

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS C. ALEXANDER, IN HIS)
OFFICIAL CAPACITY AS PRESIDENT)
OF THE SOUTH CAROLINA SENATE,)
ET AL.,)
Appellants,)
v.) No. 22-807
THE SOUTH CAROLINA STATE)
CONFERENCE OF THE NAACP, ET AL.,)
Appellees.)

Pages: 1 through 137
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Date: October 11, 2023

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5 OF THE SOUTH CAROLINA SENATE,)
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7 Appellants,)
8 v.) No. 22-807
9 THE SOUTH CAROLINA STATE)
10 CONFERENCE OF THE NAACP, ET AL.,)
11 Appellees.)
12 - - - - -

13
14 Washington, D.C.
15 Wednesday, October 11, 2023
16

17 The above-entitled matter came on for
18 oral argument before the Supreme Court of the
19 United States at 10:04 a.m.
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25

1 APPEARANCES:
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3 the Appellants.
4 LEAH C. ADEN, ESQUIRE, New York, New York; on behalf
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8 United States, as amicus curiae, supporting
9 neither party.
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 22-807, Alexander versus the South Carolina State Conference of the NAACP.

Mr. Gore.

ORAL ARGUMENT OF JOHN M. GORE
ON BEHALF OF THE APPELLANTS

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

District 1 is not a racial gerrymander. Rather, the General Assembly largely preserved District 1 from the constitutional benchmark plan and made changes based on traditional criteria and politics. The panel acknowledged that the General Assembly pursued a political goal of increasing District 1's Republican vote share. It achieved that goal by moving Republicans into the district and Democrats out of the district. All of the direct evidence confirms that it used political data, not racial data, to identify Republicans and Democrats.

The panel declared District 1 a racial

1 gerrymander only by departing from this Court's
2 precedents and adopting sua sponte, an erroneous
3 racial target theory.

4 First, the panel failed to enforce the
5 alternative map requirement. In a
6 circumstantial case like this, only such an
7 alternative can disentangle race and politics.

8 Second, the panel's racial target
9 theory hyper-entangled race and politics and
10 simply makes no sense. The panel believed the
11 General Assembly needed a racial target in
12 Charleston County to achieve its political goal
13 district-wide. But a 17 percent racial target
14 says nothing about voter turnout, says nothing
15 whatsoever about the predominant majority of
16 voters in predominantly white Charleston County,
17 and also is irreconcilable with District 1's
18 recent electoral history.

19 Moreover, even the panel agreed that
20 the General Assembly made political changes in
21 other parts of District 1 without using a racial
22 target. The General Assembly had no reason to
23 and did not use a racial target. It used
24 political data to pursue its political goals.

25 If left uncorrected, the decision

1 below will undermine this Court's holding that
2 partisan gerrymandering claims are not
3 justiciable. Partisan gerrymandering claims can
4 always be repackaged as racial gerrymandering
5 claims if all plaintiffs in lower courts have to
6 do is ignore direct evidence of intent, infer a
7 racial target from the correlation between race
8 and politics, and point to malleable expert
9 analysis.

10 This Court should reverse and not
11 allow its exacting precedents to be so easily
12 subverted.

13 I welcome the Court's questions.

14 JUSTICE THOMAS: Mr. Gore, we review
15 this for clear error. And the district court
16 credited the plaintiffs' expert and found your
17 experts non-credible. So how does that meet the
18 clear error standard?

19 MR. GORE: The Court will proceed to
20 clear error if it rejects our legal arguments,
21 but let me turn to Dr. Ragusa first. All three
22 of Dr. Ragusa's opinions raised in this appeal
23 contradict his own data and conclusions in his
24 initial report, which actually demonstrated that
25 race did not predominate in the enacted plan's

1 changes to District 1.

2 His own data showed that politics was
3 a stronger predictor than race of whether a VTD
4 was moved out of District 1. He also concluded
5 that there was no statistically significant
6 correlation between race and whether VTDs were
7 moved into District 1. That's at page 187 of
8 the Joint Appendix and page 514 of our
9 jurisdictional appendix.

10 So those facts alone establish that
11 Dr. Ragusa's three opinions at issue in this
12 appeal are unreliable and unprobative.

13 But there's even more. For each of
14 those three opinions, Dr. Ragusa committed other
15 errors. He did not control for VTD location or
16 proximity to the district line. He also did not
17 control for where in the district voters live.

18 CHIEF JUSTICE ROBERTS: Well, I
19 thought -- I thought he said that as far as
20 geographic contiguity, that the -- the size of
21 the different districts was a adequate proxy for
22 that.

23 MR. GORE: He did say that traditional
24 principles were embedded in his analysis, but
25 whatever he meant by that, he did also admit on

1 cross-examination that he didn't test or control
2 for those principles and whether they explained
3 the decisions the General Assembly actually
4 made.

5 That's the same error that the experts
6 made in Allen that this Court set aside just
7 last term. His failure to consider the location
8 of VTDs and voters within the district is the
9 same error that was committed by the expert in
10 Cromartie II, where this Court reversed a
11 finding of racial gerrymandering under the clear
12 error standard.

13 JUSTICE KAGAN: Did your expert
14 present an alternative study which did control
15 for geography and reached a different result?

16 MR. GORE: He did not try to mirror
17 Dr. Ragusa's study --

18 JUSTICE KAGAN: Because that would
19 have been the easiest way to undermine the
20 theory. I mean, as I understand it, this was
21 hardly touched upon by -- by -- by -- by the
22 state below. And, certainly, the state did not
23 do what would seem to be the -- the normal thing
24 if you were really concerned about this, which
25 is to say: Look at our study. We controlled

1 for geography. The results are entirely
2 different.

3 MR. GORE: We did raise objections to
4 Dr. Ragusa's methodology, and as I was
5 explaining, it is a flawed methodology and not
6 reliable.

7 Moreover, the state presented direct
8 testimony from the map drawer to explain which
9 VTDs were chosen and why. That direct evidence
10 showed, like all the other direct evidence, that
11 decisions were made based on politics and
12 traditional principles and not using race at
13 all.

14 JUSTICE SOTOMAYOR: I think you end up
15 in a very poor starting point under clear error
16 arguing the substance of believability of one
17 expert over another, because credibility
18 findings under clear error standard must be
19 deferred to -- to the district court.

20 I understand your points about -- your
21 point about Dr. Ragusa, but I just point out
22 that other experts before the court and he
23 himself said that geography was very much
24 embedded as part of the structure of his
25 analysis.

1 You may disagree with that. It's
2 going to be very hard for you to show that no
3 fact finder could credit that understanding of
4 his testimony.

5 But I think what I'm really troubled
6 by is, going back to Justice Thomas's question,
7 what's the legal error and what's the clear
8 error? Just tick them off for me.

9 MR. GORE: There are several legal
10 errors, Justice Sotomayor.

11 JUSTICE SOTOMAYOR: Not facts. I want
12 legal errors or clear errors beyond -- under our
13 standard.

14 MR. GORE: The first legal error is a
15 failure to enforce the alternative map
16 requirement.

17 JUSTICE KAGAN: Okay. I'm going to
18 butt in. And I'm sorry, Justice Sotomayor.

19 JUSTICE SOTOMAYOR: Yes, you can --
20 you can start there.

21 JUSTICE KAGAN: The alternative map
22 requirement, I -- I mean, doesn't exist. You
23 know, sometimes this Court, I think, holds
24 things, and then I go back to the opinion and I
25 think: Well, maybe we weren't as clear as we

1 might have been. Not here.

2 I'm just going to read from -- from
3 Cooper: "A plaintiff's task is simply to
4 persuade the trial court -- without any special
5 evidentiary prerequisite -- that race (not
6 politics) was the predominant consideration ...
7 in no area of our equal protection law have we
8 forced plaintiffs to submit one particular form
9 of proof to prevail. Nor would it make sense to
10 do so here ... an alternative map is merely an
11 evidentiary tool ... neither its presence nor
12 its absence can itself resolve a racial
13 gerrymandering claim."

14 I don't know how to more clearly say
15 that there is no alternative map requirement in
16 these kinds of cases.

17 MR. GORE: Cooper was directed -- was
18 addressing a case where there was direct
19 evidence of racial predominance. It also said
20 on page 322 in the majority opinion: In a case
21 like Cromartie II -- that is, one in which the
22 plaintiffs had meager direct evidence of a
23 racial gerrymander and needed to rely on
24 evidence of forgone alternatives -- only maps of
25 that kind could carry the day.

1 JUSTICE KAGAN: All we were saying
2 there, Mr. Gore, is that in a case with no other
3 evidence, you needed some evidence. So that is
4 not this case. Cromartie II was making a very
5 case-specific point, look at this case, there's
6 none -- none of this kind of evidence, there's
7 none of that kind of evidence, there's none of
8 the other kind of evidence. So, my gosh, in
9 that case, you needed a map.

10 But this is case by case, all we were
11 saying is that when you have no other evidence,
12 you better present a map. But that's not to say
13 that there's anything like an alternative map
14 requirement. If you make your case some other
15 way, that's good enough.

16 And, here, the Court found, again, on
17 a clear error standard, that the plaintiffs made
18 their case some other way.

19 MR. GORE: But -- even if that's the
20 correct reading of Cooper, Justice Kagan, there
21 were still other legal errors in how the panel
22 conducted its analysis.

23 JUSTICE ALITO: Well, Mr. Gore --

24 MR. GORE: One --

25 JUSTICE ALITO: -- I thought your

1 argument was that at least as a practical
2 matter, in a case in which there is no direct
3 evidence or virtually no direct evidence, there
4 is no way in which a plaintiff can disentangle
5 race and politics, except by providing an
6 alternative map. I thought that was your legal
7 argument.

8 MR. GORE: That is.

9 JUSTICE KAGAN: And that's exactly
10 what Cooper says is not the case.

11 JUSTICE ALITO: Well, one may read
12 Cooper a different way. Cooper was a case in
13 which there was a lot of direct evidence, was
14 there not?

15 MR. GORE: Yes.

16 JUSTICE JACKSON: Well, let me ask
17 you, how could there be direct evidence really
18 in this kind of case? So this is what I'm a
19 little concerned about because, to the extent
20 that this distinction's turning on whether or
21 not there is direct evidence, I wonder if it is
22 reasonable to require such evidence or -- or say
23 that such evidence would exist in a situation
24 that is not a majority-majority -- a
25 majority-minority district scenario.

1 You can see how there would be direct
2 evidence when the state's goal is to try to, in
3 its view, comply with the VRA, they're trying to
4 make a majority-minority district, so we're
5 going to have some evidence of people saying
6 that.

7 But, in a situation like this, where
8 that is not the case, where the state is saying
9 instead, we are trying to, you know, achieve a
10 partisan tilt, I guess I don't understand --
11 and, excuse me, we've also said that its, you
12 know, intent to use race is a very hard thing to
13 prove just on its own.

14 Are you asking that we have the
15 smoking gun in a situation like this?

16 MR. GORE: Not at all, Justice
17 Jackson. As you pointed out, of course, in
18 majority-minority district contexts, there's
19 often direct evidence of a use of race and even
20 of race predominating.

21 You could also have that in another
22 context if the map-drawer or some key legislator
23 admitted to using race as a proxy for politics
24 because they didn't have adequate election data
25 or --

1 JUSTICE JACKSON: But are you
2 requiring that? Could we ever -- could we ever
3 make this showing on circumstantial evidence
4 alone? I -- there were some amicus briefs
5 related to computer drawings and that sort of
6 thing that they thought would be particularly
7 helpful in this context.

8 MR. GORE: The -- the alternative map
9 itself would perform that requirement because,
10 if race predominated over politics, then any
11 alternative map can be drawn that preserves the
12 political outcome the General Assembly was
13 seeking while removing the alleged racial
14 effect.

15 JUSTICE SOTOMAYOR: Putting that
16 aside, there were alternative maps here that
17 showed that if race wasn't used, the map would
18 not look like this. So it didn't show what
19 you're saying. But we go back, let's assume,
20 let's move back past the map because I think
21 Cooper was petulantly clear that you don't need
22 a smoking gun, and -- if you don't need a
23 smoking gun, you don't need direct evidence.

24 What are the other legal errors?

25 MR. GORE: Another legal error was the

1 panel's misconstruction of the Sell -- Shelby
2 County decision. It also failed to disentangle
3 race and politics, as this Court has directed it
4 to do. It ignored volumes of direct evidence on
5 the politics-versus-race question. It didn't
6 even --

7 JUSTICE SOTOMAYOR: It didn't --

8 MR. GORE: -- discuss that evidence --

9 JUSTICE SOTOMAYOR: -- it -- it --

10 MR. GORE: -- in its opinion.

11 JUSTICE SOTOMAYOR: -- it rejected --
12 the person who drew it was Mr. Roberts? Mr. --
13 and it disclaimed his credibility. So whatever
14 the legislature said in terms of their intent is
15 irrelevant. It's what he did, and the Court did
16 not believe that he didn't use race. It said
17 so.

18 MR. GORE: The -- the Court did not
19 accept his version of events but didn't make a
20 credibility finding based on his demeanor or
21 testimony at trial. It simply credited other
22 evidence.

23 But, in conducting the sensitive
24 inquiry that Cooper requires, the Court was
25 required to look at all the evidence, direct and

1 circumstantial, of intent, and it simply didn't
2 do that here. Senator Campsen testified --

3 JUSTICE KAGAN: That's the legal
4 error, is that they didn't correctly weigh the
5 evidence?

6 MR. GORE: They didn't correctly
7 conduct the inquiry.

8 JUSTICE KAGAN: Because that sounds
9 like a factual error to me. I mean, your brief
10 basically, you know, says we have legal errors,
11 and then it says, well, the evidence didn't
12 show.

13 Those are factual errors. That's
14 subject to the clear error standard, going back
15 to Justice Thomas's question.

16 MR. GORE: To the extent we've also
17 made a clear error argument, I agree, but we've
18 pointed out that the district court failed to
19 properly apply the standards that this Court
20 required in Cooper.

21 Cooper could not have been clearer on
22 that point that the district court is required
23 to weigh all the direct and circumstantial
24 evidence of intent to ensure that plaintiffs
25 have disentangled race and politics.

1 They also were required to presume the
2 good faith of the General Assembly and its
3 explanation for what it did in the lines that it
4 drew. But the panel failed to do both of those
5 things. There was mountains of direct and
6 circumstantial --

7 JUSTICE KAGAN: And that just sounds
8 to me as though you have a different view of the
9 evidence, that you think, well, the evidence
10 showed that we were just doing politics. And
11 the court said no, the evidence showed that you
12 were doing race as a proxy for politics.

13 And, surely, there were good reasons
14 to do race as a proxy for politics here. I
15 mean, if you look at what information the map-
16 drawers had on their computer, the information
17 the map-drawers had on their computer was a
18 single presidential election year voting data
19 and then lots of race data.

20 And everybody can tell you that if you
21 really want to draw a stable partisan
22 gerrymander, you do not rely on a single
23 presidential year election data. I mean, they
24 had not only the opportunity, it was sitting
25 there on their computers, but the clear

1 incentive to be looking at this race data, which
2 is certainly more predictive of future voting
3 behavior than a single presidential year
4 election in which President Trump was the
5 candidate, which further distorts voting
6 behavior.

7 MR. GORE: We -- we totally disagree
8 with that reading of the record. The panel
9 itself did not call into question the
10 reliability of the General Assembly's election
11 data. It, in fact, used that election -- very
12 election data to support its racial target
13 theory.

14 So, if that election data is
15 unreliable, the panel's entire line of reasoning
16 is unreliable. All of the unrebutted direct
17 evidence established that the map-drawing team
18 thought that that evidence was reliable and
19 actually used it to draw lines.

20 Now, on the question of whether racial
21 data --

22 JUSTICE KAGAN: There was evidence
23 that they looked at it. There was evidence that
24 it went into their analysis. But, I mean -- I
25 mean, look at it -- there was -- what the --

1 what the panel said was that there was also
2 plenty of evidence that they looked at the
3 voting record and not just as a legal check on
4 the back end. Nobody needs to have the voting
5 records on your computer as you draw the maps in
6 order to make a legal check.

7 What they were basically doing was to
8 make sure that the population of blacks in each
9 precinct, in each district, you know, did not
10 rise above the -- the -- the -- the number which
11 would make the Republican gerrymander less
12 stable.

13 MR. GORE: That -- that's not what the
14 evidence was at trial. The evidence was that
15 the racial data is embedded in the software but
16 that the map-drawer would have to scroll over to
17 a different screen or down to the bottom in
18 order to be able to see it.

19 I'd also --

20 JUSTICE ALITO: Mr. Gore, is there --
21 is there anything suspicious about the fact that
22 a map-drawer knows the racial demographics of
23 the state or has available the racial
24 demographics of the state? Haven't we spoken
25 about that?

1 MR. GORE: Yes. Many times, this
2 Court has said that mere awareness or
3 consideration of race doesn't prove racial
4 predominance. And that's -- would be
5 particularly true in a state like South Carolina
6 --

7 JUSTICE KAGAN: Your defense --

8 MR. GORE: -- which has Voting
9 Rights Act issues.

10 JUSTICE KAGAN: -- was not something
11 along the lines of we looked at the racial data,
12 but it still -- we -- it -- it -- we -- it
13 didn't rise to the level of predominance.
14 Actually, your defense was we didn't look to the
15 racial data for this purpose. And what the
16 court --

17 MR. GORE: That's correct.

18 JUSTICE KAGAN: -- said was, I don't
19 believe that, made a credibility judgment, you
20 know, basically said your -- your map-maker gets
21 up on the stand and knows this racial data like
22 the back of his hand, and the court says, I just
23 don't believe that they were not looking at the
24 racial data that was right there in front of
25 them for the purpose of making their gerrymander

1 more secure.

2 MR. GORE: And that underscores the
3 district court's error in failing to look at all
4 the evidence. It's true the map-drawer knew the
5 racial composition of one precinct, one VTD. He
6 didn't know the racial composition of other VTDs
7 the district court asked him about, but he did
8 know the political composition of those VTDs and
9 testified to that at trial.

10 Moreover, racial data is not a good
11 predictor of partisan outcomes because racial
12 data doesn't measure turnout or voting behavior
13 --

14 JUSTICE KAGAN: You know --

15 MR. GORE: -- correlations.

16 JUSTICE KAGAN: -- to the contrary. A
17 presidential election is what doesn't measure
18 turnout in a non-presidential year correctly. I
19 mean, I'll just ask you this. There are two
20 maps, let's -- let's say you have before you,
21 that -- that -- where the election data says
22 these districts favored President Trump. One
23 has a 20 percent BVAP, and the other has a
24 17 percent BVAP.

25 Now doesn't any map-maker look and

1 say, you know, I would rather have the
2 17 percent BVAP in order to make sure that going
3 forward this continues to be a Republican
4 district?

5 MR. GORE: I don't believe that's true
6 at all, Justice Kagan. I think they'd look at
7 how much the areas favored President Trump by.
8 And in this particular hypothetical, if we use
9 Beaufort -- Berkeley County --

10 JUSTICE KAGAN: Holding that, you
11 know, constant --

12 MR. GORE: It would depend --

13 JUSTICE KAGAN: -- would you rather
14 have the 20 percent BVAP or the 17 percent BVAP?

15 MR. GORE: It would depend on other
16 factors, such as compliance with traditional
17 districting principles and other objectives the
18 map-drawer was trying to accomplish.

19 JUSTICE KAGAN: See, what this trial
20 court found on the facts, on the evidence, was
21 that the map-makers made a judgment that they
22 would rather have the 17 percent BVAP because
23 that -- you know, along with the election data,
24 they might -- they were -- they -- they looked
25 at this one year of the election data, but that

1 the 17 percent BVAP was what was, hey, if we go
2 above that, we're not sure we can hold this when
3 another election comes.

4 MR. GORE: The record did not support
5 that finding --

6 JUSTICE JACKSON: Well, let me ask
7 you, what's the --

8 MR. GORE: -- and it was infected by
9 legal error.

10 JUSTICE JACKSON: How -- how do you
11 explain the consistency?

12 I mean, my understanding is that
13 thousands of people were moved in and out of
14 this district, and yet that line, the line
15 concerning the amount of, you know, black
16 voter -- adult voter participation remained the
17 same. So, if that was not -- if -- if what the
18 court found here was not happening, how do you
19 explain the consistency of that line?

20 MR. GORE: We have a few explanations
21 for that, Justice Jackson.

22 So the first, to address Justice
23 Kagan's hypothetical, is that the BVAP in draft
24 plans -- through the drafting process actually
25 changed. In the Milk Plan, it was

1 15.48 percent. In the Staff Plan, it was
2 16 percent. The enacted plan is 16.72 percent.
3 The Staff Plan actually has a higher Republican
4 vote share than the Milk Plan. So it did change
5 --

6 JUSTICE JACKSON: Was it ever higher
7 than --

8 MR. GORE: -- over time.

9 JUSTICE JACKSON: -- was it ever
10 higher than the 17? People were being moved
11 around, and you would assume --

12 MR. GORE: They were.

13 JUSTICE JACKSON: -- that if it was --
14 if it was varying, it would do so in both
15 directions.

16 MR. GORE: People were being moved
17 around but not very many people. Remember that
18 District 1 retained 93 percent, almost
19 93 percent, of the district core, which explains
20 why the demographic --

21 JUSTICE JACKSON: But 80 percent of
22 the black people were moved out. Am I wrong
23 about that?

24 MR. GORE: That -- that's not true
25 district-wide.

1 JUSTICE JACKSON: That's not right?

2 MR. GORE: That's not right
3 district-wide.

4 JUSTICE SOTOMAYOR: I'm sorry, you
5 said 93 percent? I thought it was 82.8 percent.

6 MR. GORE: It's -- it depends on the
7 method you use to measure, but the method that
8 was actually used by the General Assembly was
9 over 92 percent district-wide.

10 JUSTICE SOTOMAYOR: Well, that's not
11 what the district court found. I thought it was
12 82.8, which was the lowest core retention of any
13 other district.

14 MR. GORE: But it was the highest --

15 JUSTICE SOTOMAYOR: And so how do you
16 account for the fact that 68.9 percent of whites
17 go to CD1, but only 50.65 percent of blacks do
18 that are Democrats? So you're controlling for
19 partisanship, and the numbers are that
20 disparate.

21 MR. GORE: Because, again, you have to
22 consider where in the district those voters
23 happen to live and where the lines are drawn.

24 JUSTICE SOTOMAYOR: So it's okay --

25 MR. GORE: It was --

1 JUSTICE SOTOMAYOR: -- for the
2 legislature to say, I was looking at
3 partisanship, but I'm not looking at whether
4 someone was white or black, but I'm going to
5 separate CD1 so that it's a hundred miles apart
6 in one county and the only commonality is that
7 they live along I-26 a hundred miles apart? And
8 I'm going to join those two black sections or
9 get rid of them and keep whites there, even
10 though they've got -- they're -- they're -- even
11 though the Democrats could have been moved?

12 MR. GORE: So this Court has been
13 clear that mere racial effects do not prove
14 racial predominance.

15 Moreover, the district court's
16 analysis --

17 JUSTICE SOTOMAYOR: No, but the
18 numbers are -- the numbers are incredible.

19 JUSTICE JACKSON: We're trying --
20 we're looking at intent here. So don't those
21 effects say something about the intent and
22 whether or not the court -- it was plausible --
23 I thought, you know, clear error standard was
24 plausible -- it was plausible for the district
25 court to believe or disbelieve the "we're not

1 looking at race" statement made by the person
2 who was putting this together?

3 MR. GORE: But the racial effects in
4 this plan are far less stark than the racial
5 effects in the Cromartie and Cromartie II plan,
6 where this Court reversed a finding of racial
7 gerrymandering. So, for example, in Cromartie
8 II, the line split a county and created a
9 72 percent BVAP area in one county and a
10 10 percent BVAP area in the other district.

11 JUSTICE GORSUCH: Counsel --

12 MR. GORE: And, here --

13 JUSTICE GORSUCH: -- counsel, I'm --
14 I'm sorry to interrupt, but we've been kind of
15 dancing around the -- the -- the -- the big
16 question, which I think is, to my mind, the
17 district court's finding that -- that your --
18 your clients had to have looked at -- at race
19 data rather than politics data because the
20 politics data wasn't robust enough.

21 Now you -- you've given part of an
22 answer. I'd just like the full answer as to why
23 you think that is clearly erroneous. Tick it
24 off for me.

25 MR. GORE: Sure. So, as I said, the

1 panel itself relied on that data. The direct
2 evidence is that everyone relied on that data.
3 Racial data does not predict election outcomes
4 particularly effectively. The correlation
5 between race and politics only affects election
6 outcomes to the extent people turn out and vote.
7 But racial data doesn't measure that; only
8 election data measures that.

9 Their own expert, Dr. Duchin, agreed
10 with that. Dr. Duchin said that racial data
11 could not be used to predict election outcomes
12 because you have to know about turnout, you have
13 to know about crossover voting and other
14 factors.

15 Their own brief at page 10 concedes
16 that racial data would not predict voting
17 behavior turnout among white voters in the area
18 covered by District 1. The reason for that is
19 that white voters in that area split between
20 Trump and Biden in 2020, and that district and
21 even Charleston County are predominantly white.
22 So using a racial target in that area wouldn't
23 have told you about what the vast majority of
24 voters were going to do.

25 So it's not an effective way to

1 predict election outcomes there. The reason
2 they used the 2020 presidential election data is
3 that the absentee votes had been properly
4 allocated back to precincts --

5 JUSTICE GORSUCH: Well, there's some
6 expert that said -- and I'm sorry to interrupt
7 -- but there's some expert that said the
8 absentee -- a consultant said, I believe it was,
9 that the absentee ballots in the presidential
10 data weren't properly allocated. What's the
11 response to that?

12 MR. GORE: That -- that's completely
13 incorrect. They're citing testimony from Mr.
14 Oldham, who was involved in drawing the Senate
15 plan, not the congressional plan. He said that,
16 hypothetically, election data would be flawed if
17 it didn't do that, but he didn't know one way or
18 the other whether the General Assembly's
19 election data did do that.

20 And, in fact, the testimony,
21 unrebutted at trial, on the data itself shows
22 that the absent -- that the election data the
23 General Assembly used did properly allocate both
24 the absentee ballots back to the precincts and
25 other votes down to the census block level. So

1 it was reliable data. It was the best data
2 available because of the absentee ballot issue
3 from prior year data.

4 Moreover, even though 2020 is a
5 presidential election year, it's also a
6 congressional election year, and it was the most
7 recent congressional election that was available
8 to the map-drawer. It's not uncommon for map-
9 drawers to use one year's worth of election data
10 and to have it be the most recent year.

11 JUSTICE KAGAN: If -- if I could just,
12 you know, summarize what you just said, you
13 think it's clear error on the court's part that
14 it did not accept the view -- clear error that
15 it did not accept the view that racial data
16 would have helped the mapmakers draw a more
17 secure Republican gerrymander?

18 MR. GORE: Yes, that is clear error on
19 this record for the reasons I've just explained.
20 Moreover, it demonstrates the panel's legal
21 error in failing to apply the correct standards
22 --

23 JUSTICE KAGAN: Thank you.

24 MR. GORE: -- which included its
25 failure to conduct a --

1 JUSTICE KAGAN: Thank you.

2 MR. GORE: -- predominance analysis.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Mr. Gore. If I could move to a 30,000-foot
5 perspective, how do you understand what we're
6 supposed to do in evaluating clear error?

7 I mean, we have just an appendices in
8 this case that is like that, and let's say there
9 are a hundred different factual determinations.
10 If we think 15 of them are wrong, do we reverse
11 for clear error in that -- in that situation?

12 MR. GORE: Well, we --

13 CHIEF JUSTICE ROBERTS: Or -- or does
14 it take more? We don't normally review -- other
15 than in these cases, we don't normally review a
16 record for factual findings, and I'm just
17 wondering how you think we should do that.

18 MR. GORE: Even one clear error can be
19 sufficient if it leaves the Court with a
20 definite and firm conviction that an error was
21 made below. And, here, we've pointed to many
22 errors in the district court's analysis, both
23 legal and factual, that establish the standard
24 has been met.

25 This Court did exactly this in

1 Cromartie II. In Cromartie II, the Court
2 reviewed the record and determined that clear
3 error had been committed and therefore reversed
4 a finding of -- of a three-judge panel of racial
5 predominance.

6 CHIEF JUSTICE ROBERTS: So we just
7 give different degrees of the importance of
8 particular facts and weigh those --

9 MR. GORE: We --

10 CHIEF JUSTICE ROBERTS: -- in
11 reviewing the entire record?

12 MR. GORE: Yes, and we've -- we've
13 tried in our brief to show what we think are the
14 most important factual errors made by the
15 district court. There's no direct evidence of
16 any racial target. In fact, all the direct
17 evidence points the other way. And the panel
18 didn't even mention any of that.

19 There's also the -- their own
20 alternative plans. Even if there's no
21 alternative map requirement in this particular
22 case, their own alternative maps fail to
23 disentangle race and politics because they all
24 turn District 1 into a majority Democratic
25 district. That's actually evidence that

1 supports our case because it shows that -- that
2 race and politics can't be disentangled and that
3 they failed to carry their burden.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas?

7 Justice Alito?

8 JUSTICE ALITO: Well, the clear error
9 standard, if that's the standard that we are
10 required to apply, is a very demanding standard,
11 but it is not an impossible standard, and it
12 doesn't mean that we simply rubber-stamp
13 findings by a district court, particularly in a
14 case like this, where we are the only court that
15 is going to be reviewing those findings and
16 particularly in a case in which the -- the basis
17 for a judgment in favor of the prevailing party
18 relies very heavily, if not entirely, on expert
19 reports, the methodology of which can be
20 examined.

21 So, in light of that, I want to ask
22 you about a -- an alleged flaw in Dr. Ragusa's
23 analysis that you mention on page 21 of your
24 reply brief, and Dr. Ragusa's expert report may
25 turn out to be crucial in this case because --

1 is it not correct that all of the other experts
2 failed to control for partisanship?

3 MR. GORE: That is -- that is correct.

4 JUSTICE ALITO: All right. So you say
5 on page 31 that Dr. Ragusa's analysis is flawed
6 because it "used total numbers instead of
7 percentages for VTDs' racial and political
8 compositions."

9 That's what I understand you're
10 saying, is that in determining whether a VTD was
11 moved out or moved in for a political reason, as
12 opposed to -- for a racial reason, as opposed to
13 a political reason, Dr. Ragusa looked only to
14 the number of votes cast for President Biden in
15 those districts.

16 Is that -- is that the problem, rather
17 than the net Biden vote over the Trump vote?

18 MR. GORE: That -- that's one of the
19 problems, yes.

20 JUSTICE ALITO: Could you just explain
21 that problem?

22 MR. GORE: Yes. It was clear at trial
23 -- and the panel even relied upon this in its
24 discussion of Mr. Roberts' testimony -- that the
25 total number is not as relevant as the

1 percentage in determining the effect of moving a
2 VTD because VTDs are of different sizes. And
3 so, when you move a total number, it doesn't
4 tell you as much as the percent composition
5 either racially or politically in terms of how
6 that affects the total composition of a
7 district.

8 The other problem that we pointed out
9 in our brief with that particular analysis is it
10 contradicts Dr. Ragusa's own data from his
11 initial report. His own data in the initial
12 report showed that politics was a stronger
13 predictor than race as to whether VTDs were
14 moved out, and it -- he also concluded that
15 there was no statistically significant
16 correlation to race in terms of VTDs being moved
17 into District 1.

18 So he arrived at this contrary
19 conclusion only by jerry-rigging his analysis.
20 He didn't consider traditional districting
21 principles, he didn't consider VTD or voter
22 location, he committed this error about
23 percentages, and he also didn't consider VT --
24 he lumped these VTDs together in very broad
25 categories, and so they were dissimilar -- it

1 was a dissimilar apples-to-oranges comparison.

2 JUSTICE ALITO: Okay. Can I ask you
3 one more question, and that concerns Mr. Roberts
4 and his job and his background.

5 Am I correct that he is -- he is
6 employed by the legislature?

7 MR. GORE: That's correct.

8 JUSTICE ALITO: And has been employed
9 by the legislature for some period of time?

10 MR. GORE: That's correct.

11 JUSTICE ALITO: And he draws maps for
12 both Republicans and Democrats?

13 MR. GORE: Yes, he did.

14 JUSTICE ALITO: Thank you.

15 MR. GORE: And let me correct one
16 thing that I said. I believe Dr. Liu also
17 claimed to be controlling for partisanship. But
18 Dr. Liu used a flawed VTD data set in his
19 analysis, so his analysis of the enacted plan's
20 VTD moves is also flawed.

21 The -- the Joint Appendix at 142 to
22 144 illustrates the magnitude of that flaw. He
23 thought there were -- his data set told him
24 there were 91 split VTDs in the enacted plan.
25 That's seven times more than there actually

1 were, which is 13.

2 JUSTICE ALITO: All right. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Sotomayor?

5 JUSTICE SOTOMAYOR: You know, on each
6 expert, you take potshots and say they failed to
7 do this, they failed to do that. But we've
8 never required one perfect expert to testify to
9 all aspects of a case, but I worry that your
10 methodology is going to suggest that what we do
11 now is do exactly that and instead of looking at
12 the gestalt, which is what the district court
13 did, not the gestalt, but the whole picture.

14 So you discount all four of the
15 plaintiffs' experts, Dr. Ragusa, but there were
16 three others. Two of the experts accounted for
17 partisanship but not geography, and two others
18 accounted for geography but not partisanship.
19 There's no rule that requires one expert to do
20 all of it.

21 And even with Dr. Ragusa, his purpose
22 for his choices were not your purposes. His
23 purposes for his choices were to show that VTDs
24 with a particular percentage of blacks were
25 going to be selected over white districts, and

1 that proof he made.

2 So I'm wondering, where would the
3 clear error standard come in for us to be doing
4 what Justice Alito did in picking one factor and
5 saying this is a critical flaw that can't be
6 made up by the circumstantial evidence around it
7 from all other three experts?

8 MR. GORE: Two responses on that.
9 Actually, three maybe, Justice Sotomayor.

10 The first is that this is supposed to
11 be a demanding burden for plaintiffs, and so
12 this kind of analysis of the evidence they
13 actually put forward is exactly what this Court
14 did in *Cromartie II* when it recognized that the
15 clear error standard is informed by the
16 demanding burden of proof that the plaintiffs
17 bore below.

18 And in *Cromartie II*, the Court
19 rejected an --

20 JUSTICE SOTOMAYOR: But that doesn't
21 change the clear -- clear error standard. That
22 doesn't make it harsher.

23 MR. GORE: Under -- under any proper
24 formulation of the clear error standard,
25 however, the Court has to ensure that what the

1 district court relied on was actually reliable
2 evidence. And this Court's already did that in
3 Cromartie II when it rejected an expert analysis
4 --

5 JUSTICE SOTOMAYOR: So, if I come away
6 from this looking at all four experts and
7 looking at other cases where we've accepted that
8 expert testimony even with the pointed-out
9 flaws, does that defeat your argument?

10 MR. GORE: No, I don't think it does
11 because what I think you'll find is that in
12 Allen, the Court rejected the analysis of two of
13 the four experts that they put forward in this
14 case. That's Dr. Duchin and Dr. Imai.

15 JUSTICE SOTOMAYOR: But it didn't in
16 others?

17 MR. GORE: Don't know that those
18 particular experts came before the Court, but
19 they made exactly the same error -- committed
20 exactly the same errors in this case that they
21 committed in Allen that led this Court to set
22 aside their analyses, in particular and -- and
23 even more so here because they failed to
24 consider politics in their simulation and
25 ensemble analyses, so they say nothing on the

1 disentanglement question.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 JUSTICE KAGAN: And just to continue
4 in Justice Sotomayor's line of questioning, you
5 have two experts here, Ragusa and Liu, who
6 answer the exact question that is supposed to be
7 answered in such a case. In other words, is
8 this gerrymander based on politics, or is it a
9 way to get to an ultimate goal, an ultimate
10 political goal, but the gerrymandering is based
11 on race?

12 And what the two of them do is that
13 they show that black Democrats are excluded from
14 District 1 at a far greater percentage than
15 white Democrats are.

16 So, you know, Liu says, what is it,
17 61 percent -- now I'm going to lose it --
18 69 percent of white Democrats were -- were --
19 remained in the district, whereas only
20 51 percent of black Democrats did. Ragusa's
21 analysis, similarly clear, a little bit harder
22 to state in one sentence.

23 But -- but both experts essentially
24 said: Look, we've done these regressions, and
25 we can show you that black Democrats and white

1 Democrats are not being treated the same way,
2 that black Democrats are being excluded for the
3 district at a far greater proportion.

4 So, you know, every regression
5 analysis has things that you can poke holes in,
6 but you didn't give anything in response to
7 that. It's not like you said: We have a better
8 regression analysis. We've controlled for more
9 things and we can show you that the -- that the
10 effect disappears.

11 You're saying that it was clear error
12 to credit the plaintiffs' experts dealing with
13 the exact question under review and finding
14 statistically significant results, to credit
15 those experts over your nothing.

16 MR. GORE: Over our direct evidence,
17 which the panel didn't even mention. Those
18 experts had flawed methodology. I already
19 talked about Dr. Liu's VTD data set. The panel
20 didn't even cite to Dr. Liu in its opinion
21 because the glaring error and glaring flaw in
22 his VTD set became so clear on
23 cross-examination. So Dr. Liu's completely out
24 of the case because his VTD data set was
25 worthless. And the district court knew that and

1 didn't even cite to Dr. Liu in the opinion.

2 Dr. Ragusa's regression analysis at
3 one point also used an inapt political number
4 because he used an average Democratic vote
5 number rather than the actual number, and he
6 compared that to the actual African American
7 number. That's at pages 506 and 509 of the
8 Joint Appendix.

9 So, yes, it was clear error to rely on
10 clearly erroneous and unreliable expert
11 testimony and to use that to override a mountain
12 of direct evidence, both looking at Charleston
13 County and district-wide, that established that
14 the plan achieved the General Assembly's
15 political goal uniquely among all the plans
16 presented at trial and that it complied with
17 traditional districting principles both in
18 Charleston County and in District 1
19 district-wide, again, uniquely among all the
20 alternatives presented at trial.

21 That -- that's the -- if that's not
22 the definition of clear error, then I don't know
23 what is. And if that's not the definition of
24 departing from the presumption of good faith and
25 the requirement of extraordinary caution, then

1 plaintiffs no longer face a demanding burden in
2 these cases.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch?

5 Justice Kavanaugh?

6 JUSTICE KAVANAUGH: I want to make
7 sure you have a chance to summarize the evidence
8 as you see it of why Charleston County was split
9 the way it was split.

10 MR. GORE: Thank -- thank you, Justice
11 Kavanaugh.

12 So, first of all, it was done for
13 political reasons because, of course, it was
14 part and parcel of achieving the district -- the
15 goal, the political goal, district-wide. The
16 big -- the most significant move that the
17 enacted plan made was in Charleston County. It
18 moved the West Ashley neighborhood from District
19 1 to District 6.

20 That was over 80,000 of the 140,000
21 people that were moved from District 1 to
22 District 6. West Ashley is a close-in suburb of
23 Charleston. It is majority Democratic but also
24 predominantly white. We've given the figures in
25 our brief that show that that move in particular

1 had a much greater impact on the political
2 composition of District 1 than its racial
3 composition. So that move, which is over half
4 of the people involved, is itself more easily
5 explained by politics than by race.

6 The line in Charleston County actually
7 improved compliance with traditional districting
8 principles compared to the benchmark plan. The
9 benchmark plan had five split VTDs in Charleston
10 County. The enacted plan fixed all of those.
11 The enacted plan also followed natural
12 geographic boundaries in Charleston County, such
13 as rivers, which are very significant methods of
14 transportation and commerce in a -- in a county
15 like Charleston that's coastal.

16 It also achieved Senator Campsen's
17 policy goal, which was to keep two
18 representatives in Charleston County to
19 represent the county's interests here in
20 Washington, D.C.

21 JUSTICE KAVANAUGH: And why don't you
22 explain that a little more.

23 MR. GORE: So Senator Campsen
24 testified on direct that he loves having Jim
25 Clyburn represent Charles -- a portion of

1 Charleston County because Congressman Clyburn is
2 one of the most powerful Democrats in the
3 Congress, and what Senator Campsen explained is
4 that Joe Biden wouldn't be president if it
5 weren't for Congressman Clyburn. So, of course,
6 he wants Congressman Clyburn representing the
7 interests of his home county of Charleston. But
8 he also wanted to keep a Republican
9 representative there too in case there's a
10 change in administration here in Washington.

11 Congressman Clyburn's own draft map
12 kept a split in Charleston County because he
13 wanted to keep a portion of Charleston County in
14 his district as well.

15 JUSTICE KAVANAUGH: What was the black
16 voting population in District 1 in that map?

17 MR. GORE: It was only 15.48 percent,
18 which is lower than where it ended up under the
19 enacted plan by more than a point.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 JUSTICE BARRETT: I have a question
23 about Dr. Ragusa's expert report. I just want
24 to make sure that I understand, because the
25 circumstantial evidence is what the plaintiffs

1 relied on, and the whole issue is disentangling
2 race and partisanship.

3 I understood your brief to say, but
4 you haven't said this yet that I heard, so I
5 want to make sure I understand it correctly,
6 that he did not take into account factors like
7 contiguousness and compactness, and so he was
8 assuming that you could have essentially kind of
9 an island cut off in the middle of the district
10 that would have more black voters, which would
11 obviously then not be contiguous.

12 Am I misunderstanding that?

13 MR. GORE: That -- that's correct for
14 his county envelope analysis, yes.

15 JUSTICE BARRETT: Okay.

16 MR. GORE: And what he also didn't do
17 is the other piece of that, is control or test
18 for traditional principles. That's on page 197
19 of the Joint Appendix.

20 And what we mean by that is it would
21 be possible to draw different lines for District
22 1 in a county, take Charleston County or
23 Dorchester, which are both split. But, if you
24 want to go out and grab that other VTD, you have
25 to make tradeoffs elsewhere because, if you're

1 changing the shape of the district or picking up
2 additional population from other VTDs, you have
3 to offset that somewhere else.

4 And so what a properly done analysis
5 does, as this Court recognized in Allen, would
6 test whether the decisions that were made are
7 more or less consistent with traditional
8 principles than the decisions the expert is
9 proposing. And Dr. Ragusa doesn't do that here
10 because he doesn't control for traditional
11 principles like contiguity.

12 And his analysis is different than the
13 analysis that was done and this Court credited
14 in Cooper because of the thing I mentioned
15 before about his regression analysis using only
16 an average political number rather than the
17 actual political number in each VTD.

18 JUSTICE BARRETT: And how much of a
19 point did you make of that in the district
20 court?

21 MR. GORE: We -- we raised many -- we
22 raised a lot of objections to Dr. Ragusa and his
23 methodology in the district court.

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: Yeah, can I drill
3 down on that a little bit? Because I think
4 that's at the heart of one of my concerns about
5 the burdens and some of the questions that we've
6 heard.

7 So you put on Mr. Trende at the
8 district court, and my understanding was that
9 Mr. Trende did not really, as an expert,
10 undercut the methodologies of Ragusa and the
11 other experts. Is that -- is that correct? I
12 mean, he didn't put forward an alternative or do
13 a kind of methodological analysis of Ragusa, did
14 he?

15 MR. GORE: He did point out some of
16 the flaws in -- in his expert reports, including
17 this use of total numbers instead of
18 percentages. He also talked about the
19 contiguity issue in the county envelope analysis
20 I was just discussing with Justice Barrett.

21 JUSTICE JACKSON: But you --

22 MR. GORE: He did --

23 JUSTICE JACKSON: Oh, sorry. So he
24 did?

25 MR. GORE: He did point out some of

1 these methodological flaws. And we pointed them
2 out also to the district court.

3 JUSTICE JACKSON: And what if the
4 district court disagreed? I mean, the district
5 court ultimately relies on Ragusa's expert --
6 expertise, and you say that you challenged,
7 although you did not really bring an expert
8 report that met Ragusa at the same level, but
9 you -- you raised the objections, and the
10 district court disagreed apparently, right?

11 MR. GORE: That's correct.

12 JUSTICE JACKSON: Okay. So I guess
13 what I'm concerned about is that I kind of hear
14 you wanting us to do a de novo review, as
15 opposed to a clear error review, because, to the
16 extent that you're now asking us to look at the
17 flaws in Ragusa's testimony and I guess disagree
18 with the district court's crediting that -- that
19 -- that report, that sounds to me like de novo.

20 I understood from Cooper that the
21 clear error standard -- and I had it here a
22 second ago -- is a highly deferential standard,
23 that the Court may not reverse just because it
24 would have decided the matter differently. A
25 finding that is plausible in light of the full

1 record, even if another is equally or more so,
2 must govern.

3 So to what extent do we have to credit
4 the district court's disagreement with your
5 objections to Ragusa's report?

6 MR. GORE: That's a great question.
7 Let me give a couple of responses.

8 First of all, as you just read from
9 Cooper, the court has to consider whether it's
10 plausible in light of the entire record and all
11 of the evidence. And, here, the district court
12 just ignored other evidence that was put
13 forward.

14 What we are asking the Court to do is
15 exactly what it did in Cromartie II. In
16 Cromartie II, there was a plaintiff's expert who
17 did an analysis of VTDs moved in or moved out or
18 potentially available to the district. The
19 state also put forward an expert to give the
20 contradictory interpretation of that evidence,
21 but the district court excluded that expert.

22 JUSTICE JACKSON: Yes --

23 MR. GORE: Once the case --

24 JUSTICE JACKSON: -- but wasn't there
25 other -- I'm sorry. Wasn't Cromartie II a

1 majority-minority district scenario?

2 MR. GORE: Sure, which, again, is all
3 the more reason why the racial target theory in
4 this case just makes no sense, because there's
5 no motive -- clear motivation to --

6 JUSTICE JACKSON: No, I understand.
7 You're sort of shifting. I guess I'm just
8 trying -- so keep going.

9 MR. GORE: But -- but -- yes.

10 JUSTICE JACKSON: Cromartie II --

11 MR. GORE: So Cromartie II --

12 JUSTICE JACKSON: -- you're asking us
13 to do the same thing?

14 MR. GORE: -- we had exactly the same
15 situation with the experts. The district court
16 had excluded the defense expert, so that expert
17 wasn't really considered by this Court on
18 review, but this Court went through as part of
19 clear error to ensure that the district court
20 had not relied on -- relied on clearly erroneous
21 expert testimony and a bad methodology. That's
22 what most of Cromartie II found.

23 JUSTICE JACKSON: But how does clear
24 error work in that? Like, I understood the
25 standard now, post-Cooper, to be is it plausible

1 that the district court could have relied on
2 Ragusa's testimony and could have found it to be
3 reliable. And in the absence of a defense
4 expert that's actually poking methodological
5 holes in it, I think you have a hard time, you
6 know, if our burden is just to say was it
7 plausible that the -- the district court got it
8 right in terms of the -- of the crediting of the
9 -- Ragusa's report?

10 MR. GORE: I don't think that's what
11 the -- exactly what the clear error standard
12 requires.

13 JUSTICE JACKSON: All right. So tell
14 me what it requires.

15 MR. GORE: It says: Is the district
16 court's finding of predominance as -- as a
17 finding plausible in light of the whole record?

18 JUSTICE JACKSON: And that --

19 MR. GORE: It doesn't mean --

20 JUSTICE JACKSON: -- includes both the
21 expertise and also the district court's
22 credibility findings? Which is another sort of
23 aspect of this that I really wanted to pin down.

24 You say the district court ignored
25 other evidence. But it did have a trial, and it

1 had the actual person who drew the maps come in,
2 and there's testimony in the record where the
3 court itself is questioning directly, not
4 relying on the attorneys, but actually putting
5 questions to that -- that map-drawer. And I'm
6 just wondering how we are to assess the court's
7 determination that it disagreed with or didn't
8 believe the expert when he said, I'm -- was
9 looking at -- at partisanship and not race.

10 MR. GORE: There was -- it was not a
11 credibility determination because the court
12 never based that on his demeanor on the witness
13 stand or at trial. The court credited other
14 evidence, but there was also other evidence the
15 court didn't even discuss, such as the direct --

16 JUSTICE JACKSON: So are you saying
17 the court could not have disagreed -- I mean,
18 they asked him the question, moving that line up
19 into the African American areas of North
20 Charleston you would say was for a partisan
21 lean, correct? And the witness says yes. And
22 -- and they ultimately find that that's not so.

23 So why isn't that a -- a -- a finding,
24 I disagree, I don't believe you?

25 MR. GORE: A credibility

1 determination, as we pointed out in our reply
2 brief, requires a determination about the
3 demeanor of the witness on the stand.
4 Otherwise, district courts could always wrap
5 their fact findings in credibility
6 determinations in an -- in an attempt to avoid
7 review. They didn't even do that here. There
8 isn't that kind of classic credibility
9 determination.

10 But even setting that aside, there was
11 all kinds of direct testimony from Senator
12 Campsen, who was the sponsor of the bill, from
13 Senator Massey, who was the Senate Majority
14 Leader, from Representative Jordan, who also
15 testified about text messages in the record.

16 JUSTICE JACKSON: So what would a
17 plaintiff have needed -- and this is my final
18 question. I'm short on time. What would a
19 plaintiff have need -- have needed in your view,
20 direct evidence, a statement that says we are
21 using race and not partisanship in this
22 particular area?

23 MR. GORE: That, or an alternative map
24 that disentangled the two, or, if you think the
25 alternative map's not required, a full

1 evidentiary picture that showed that traditional
2 principles actually were subordinated to race.
3 And, here, there's been no showing for the
4 reasons I just discussed with Justice Kavanaugh
5 --

6 JUSTICE JACKSON: Thank you.

7 MR. GORE: -- a line in Charleston
8 County complies with traditional principles.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Ms. Aden.

13 ORAL ARGUMENT OF LEAH C. ADEN

14 ON BEHALF OF THE APPELLEES

15 MS. ADEN: Mr. Chief Justice, and may
16 it please the Court:

17 No party disputes Cooper's basic legal
18 rule that absent a compelling interest, race
19 cannot predominate in line drawing, even as a
20 means to achieve a partisan goal. Here, the
21 panel properly concluded that race predominated
22 over partisanship in CD1's design based on
23 strong factual findings, including that after
24 map-drawers moved more than 193,000 people in
25 and out of CD1, its BVAP remained identical as

1 in the 2011 map.

2 In so doing, mapmakers sorted more
3 than 30,000 black Charlestonians based on their
4 race, removing 11 of the 12 precincts with the
5 highest black Voting-Age Populations. This
6 massive movement disregarded the least change
7 approach that the state applied statewide and
8 that map-makers admitted they abandoned only in
9 Charleston County, which had been CD1's
10 historical anchor.

11 Disentangling race and party
12 affiliation using the very methods this Court
13 accepted in Cooper, the panel credited the
14 un rebutted expert testimony that race was a
15 better predictor than partisan affiliation for
16 the design of CD1.

17 Under the clear error review standard,
18 this Court should affirm the panel's factual --
19 racial gerrymandering factual finding because it
20 is more than plausible in light of the total of
21 the record. Appellants also cannot show that
22 the panel committed a legal error, particularly
23 in its rejection of the alternative map
24 requirement.

25 Finally, the record here is indeed the

1 inverse of Cromartie II, where a majority of
2 this Court determined that mapmakers designed a
3 district using political voting behavior over
4 time, rather than relying upon racial
5 stereotypes.

6 Here, by contrast, the panel found
7 non-credible the Appellants' assertion that they
8 relied on merely 2020 partisan performance data
9 for CD1's design.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Counsel, we normally
12 have an alternate map in these redistricting
13 cases, and, of course, we don't have one here.
14 In these -- in instances where you have a high
15 correlation between race and political
16 affiliation, how would you constitutionally
17 disentangle them?

18 MS. ADEN: We have something we
19 believe that was better, if not comparable, to
20 an alternative map. We have this unrebutted
21 testimony of Dr. Ragusa. That testimony is
22 corroborated by the testimony of Dr. Liu.

23 If you look at the amici briefs of the
24 political scientists who performed the analysis
25 in Cooper, they validate that the methods that

1 Dr. Ragusa and Dr. Liu used are the same as in
2 Cooper. All of the potshots that are made by
3 the defendants in their brief about Dr. Ragusa's
4 analyses and Dr. Liu's, almost all of them,
5 nearly all of them, and I can walk you through
6 them, were made during either discovery or
7 during Daubert motions or at trial, and the
8 court simply didn't reject them.

9 It is unrebutted evidence
10 disentangling race and party, which is a form of
11 circumstantial evidence, but akin to an
12 alternative map. If you look at Dr. Ragusa's
13 rebuttal report, Figure 1, he charts out all the
14 VTDs in CD1, and he looks at the -- whether the
15 racial part -- composition or the political
16 composition determined their placement in the
17 map. And you can see that four of the five
18 heaviest black precincts were moved out of CD1.
19 By contrast, only five of the 17 majority white
20 precincts were removed from CD1.

21 And this is, again, unrebutted
22 testimony, and it serves the purpose of an
23 alternative map because this Court unanimously
24 in Desert Palace said that there is no
25 particular form of proof a plaintiff needs to

1 show in an equal protection case.

2 CHIEF JUSTICE ROBERTS: Counsel, we
3 have said that the burden that you're assuming
4 of disentangling race and politics in a
5 situation like this is very, very difficult.
6 But it is your burden, right?

7 MS. ADEN: Yes, Your Honor.

8 CHIEF JUSTICE ROBERTS: And -- and
9 you're trying to -- to carry it without any
10 direct evidence, with no alternative map, with
11 no odd-shaped districts, which we often get in
12 gerrymandering cases, and with a wealth of
13 political data that you're suggesting your
14 friends on the other side would ignore in favor
15 of racial data.

16 Have we ever had a case like that with
17 that combination? We usually are looking for
18 those sorts of things and we have those. Have
19 we ever had a case before where all it is is
20 circumstantial evidence?

21 MS. ADEN: I -- I wracked my mind and
22 I think the closest we might come to it is a
23 case like Gomillion, where plaintiffs would have
24 lost there if they had been required to have
25 proved by direct evidence where the

1 circumstantial evidence was overwhelming.

2 But, here, if you're asking whether
3 there is direct evidence that the legislature
4 admitted in the 21st Century that they sorted
5 voters on the basis of race as a means to
6 achieve their political goal, no, we do not have
7 that.

8 But what we do have is the factual
9 finding that the map-makers had Maptitude data
10 with race data --

11 CHIEF JUSTICE ROBERTS: Well, I
12 understand that, and there's a lot of
13 back-and-forth on it, and you certainly have the
14 clear error standard in reviewing that.

15 But we've never had a case where
16 there's been no direct evidence, no map, no
17 strangely configured districts, a very large
18 amount of political evidence, whether the
19 district court chose to credit it or not, and,
20 instead, it all resting on circumstantial
21 evidence.

22 Circumstantial evidence to -- to
23 determine what we held as recently as in Allen
24 last year is something that is peculiarly in the
25 province of the states in drawing the districts.

1 I -- I'm not saying you can't get
2 there, but -- but it does seem that this is the
3 -- this would be breaking new ground in our
4 voting rights jurisprudence.

5 MS. ADEN: Respectfully, I -- I
6 disagree. I mean, we have strong -- this is not
7 Cromartie. We have strong circumstantial
8 evidence where we're not relying upon the -- the
9 Court did not rely upon forgone alternatives or
10 conclusions about what happened.

11 We have a racial target that the fact
12 that the Senate was proposing various maps over
13 the legislative process and moving 193,000
14 people around and they can only explain it as
15 being by coincidence, the fact that the question
16 in a Shaw case is whether there was a
17 significant sorting of black voters on the basis
18 -- of -- of voters on the basis of race.

19 We have 30,000 Charlestonians moved
20 out of CD1, out of their home county. It cannot
21 be explained by least change, the priority
22 principle that they said was guiding their map
23 for much --

24 CHIEF JUSTICE ROBERTS: But just to --

25 MS. ADEN: -- of the legislative

1 process.

2 CHIEF JUSTICE ROBERTS: Sorry to
3 interrupt. And that is to change the voting
4 percentage in that district by how much?

5 MS. ADEN: Ultimately, it was by
6 1.36 percent, and Senator Campsen used that
7 1.36 percent, the lead sponsor, to disclaim that
8 this was a partisan gerrymander during the
9 legislative process.

10 So the court accepted that they had a
11 legitimate means to achieve this political goal.
12 We don't dispute that. The court accepted that
13 they had this preference to bring in political
14 counties. But what the court acknowledged is
15 that when bring -- they brought in those
16 counties, there were black people brought in
17 alongside with them.

18 That then led to an increased BVAP in
19 CD1 that became too politically risky. And for
20 the black people they brought in, they offset
21 the black people by --

22 CHIEF JUSTICE ROBERTS: This is --

23 MS. ADEN: -- by expelling them from
24 Charleston County. And that goes to the heart
25 of this Court's jurisprudence of using race as a

1 means, even for a legitimate political goal, as
2 --

3 CHIEF JUSTICE ROBERTS: Well, it's
4 not -- just so I understand correctly, this is
5 not a voting rights case, right?

6 MS. ADEN: This is a --

7 CHIEF JUSTICE ROBERTS: It's not --
8 it's a gerrymandering case, right? And they did
9 all of these things to increase the percentage
10 of the voters they wanted in that district by
11 1.6 percent?

12 MS. ADEN: 1.36 percent.

13 CHIEF JUSTICE ROBERTS: 1.3 percent.

14 MS. ADEN: Mm-hmm. Yeah. Close
15 enough. But --

16 JUSTICE ALITO: You had --

17 MS. ADEN: -- whether --

18 JUSTICE ALITO: I -- I'm sorry.

19 MS. ADEN: Yes.

20 JUSTICE ALITO: You had four
21 sophisticated experts, right?

22 MS. ADEN: Yes.

23 JUSTICE ALITO: Is there any reason
24 why one or more of them could not have drawn up
25 an alternative map that met the legislature's

1 stated partisan goal but had a different effect
2 on the racial composition?

3 MS. ADEN: Because, once again, we
4 think that we proffered evidence that was as
5 good as, if not comparable to, an alternative
6 map. You can --

7 JUSTICE ALITO: But they -- you admit
8 they could have done that? It wouldn't have
9 been a big burden for them to do that?

10 MS. ADEN: Well, I would submit --

11 JUSTICE ALITO: And they didn't do it?

12 MS. ADEN: -- that the legislative
13 record reflects that the partisan justifications
14 did not become clear until midway through trial.
15 For most of the legislative session, most of
16 discovery in the case, the map -- enacted map
17 was defended as being compliant with traditional
18 redistricting principles.

19 JUSTICE ALITO: I mean, this whole
20 case --

21 MS. ADEN: It only --

22 JUSTICE ALITO: -- this whole case is
23 about -- is about disentangling race and
24 politics, right? That's what the whole case is
25 about.

1 MS. ADEN: But the justification for
2 the map was largely based upon traditional
3 redistricting principles until trial. Then, at
4 trial, the lead counsel says this was about
5 partisanship, this was about -- and the map --
6 map creator -- says, I was instructed to make
7 this a Republican-leaning district.

8 JUSTICE ALITO: And until --

9 MS. ADEN: -- and, alternatively, it's
10 traditional redistricting principles --

11 JUSTICE ALITO: I -- I'm sorry, I
12 didn't mean to interrupt. Until trial, you
13 thought that the state was going to defend this
14 without making the argument that this was done
15 to increase Republican chances in District 1?

16 MS. ADEN: Yes, because it was not --

17 JUSTICE ALITO: Really?

18 MS. ADEN: -- because it was not in
19 the guidelines for the legislature that they
20 were achieving a political goal. There are
21 statements that we have included in our brief
22 that outline that people were disclaiming that
23 this was about partisanship and this was about
24 -- but even if -- even if --

25 JUSTICE ALITO: You didn't see that in

1 the discovery? You had very extensive
2 discovery.

3 MS. ADEN: There was people -- during
4 -- it looked --

5 JUSTICE ALITO: They didn't say the
6 discovery doesn't -- the -- the -- the members
7 of the legislature in the discovery didn't say
8 this is what our aim was?

9 MS. ADEN: If you look to the
10 testimony of people like Mr. Fiffick, Mr.
11 Terreni, these were counsel for the staff, they
12 were all disclaiming in the lead-up to trial
13 that this was about partisanship.

14 JUSTICE JACKSON: And, in fact --

15 JUSTICE ALITO: Let me come back to
16 Doctor --

17 JUSTICE KAGAN: I mean, you know the
18 -- the -- the record better than I do, but is it
19 a particular surprise that people did not brag
20 about the fact that they were doing a partisan
21 gerrymander?

22 MS. ADEN: And the court acknowledged
23 that in its opinion, that --

24 JUSTICE KAGAN: Is it a surprise that,
25 instead, they disclaimed that they were doing a

1 partisan gerrymander until it got to the point
2 where they thought we better make a case?

3 MS. ADEN: And we know that they were,
4 notwithstanding looking at BVAP throughout the
5 legislative process, they were running BVAP
6 reports for every map and they were looking at
7 the connection between racial data and political
8 data, and because they believed, whether they
9 were right or wrong, whether they should have
10 relied upon one piece of partisan data or not,
11 they were relying upon race consistently to
12 understand the ramifications politically for
13 their map drawing.

14 JUSTICE BARRETT: But didn't they --

15 JUSTICE ALITO: But you have no --

16 MS ADEN: And they have no good reason
17 --

18 JUSTICE ALITO: -- do you have -- do
19 you have evidence of that, that they were
20 relying extensively on race?

21 MS. ADEN: Yes. We know that, again,
22 they were looking at race as they -- on the
23 screen seeing how it --

24 JUSTICE ALITO: Well, they had --

25 MS. ADEN: -- factored into the BVAP

1 --

2 JUSTICE ALITO: -- the racial data.

3 MS. ADEN: -- and seeing how it
4 affected the --

5 JUSTICE ALITO: Is there anything
6 surprising about that?

7 MS. ADEN: And we don't -- we don't
8 have a problem with them ignore -- looking at
9 race data or being race-conscious. But they had
10 no good reason to do it, and, again, they were
11 disclaiming it.

12 JUSTICE BARRETT: But I thought
13 counsel that needed to ensure compliance with
14 the Voting Rights Act was asking Mr. Roberts for
15 the racial data.

16 MS. ADEN: There was no -- there's
17 never been a defense that they were trying to
18 draw CD1 in order to comply with the Voting
19 Rights Act. They disclaimed that they were
20 looking at race at all. And the court found
21 non-credible that they were not looking at race.

22 In fact, the experts tested, do the
23 maps -- are they more predictive based upon
24 racial data and BVAP data than they are partisan
25 data? They used the 2020 political data that

1 the state said they only used. And Dr. Ragusa,
2 corroborated by Dr. Imai, demonstrate that race
3 was a better predictor than the only -- the only
4 single piece of data that they had that their
5 consultant for the Senate was telling them was
6 unreliable for predicting political behavior
7 over time. These are all factual findings --

8 JUSTICE ALITO: Dr. Imai ran --

9 MS. ADEN: -- they had that were
10 provided in the record.

11 JUSTICE KAGAN: Why -- why -- why --
12 why did they have so little electoral data?

13 MS. ADEN: We don't --

14 JUSTICE KAGAN: Because, I -- I mean,
15 it strikes me as, like, if -- if you were really
16 using electoral data, why wouldn't you have more
17 of it?

18 MS. ADEN: Well, they had more. They
19 had -- they -- in addition to the 2020 political
20 data, they got the 2020 -- I mean, in the 2020
21 presidential data, they had the 2020 Senate
22 data, but they've never advanced that they used
23 that. The State Elections Commission is a
24 defendant in this case, and they have tons of
25 data, but they did not use it.

1 And what the record reflects is that
2 they were consistently looking at race because
3 they had an expectation that race was a
4 predictor for how political outcomes would
5 perform. This is shown in the closing argument
6 of counsel, my friend, who showed the connection
7 between race and party in his closing. But he
8 was relying upon racial reports and some
9 partisan reports that were being generated
10 during the legislative process.

11 And, once again, it is more than
12 plausible that the court said in the total of
13 evidence that the fact that there was this
14 consistency in the BVAP, despite the fact that
15 maps were changing over time, the House even
16 tried to propose a map that was 20 percent BVAP,
17 and Senator Campsen intervened, and then the
18 House ultimately adopted a map with the BVAP.
19 The National Republican Redistricting Trust was
20 proposing maps around 17 percent.

21 And in the colloquy with Mr. Roberts,
22 the court asked: What would happen if you bring
23 in VTDs or counties that maybe are not majority
24 black but are below majority black? Would that
25 affect the overall BVAP of your district? And

1 he acknowledged that it would. So --

2 JUSTICE ALITO: Well, when race and --
3 when race and partisanship are so closely
4 aligned, as they are in fact, why is it
5 surprising that a legislature that is pursuing a
6 partisan goal would favor a -- a map that turns
7 out consistently to have the same BVAP?

8 MS. ADEN: Because, if they're using
9 race as the means to get there, this Court last
10 term said that a legitimate interest cannot be
11 achieved --

12 JUSTICE ALITO: Yeah.

13 MS. ADEN: -- with illegitimate ends.

14 JUSTICE ALITO: Yeah, if they're -- if
15 that's what they're using. But, if they are
16 disregarding race entirely and looking only at
17 politics, where race and politics are so closely
18 aligned, it isn't surprising that when you want
19 to get a district that has a certain Republican
20 percentage, you're going to get a district that
21 has a -- a -- a steady BVAP.

22 MS. ADEN: Two responses to that.
23 Even if the map-maker wasn't just looking at
24 race in the actual documents, the court credited
25 that it was in his mind and that all the

1 evidence reflects that they were looking at
2 race. The fact that they were trying to keep it
3 at 17 percent reflects that it had worked at
4 17 percent prior to 2018. It worked at
5 17 percent after 2018. They were defending this
6 map as being least change, a map that had
7 pre-cleared the Department of Justice, that had
8 survived a constitutional challenge. And,
9 again, the lead sponsor said we only wanted to
10 make this a little bit more Republican-leaning
11 at trial.

12 So they served their purpose, but at
13 the heart of this, they served their purpose by
14 focusing on the -- the precincts with the
15 highest BVAPs, leaving alone white precincts
16 with -- in -- in Charleston and moving out black
17 precincts and pushing them --

18 JUSTICE KAVANAUGH: What about West
19 Ashley? The -- your opposing counsel mentioned
20 West Ash -- West Ashley was moved out. So just
21 give you a chance to respond to that.

22 MS. ADEN: West Ashley is cited by the
23 court. This is a historic community that has a
24 lot of mixed precincts, but what we see is that
25 the entirety of --

1 JUSTICE KAVANAUGH: It's predominantly
2 white, isn't it?

3 MS. ADEN: It's predominantly white,
4 but the precincts with the highest and most
5 significant black populations, those were
6 targeted for movement. And the court recognized
7 that, yes, white voters may be overall impacted
8 by this map, but because this is a White versus
9 Regester reality on the ground look by this
10 three-judge panel, they recognized that there
11 were some mixed precincts. There were white
12 voters impacted.

13 But the unrebutted expert evidence is
14 that race was a better predictor for movement
15 and that black Democrat -- black voters were
16 significantly and disproportionately targeted
17 for movement.

18 And that is unrebutted by the state.
19 The district court says they cannot explain the
20 30,000 Charlestonians moved out of CD1. They've
21 never been able to explain that --

22 JUSTICE ALITO: Well, this -- I'm
23 sorry. Did you want to finish your sentence?

24 MS. ADEN: They've never been able to
25 explain that significant sorting, which complies

1 with the question in Shaw.

2 JUSTICE ALITO: Yeah, I think this
3 goes to what Mr. Gore claims is a very serious
4 flaw in Dr. Ragusa's methodology, and I -- I
5 want you to talk about that. Maybe you have a
6 good answer to his argument.

7 So let's say the Republican
8 legislature is intent on ensuring that District
9 1 has a Republican lead. Then, all else being
10 equal, which of the following two precincts
11 would they rather include in District 1: a
12 district with -- a precinct with 3,000 residents
13 that went 900 to 800 for Trump, 900 votes for
14 President Trump, 800 votes for President Biden,
15 or a precinct with the same number of residents,
16 3,000, that went 700 to 600 for Biden, 700,
17 okay, 700 votes for President Biden, 600 for
18 Trump? Which one would you rather include if
19 you're a Republican legislature that wants to
20 produce a Republican-leaning district?

21 MS. ADEN: I would like to know two
22 things with respect to the racial makeup of
23 those precincts because, here, we know that the
24 legislature knew not only the partisan
25 performance based upon the 2020 data, but they

1 knew the racial makeup that they --

2 JUSTICE ALITO: Well, suppose you
3 don't know anything -- you don't know anything
4 about race, which is what they claim, not that
5 they know -- they didn't take race into account
6 at all. All you had before you were those
7 statistics: 900 to 800 for Trump, 700 to 600
8 for Biden. You want to make it a Republican
9 district. Which one do you want to keep in?

10 MS. ADEN: The former. But, if it --
11 this case would be more like Cromartie if they
12 were actually looking at pure partisan data and
13 they were looking at partisan data voting
14 behavior over time to make predictions.

15 JUSTICE JACKSON: Ms. -- Ms. Aden --

16 JUSTICE ALITO: Yeah. But that's the
17 problem with --

18 MS. ADEN: But that's not this case.

19 JUSTICE ALITO: If I could just follow
20 up.

21 That is the problem they claim with
22 Dr. Ragusa's methodology, because he says no,
23 you're going to -- the -- the one you want to
24 keep is the one with the greater number of votes
25 for President Biden.

1 So you'd rather keep the -- the
2 district that went 900 to 800 for Trump because
3 there are 800 Biden votes there, as opposed to
4 the one that went 600 -- 700 to 600 for Biden
5 because there are fewer Biden votes there.

6 MS. ADEN: But Dr. Ragusa --

7 JUSTICE ALITO: I'm sorry -- yeah?

8 MS. ADEN: -- in his rebuttal report,
9 I think pages 3 through 4, controls for the
10 precinct size and, notwithstanding controlling
11 for that, in his analysis determines that black
12 voters were moved out, white voters were kept in
13 or moved in. And that is unrebutted data. So
14 he controlled for this.

15 JUSTICE ALITO: But what I just said
16 is his methodology, is it not? He looked at the
17 absolute number of votes for President Biden,
18 not the percentage, not the net votes.

19 MS. ADEN: And Dr. Ragusa testified
20 about why looking at the total net was the
21 better methodology than the percentages, and
22 this was tested below, and the district court
23 did not accept these arguments.

24 And so this goes to, are we retrying
25 expert testimony on appeal? Or do three judges,

1 consistent with *White v. Regester*, consistent
2 with *Cooper*, do -- are their findings of fact
3 and credibility determines given the deference
4 that an appellate court is to give a unanimous
5 opinion, where, in light of the total record, it
6 reflects that there was a racial target. It
7 reflects that there was a significant sorting of
8 black people. It reflects unrebutted expert
9 evidence of race rather than party explaining
10 the assignment of voters. It reflects a
11 disregard of traditional redistricting
12 principles.

13 And all of that evidence in total is
14 more than plausible in the record for the using
15 race as a means to harm individual plaintiffs,
16 Mr. Tai Scott and members of the --

17 CHIEF JUSTICE ROBERTS: Thank you.

18 MS. ADEN: -- South Carolina NAACP.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MS. ADEN: Thank you, Your Honor.

22 CHIEF JUSTICE ROBERTS: Justice
23 Thomas?

24 Justice Alito?

25 JUSTICE ALITO: Yeah, I -- I'm

1 concerned about what has been said here earlier
2 about Mr. Roberts. And as I -- I asked Mr. Gore
3 about that. Is it not true that he has a long
4 record working for the legislature and he's
5 drawn maps for both Republicans and Democrats?

6 MS. ADEN: The panel -- yes. The
7 panel acknowledged he has two decades of
8 experience in which he used race every time he
9 was drawing maps in the past but denied doing so
10 in this case.

11 JUSTICE ALITO: I mean, at trial,
12 Judge Gergel -- is that the correct
13 pronunciation of his name, Gergel?

14 MS. ADEN: It is Judge Gergel, yes.

15 JUSTICE ALITO: Yeah. Judge Gergel
16 had complimentary things to say about him. He
17 said, "I mean, I know Mr. Roberts. He's a very
18 precise guy. What I want is -- is, if that
19 report," talking about a particular report --
20 "isn't accurate, and I'm -- persuaded, if he
21 tells me it's not, that's good enough for me..."

22 MS. ADEN: The -- and that --

23 JUSTICE ALITO: He's complimentary of
24 his -- of his honesty, right?

25 MS. ADEN: Yes, and also his honesty

1 in Footnote 9, I believe, where he recognized
2 that a year after trial, