,
20 it's going to be very difficult to show that race
21 predominated without showing a conflict with traditional
22 redistricting principles. But there's no hard-and-fast
23 rule that says -- that -- that prevents a plaintiff from
24 trying.

25 JUSTICE KAGAN: When, then, can you? What

1 would be a case in which that might be possible? Not
2 theoretically possible, but you can imagine it
3 happening?

4 MR. GORNSTEIN: So I -- I we have two
5 examples in our brief, and -- and most of the cases I
6 can think of are -- are -- are but variations of those.

7 So the first relies on direct evidence from
8 the mapmaker himself, and the second is where the
9 State's nonracial explanation is discredited by the
10 evidence to be more concrete. If you have ten -- tens
11 of thousands of predominantly white voters moved out,
12 tens of thousands of predominantly minority voters moved
13 in, and the mapmaker says, I did that to hit the target,
14 then a finding of racial predominance could be made even
15 if, Justice Alito, the -- the district was reasonably
16 compact.

17 And the -- the second example that I -- I
18 would -- from the brief is, if the State says politics
19 is what explains that, and then you look at the evidence
20 and they used racial data rather than political data,
21 then a finding of racial predominance could be made even
22 if politics is also playing a role; and there's no
23 conflict with politics in the drawing of the district --

24 JUSTICE ALITO: There's no way --

25 MR. GORNSTEIN: -- lines.

1 JUSTICE ALITO: And -- and maybe there's no
2 way around this; but this is all, as you -- as you lay
3 it out, very, very complicated. And the State
4 legislature has to redistrict a huge -- a large number
5 of districts in a short amount of time using a very --
6 a -- a multifactor, vague predominance standard. And if
7 it turns out that there is predominance, what -- when
8 they will be deemed to have had a strong basis in
9 evidence to -- to -- that there would be a Voting Rights
10 Act claim is also quite unclear.

11 So it's just -- maybe there's no way around
12 it, but it -- isn't this just an invitation for
13 litigation --

14 MR. GORNSTEIN: So --

15 JUSTICE ALITO: -- in every one of these
16 instances?

17 MR. GORNSTEIN: So we're very sympathetic to
18 the interest of the State in being able to comply with
19 the Voting Rights Act while simultaneously pursuing its
20 traditional redistricting policies. And, in fact, we
21 proposed a version of the conflict case test to the
22 Court in Miller.

23 But we read Miller and Shaw to -- to have
24 rejected this conflict requirement and -- and, instead,
25 to replace it to what a -- as you said, is a complicated

1 test about whether race predominated in the drawing of
2 district lines, even if traditional factors also played
3 a role.

4 CHIEF JUSTICE ROBERTS: Is it still the
5 office's position that it would preferable to have the
6 test that was adopted by the district court here,
7 requiring a conflict before you find that race
8 predominated?

9 MR. GORNSTEIN: So putting aside the
10 question of whether it would -- you would -- overruling
11 the Court's --

12 CHIEF JUSTICE ROBERTS: I --

13 MR. GORNSTEIN: -- decisions, yes, except
14 that we wouldn't want that to bleed over into racial
15 vote dilution claims.

16 CHIEF JUSTICE ROBERTS: So -- so your
17 objection to the court below is that it required a
18 conflict?

19 MR. GORNSTEIN: Correct.

20 CHIEF JUSTICE ROBERTS: And in your brief,
21 you say, in the vast majority, your words, of cases, you
22 will need to show a conflict?

23 MR. GORNSTEIN: Correct.

24 CHIEF JUSTICE ROBERTS: And you think
25 showing a conflict should be the correct legal standard,

1 putting aside the decisions?

2 MR. GORNSTEIN: Well, I wouldn't want to
3 urge the Court to overrule its decisions in --

4 CHIEF JUSTICE ROBERTS: No, I know. Putting
5 those cases --

6 MR. GORNSTEIN: -- those cases -- for
7 that -- but putting aside, that is the position that we
8 advocated in -- in -- or a version of it in Miller.

