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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT J. WITTMAN, ET AL., :

Appellants : No. 14-1504

v. :

GLORIA PERSONHUBALLAH, ET AL., :

Appellees. :

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Washington, D.C.  
Monday, March 21, 2016

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

APPEARANCES:

MICHAEL A. CARVIN, ESQ., Washington, D.C.; on behalf of Appellants.

STUART A. RAPHAEL, ESQ., Richmond, Va.; on behalf of State Appellees.

MARC E. ELIAS, ESQ., Washington, D.C.; on behalf of private Appellees.

IAN H. GERSHENGORN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Appellees.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case No. 14-1504, Wittman v. Personhuballah.

Mr. Carvin.

ORAL ARGUMENT OF MICHAEL A. CARVIN  
ON BEHALF OF THE APPELLANTS

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

The sum total of the alleged Shaw violation here is that the legislature treated black-majority District 3 the same way as it treated the 10 majority-white districts. It's undisputed that with respect to all of those districts, they preserved the cores of the districts, and whatever minor injustice --

JUSTICE GINSBURG: Is that -- is that undisputed? How did they preserve the core when they shifted something like 180,000 people around?

MR. CARVIN: Right. Your Honor, 83 percent of the prior occupants of District 3 were in the core. The plaintiff's alternative only had 69,000. If -- anybody who spent a minute doing redistricting knows that simply because they're 63,000 short, that doesn't mean you're going to move anywhere near 63,000. If I

1 may explain: For example, District 11 in Virginia was  
2 64,000 short. They moved 480,000 people to fill that  
3 up. The district directly adjacent to District 3 was  
4 District 2. That was the most --

5 JUSTICE GINSBURG: Was there any holding  
6 that that preserved the core?

7 MR. CARVIN: Yes. Obviously, they said that  
8 core preservation was the most important interpretation.  
9 The district court found that incumbency protection and  
10 politics were inarguably motivating the district. The  
11 way they were protecting incumbents was through core  
12 preservation. And the key problem here is, they never  
13 found that race subordinated incumbency protection or  
14 politics, or that it was in any way inconsistent --

15 JUSTICE GINSBURG: And how can we take  
16 politics when the drafter of the plan -- rightly or  
17 wrongly, the drafter of the plan represented to the  
18 court, I haven't looked at partisan performance. It was  
19 not one of the factors I considered in drawing  
20 districts. Now, we have to take that. That's what the  
21 drafter of the plan said. He didn't take into account  
22 partisan performance.

23 MR. CARVIN: He said he didn't look at  
24 partisan performance statistics. In the face of that  
25 statement, the court found as a fact that politics

1 inarguably motivated these districts. Every incumbent  
2 was re-elected in the district. The --

3 JUSTICE KENNEDY: Politics motivates the  
4 change in district. That is our objective. That is  
5 what we seek to do, to preserve incumbency or whatever.

6 MR. CARVIN: Right.

7 JUSTICE KENNEDY: May we then use race to  
8 move people from one district to another, simply because  
9 that's the easiest way to do it? We know that this is a  
10 -- a race that votes strongly for a particular party, so  
11 we can use race for this ultimate neutral purpose?

12 MR. CARVIN: You can't use race as a proxy,  
13 Justice Kennedy, and it's very important to note that  
14 they didn't find --

15 JUSTICE KENNEDY: The -- the district -- I  
16 understood your argument to be that, so --

17 MR. CARVIN: No.

18 JUSTICE KENNEDY: So perhaps you can correct  
19 me.

20 MR. CARVIN: It's the difference between  
21 Cromartie II and using race as a proxy. Cromartie II  
22 tells the Federal judiciary you can't use politics as a  
23 proxy for race.

24 Here, when it's conceded by the plaintiffs  
25 that everything we did made perfect sense if everybody

1 in District 3 was white, we know that they wouldn't have  
2 led to a dramatic exodus of Democratic voters into the  
3 four adjacent districts, all of which had Republican  
4 incumbents, if all of those people were white. And  
5 therefore, since they were pursuing exactly the same  
6 incumbency protection and political motivation with  
7 respect to District 3, they are not somehow disabled  
8 from doing that simply because the predominantly  
9 Democratic voters happen to be black.

10 CHIEF JUSTICE ROBERTS: How did you --

11 MR. CARVIN: That is why Cromartie II  
12 insisted that plaintiffs show, meet the demanded burden  
13 of showing, that's -- race -- traditional districting  
14 principles were subordinated to race rather than  
15 politics.

16 CHIEF JUSTICE ROBERTS: How do you show what  
17 the motive of the legislature was? Let's say you have  
18 10 percent of the legislators say this is because of  
19 race -- that's their motive -- 10 percent say it's  
20 because of partisanship, and 80 percent say nothing at  
21 all. What -- what is the motive of that legislature?

22 MR. CARVIN: Right. I think it's very  
23 difficult to discern motive in a multimember legislative  
24 body, which is why this Court has always looked, for  
25 example, in Cromartie II, what are the effects?

1           If, for example, there was a way of  
2 achieving the political objectives without respect to  
3 the racial composition of the enacted district, then it  
4 should be simple as pie for plaintiffs to come in with  
5 an alternative that doesn't rely on race that achieves  
6 their legitimate political objectives, and yet  
7 plaintiffs in the district court here have proved that  
8 any realteration of District 3 which results in a  
9 diminution of the black voting-age population would be  
10 absolutely contrary to the normal political agenda that  
11 would be motivating the legislature if everybody  
12 involved was white.

13           The plaintiff's alternative only reduced the  
14 BVAP by 3 percent to 50 percent, and yet that converted  
15 District 2 with a brand-new Republican incumbent from a  
16 toss-up district to what plaintiffs themselves  
17 characterize as a heavily Democratic district. The  
18 Court's remedy demonstrates that the reduction was to 45  
19 percent. And what did that do? It dismantled entirely  
20 District 3 and District 4. It took away about half the  
21 districts.

22           JUSTICE SOTOMAYOR: But it -- but it made  
23 District 3 more compact.

24           MR. CARVIN: The only way to make it more  
25 compact is to split the district in half. That was the

1 point we are making.

2 JUSTICE SOTOMAYOR: Well, this district was  
3 never compact to start with.

4 MR. CARVIN: Well --

5 JUSTICE SOTOMAYOR: I mean, it's -- it's  
6 contiguous only by water, not by land.

7 MR. CARVIN: Well --

8 JUSTICE SOTOMAYOR: And it runs a very  
9 unusual route.

10 MR. CARVIN: It's certainly reasonably  
11 compact within the meaning of the Supreme Court --  
12 Virginia Supreme Court's definition of compactness,  
13 where you have to look at whether or not they're  
14 preserving the core of the existing district to assess  
15 --

16 JUSTICE SOTOMAYOR: The new plan --

17 MR. CARVIN: -- capacity.

18 JUSTICE SOTOMAYOR: -- splits less  
19 districts. It -- all of these plans have their flaws,  
20 but the new one at least splits less districts, and it  
21 is more compact under traditional criteria.

22 MR. CARVIN: That is only half-accurate,  
23 Justice Sotomayor. It splits just as many political  
24 boundaries, county lines, as ours does, 14. That's what  
25 Special Master Grofman said in his report.



1                   It is more compact, but I want to  
2 re-emphasize, the only way to make it more compact is to  
3 split District 3 in half and to split District 4 in  
4 half. And what happens when you do that? It puts  
5 Representative Forbes in a 60 percent Democratic  
6 district, and he loses half of his incumbency advantage.  
7 Worse still, the avowed purpose of splitting them in  
8 half was to create two black opportunity districts, so  
9 it's actually more race-conscious than what the  
10 legislature did.

11                   JUSTICE SOTOMAYOR: Would you spend a few  
12 minutes on whether this case is moot or not?

13                   As I understand it, the vast majority of the  
14 districts of the representatives who are parties to this  
15 action have not been changed in any meaningful way.  
16 Forbes is the only one who had a -- who had, perhaps, a  
17 live claim, but he's decided to run in another district.  
18 So how do we have a live claim or controversy?

19                   MR. CARVIN: Oh, because what they did to --  
20 to Representative Forbes was to severely hamper and  
21 be -- make impossible --

22                   JUSTICE SOTOMAYOR: But he has decided not  
23 to run.

24                   MR. CARVIN: Right, and that means the  
25 injury is so severe that it forced him out of the

1 districts.

2 Let's assume you had paired two Republican  
3 incumbents, and what --

4 JUSTICE SOTOMAYOR: Is he going to go back  
5 and run in the old district?

6 MR. CARVIN: But for the remedial order, he  
7 would obviously be running in District 4. That's where  
8 he lives, that's where he's a 16-year incumbent, and  
9 that's where he's got a huge incumbency advantage. The  
10 fact that -- the injury that they imposed on him in  
11 District 4 was so severe it pushed him out.

12 Plaintiffs don't need to continue down what  
13 they were doing. This Court has found that the worst  
14 kind of injury is when the challenge back --

15 JUSTICE SOTOMAYOR: Are you representing  
16 that if the map goes back to the enacted form, not the  
17 new one, that he will run in his old district?

18 MR. CARVIN: Absolutely. He will run in the  
19 district that he lives in, that he has been reelected in  
20 for 16 years, and that he has a huge incumbency  
21 advantage, rather than going to a new district, where  
22 100 percent of the voters will not be --

23 JUSTICE GINSBURG: And as --

24 MR. CARVIN: I'm sure this was undisputed.

25 JUSTICE GINSBURG: As to the old district --

1 I mean, we do have a rule that -- District A is  
2 allegedly gerrymandered. Voters in District B can't  
3 challenge that. You have to be a voter in the district  
4 that's allegedly gerrymandered. So how is it that a  
5 voter in District 4 could not bring a challenge, but the  
6 representative of the voters in District 4 can?

7 MR. CARVIN: Because they're asserting the  
8 constitutional right. And as this Court held in Hayes,  
9 certainly these people in adjacent districts are  
10 injured; they are just not injured in a way that's  
11 cognizable under the Fourteenth Amendment, because their  
12 personal right to discrimination has not been validated.

13 But we are defendants appealing an adverse  
14 order. Defendants appealing an adverse order never  
15 argue that the adverse order violates their  
16 constitutional rights. They're arguing that it disrupts  
17 the status quo by changing the rules, and the status quo  
18 is what they are defending.

19 This Court has made it clear repeatedly, in  
20 ASARCO, Swann, Electronic Fittings, that obviously, if  
21 the remedial order puts the defendants in a worse  
22 position than they were, they have a direct stake in the  
23 outcome of the appeal and they can appeal.

24 If the rule were otherwise, Justice  
25 Ginsburg, no defendant could ever appeal an adverse

1 order, because the adverse orders virtually never are  
2 alleged to violate their rights. So it's precisely the  
3 same sort of injury suffered by Representative Forbes as  
4 we -- would be suffered by an incumbent who lived in  
5 District 3.

6 Let's assume the incumbent in District 3 had  
7 intervened, and they dropped the BVAP to 30 percent and  
8 made it a 60 percent Republican district. Is anyone  
9 arguing that that incumbent couldn't challenge the order  
10 that severely hampers his or her chances for  
11 re-election, the answer is clearly yes. Since  
12 Representative Forbes in the adjacent district has  
13 suffered precisely the same kind of injury, as I had  
14 hypothesized for the incumbent in District 3 by analogy  
15 to Hays, obviously he has standing to appeal.

16 CHIEF JUSTICE ROBERTS: What about Brat?  
17 What about Brat?

18 MR. CARVIN: I could argue, Your Honor, if I  
19 wanted to that Brat and Wittman, who had seven and one,  
20 also had their districts changed in a way. But I must  
21 admit, the palpable negative political consequences are  
22 de minimis compared to that suffered by Representative  
23 Forbes. So while I'm certainly not abandoning it, I  
24 have to face the reality, if you're not accepting my  
25 argument for Appellant Forbes in 842R, you won't accept

1 it for Brat and Wittman in one and seven.

2 JUSTICE BREYER: Normally, the defendant is  
3 the State in a voting rights case. They are the ones  
4 that have the plan until someone attacks the plan.  
5 These were Intervenors because they were affected. The  
6 Court said you could intervene. Now the State's gone.

7 I'm looking for some kind of -- of rule or  
8 some kind of workable standard such that a new plan that  
9 the Court puts in would allow some people in other  
10 districts to remain to defend it, but not everybody. Or  
11 do you think everybody? I mean, after all, a plan in a  
12 smaller State that affects one district and makes  
13 changes likely affects people in every district, at  
14 least some of them. Some people will find it easier to  
15 get elected, some harder. I haven't found a case that  
16 supports you, but you'll tell me which one.

17 MR. CARVIN: I -- I will give you two.

18 JUSTICE BREYER: Okay. Good.

19 MR. CARVIN: ASARCO -- ASARCO articulates  
20 the burden in a nonelection context which is, do you  
21 suffer a threat to your current injuries because of the  
22 lower court opinion? And the best case is actually  
23 Meese v. Keene in applying that injury to hurting your  
24 chances for re-election.

25 JUSTICE BREYER: Meese --

1 MR. CARVIN: Meese v. Keene, where the Court  
2 found that because they had attached the propaganda  
3 label to this California Democratic legislator's acid  
4 rain documentary, that hurt his chances for re-election.  
5 Solicitor General says, let's use the word "reputation."  
6 That's true, but reputation was only relevant because it  
7 hurt his chances for re-election. If you look, Justice  
8 Breyer, carefully at the case, you will see there is not  
9 a scintilla of evidence suggesting that his reputation  
10 was harmed.

11 JUSTICE BREYER: I'm --

12 MR. CARVIN: And after all -- I'm sorry.

13 JUSTICE BREYER: And the distinction  
14 between, let's say, the best one is the split district,  
15 you know, the one you were just talking about,  
16 Representative --

17 MR. CARVIN: Forbes.

18 JUSTICE BREYER: -- Forbes, right.

19 If he has standing, who doesn't?

20 MR. CARVIN: Well, the standard is Meese v.  
21 Keene, and this was the argument that this California  
22 Democratic legislature running an acid rain documentary  
23 said. He said he's hurt for re-election because Ed  
24 Meese and the Reagan Justice Department labelled it  
25 "propaganda." That's not a severe --

1 JUSTICE BREYER: But, I mean, in the voting  
2 context, the standard for saying that a person in  
3 another district is hurt enough to be able to maintain a  
4 standing here, and these people aren't, which ones are  
5 and which ones aren't? Meese used the formulation harm  
6 his chances for re-election.

7 MR. CARVIN: You can attack --

8 JUSTICE BREYER: Harmed his chances for  
9 re-election.

10 MR. CARVIN: But -- but, Justice Breyer,  
11 this is the simplest process. You can use whatever  
12 adjective you want before "harmed"; "substantial,"  
13 "significant." They turned a district that he had  
14 easily won for 16 straight years into a 60 percent  
15 Democratic district, which no Republican has ever won --

16 JUSTICE SOTOMAYOR: So we announce a rule --  
17 so we announce a rule --

18 CHIEF JUSTICE ROBERTS: All right. Justice  
19 Sotomayor.

20 JUSTICE SOTOMAYOR: We announce a rule that  
21 every change that affects an incumbent gives the  
22 incumbent the right to challenge the line of change.

23 MR. CARVIN: I think any -- any time  
24 somebody is injured-in-fact --

25 JUSTICE SOTOMAYOR: Just answer the question

1 yes. Every -- this is now an incumbency protection  
2 standing rule.

3 MR. CARVIN: No.

4 JUSTICE SOTOMAYOR: Every time your district  
5 is changed and you believe it hurts you, you have a  
6 right to go to court and say what?

7 MR. CARVIN: I want to quibble that -- with  
8 the premise, Justice. It's not that you believe it  
9 hurts you. It's that it's undisputed that it hurts you.  
10 That's what it said the evidence shows.

11 JUSTICE SOTOMAYOR: But -- but I -- but  
12 that's the rule. Do you have a right to claim? It's  
13 one thing to say I'm a voter and I've been racially  
14 discriminated against. What is the incumbent claiming?  
15 It's not racial discrimination against.

16 MR. CARVIN: That the remedial order has  
17 hurt dramatically, indeed, irretrievably, his chances  
18 for re-election.

19 JUSTICE KAGAN: So, Mr. Carvin --

20 MR. CARVIN: If

21 JUSTICE KAGAN: -- let's assume that that's  
22 true and that that is -- counts as an injury-in-fact.  
23 We also have this other requirement in the law, which we  
24 talk about a lot less, but it seems to be quite well  
25 established, which is that there needs to a kind of



1   legally recognized interest.  So it's not just that you  
2   have to have an injury-in-fact, although you have to  
3   have that, but that there needs to be an injury to a  
4   legally recognized interest.

5                   So what is the legally recognized interest  
6   here that the -- the legislators are banking on?

7                   MR. CARVIN:  That he wants to be elected.

8                   JUSTICE KAGAN:  No, that's -- that's --  
9   that's, you know, he wants to be elected.  He has been  
10  injured-in-fact in the kind of practical ways we can all  
11  understand for the injury.  But this other part of the  
12  test really suggests that you need a kind of legal  
13  recognition of your claim, and that's what I'm searching  
14  for here.

15                   MR. CARVIN:  Well, two points:  You surely  
16  don't need to show any cognizable right.  Nobody is  
17  arguing that they have a right to these districts.  If,  
18  again, appealing defendants had to show a legally  
19  cognizable right, then nobody would be able to appeal  
20  because they are never arguing that the adverse judgment  
21  deprived them a legal right.

22                   JUSTICE KAGAN:  Are you saying that that  
23  part of our standing doctrine which does look as to  
24  whether there is a legally cognizable right is only good  
25  for plaintiffs, and that once the inquiry shifts to the

1 defendant, it just completely drops out of the picture?

2 MR. CARVIN: It just recognizes the reality  
3 the difference between a plaintiff filing a complaint  
4 challenging a State law and the defendant who is  
5 defending the State law, who is obviously not going to  
6 argue that his legal rights have been violated, he has  
7 the same interest as the people who are supposed to be  
8 defending the State law, which is he was well benefited  
9 under the status quo ante, and he has suffered direct  
10 injury-in-fact because of the alteration caused by the  
11 remedial order. And -- and the --

12 JUSTICE KENNEDY: Justice Kagan can ask her  
13 own question, but he suffered injury-in-fact to what?

14 MR. CARVIN: To his ability to be reelected.  
15 The same injury-in-fact that was recognized in Meese v.  
16 Keene, Davis v. FTC, and a host of cases like --

17 JUSTICE KENNEDY: So they are right to  
18 assert that you have a legally recognized interest in  
19 being re-elected without, I don't know, improper  
20 interference or something like that?

21 MR. CARVIN: Not having a State entity, in  
22 this case a Federal entity, affirmatively intervene,  
23 override the sovereign prerogatives of the State, and  
24 create an electoral system which substantially  
25 diminishes, indeed eliminates, his chances for election.

1 Why is that not injury-in-fact? There was  
2 injury-in-fact every time this Court says --

3 JUSTICE KAGAN: I wasn't -- I wasn't -- I  
4 wasn't contesting the injury-in-fact requirement. I  
5 think I was -- I was asking about -- and it really is a  
6 question -- how this other separate requirement, which  
7 is that the invasion of -- that has to be to a legally  
8 protected interest applies in the context of a  
9 defendant. And you're just suggesting it drops out  
10 entirely. And I guess I'm suggesting -- I mean, I might  
11 be right, but it seems odd that a plaintiff would have  
12 to show it, and a defendant, it -- it just disappears  
13 from the inquiry.

14 MR. CARVIN: May I clarify? They need to  
15 show a legally cognizable interest. What they don't  
16 have to show, unlike the plaintiff, is that legally  
17 cognizable interest is a protected Constitutional or  
18 statutory right.

19 JUSTICE KENNEDY: But would they have a  
20 legally --

21 JUSTICE KAGAN: So the legally cognizable  
22 interest is -- just finish the sentence for me.

23 MR. CARVIN: That he has been  
24 injured-in-fact and has a direct stake in the outcome  
25 because he wants to be re-elected.

1 JUSTICE KAGAN: That just -- that just makes  
2 the legally cognizable interest the same as the  
3 injury-in-fact requirement.

4 MR. CARVIN: Fair enough --

5 JUSTICE ALITO: I'm sorry. Go ahead.

6 MR. CARVIN: Okay. No, I -- I apologize.  
7 But I -- I do want to make -- eliminate any confusion  
8 with Justice Kagan.

9 Here is the point: Why would, of all the  
10 harms in American society, harms to re-election not be  
11 legally cognizable? As the Solicitor General points  
12 out, the point of standing is to keep the Federal  
13 judiciary in its proper role -- limited role in  
14 democracy. If two unelected judges have falsely altered  
15 the State's sovereign's view of redistricting, that  
16 would be the situation where we would want to find the  
17 injury most cognizable because that's where the Court  
18 exercises extraordinary caution and extraordinary  
19 abilities. I apologize.

20 JUSTICE ALITO: There are two questions.  
21 There's the question injury-in-fact, which you've been  
22 talking about.

23 Now, on the issue of legally cognizable  
24 interest, does a member of Congress who wants to be  
25 re-elected have a legally cognizable interest in running

1 in a district that was lawfully enacted by the State  
2 legislature?

3 MR. CARVIN: Yes, he certainly does, because  
4 obviously the interference -- and you have to accept as  
5 true for standing purposes -- the improper interference  
6 in the Federal judiciary into that political thicket,  
7 which harms him and rearranges the entire district, is  
8 obviously injury-in-fact, and is just the kind of  
9 interest that this Court would want to find cognizable,  
10 because, after all, it's most concerned about the  
11 Federal judiciary hijacking the political process much  
12 more than in any other --

13 JUSTICE BREYER: Here -- here is the basic  
14 problem. I -- I can't get the right analysis. Look,  
15 normally a plaintiff is suing because somebody did  
16 something to him. So the defendant is the person who  
17 did it. And normally we're looking for the standing of  
18 a plaintiff, and there are all kinds of rules there.

19 The person who did this to the plaintiff is  
20 the State. They're not in it anymore. So what -- of  
21 course the -- the difficulty comes from the fact that  
22 the congressmen aren't the people who did it. I mean,  
23 these particular people aren't the ones who did it, but  
24 they're still in the case.

25 It's rather like Smith sues Jones for a

1 nuisance. There's an order entered. It is an  
2 injunction. Jones's neighbor Brown says, this  
3 injunction is hurting me. Now, does Brown have  
4 standing? And -- and at that point we're into a  
5 new kind of a case, and I'm sure there's law on it. And  
6 -- and I just haven't got the right things yet. And --  
7 and these cases -- they have the -- they'll have the  
8 language, you say. I'm just not certain of the way to  
9 analyze it.

10 MR. CARVIN: I -- I've given you ASARCO;  
11 I've given you Meese v. Keene.

12 JUSTICE BREYER: Yeah. Yeah --

13 MR. CARVIN: Now let's talk -- let's talk  
14 about incumbency protection generally.

15 JUSTICE BREYER: Okay.

16 MR. CARVIN: If they had paired two  
17 incumbents.

18 This Court found in Karcher v. Daggett,  
19 Justice Brennan said, that kind of political  
20 gerrymandering imposes such a severe injury --

21 JUSTICE BREYER: Yeah.

22 MR. CARVIN: -- you can adjust equal  
23 population.

24 In Larios, this -- where this Court  
25 summarily affirmed, they said that kind of injury is a

1 classic tool of political gerrymandering. Is it  
2 conceivable that -- that paired incumbents would have no  
3 standing to the challenge the fact that a court has put  
4 them in the same district?

5 Your Honor is recognizing that incumbency  
6 protection is one of the neutral districting principles  
7 no different than compactness or anything else, which  
8 gives incumbents special factual distinctions from the  
9 run-of-the-mill people.

10 In Term Limits v. Thornton, this Court held  
11 it was unconstitutional to make it more difficult for  
12 incumbents to be reelected because they had to engage in  
13 mail-in campaigns rather than be on the ballot.

14 So we are talking about a well-recognized  
15 constitutional right where incumbents do -- are not  
16 similarly situated to average voters and do have very  
17 different factual interests. If it is undisputed, as it  
18 is, that the sole reason that Representative Forbes is  
19 now facing doom in District 4 is because of this order,  
20 I can't understand any reason why the Court would sit  
21 back and allow the Federal judiciary to hijack the most  
22 intensely partisan kind of litigation we have.

23 JUSTICE KAGAN: Mr. Carvin, can I -- can I  
24 take you back to the merits? Let me give you a  
25 hypothetical. It's not this case. It's a different

1 case.

2 MR. CARVIN: Okay.

3 JUSTICE KAGAN: Let's say that there are  
4 some racist mapdrawers, and -- and they say, here's what  
5 we're going to do. We're going to set districts, and we  
6 really want to segregate African-Americans. And so --  
7 and they say, that's our -- that's our first aim.

8 But we also have a second aim. It turns out  
9 that African-Americans vote in a particular way. And so  
10 our second aim is that we are going to achieve some kind  
11 of partisan advantage as a result of this segregation.

12 MR. CARVIN: Uh-huh.

13 JUSTICE KAGAN: Now what should be the right  
14 answer to that question? Is there strict scrutiny in  
15 such a case?

16 MR. CARVIN: I give precisely the answer  
17 this Court gave in Alabama where they had an absolute  
18 BVAP floor which you could argue was trying to segregate  
19 the cases.

20 This Court didn't say that ipso facto  
21 invalidated all 35 majority-minority districts in  
22 Alabama. It didn't, as this district court said, go  
23 dismantle all 35. It said, did that racial purpose have  
24 some kind of effect on the --

25 JUSTICE KAGAN: You're making -- you're



1 making my hypothetical more complicated than it is.  
2 We're just -- this it one district, we're just going to  
3 segregate all the African-American voters in this  
4 district. We're doing that primarily because of racial  
5 reasons. We don't like African-American voters, and  
6 we're just going to keep them all in one district. And  
7 secondarily, that has politically-beneficial  
8 consequences for us.

9 MR. CARVIN: Right.

10 JUSTICE KAGAN: Is -- and -- and so the  
11 question is, is that unconstitutional, because you know,  
12 if I look at that, I say, okay, that's -- the race was  
13 your primary motivation. That triggered strict  
14 scrutiny. You failed strict scrutiny; you're out of the  
15 ball game.

16 But you suggest that you're not out of the  
17 ball game because you have this secondary interest which  
18 coincides with the clearly racist conduct. And that's  
19 the question that I want you to answer.

20 MR. CARVIN: If it coincides, and if it is a  
21 motivating factor like it was here, then obviously you  
22 need to show that race was the but-for cause of any  
23 alteration of district lines. You need to show that it  
24 subordinated the neutral principle, and you need to  
25 show, to quote Alabama, that it had an effect on --

1 JUSTICE KAGAN: Okay. So then -- then  
2 you're -- then it seems to me you're changing your  
3 argument because in my hypothetical, both of these  
4 things run together. They're not in conflict with each  
5 other.

6 MR. CARVIN: Right.

7 JUSTICE KAGAN: So you're saying the -- the  
8 critical question is not conflict. I had thought that  
9 you thought that the critical question was conflict.  
10 Rather, the critical question is which is the primary  
11 motivation or which is the but-for purpose, and which is  
12 the secondary motivation, even if both run in line with  
13 each other. That's a different kind of test.

14 MR. CARVIN: No. I'm -- I'm happy to  
15 clarify, Justice Kagan. If they're completely  
16 co-extensive, if as here, the only way to accomplish  
17 your incumbency protection in political purposes was by  
18 doing where race predominated, then obviously it can't  
19 be the but-for cause. If --

20 JUSTICE KAGAN: This is -- this is -- it's  
21 very clear, just as it is in this case I have to say,  
22 they have a list of criteria, and number one on the list  
23 is race. And then we have a lot of direct evidence in  
24 my hypothetical that this is for the most heinous racial  
25 purposes imaginable.

1 MR. CARVIN: Right.

2 JUSTICE KAGAN: And the question is, does  
3 the fact that it also has political benefits, does that  
4 insulate these line drawers from what you would think is  
5 the obvious conclusion, which is this is  
6 unconstitutional conduct?

7 MR. CARVIN: In every context, Mount  
8 Healthy, Gross, even outside of the Shaw cases where  
9 plaintiffs have a special burden to show, it's race  
10 rather than politics. Even in those cases, you need to  
11 show that the impermissible factor was the but-for cause  
12 of the challenge, that --

13 JUSTICE KAGAN: Well, he says, this is our  
14 first priority.

15 MR. CARVIN: Yes. And every legislature in  
16 every court in the United States has ranked the Voting  
17 Rights Act higher than other things because they all  
18 recognize the Supremacy Clause.

19 JUSTICE KAGAN: But in my hypothetical --

20 MR. CARVIN: But -- but -- but --

21 JUSTICE KAGAN: -- it's his first priority  
22 because he is a racist line drawer.

23 MR. CARVIN: Great. Let's assume that he  
24 picked 55 percent BVAP out of the air and just wanted to  
25 make that his top priority. Does that have any effect

1 on district lines? If it is undisputed and clear, as it  
2 is here, that they would have drawn the district  
3 precisely the same way to protect incumbents and  
4 politics, that if you diminish below that BVAP floor,  
5 even to 50 percent, we know to a certainty because  
6 plaintiffs have proved to us that that would -- that  
7 would --

8 JUSTICE KAGAN: That -- that sounds to me as  
9 though it's a harmless error rule for racial  
10 discrimination. And we've never had a harmless error  
11 rule for racial discrimination. What we've said is,  
12 look, we just found racially-discriminatory purpose, end  
13 of case.

14 MR. CARVIN: What you found in Cromartie,  
15 it's not harmless error. You need to show but-for  
16 causation or effect, as they said in Alabama.

17 Cromartie held, as a matter of law, the fact  
18 that there was racial percentages, lack of compactness,  
19 and breaking of county lines is insufficient as a matter  
20 of law to find a violation. Why? Because there is an  
21 equally plausible explanation, which is politics. And  
22 it is the plaintiffs' demanding burden to prove race  
23 rather than politics.

24 JUSTICE KAGAN: Yes, but --

25 MR. CARVIN: And we --

1 JUSTICE ALITO: Could I ask a question,  
2 which is really highlighted by Justice Kagan's  
3 hypothetical? Because normally, were -- were it not for  
4 the Voting Rights Act, there would be a very simple  
5 answer to all of these questions, and that is that you  
6 cannot take race in account at all. It's invidious  
7 discrimination to take governmental action on the basis  
8 of race.

9 Does Shelby County have any relevance to  
10 this case? Is this the type of case that will never  
11 come up again in the future if the Voting Rights Act is  
12 not amended?

13 MR. CARVIN: Right. You need not worry  
14 about this in 2022, but the issue here, Justice Alito,  
15 is what was the reality confronting the legislature in  
16 2012? And they had to get preclearance by the Justice  
17 Department in record time, so they needed to get very  
18 quick preclearance, which is why it made eminently good  
19 sense not to go -- go below the benchmark BVAP.

20 But even if we assume, to get back to  
21 Justice Kagan's question, that they just plucked  
22 50 percent out of the air, it still doesn't establish a  
23 violation because this Court has said countless times,  
24 race is always a factor in redistricting. So it's not  
25 like employment in another context.

1                   And here's what the Court said in Cromartie  
2   II, and the lower court completely defied, it said, in a  
3   case such as this one where majority-minority districts  
4   are at issue, and where racial identification correlates  
5   highly with political affiliation, the party attacking  
6   the legislative-drawn boundaries must show at the --  
7   least that the legislature could have accomplished its  
8   legitimate political objective in a different way.

9                   JUSTICE KAGAN: Well, the first seven words  
10   of that quote are "in a case such as this one."

11                  MR. CARVIN: Yes.

12                  JUSTICE KAGAN: And the question is what did  
13   they mean by that? And one understanding of what they  
14   meant when they said "in a case such as this one" is in  
15   a case in which there was no direct evidence of racial  
16   motivation but only circumstantial evidence, and -- and  
17   the -- and the absence or the presence of a map was  
18   indeed relevant to the question of whether that  
19   circumstantial evidence added up to the conclusion that  
20   race was the motivator.

21                  MR. CARVIN: I -- I must respectfully  
22   disagree that that's a remotely implausible  
23   interpretation of this language. "In a case such as  
24   this one," comma, "where majority-minority districts are  
25   at issue and where racial identification correlates

1 highly with political affiliation" was somehow sending  
2 some implicit signal that what we meant was some --

3 JUSTICE KAGAN: No. It's just in a case  
4 such as this one, the case before us.

5 MR. CARVIN: No, it's -- it's -- the  
6 beginning --

7 JUSTICE KAGAN: Well, why didn't we ask for  
8 a map in Alabama?

9 MR. CARVIN: It's -- why didn't we -- the  
10 Court said, remand to find out which districts were  
11 affected by the BVAP floor. Under this theory, all 35  
12 districts in Alabama, all majority-black districts, are  
13 ipso facto violations of Shaw. And by the way, every  
14 majority-minority district in the country is ipso facto  
15 violative of Shaw, because every legislature and every  
16 court that has created one has invoked the supremacy of  
17 the Voting Rights Act.

18 But that's not what the court did. The  
19 court said, go back and figure out if race had some  
20 significant effect on the lines. It didn't say, go turn  
21 all majority-black districts into 45 percent-black  
22 districts. And that would be the great evil of  
23 accepting this tautological rule. That is why the Court  
24 has been so insistent on showing that race rather than  
25 politics did it, particularly in States where -- like

1 Virginia, where race and politics are so coextensive.

2 Without any further questions, I'll yield  
3 the floor.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
5 Mr. Raphael.

6 ORAL ARGUMENT OF STUART A. RAPHAEL

7 ON BEHALF OF THE STATE APPELLEES

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

10 The district court did not commit clear  
11 error in concluding that race predominated in the  
12 redistricting, triggering strict scrutiny, because ample  
13 evidence supported the district court's finding that  
14 there was a 55 percent-BVAP floor that was used to move  
15 more than 44,000 African-American voters into CD3.

16 CHIEF JUSTICE ROBERTS: You -- it didn't  
17 commit clear error, but you thought it committed error,  
18 right, given your --

19 MR. RAPHAEL: Well, our -- our office --

20 CHIEF JUSTICE ROBERTS: -- prior position in  
21 this case?

22 MR. RAPHAEL: Your Honor, our office  
23 defended this district at trial. We thought that there  
24 was conflicting evidence about whether race or politics  
25 predominated, and the district court resolved those



1 factual -- factual issues against us. And because of  
2 the clear-error standard, we chose --

3 CHIEF JUSTICE ROBERTS: No, I understand.  
4 But your position, if you were taking a considered  
5 position at trial, is that the -- the district court was  
6 wrong, because that was -- you presented the facts and  
7 you defended those facts, under your view. And then on  
8 appeal, they overturned it, and you say, okay, they were  
9 wrong, but not clearly wrong.

10 MR. RAPHAEL: That's --

11 CHIEF JUSTICE ROBERTS: I mean, there's  
12 nothing wrong with that. I just want to make --

13 MR. RAPHAEL: That's exactly -- that's  
14 exactly right. And we didn't -- and that's why we  
15 didn't appeal. But the evidence supporting the district  
16 court's finding was amply sufficient under the clear  
17 error standard. It included the sworn expert report,  
18 frankly, by our own expert, that -- that conceded that  
19 there was a 55 percent floor. That's page 518 of the  
20 Joint Appendix.

21 JUSTICE ALITO: Did anything else happen  
22 between the time when your office took the prior  
23 position and --

24 (Laughter.)

25 JUSTICE ALITO: -- your appearance here

1 today?

2 MR. RAPHAEL: You may be referring to Judge  
3 -- Judge Payne's surmise that because of a change in --  
4 in administration --

5 JUSTICE ALITO: No. I'm just asking you:  
6 Was there anything relevant that happened?

7 MR. RAPHAEL: Your Honor, our -- our  
8 administration came into power in January 2014. The  
9 case was pending on summary judgment. We defended the  
10 district on summary judgment. We defended it at trial.  
11 The same career attorney argued it at trial. When the  
12 district court ruled against Virginia, we had to  
13 evaluate whether we could win on a clear error standard,  
14 and concluded we could not.

15 In addition to the -- to our own expert's  
16 sworn report that said that there was a 55 percent  
17 floor, Virginia's Section 5 submission referred to a  
18 55 percent threshold as well. That's at page 77 to 79  
19 of the Joint Appendix.

20 JUSTICE ALITO: Which expert are you talking  
21 about?

22 MR. RAPHAEL: John Morgan, Your Honor. At  
23 page 518 of the Joint Appendix, you'll see his sworn  
24 report, where he refers to a 55 percent floor that was  
25 used in the House of Delegates redistricting. He

1 actually served as a consultant to the Republicans in  
2 the House of Delegates and served as an expert here.

3 CHIEF JUSTICE ROBERTS: One -- it was also  
4 one of your experts that said that if every person  
5 involved in these swaps were white, the results would  
6 still be the same, right?

7 MR. RAPHAEL: Well, Mr. Morgan --

8 CHIEF JUSTICE ROBERTS: That's at 649. Is  
9 that --

10 MR. RAPHAEL: John McDonald --

11 CHIEF JUSTICE ROBERTS: McDonald, right.

12 MR. RAPHAEL: -- who was the plaintiffs'  
13 expert, he was asked, can't -- can't a lot of these  
14 swaps be explained based on -- based on politics? And  
15 he said they could be, with the exception, I would say,  
16 of Plaintiffs' Exhibit 57, which showed that there were  
17 five -- that's on page 439 of the Joint Appendix. And  
18 it showed that there were five voting districts that  
19 were dropped from the benchmark district which had above  
20 55 percent performing -- Democratic performance, but  
21 they were very low in BVAP. And I think that that  
22 evidence supports his -- his argument that --

23 CHIEF JUSTICE ROBERTS: Would there -- would  
24 there be a violation here if the district that were  
25 drawn could be explained on the basis of partisanship

1     rather than race?

2                   MR. RAPHAEL:  If -- if the only evidence  
3     were statistical, just like in *Easley v. Cromartie*, and  
4     it could equally be explained based on partisanship,  
5     you're right, I think we would have won the case and  
6     we'd be defending that position here.  But I think what  
7     really killed us was the Morgan -- our own expert's  
8     report that said that there was a 55 percent floor.  
9     There was other evidence that there was a floor.  The  
10    district court did not commit clear error in -- in -- in  
11    finding that that was the driving factor here.

12                   CHIEF JUSTICE ROBERTS:  It's a -- a question  
13    I asked Mr. Carvin.  You're talking about the motive of  
14    the legislature, right?  What do you do when it's 10  
15    percent race, 10 percent partisanship, and, as is often  
16    the case, I suspect, 80 percent of them don't say  
17    anything at all?

18                   MR. RAPHAEL:  Right.  It would be a lot  
19    harder if you had that kind of case here.  But in this  
20    case, there was one sponsor.  He said that the BVAP had  
21    to be at least the same in the new district as in the  
22    benchmark district.  He said that twice.  And then he  
23    said in order to have certainty of preclearance, we need  
24    to bump it up to 55 percent.  And if you're --

25                   CHIEF JUSTICE ROBERTS:  But if you're a

1 legislature and you say, okay, I understand now what you  
2 said. But I suspect most of them looked at the map and  
3 said, you know, how a.m. I doing here? What's  
4 percentage of Republican? What's percentage of  
5 Democrat? What's the change? They may not have cared  
6 what the sponsor thought about it.

7 MR. RAPHAEL: Yeah. Yeah, I think -- I  
8 think there may be two ways to look at the evidence in  
9 this case. There is the way that the district court  
10 did, which was to say, there was a 55 percent floor; did  
11 politics trump that? No, because, as Justice Ginsburg  
12 pointed out, the sponsor said, I didn't do a partisan  
13 analysis. That wasn't a factor. And so on that  
14 scenario, the district court didn't commit clear error  
15 in saying there was a floor. It triggered strict  
16 scrutiny, politics didn't -- didn't control.

17 That's a simple case. The harder case is  
18 the one that you're describing, where, you know, people  
19 might look at this 55 percent floor and think, you know,  
20 this is actually pretty good for Republicans, so I'm  
21 going to quietly go along with it. But in that  
22 instance, race would be used as the proxy for justifying  
23 a -- the plan, and I don't think race can be used as a  
24 proxy, to Justice Kennedy's point, nor can it be used as  
25 the excuse, and that's how it was -- was used here.

1           The other evidence included statements by  
2 members of the House and Senate in the House of  
3 Delegates redistricting at page 533 and 527. There --  
4 there really appears to have been a mantra: "This has  
5 to be at least 55 percent performing." Senator Vogel  
6 said that, and she's an election lawyer. She said, "The  
7 lowest that DOJ will preclear is 55 percent." That's  
8 page 533 of the Joint Appendix. And then Janis's  
9 statements that the most important factor to him was  
10 obtaining preclearance, and it -- that --

11           JUSTICE GINSBURG: Wouldn't there be a basis  
12 for the legislator who said, the Department of Justice  
13 won't accept it if we go below 55 percent? Is it -- was  
14 there -- was it something she made up, or did she have  
15 some basis for that?

16           MR. RAPHAEL: The record in this case has no  
17 showing as to where that 55 percent number came from.  
18 In fact, the record shows that this exact district was  
19 precleared previously at 53 percent and at 50 percent.  
20 The Senate -- Virginia Senate districts were precleared  
21 at 50 percent --

22           JUSTICE KENNEDY: Are there districts in  
23 other States or in other cases where the BVAP is at  
24 55 percent or 60 percent, or is that unusually high?

25           MR. RAPHAEL: I -- I don't know the answer

1 to that question. The record shows that DOJ precleared  
2 a district as low as 33 percent. That's at page 205 of  
3 the Joint Appendix. That was in South Carolina.

4 And we -- I agree with Mr. Carvin that it's  
5 not enough to say that we are complying with the VRA and  
6 that that triggers strict scrutiny. I don't think it  
7 does. But when you say we've got to comply with the  
8 VRA, and the way we do that is by having a 55 percent  
9 floor, then I think the trial court got that right, and  
10 that does trigger strict scrutiny.

11 Once we lost the issue of race  
12 predominating, that was the end of the case for us,  
13 because we didn't put any evidence -- Mr. -- and  
14 Mr. Carvin put no evidence in to justify narrow  
15 tailoring as to where that number comes from. It simply  
16 wasn't there.

17 The -- the -- Congressman Scott had been  
18 elected by huge margins -- 70 percent before this plan  
19 was altered; after it, he was elected by a margin of 81  
20 percent -- and our own defense witness said he wasn't  
21 offering evidence on narrow tailoring. That was the end  
22 of the case on the merits.

23 I would like to address the -- the standing  
24 issue briefly.

25 It's not in Virginia's interest, or in any

1 State's interest, for an officious intermeddler to  
2 prolong litigation like what -- what's happening here.  
3 But we looked at the law in Meese v. Keene, and we read  
4 that as standing for the proposition that where an  
5 intervenor can argue injury to his election opportunity,  
6 that is adequate for a standing.

7           And in this case, it's true: Congressman  
8 Forbes, the fact that he had to switch from CD4 to CD2  
9 really does prove the injury. And the Special Master  
10 found that his district would go from 48 percent  
11 Democratic to 60 percent Democratic. I think that that  
12 suffices to prove the injury.

13           JUSTICE BREYER: Meese was the case, wasn't  
14 it, about -- was that the case involving the --

15           MR. RAPHAEL: California --

16           JUSTICE BREYER: -- supporting a lobbyist?

17           MR. RAPHAEL: That was the California  
18 Senator who wanted to show a Canadian film that was  
19 dubbed political propaganda.

20           JUSTICE BREYER: Yeah, yeah. Political  
21 propaganda. Okay. So it's a harm to reputation. I see  
22 that. All right.

23           If, in fact, this is a sufficient injury,  
24 the injury that now, the plan will make it harder for me  
25 to be elected, that should give rise to a claim by



1 virtually every member of the State legislature. And  
2 indeed, if it gives rise to their claim in their hands,  
3 why not in the voters' hands?

4 MR. RAPHAEL: Yeah, I --

5 JUSTICE BREYER: You have, in a State like  
6 Virginia, several million people who could attack any  
7 redistricting plan and any variation on any  
8 redistricting plan. That's quite a lot to read into  
9 Meese.

10 MR. RAPHAEL: Justice Breyer, I don't think  
11 it means that. Forbes has a special justification  
12 because he clearly goes from a safe seat to a seat he is  
13 probably going to lose, and that's why he switched.  
14 Wittman --

15 JUSTICE BREYER: Special because it's more  
16 severe in degree?

17 MR. RAPHAEL: Yes. I think normal  
18 Article III jurisprudence explains this. Others, like  
19 Wittman, for example --

20 JUSTICE BREYER: There is no case that --  
21 the closest you can come is the case of a lobbyist who  
22 is complaining about his reputation.

23 MR. RAPHAEL: He wasn't a lobbyist. He was  
24 a State Senator --

25 JUSTICE BREYER: He was a State Senator.

1 That's fine.

2 MR. RAPHAEL: -- running for re-election,  
3 and I think that case is controlling. I would --

4 JUSTICE BREYER: Is there anything better?

5 MR. RAPHAEL: I think that's the best case.  
6 Take a look at Footnote 8 of the brief that the  
7 government filed in that case.

8 JUSTICE BREYER: I did. I --

9 MR. RAPHAEL: The government argued in Meese  
10 v. Keene the damage to reputation isn't -- a damage to  
11 candidacy isn't enough because it depends on the actions  
12 of voters and third parties. This -- not one Justice  
13 dissented from the holding in Meese v. Keene that injury  
14 to -- to candidacy was an adequate Article III injury.  
15 And as I mentioned earlier, Justice Alito's opinion for  
16 the Court in Clapper referred to Meese as standing for  
17 the proposition that it was impairment of political  
18 career.

19 So we read that case. We looked at what the  
20 government said. We think it gives them standing. Are  
21 we happy about it? Not -- no, we don't want officious  
22 intermeddlers to prolong litigation, and maybe they'll  
23 be responsible for the State's attorneys' fees if we --  
24 if we have to pay the Plaintiffs' attorneys' fees. But  
25 they -- we think they do have standing to maintain their

1 --

2 CHIEF JUSTICE ROBERTS: Do -- do you think  
3 it's fair to characterize Forbes as an officious  
4 intermeddler?

5 MR. RAPHAEL: Well, I don't mean to  
6 disparage him in any way. He obviously is a --

7 CHIEF JUSTICE ROBERTS: The future of his  
8 political career that he's had for 16 years.

9 MR. RAPHAEL: That's exactly right, and  
10 that's why I think he has standing and why the Court  
11 should affirm on the merits.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Mr. Elias.

14 ORAL ARGUMENT OF MARC E. ELIAS  
15 ON BEHALF OF THE PRIVATE APPELLEES

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

18 The State of Virginia has twice decided not  
19 to appeal the decision below. This Court has said in  
20 several occasions, and most recently in Hollingsworth,  
21 that it has never upheld standing of a private party to  
22 defend the constitutionality of a State statute where  
23 the State itself has not chosen to do so.

24 This is not the first time that the Court  
25 should venture into this new ground. The fact is that

1 in -- under the American system, voters choose  
2 candidates. They choose their elected officials. It is  
3 not the other way around. I listened intently to the  
4 arguments of counsel, and the fact is, this is not a  
5 question of what they did to Mr. Forbes. It's a  
6 question of what the State of Virginia did to the voters  
7 throughout the Commonwealth, including in the 3rd  
8 Congressional District, the 2nd and the 4th.

9 Candidates win and lose elections for all  
10 types of reasons. It is not true that it is conceded  
11 that -- that partisan performance is the be-all/end-all  
12 why one wins or loses elections. In fact, the lead  
13 plaintiff -- the lead intervenor in this case initially  
14 was Congressman Kantor.

15 JUSTICE ALITO: Well, I don't want to  
16 impute -- impugn in any respect the motives of the  
17 Commonwealth of Virginia, but if it were the case that a  
18 State decided not to defend the Constitution, not to  
19 defend the legality of a districting plan that was  
20 adopted by the legislature, and that decision was made  
21 purely for partisan reasons, you would say that a number  
22 of -- that -- that an elected official or a candidate  
23 who was severely adversely affected by that should not  
24 be able to challenge it.

25 MR. ELIAS: That is -- that is correct, Your

1 Honor. Not every injury in our society opens up the  
2 courthouse door. There are -- as the colloquy earlier  
3 discussed, there has to be a legally protected interest.  
4 And members of Congress do not have a legally protected  
5 interest to choose their voters.

6 JUSTICE ALITO: What if the -- the  
7 decision -- and, again, this is not a -- I'm not saying  
8 this is about Virginia in this case. But what if it  
9 were the case that that decision was made for a racist  
10 reason?

11 MR. ELIAS: I'm sorry. I'm not --

12 JUSTICE ALITO: What if it were made for a  
13 racist decision? What if the reason for not defending  
14 the legality of this -- of the districting plan was a  
15 racist reason on the part of the State executive? You  
16 would say that an adversely affected member of Congress  
17 or candidate may not have standing?

18 MR. ELIAS: That is correct, Your Honor,  
19 because members of Congress simply don't have a legal  
20 interest in choosing their voters. It's -- it's worth  
21 looking at the supplemental briefing and the briefing on  
22 standing in this case to illustrate why the injury here  
23 is not just -- not legally protected but is entirely  
24 speculative.

25 The State of Virginia in their initial

1 brief, when we were asked to brief the question of  
2 standing, said that there was no particular congressmen  
3 that had standing at that time but that one may soon  
4 reveal themselves. Seven days later they filed a brief  
5 saying they have now revealed him themselves and this --  
6 the member withstanding is Congressman Rigell, because  
7 it looks like Congressman Rigell's district is going to  
8 be affected.

9 A month later the State of Virginia said,  
10 it's not Congressman Rigell. It's Congressman Forbes.

11 This Court has said one needs to have  
12 standing at every stage of the proceeding. These  
13 plaintiffs needed -- I'm sorry. These Appellants needed  
14 standing at the moment they filed their appeal and at  
15 every stage thereafter.

16 JUSTICE KENNEDY: If the State had a plan  
17 designed to protect incumbency and it did not do that,  
18 could a -- a voter object to the fact that the  
19 incumbency rationale was not followed?

20 MR. ELIAS: So --

21 JUSTICE KENNEDY: Can voters assert an  
22 interest in preserving incumbency?

23 MR. ELIAS: So two -- two answers, Your  
24 Honor. Number one is, I don't believe an individual  
25 voter would have anything more than a general grievance.

1                   Number two, it's worth noting, just as a --  
2                   JUSTICE KENNEDY: So then -- so then you  
3 have an -- an acknowledged interest on the part of this  
4 legislature, but -- that the -- the fact that the plan  
5 fails to accomplish that, no one -- nobody can object?

6                   MR. ELIAS: Well, it is interesting that in  
7 this case neither the Virginia State House nor the  
8 Virginia State Senate, both of whom are controlled by  
9 the same party as the members of Congress affected,  
10 neither body nor the legislature as a whole has chosen  
11 to intervene in this case, which is quite different  
12 than, for example, in the Arizona case that this Court  
13 handled -- resolved where it found --

14                   JUSTICE KENNEDY: Under your view, could the  
15 legislature as a whole intervene?

16                   MR. ELIAS: I think that the legislature  
17 could have intervened and would -- and would have a  
18 better claim to standing again under the -- the Arizona  
19 redistricting case that this Court decided.

20                   JUSTICE KENNEDY: So a legislature who  
21 passes the law has greater standing than the individual  
22 who is affected by the law?

23                   MR. ELIAS: Well, we are all affected by the  
24 law. I say "we" because I live in the Commonwealth.

25                   All Virginia voters are affected by the law,

1 and members of Congress have to -- the -- the Appellants  
2 in this case have to do better than that. They can't  
3 just say they are affected by the law. They have to  
4 show why they have a legally protected interest as  
5 Justice Kagan --

6 JUSTICE KENNEDY: It sounds to me like it's  
7 incumbency, which is the very thing you say that this  
8 one individual cannot protect. Why can a legislature --  
9 a whole legislature say it, but not one legislature. I  
10 don't understand it.

11 MR. ELIAS: So, Your Honor, one thing I want  
12 to clarify just from the record, it is not the case that  
13 we have conceded nor is it the case that the Court  
14 found, nor are the underlying facts of the case that the  
15 Virginia legislature endeavored to protect incumbents.

16 What Mr. Janis said was quite specific. He  
17 did not want to pair incumbents. He did not want to  
18 draw them -- their houses out of their districts. That  
19 is quite different than saying that the Virginia  
20 legislature had a policy of protecting incumbents. In  
21 fact, the only way to protect incumbents would have been  
22 to use partisan data or race as a proxy for partisan  
23 data. The second of which would be unconstitutional --

24 CHIEF JUSTICE ROBERTS: Race -- you say race  
25 is a proxy. If -- and this is why, easily, I think it's



1 so important. The way you check is to come up with a  
2 district that would achieve the same partisan objectives  
3 without respect to race, and you weren't put to that  
4 test in this case.

5 MR. ELIAS: Well, Your Honor, I -- I think  
6 that that is true in the circumstances in a case such  
7 as -- as Cromartie where the evidence, the direct  
8 evidence that race predominated was quite weak. In  
9 fact, it -- arguably the direct evidence went the other  
10 way, suggested that politics was what drove -- what  
11 drove the map.

12 And the Court was -- was evaluating what do  
13 you do in a circumstance where there is no direct  
14 evidence that race predominated, but you have  
15 circumstantial evidence that maybe it did, maybe it  
16 didn't. And in that case, one way to tease out that --  
17 whether it was partisanship or race -- is to say, okay,  
18 show me the map that teases that out. In this case, we  
19 have no need to tease it out. It --

20 CHIEF JUSTICE ROBERTS: No. I mean, it  
21 makes it -- I guess you have a greater degree of  
22 confidence if you have an alternative that said, look,  
23 if they wanted partisanship, which is usually a pretty  
24 high priority for politicians, if they wanted  
25 partisanship, they would have done this, but instead

1 they did this. But if you're not -- if you're not  
2 forced to show that, then you have reliance on, you  
3 know, however many quotes you can find, and -- and I get  
4 back to the question I asked before. What do you -- how  
5 do you analyze it if it's 10 percent race, 10 percent  
6 partisanship and 80 percent who say nothing at all?

7 MR. ELIAS: So in this case, Your Honor,  
8 just as a factual matter, it was the person who  
9 sponsored the bill, the person who drew the map.

10 CHIEF JUSTICE ROBERTS: Is that Janis?

11 MR. ELIAS: Janis.

12 CHIEF JUSTICE ROBERTS: He wasn't in the  
13 legislature when this took -- was approved, was he?

14 MR. ELIAS: I believe he -- I believe he was  
15 at the -- at the time that the -- that the map was  
16 approved. He was the sponsor of the bill.

17 CHIEF JUSTICE ROBERTS: Well, I thought  
18 the -- the person who drafted the plan -- maybe I've got  
19 that mixed up. It wasn't Janis -- was -- was not in the  
20 legislature.

21 MR. ELIAS: Well, Janis says that he -- that  
22 he -- in fact, I believe said that he in fact drafted  
23 the -- we may be talking against each other about the  
24 house -- the State house plan versus the -- the  
25 congressional plan.

1           But in any event, the -- the fact is that if  
2 you look at Exhibit 57, which Mr. Raphael pointed to,  
3 what you see is that Professor McDonald did a very  
4 important calculation. What he looked at is the -- the  
5 voters that were added and the voters that were -- that  
6 were taken out. And what he found is that the voters  
7 being added were much higher propensity -- had a higher  
8 percentage of black voters than they were Democratic.

9           So in fact, he found -- to use a  
10 colloquialism, he found the blackest parts of the  
11 voters -- the voter pool, and added them, and skipped  
12 over white Democratic voters instead. The differential  
13 was about 2-1. So in fact, there was an analysis that  
14 teased out based on statistics.

15           CHIEF JUSTICE ROBERTS: So you could have --  
16 you think you could have drawn a map under Cromartie  
17 that would show if you wanted to protect incumbency or  
18 -- and Republican or Democratic advantage, you would  
19 have done this, and instead you did this?

20           MR. ELIAS: I don't think that that -- that  
21 the -- the question is whether we could have drawn a  
22 map. The question is whether or not Cromartie requires,  
23 in a case where -- where --

24           JUSTICE KENNEDY: Well, why isn't it the  
25 question where you could have drawn the map another way?

1 Are -- are you saying that you can draw a map only by  
2 using race, then you can't draw the map? Is that your  
3 position? I can see where you could take that position,  
4 but is that what you're saying?

5 MR. ELIAS: Yeah. Well, my position is that  
6 as -- as Mr. Raphael suggested, the analysis that was  
7 done involved a handful of VTDs. So I -- which are  
8 essentially precincts. So we could have potentially  
9 drawn, after that analysis, a district that made very  
10 few changes. But I don't think that that's what  
11 Cromartie had in mind.

12 I think Cromartie had in mind a circumstance  
13 where you are not using race as a proxy, and you are  
14 drawing a significantly different district that shows  
15 that race and -- that race predominated over  
16 partisanship. Whereas, in this case the use of these  
17 VTDs was to try to get at something different, which was  
18 the intent of what Mr. Janis and the legislature had in  
19 mind.

20 JUSTICE SOTOMAYOR: Let's not forget that  
21 there was -- counsel, I'm over here -- you're skipping  
22 over it. And I'll bet the map might have been slightly  
23 different. It still was going to be different --

24 MR. ELIAS: Yes, it was --

25 JUSTICE SOTOMAYOR: -- if you had not used

1 race.

2 MR. ELIAS: Yeah.

3 JUSTICE SOTOMAYOR: That's the whole purpose  
4 of the exercise, correct?

5 MR. ELIAS: Correct.

6 JUSTICE SOTOMAYOR: If you're race neutral,  
7 you move people not on the basis of their skin color,  
8 but on some -- some neutral principle. And you have  
9 shown that in at least five precincts were moved where  
10 it wasn't on the base of partisanship, it was on the  
11 basis of race.

12 MR. ELIAS: Yes, Your Honor.

13 CHIEF JUSTICE ROBERTS: Well, but if you  
14 moved those districts, then you'd have to move other  
15 districts to make up for -- for it. And again, I think  
16 that's what Cromartie does. It says we don't have to  
17 speculate about 10 percent, 10 percent, 80 percent.  
18 What you have to show is that partisanship could not  
19 have been a factor, because you couldn't have drawn it  
20 any differently without affecting partisanship.

21 MR. ELIAS: I think that our burden was to  
22 show that race predominated. And I don't think that  
23 Cromartie puts a straightjacket on Miller and Vera to  
24 say that the only way -- or Shaw -- that the only way  
25 you can do that is through the alternative map.

1 CHIEF JUSTICE ROBERTS: If -- if race and  
2 partisanship are co-extensive, which one predominates?

3 MR. ELIAS: Well, in a case where the  
4 legislature tells you?

5 CHIEF JUSTICE ROBERTS: No, no. If race and  
6 partisanship are co-extensive, then which one -- it's --  
7 you may say it's an abstract question that isn't that  
8 the same but doesn't fit these facts -- but if that's  
9 the case, which one predominates?

10 MR. ELIAS: If -- if you had a circumstance  
11 where there was no other evidence other than these two  
12 factors, race and -- and partisanship, then essentially  
13 it's a tie, then neither predominates over the other.

14 CHIEF JUSTICE ROBERTS: And who loses if  
15 it's a tie?

16 MR. ELIAS: We would lose -- we would lose  
17 if it's a tie, but in this case there is no tie.  
18 There's nothing even approaching a tie. The legislature  
19 set a 55 percent threshold.

20 JUSTICE GINSBURG: Suppose the legislature  
21 had set the same number as what was referred to as the  
22 Benchmark Plan. Suppose, instead of making it 56.3 they  
23 kept it at 53.1, kept it exactly the same as in the --  
24 the prior plan.

25 MR. ELIAS: Justice Ginsburg, if it was done

1 as a mechanical threshold, then it would be subject to  
2 heightened scrutiny. The State would have to show that  
3 -- that it had met that burden.

4 Any time the State sorts people based on  
5 race in a -- using mechanical targets or -- or  
6 thresholds in a redistricting context, then it has to  
7 show that there was a -- a very good reason for doing  
8 so --

9 JUSTICE KAGAN: Is that what you're making  
10 it right on? Do you agree with the Solicitor General  
11 that a simple statement from the line drawers that they  
12 were trying the best they can to comply with the Voting  
13 Rights Act, that that is not sufficient to -- to have  
14 strict scrutiny apply?

15 MR. ELIAS: So I think that this Court in  
16 Alabama made clear that the fact that the State of  
17 Virginia may have been under the mistaken belief -- a  
18 good faith mistaken belief -- that it had to -- that it  
19 had to go to 55 percent --

20 JUSTICE KAGAN: Yes. No. I got that.

21 I'm saying assume a different -- a different  
22 set of facts where they weren't just saying we have to  
23 stick at 53.1, or we have to go at 55.55 percent.  
24 Assume a different state of facts where line drawers  
25 simply say of course our first priority is to comply

1 with the law. Do you think that that itself triggers  
2 strict scrutiny?

3 MR. ELIAS: No, of course not. That's the  
4 Supremacy Clause. So the fact that the -- the fact that  
5 the State of Virginia understood it needed to comply  
6 with the Voting Rights Act does not, in and of itself,  
7 trigger --

8 JUSTICE KAGAN: So what you think triggers  
9 strict scrutiny is essentially the use of a mechanical  
10 target here?

11 MR. ELIAS: Correct. Correct.

12 JUSTICE KAGAN: It's not related to the  
13 ability to elect?

14 MR. ELIAS: Correct. And in fact, if you  
15 look at what Professor Grofman did as the Court -- as  
16 the Court's Special Master, you can see he did a very  
17 thoughtful analysis that weighed all of the traditional  
18 redistricting criteria, and then looked at the impact  
19 that it would have on the ability of African-Americans  
20 to elect a candidate of choice. And that is a model of  
21 the kind of analysis that -- that the State of Virginia  
22 should have engaged in but didn't.

23 Instead, it started with a 50. It said the  
24 district was 53.1. If we go under 53.1, we are breaking  
25 the law. Let's go to 55, because that gives us



1 certainty rather than a lack of certainty. So 55  
2 percent it is.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Gershengorn.

5 ORAL ARGUMENT OF IAN H. GERSHENGORN

6 FOR UNITED STATES, AS AMICUS CURIAE,

7 SUPPORTING APPELLEES

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

10 I'd like to make two points on the merits,  
11 but I'd like to start where this Court is going to  
12 start, with standing.

13 We believe that Appellants lack standing to  
14 appeal. Appellants allege that the district court's  
15 judgment may cause them harm by adding voters to the  
16 district of a different political party who may vote  
17 against them. But candidates have no legally-cognizable  
18 interest in the particular composition of the voters in  
19 their district --

20 JUSTICE KENNEDY: Is that -- is that true  
21 when the legislature specifically has adopted incumbency  
22 protection as a matter of State law or a matter of State  
23 policy?

24 MR. GERSHENGORN: So Your Honor, I think if  
25 they had adopted, as a matter of State law, incumbency

1 protection, that might be different, because then the  
2 legislature would have established that, actually, as a  
3 legally-cognizable right. But that's not what's at  
4 interest here.

5           And if I could say, Your Honor, what's at --  
6 what's at issue here is whether a candidate has an  
7 interest in a particular composition of his voters. And  
8 we think actually Your Honor's own opinion in Lulac is  
9 quite instructive on this.

10           What Your Honor said in Lulac, if you'll  
11 recall, is Congressman Bonilla had alleged that the  
12 allegation was that the Latino voters there were no  
13 longer voting for Congressman Bonilla, and that was why  
14 they redistricted.

15           And what you -- what your opinion for the  
16 Court said there was that that kind of voter protection,  
17 which is for the candidate and not for -- not for the  
18 individual voter, is fine for the realm of politics, but  
19 it did not justify the -- could not justify the action  
20 there to save it for Section 2. That's the same point.

21           JUSTICE BREYER: That's the area District 5,  
22 District 5 in the State which is heavily  
23 African-American and so imagined racist legislatures  
24 changed the whole district so they couldn't possibly  
25 elect an African-American. Does the African-American

1 member of Congress have standing to contest that?

2 MR. GERSHENGORN: So a voter would have  
3 standing to contest it. A candidate would have standing  
4 to contest it if he or she were a voter in the district.  
5 I think under Hays, that --

6 JUSTICE BREYER: And as a congressman, not.

7 MR. GERSHENGORN: As a congressman, I think  
8 not, at least this Court has not said. But remember,  
9 what we have here is a quite different situation where  
10 you have a candidate --

11 JUSTICE BREYER: No, I know it's different,  
12 but what I'm looking for throughout is the -- I  
13 understand that there has been no case which discusses  
14 this -- that I've been able to find. They have the  
15 Meese case, which is in a different context, but why is  
16 that different? And what's bothering me about it, which  
17 -- I don't want you to just say I'm right; I want you to  
18 explain why, if I a.m., or why I'm wrong -- is that  
19 there are potentially dozens of remedial plans and there  
20 are hundreds of possible plans for a State, and every  
21 plan will hurt someone. And if one district in a State  
22 is changed, suddenly you open the door to every  
23 legislature and every Congressman from every other  
24 district challenging the plan.

25 That strikes me as a big shift in the

1 direction of taking power from the legislature and  
2 turning it over to the judges as to what kind of  
3 districting plan you're going to have, and a mess to  
4 boot.

5 MR. GERSHENGORN: Your Honor --

6 JUSTICE BREYER: That's what's worrying me.

7 MR. GERSHENGORN: And I think you're right  
8 to be worried about it, and I --

9 JUSTICE BREYER: Well, I knew you thought I  
10 would be, given your comments.

11 (Laughter.)

12 MR. GERSHENGORN: Now I'm going to tell you  
13 why.

14 See -- but I -- and I do think there are a  
15 couple of responses to that. I mean, we do normally  
16 rely, in that instance, on the State to be the principal  
17 defender. But when the State is not there, what this  
18 Court recognized in *Hollingsworth* is often that means  
19 that the -- the bill goes undefended, and that's not  
20 something that concerns the Court.

21 Now, the reason why we have to be very  
22 careful about legislators and why choosing their own --  
23 I think, as plaintiffs' counsel said, we don't usually  
24 let legislators choose their own -- choose their own  
25 voters, and there is good reason for that. That's not

1 the way the system is supposed to work. And I do think  
2 it would have quite expansive effects. It's not clear  
3 to us there is a huge difference between this kind of  
4 line-drawing and a challenge; for example, that a  
5 legislator might seek to appeal the relocation of a base  
6 or a university in his or her district on the grounds  
7 that that would radically change the number of  
8 Republican or Democratic voters in the district.

9 We do think Meese is --

10 JUSTICE KAGAN: But if you -- yeah, I -- I'm  
11 sorry. I --

12 MR. GERSHENGORN: I was just going to say  
13 that we think Meese is very different, because Meese is  
14 not about choosing the voters in the district. It's  
15 about -- we're not saying that you don't have an injury  
16 -- Article III harm from a harm to reelection. We are  
17 saying that you don't have an interest in vindicating  
18 that right through a -- through choosing the voters in  
19 your district.

20 I'm sorry, Your Honor.

21 JUSTICE KAGAN: I guess I find this a little  
22 bit harder than you just suggested, because this is not  
23 Representative Forbes saying, I want to choose exactly  
24 the set of voters that's going to increase my own  
25 electoral chances. This is Representative Forbes

1 saying, look, there has been an act of the legislature,  
2 and the -- the act of the legislature has given me a  
3 certain set of voters, and why don't I have a legally  
4 cognizable interest in relying on that legislative  
5 judgment when some court has taken it away?

6 MR. GERSHENGORN: Your Honor, I think it's  
7 for the same reason that this Court rejected that idea  
8 in the -- in Hays itself. There isn't a -- a -- a  
9 cognizable interest among the voters or among the  
10 candidates in just seeing that a -- a lawfully  
11 legislated districting plan is enacted. Otherwise, I  
12 think every voter in the State would have standing,  
13 because the legislature said, you should be in this  
14 district, you should have a fair opportunity to vote.  
15 But that's not the direction the Court has gone.

16 And I do think that the combination of --  
17 viewing the office as, one, that the officeholder gets  
18 to choose the constituents, and the potentially broad  
19 impact of that is one that should give this Court some  
20 pause. And particularly -- again, just to pick up on  
21 what plaintiffs' -- plaintiffs' counsel, Mr. Elias, was  
22 saying -- I think, particularly in a situation where you  
23 have a State statute, in this Court's observation in  
24 Hollingsworth, it would be quite unusual, I think, to  
25 find standing here.

1           If I could switch over to the merits very  
2 quickly, a couple of -- a couple of points.

3           I wanted to start with the observations of  
4 Justice Kennedy and Justice Kagan on the  
5 could-have, would-have standard that Mr. Carvin has --  
6 has put forth, which, as I understand it, is basically,  
7 the district is okay even if based on race as long as it  
8 could have been drawn on the basis of politics or would  
9 have been. We think that really flies in the face of  
10 the Shaw and Miller line of cases, that what those cases  
11 are about at core are two principal things: That you  
12 can't use race as a proxy, and you can't sort voters on  
13 the basis of race. And when you do that, it is not a  
14 defense to say, well, I could have done the same thing  
15 on the basis of politics. You can send it back. If the  
16 legislature, in fact, does the same thing, taking race  
17 out of the equation, then fine. The injury that the  
18 Shaw line of cases was designed to get at is eliminated.  
19 It is precisely the sorting. And so I think the  
20 would-have or could-have test that Mr. Carvin has put  
21 forward is really quite at odds with -- with the -- with  
22 this Court's jurisprudence.

23           CHIEF JUSTICE ROBERTS: But, I mean, people  
24 have objected to some extent that Cromartie cut back on  
25 Shaw and Miller as well, and again, I just -- I, at

1 least, would feel on much more solid ground if the  
2 plaintiffs had been put to the test of saying, show us.  
3 They say this isn't about partisanship; this is about  
4 race. Okay. Show us. You draw the district that would  
5 protect the partisanship interest that's going to be  
6 different. And yet the -- the lower court did not  
7 subject them to that inquiry.

8 MR. GERSHENGORN: So, Your Honor, we think  
9 Cromartie is a very important case, but it actually is  
10 quite the -- the exact opposite of the situation here.

11 We think Cromartie is the situation in which  
12 the legislator -- there was direct and substantial  
13 evidence that the legislature acted on the basis of  
14 politics, and statistics were put forward that said it's  
15 equally explained by race. And what this Court said,  
16 and we think it was sensible, is there's basically a  
17 thumb on the scale for politics at that point, to give  
18 the State legislatures their room.

19 But in a situation like this, where there is  
20 direct and substantial evidence that race was at issue,  
21 that same evidence that it's equally consistent with  
22 politics just doesn't cut it. That --

23 CHIEF JUSTICE ROBERTS: Well, okay, if there  
24 is evidence that race is at issue. I will give you a  
25 chance to answer the question I asked each of the



1 others. I wouldn't want to deprive you of that  
2 opportunity.

3 (Laughter.)

4 CHIEF JUSTICE ROBERTS: But you're looking  
5 to see whether race was the motive. What do you do if,  
6 as I said, you know, 10 say yes, 10 say something else,  
7 and 80 don't say anything? How can you say that the  
8 motive of the legislature was -- was this or that?

9 MR. GERSHENGORN: So, Your Honor, I think --  
10 it's obviously a difficult question, but I would say two  
11 things on that.

12 First is, this Court's cases have been  
13 fairly unanimous in looking to the -- to the intent of  
14 the drafter. That's what they look to, for example, in  
15 *Bush v. Vera*. And in Alabama, this Court had a policy,  
16 and it didn't look to see whether each of the  
17 legislators individually had embraced that policy. That  
18 was something that the Court accepted. So I think there  
19 is a long line of case law going that way.

20 And second, of course, it's not solely the  
21 intent of the drafter here. There are objective  
22 indicators, which this Court has indicated in both *Shaw*  
23 and *Miller* are extremely important, things the Court  
24 looks to -- the traditional redistricting factors, such  
25 as contiguity, compactness, are counties being split --

1 that reinforce that kind of intent. And those are  
2 things that are open, that -- that are -- are part of  
3 the plan that was enacted by all of the legislature.  
4 And here --

5 JUSTICE ALITO: What if the drafter or other  
6 members of the legislature say, race was our first  
7 consideration, and by that, what we mean is that we have  
8 to take race into account under the Voting Rights Act,  
9 and that's what we've done? Would that -- what would be  
10 the -- what would be the result there?

11 MR. GERSHENGORN: So, Your Honor, I don't  
12 think that that necessarily results in strict scrutiny.  
13 What this Court has said over and over is that the --  
14 that race must predominate. The mere intentionally --  
15 or consciousness of race, or even the intentional use of  
16 race, is not sufficient.

17 And we think that makes sense, because as  
18 the Court has said, the redistricters are always  
19 conscious of race and always aware of race, and that the  
20 State legislatures need room and -- need room to  
21 maneuver. And so the mere -- the mere fact that you're  
22 conscious of race or even that race -- you intentionally  
23 use race is not sufficient by itself to have strict  
24 scrutiny.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Carvin, you have four minutes remaining.

2 REBUTTAL ARGUMENT OF MICHAEL A. CARVIN

3 ON BEHALF OF THE APPELLANTS

4 MR. CARVIN: I'd like to begin with Justice  
5 Kagan's questions.

6 We've heard a constant theme that if it was  
7 done because of race, a post hoc political explanation  
8 doesn't justify it -- I fully agree with that -- with a  
9 mixed motive case here. That's what the district court  
10 said: Race, politics, and incumbency protection. And  
11 the only reason that race was, quote, "ranked higher"  
12 was because he said that it was a Federal mandate under  
13 the Supremacy Clause. So if that's not a justification,  
14 they committed legal error.

15 If you turn to 33a, why was politics and  
16 incumbency subordinate? They told you: Because that,  
17 quote, "goal was permissive and subordinate to the  
18 mandatory criteria of compliance with the VRA." Now,  
19 they said that they implemented it by not reducing the  
20 benchmark BVAP, but that had nothing to do with the rank  
21 ordering of VRA over these other things.

22 To get to your question: If two --

23 JUSTICE KAGAN: Well, I take the point,  
24 Mr. Carvin, but isn't that really exactly what we  
25 confronted in Alabama, which is -- you know, the number

1 one priority was the VRA, but then it turned out that  
2 they had misunderstood the VIA, so it turned out that  
3 the number one priority was a racial quota, which had  
4 nothing to do with the way the VRA is really supposed to  
5 operate?

6 MR. CARVIN: That's fine, and that goes to  
7 narrow tailoring, but what we are trying to figure out  
8 here is whether or not there is a prima facie case.

9 Now, assume with me that in 30 of the  
10 districts in Alabama, race was completely coextensive.  
11 They didn't assert politics, but with county lines.  
12 Would you ever say that race predominated over something  
13 or subordinated something when they are entirely  
14 coextensive?

15 Let's take it out of the racial context.  
16 Compactness is number two; county lines are number  
17 three. You draw a nice, compact district that complies  
18 with county lines. No one in their right mind would say  
19 "compactness predominated over county lines" because the  
20 same result was ordained by these two motives. And you  
21 can search this opinion for any finding that race was  
22 inconsistent with or subordinated incumbency protection  
23 or politics, and you won't find it.

24 Therefore, they haven't made their basic  
25 burden of showing that traditional districting

1 principles were subordinated nor their specific  
2 Cromartie II burden of showing it was subordinated to  
3 race rather than politics. The only evidence that they  
4 have even tried to come up with at the last minute is  
5 Joint Appendix 439. This is the VTDL analysis done by  
6 McDonald.

7           It is undisputed that it has exactly the  
8 same flaws that this Court rejected as a matter of law  
9 in Cromartie II. Why? Because the racial effect is  
10 identical to the political effect. He made a big deal  
11 about the fact that there was a 16.5 percent gap between  
12 the VTDs in District 3 and those outside of District 3  
13 in terms of race. But what his own index shows on JA  
14 439 is there was also a 16 percent gap in Democratic  
15 percentages. So it's exactly the same flaw that was at  
16 issue in Cromartie II is here.

17           So unless this Court is prepared to allow  
18 district courts to engage in naked defiance of the plain  
19 language and holding of Cromartie II, this case needs to  
20 be reversed.

21           As to your direct evidence point, Justice  
22 Kagan, what was the direct evidence in Cromartie II?  
23 Partisan and racial balance. The Court said as clear as  
24 possible since he said partisanship and race, it says  
25 little or nothing about the relative predominance. What

1 do we have here? Incumbency protection, politics and  
2 race. Therefore the direct evidence says little or  
3 nothing about the relative predominance. What you need  
4 to do is to show that they could have accomplished their  
5 legitimate political objectives in some other way.

6 As to standing, I've heard the slogan  
7 repeated by all of my opponents, "voters choose  
8 representatives not vice versa." That's a lovely  
9 slogan. But the relevant point here is that State  
10 legislatures choose which districts those voters go  
11 into, not the Federal judiciary.

12 If, as you must assume, the Federal  
13 judiciary has exceeded its proper role and created a  
14 system which dramatically hurts the incumbents who were  
15 designed to be protected by this law, how can they not  
16 have a legally cognizable injury-in-fact?

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 The case is submitted.

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

21

22

23

24

25

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