9 JUSTICE BREYER: But in -- in -- in the
10 Alabama case, certainly what I tried to do, changing
11 what my position had been previously, in order to get a
12 court that would have a clear set of standards, on
13 page 1271 there are two paragraphs that address the
14 issue you're talking about, and they virtually say what
15 you say. And then at the end, to deal with the problem
16 you're -- you're -- you're raising, we say that it has
17 to be a strong basis in evidence. That's because you
18 don't want to put the district court in a position, and
19 the legislature, to do the impossible, right?

20 So it tries to do that. That is the
21 decision of the Court. I had thought, that having done
22 that, there would be lots of lower courts that would
23 rely on that decision.

24 Is it a good idea now suddenly to change and
25 go to some different test?

1 MR. GORNSTEIN: No. I'm -- I'm not saying
2 you should go to a different test. I think that the
3 stare decisis considerations are what they are. The
4 Court's Alabama approach is the right approach, but
5 under that approach, Justice Breyer, you did not say
6 that it's an essential to show a conflict --

7 JUSTICE BREYER: Right, correct, exactly.
8 It's predominant. And then it has the two paragraphs
9 that I've talked about, which are meant to illustrate
10 what that predominance means. And they are pretty much
11 what -- I think pretty much what you said.

12 MR. GORNSTEIN: Yes. We would agree with
13 that.

14 JUSTICE BREYER: Pretty much.

15 CHIEF JUSTICE ROBERTS: What is it -- what
16 is it -- what is it that you said?

17 MR. GORNSTEIN: I think that what we said --
18 (Laughter.)

19 MR. GORNSTEIN: I think what we said are two
20 things.

21 One, that there -- that simply because you
22 use a racial target, you're not in strict scrutiny, and
23 that's from Alabama; and, two, a conflict is not
24 essential to prove a claim; but, three, there has to be
25 pretty strong evidence besides just the use of the

1 racial target to put you in strict scrutiny. And so --

2 JUSTICE KAGAN: May I ask, Mr. --

3 Mr. Gornstein, the -- the same question I asked

4 Mr. Elias. If we did vacate this on the grounds that

5 that's the correct standard, what you just said, and

6 that is not the standard that the district court used,

7 what do you think would happen? You know, if -- if the

8 standard that you just stated was fairly applied, would

9 anything change?

10 MR. GORNSTEIN: So we've only done a close

11 analysis of three districts, as you can see from our

12 brief. And in -- in two of those three districts, we

13 thought there was a pretty strong case, but not one

14 where we could say it definitely would come out one --

15 one way or the other.

16 JUSTICE KAGAN: But a strong case that it

17 would change?

18 MR. GORNSTEIN: It would change.

19 JUSTICE KAGAN: And those districts are?

20 MR. GORNSTEIN: Those are 71 and 95.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Clement.

23 ORAL ARGUMENT OF PAUL D. CLEMENT

24 ON BEHALF OF THE APPELLEES

25 MR. CLEMENT: Mr. Chief Justice, and may it

1 please the Court:

2 The 2011 redistricting of the Virginia House
3 of Delegates was a bipartisan success story. There was
4 wide agreement that the 12 majority-minority districts
5 that existed in the benchmark plan should be preserved,
6 and there was a consensus on the Bipartisan Privileges
7 and Elections Committee that a 55 percent BVAP level was
8 the appropriate level to assure that African-American
9 candidates in those 12 districts had an opportunity to
10 elect the candidates -- elect the candidates of their
11 choice.

12 JUSTICE GINSBURG: How was the 55 percent
13 arrived at?

14 MR. CLEMENT: 55 percent, the testimony in
15 the record, Justice Ginsburg, shows that was arrived at
16 by the members of the bipartisan Privileges and Election
17 Committee. It was principally done by the principal
18 architect of the plan, Delegate Chris Jones, by talking
19 to members of the public and members of, particularly,
20 the African-American Caucus. And they told Delegate
21 Jones -- and then they reinforced this on the floor, and
22 the floor debates in the House of Delegates are
23 something that's on the CD in the Joint Appendix,
24 Volume 1 of the Joint Appendix. And it is worth a look
25 because the African-American members of the House of

1 Delegates testified that -- based on their knowledge of
2 their districts, that African-American voters did not
3 vote in the same numbers as -- as -- as white voters.
4 Therefore, to simply have 50 percent --

5 JUSTICE KAGAN: I thought, Mr. Clement, that
6 the -- the 55 percent was based on a single district,
7 75; and that they said, okay, we've looked at 75. You
8 need 55 percent there. And then it was applied across
9 the board to every other majority-minority district
10 without any granular analysis.

11 MR. CLEMENT: I don't think the record would
12 support that characterization of the evidence, Justice
13 Kagan. I think it was certainly based predominantly on
14 HD75, but it was also based on the testimony of Delegate
15 Dance, who's from -- from District 63. She testified,
16 as well, that it has to be north of 50 percent.

17 It was also done in consultation with
18 Delegate Spruill, who's the delegate from District 77.
19 And it was based on not just the demographics in HD75,
20 though that was essentially the starting point, but also
21 based on the characterizations of the districts and the
22 voting tendencies --

23 JUSTICE KAGAN: Isn't there something a bit
24 strange about this kind of rule? And it's not to say
25 that this kind of rule is the end all and be all.

1 You -- it might be that you can have this rule and still
2 be absolutely fine in the way that Mr. Gornstein
3 suggested. But the idea that you would look at 12
4 districts and say that every single one of them ought to
5 meet the same BVAP standard without looking at the
6 characteristics of those districts, who's in them, how
7 they vote, I mean, it just -- it sort of defies belief
8 you could pick a number and say that applies with
9 respect to every majority-minority district.

10 MR. CLEMENT: Well, Justice Kagan, I think
11 that maybe if you were picking one number for every
12 district in the state, from Big Stone Gap to Arlington,
13 maybe that would be the case. And if you're trying to
14 apply one number to Latino districts in one part of the
15 State and African-American districts in another part of
16 the State, you might have a point. But although these
17 are 12 districts, and there are four subregions, these
18 are all pretty much in the same part of the State. They
19 all started on a benchmark map as somewhere between 46
20 and about 62 percent for starting. So it's not like
21 this number comes out of thin air.

22 With respect to nine of the 12 districts,
23 they are already north of 55 percent and between, like,
24 55 and 62. Two of the other ones are very close. They
25 are at, like, 54 and 53. And then one is a little bit

1 lower, like 46, which is District 71, which I hope I'll
2 get a chance to talk about, because there, there is very
3 strong evidence that the redrawing was not done solely
4 on the basis of race.

5 JUSTICE BREYER: Let's talk about 71.

6 MR. CLEMENT: Sure.

7 JUSTICE BREYER: Now, I have a particular
8 question on 71. Remember what I was trying do.

9 MR. CLEMENT: Sure.

10 JUSTICE BREYER: At least in Alabama.

11 The -- the Court's cases, at that moment,
12 pre-Alabama, I -- I'm one of the problems. Okay?

13 So I am trying to reflect what is actually
14 there in Miller, for better or for worse, and to make it
15 clear.

16 The column I've referred to talks really
17 about evidence showing predominance. Does it or doesn't
18 it? And there are two things there that are crucial in
19 that -- I think, in those two paragraphs. One, there
20 was direct evidence that they moved 70 -- or 50,000 --
21 15,000 people are all black. Okay?

22 Two, when you look at the three districting
23 traditional criteria, they are pretty weak as applicable
24 to that case. They just seem not to have much relevance
25 to what they are talking about.

1 MR. CLEMENT: Right.

2 JUSTICE BREYER: Now, let's look at 71.
3 Same kind of thing they are arguing. Same kind of
4 thing. They moved -- I don't know, you have it in the
5 SG's brief too. They moved 11,293 people out and 17,000
6 in. So let's look at those people. The ones they moved
7 out were three-quarters or something white, and the ones
8 they moved in were three-quarters or something black.
9 So that's pretty similar. It seems to me they paid a
10 lot of attention to race.

11 Then they say, let's look at the traditional
12 criteria. The one they mentioned, which is this horn
13 thing, they said that they -- they did it to keep it
14 preserved Richmond centered. But it already changed it
15 so it wasn't Richmond centered at all, and the changes
16 had nothing do with it.

17 So what they are saying is in that case,
18 look at that specificity, and you will see that the
19 mistake of the judge in listing the criteria, you know,
20 his statement, overly broad or whatever, made a
21 difference, send it back, get him to do it right.

22 Now, that's a long question, but that's
23 designed to focus you.

24 MR. CLEMENT: And I'm -- I'm glad to be
25 focused on District 71, because what the district court

1 did is not apply any sort of cartoonish analysis. He
2 looked at the district as drawn. The first thing he
3 noticed is that it preserves 78 percent of the core of
4 the district, which is higher than the statewide average
5 of 70 percent. So you have the core of the district is
6 being preserved, which is a traditional districting
7 principle.

8 He then looks at those horns, and he looks
9 at them, and he doesn't just look at them and say, well,
10 they look a little funny. He has direct testimony from
11 Delegate Jones, who drew the district, and he realizes
12 that the horns were drawn in order to preserve an
13 incumbent in the neighboring district so that that
14 incumbent could stay in her district.

15 He then looks at Precinct 207, where he says
16 he doesn't want to get into conflicting testimony
17 between two -- two -- two delegates, and what he says, I
18 think absolutely correctly, is, this is a contiguous
19 precinct. It's 207; it's right on the border. So
20 whether it's in or out, it conforms with traditional
21 districting principles.

22 JUSTICE KENNEDY: Suppose you have two
23 district -- or two possible districts. Each of them
24 look conventional. Each of them are conventional in the
25 same sense that you've been describing these multiple

1 factors.

2 But the stated reason, the stipulated reason
3 for choosing District A over District B is because it
4 has more voters of a certain race, black, Latino, white,
5 whatever. Is that a predominant motive based on race?

6 MR. CLEMENT: I would say that the right
7 answer to that in -- when -- for predominance within the
8 meaning of your Court's cases is no. And I think there
9 are two reasons --

10 JUSTICE KENNEDY: That -- and that's what
11 the district court says, and I have -- I have problems
12 with that, because predominance is designed to measure
13 intent when there are multiple causes, and in my -- in
14 my hypothetical, the hypothetical is, the -- the -- the
15 tipping point, the principal motivating factor was race.
16 And you say that because -- and the district court I
17 think said because the districts are conventional in all
18 other respects, strict scrutiny doesn't apply. I have a
19 problem with that.

20 MR. CLEMENT: Okay. Justice Kennedy, I -- I
21 thought you might, but I'd like to say three things to
22 try to convince you in defense of the district court.

23 First of all, the -- when this Court says
24 "predominance," I assume they mean predominant over
25 something else. And I think the "something else" is

1 traditional districting principles. So when race
2 predominates over those principles, those principles are
3 sacrificed. They are subordinated. I think that's the
4 way to make sense of this Court's cases.

5 Second of all, I think that if you apply the
6 test that way, what you are doing is you are mapping on
7 the test to the theory of a Shaw claim. Now, you may
8 disagree with me on this, but I think the -- what makes
9 a Shaw claim a Shaw claim is not that somebody is kept
10 in a perfectly formed district in a community of
11 interest based on race. It's the particular injury in a
12 Shaw claim is that people from different parts of the
13 State who would share nothing in common except the color
14 of their skin are grouped together in the same district.
15 That's what makes a Shaw claim different from other
16 kinds of claims.

17 And I completely agree with the Solicitor
18 General's office that in thinking about this question,
19 you should be thinking about Shaw claims and thinking
20 about them separately from vote dilution claims.

21 And I think there's a real problem in this
22 area of the law is what's happened is that Shaw, which
23 started as a doctrine for outlying districts in outlying
24 claims, has become the weapon of choice in redistricting
25 litigation, and people see Shaw violations everywhere.

1 And that's just not the way that Shaw was originally
2 constructed. It ignores that there is a separate vote
3 dilution claim that can be brought that has a much
4 higher standard of proof, and people are essentially
5 trying to evade that --

6 JUSTICE KAGAN: But, Mr. Clement --

7 MR. CLEMENT: -- by bringing junior
8 varsity -- I'm sorry.

9 JUSTICE KAGAN: No, please.

10 MR. CLEMENT: People are bringing junior
11 varsity dilution claims under the guise of calling them
12 Shaw claims, and I think it's really distorted the law.

13 The third point, just to put it on the
14 table, is that at some point then you have to ask the
15 question -- if -- if you disagree with me on those first
16 two points and you actually think you have a different
17 conception of what a Shaw claim is, there still has to
18 be the question of is the game worth the candle given
19 the stated need to defer to State legislatures. And 80
20 members of the House of Delegates voted in favor of this
21 plan because they -- it comported with traditional
22 districting principles and everybody wanted to preserve
23 majority-minority districts.

24 I'm sorry, Justice Kagan.

25 JUSTICE KAGAN: Just -- yeah, no, just going

1 back to Justice Kennedy's question, it seems pretty
2 clear to me that in the cases after Shaw -- because
3 Shaw, you could have looked at it as, this is all about
4 the way the district looks, and then in the cases after
5 Shaw, in Shaw II, and in Miller, the Court makes very
6 clear that it's not all about the way the district
7 looks, and indeed --

8 MR. CLEMENT: But can I -- can I stop you
9 there, though, and say: In Miller, what this Court
10 confronted was an argument that bizarreness is an
11 element of the claim. And I think, you know -- and
12 nobody, I think, thinks that's the right answer.

13 JUSTICE KAGAN: If you look at Shaw and
14 Shaw II and you look at Miller, and then you think about
15 the -- the hypothetical that Justice Kennedy gave you,
16 which is essentially -- maybe I'll change it a little
17 bit -- it's essentially a mapmaker who says, look, we
18 really want to do race-based districting here. We can
19 manage to do this in a way where the maps look kind of
20 contiguous and kind of regularly shaped, but what we're
21 doing is race-based decision making.

22 Now, it seems pretty clear to me that if you
23 look at Shaw II, if you look at Miller, that's
24 forbidden. And -- and -- and that's exactly the
25 opposite of what the district court said here.

1 MR. CLEMENT: I don't think that you have to
2 read those decisions in that way. I think if you're
3 going to read those decisions in that way, it's
4 appropriate to pause and reflect where it's gotten us.
5 And I think that every one of those decisions starts out
6 by saying this is a very difficult task for State
7 legislatures. It's hard enough to draw districting --
8 districts without the Voting Rights Act, but to draw
9 them in compliance with the Voting Rights Act is
10 exquisitely difficult. And we want to have deference to
11 State legislatures.

12 JUSTICE KAGAN: Well, then I'm with
13 Justice Breyer, who suggested that a few years ago we
14 took those concerns into account and we tried to figure
15 out a test that was responsive to those concerns, and
16 that is not the test that the district court used here.

17 MR. CLEMENT: I -- I beg to differ. I think
18 you have to, as Justice Breyer was suggesting, at least
19 in the first 25 minutes, give the district court a
20 little more credit than that.

21 The district court had Alabama in front of
22 him. He also had the arguments of the parties, and I
23 think if you go back and look -- I mean, with all due
24 respect to my friends on the other side, they did not
25 argue this in terms of, let's look at all the people

1 moving in and out. That was not the thrust of their
2 case. They really argued that this was a direct
3 evidence case based on the fact that --

4 JUSTICE BREYER: That's -- that's what I
5 have to do after this argument, isn't it? I mean, you
6 gave me exactly what I needed. You -- you gave me the
7 things to look up. He gave me the things on the other
8 side, and -- and they -- they didn't use exactly the
9 right test, but does it matter?

10 And -- and -- and I -- I think the -- the
11 reason I approach it that way is because this is such
12 a -- the reasons you said. Okay. You have to give
13 leeway here; leeway, leeway.

14 But the government makes a pretty good point
15 here that it -- that really was important evidence he
16 didn't look at. And -- and that's -- that's my job,
17 isn't it, to go back and read these things and figure
18 out how they -- the -- the evidence.

19 MR. CLEMENT: Absolutely. But I think you
20 should -- I think you should look at the evidence in
21 this case, and you shouldn't look at the evidence that
22 could have been mounted. You should look at the
23 evidence as it actually came in, the way it was argued
24 to the district court.

25 I think if you go and look, for example, at

1 the closing arguments of this case, you will see that
2 the other side did not say, this is a case about moving
3 too many people in and out of a particular district.
4 They said, this is a direct evidence case. They told
5 you what the problem was. They told you they were going
6 to apply a 55 percent BVAP floor.

7 And that -- and so really, they tried to get
8 not just some tailwind from the fact that there was a
9 BVAP floor; they tried to make -- essentially rest their
10 case below on that proposition. And as a result of
11 that, it left them with a vacuum in the evidence,
12 because we had extraordinarily good evidence on our side
13 of this case, because the principal map drawer, Delegate
14 Jones, testified for hours and hours about why
15 particular lines were drawn. And in every case, he
16 provided explanations for why they comported with
17 traditional principles.

18 But not just that, he told you why the lines
19 were there. The lines weren't there because, oh, we
20 have this 55 percent BVAP target and everything had to
21 go out the window. He said, well, you know, down here
22 in Southampton Roads, we have three incumbents that are
23 all close together because this part of the state lost a
24 lot of population. So I drew some zigs and zags here to
25 keep the three incumbents separate, which I think is a

1 perfectly nonracial explanation for it.

2 Now, down in Delegate 77 -- in District 77,
3 that looks a little funny, but I got together with
4 Delegate Spruill, and Delegate Spruill said he wanted to
5 reunite the old city of South Norfolk, so we did that.
6 And that required to us move a couple of districts
7 around, and there it is.

8 There's -- there's reams of evidence of
9 that. And there's really a vacuum of evidence on the
10 other side of this.

11 And I do want to sort of rewind the tape a
12 little bit, too, here, which is the reason it's so
13 problematic, I think, to think that just because they
14 applied a BVAP floor, you're, like, already
15 three-fourths of the way to applying strict scrutiny is,
16 what else is a State legislature supposed to do? I
17 don't think in this context a BVAP floor is inherently
18 sinister.

19 And, I mean, one way of thinking about this,
20 Justice Kagan, is the Voting Rights Act itself is a BVAP
21 floor. I mean, in those situations where it -- it
22 requires a majority-minority district, that's a
23 quantitative floor of at least 50 point --
24 plus .01 percent. But everywhere, it's a qualitative
25 floor, that you have to preserve the ability -- ability

1 to elect.

2 And so there's nothing in this context --
 3 and I think that's exactly why this Court has gotten
 4 where it's gotten. And I'm not so sure that you
 5 couldn't even further refine what you said in Alabama to
 6 make it a little bit closer to where I think the law
 7 should be in this area.

8 But here's the point: I mean, the reason
 9 that, in this area uniquely, the Court allows race to be
 10 considered is in part because the Voting Rights Act
 11 makes the consideration of race absolutely necessary.
 12 And I don't want -- think you want to send the signal --
 13 I mean, unless you want to take the first steps towards
 14 declaring the Voting Rights Act unconstitutional, you
 15 don't want to send the signal that when legislatures
 16 approach this in a way that I think is perfectly
 17 appropriate to what's going on. I mean, Virginia's got
 18 12 --

19 JUSTICE KAGAN: You absolutely don't,
 20 Mr. Clement. But it's one thing for a legislature to
 21 say, we view it as a core priority up there with
 22 one-person, one-vote to comply with the Voting Rights
 23 Act. That's a terrific thing. It's another thing for
 24 the legislature to do what it did, for example, in the
 25 Alabama case, which is to just say something about there

1 can't be any retrogression from whatever there is,
2 notwithstanding that that's just not Section 5 law, and,
3 similarly, it's another thing for the legislature to
4 just pick a number out of one district, apply it to all
5 12 districts, and say that that's compliance with the
6 Voting Rights Act.

7 Now, I agree with you and with Mr. Elias and
8 with Mr. Gornstein: That does not get you all the way
9 there. But there's something about -- this is --
10 Alabama suggested this was evidence. When a State says
11 across the board we're going to do something that just
12 on its face you know is not required by the Voting
13 Rights Act, that's a problem.

14 MR. CLEMENT: Well, I'm with a lot of what
15 you had to say, Justice Kagan. I think where I'm not
16 with you is that there is something particularly
17 problematic about picking a 55 percent number and
18 applying it in Richmond and south and in the Hampton
19 Roads area. And I think -- I mean, I'd say two things
20 about that.

21 I mean, in the universe of possible numbers,
22 55 percent's about the best number you could come up
23 with, because -- I mean, my friends on the other side
24 agree these all need to be majority-minority districts.
25 So if the whole debate is it's got to be somewhere north

1 of 50 percent, I mean, 55 percent, which gives you a
2 little bit of margin for the fact that there may be
3 differentials in -- in -- in turnout. And where the
4 rubber's going to meet the road, remember, is on the
5 cases where -- I mean, you know, the incumbents are
6 going to always win. And most of these districts are
7 majority-minority, but they're way majority Democrat.
8 So where the rubber is going to meet the road about
9 opportunity to elect is going to be in the open
10 primaries. That's when you're really going to tell
11 whether the African-American has -- community has the
12 opportunity to elect the candidate of their choice.

13 Now, those are relatively rare. And so the
14 idea that, you know, it's -- it's somehow presumptively
15 unconstitutional for the State to look at one of the
16 most recent open primaries in HD75 and say, well, yeah,
17 5 percentage points, but 5 percentage points in a badly
18 splintered primary, it's only 300 votes. And Delegate
19 Tyler herself is saying, you know, these need to be
20 north of 50 percent. Everybody is basically saying
21 that.

22 You know, I don't think it's fair to put
23 this -- and I guess this is where I really take issue.
24 I don't think it's -- I think it's a mistake to put this
25 in the same basket as Alabama. The idea that you can't

1 go from 80 to 79 percent is a cartoonish version of the
2 Voting Rights Act. To say that in an area where 9 of
3 the 12 districts are already north of 55 percent, to say
4 that 55 percent is a pretty darn good threshold for
5 compliance with the Voting Rights Act just isn't in the
6 same category at all.

7 And I know they try to get a lot of sort of
8 mileage out of the idea of, well, it was
9 one-size-fits-all. But the two things I would say about
10 that -- what I sort of already said -- which is we're
11 talking about the same part of the State, and there's no
12 reason to think there's a different dynamic in this --
13 and all of these districts are majority-minority
14 districts, African-American districts. It's not like
15 they're applying one rule and trying to say that it
16 fits, you know, for the -- for the complicated districts
17 in Northern Virginia with multiracial groups and those
18 districts down in the South. They're all very similar
19 districts. That's one thing.

20 The second thing is -- I mean, keep in mind,
21 whatever rule you adopt here is not just for relatively
22 sophisticated State legislatures. It's going to apply
23 to all sorts of school boards and sewer districts.
24 There has to be -- I mean, I -- you know, I just don't
25 think the analysis is that you have to go district by

1 district with regression analysis in order to comply
2 with the Voting Rights Act. I don't think that's the
3 rule you want to lay down.

4 And I also think -- and this is, I think,
5 responsive to Justice Kennedy's earlier question -- I
6 mean, the -- the -- the idea that they have on the other
7 side, it's -- they're not against racial targets. They
8 agree these need to be majority-minority districts.
9 Here, they agree they need to be north of 50 percent.

10 The real beef is with the legislature making
11 a sort of commonsense judgment based on the evidence in
12 front of them that it should be 55 percent. What they
13 want is more use of race in more minute detail where you
14 go district by district and say, all right. As to 75,
15 it's going to be 55. As to 63, it's going to be 74. As
16 to 77, it's going to be 56. I don't think that gets us
17 further along the lines of compliance with the Equal
18 Protection Clause. I also don't even think it's
19 practically possible.

20 JUSTICE KAGAN: I think the -- the real
21 difference between your standard and the SG's standard
22 is that in your standard, the shape of a district
23 functions as a threshold inquiry such that if the shape
24 is okay, we don't look at anything else, and
25 particularly we don't look even if the districting was

1 completely race-based in motive. And that's just what
2 the -- that three-part test does. It sets up a
3 threshold inquiry about -- about how the district is
4 shaped in a way that some people thought Shaw was when
5 Shaw was first announced and that this Court in one,
6 two, three subsequent cases made clear it wasn't.

7 MR. CLEMENT: Well, Justice Kagan, first of
8 all, I think the real difference between our position
9 and the SG's position is a difference in the real world,
10 which is, they admit it's not going to make a difference
11 in 99 percent of the cases. All right. Maybe they had
12 something else in mind by vast majority. But in a lot
13 of these cases, it won't make any differences.

14 But given the stakes, it's going to mean
15 that lots more State legislatures get sued over
16 districts that don't even look particularly suspicious.
17 And this case is the perfect example. These districts
18 existed for four years and two complete election cycles
19 before anybody perceived there was a racial gerrymander
20 lurking here. And what changed in 2014 was the resident
21 of the Governor's Mansion in Richmond. And what
22 happened is these guys realized that if we can get these
23 districts thrown out and they have to redraw the
24 district, we'll now have a veto power that we didn't
25 have before. That explains why lines that looked

1 perfectly square relatively and were approved 80 to,
2 like, 9, with a majority of Democrats supporting them,
3 all but two members of the African-American Caucus
4 supporting them, with one of the two members of that
5 caucus opposing because the numbers weren't high enough.
6 That's the dynamic that was 2011.

7 You go from a bipartisan success story where
8 everybody points to the House and said, these guys did
9 it right; the Senate, not so much. The House, these
10 guys did it exactly right. They did everything they
11 were supposed to do.

12 Four years later, they can still draw a
13 racial gerrymandering charge and have to litigate for
14 years based on this theoretical possibility that maybe,
15 just maybe, in drawing these square lines, someone
16 took --

17 JUSTICE KAGAN: Well, it's more than a
18 theoretical possibility. And Mr. Gornstein says -- and
19 he seems to be pretty sensitive to the idea of giving
20 States latitude. But he looks at this and says, this
21 standard actually did make a difference on the ground,
22 that there were districts kicked out and said, oh, this
23 isn't race-based because it looks good, even though it
24 was race-based.

25 MR. CLEMENT: Well, I would put,

1 representing the State Legislature of Virginia, my bona
2 fides in looking out for the State's even ahead of
3 Mr. Gornstein's. And it's easy in the Solicitor
4 General's Office to throw out a standard that's
5 theoretically pure and that's going to force lots of
6 other people to litigate for years.

7 These districts were good enough for
8 everybody for four years. They were good enough to be
9 pre-cleared by the Justice Department. Having this
10 detailed inquiry out there to have them invalidated
11 years later does not seem to me to have a lot to
12 recommend it.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 Mr. Elias, you have two minutes left.

15 REBUTTAL ARGUMENT OF MARC E. ELIAS

16 ON BEHALF OF THE APPELLANTS

17 MR. ELIAS: Mr. Chief Justice, and may it
18 please the Court:

19 I want to clarify a few factual points and
20 obviously answer any questions you have.

21 The first is, the timing of this case
22 followed the Page decision. It was the Page III court
23 that -- that ruled on the congressional map that then
24 was the -- it had nothing to do -- that case was filed
25 when there was a Republican in the Governor's Mansion.

1 It had nothing to do with who was in the Governor's
2 Mansion, that just as a factual matter.

3 Justice Breyer, to your -- the question that
4 you posed to me earlier, and which is at the heart of
5 this, we completely agree with the analysis in Alabama
6 that -- that there needs to be a -- that you need to
7 show voters moved in and out on account of this rule.
8 And if you look at JA672, you will see there is a
9 50.8 percent differential between the white voters moved
10 out and the black voters moved in. As you point out,
11 three-quarters of the -- of the -- of the voters moved
12 in were black, and --

13 JUSTICE BREYER: You make a point of that.

14 MR. ELIAS: Yes. That --

15 JUSTICE BREYER: I mean, I think I heard
16 the -- Mr. Clement say that, well, no, this has all been
17 brought up after the case was over, and --

18 MR. ELIAS: Your Honor, it's in our expert's
19 report from trial. It's just not true. You can find it
20 in the JA, because --

21 JUSTICE BREYER: You called it to the
22 attention --

23 MR. ELIAS: -- we called it -- it was in our
24 expert's report at -- at trial. Point number one.

25 Point number two, very quickly, this Court

1 in Shaw v. Hunt specifically dealt with Justice Stevens'
2 dissent, saying there should be an actual conflict test.
3 And what this Court said is, in his dissent, Justice
4 Stevens argues that strict scrutiny does not apply where
5 the State respects or complies with traditional
6 districting principles.

7 That, however, is not the standard
8 allowed -- announced and applied in Miller. Shaw II
9 resolved for -- for this three-judge court well before
10 Alabama that an actual conflict test was not the law,
11 and the district courts here simply -- simply ignored
12 it.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.

14 The case is submitted.

15 (Whereupon, at 11:05 a.m., the case in the
16 above-entitled matter was submitted.)

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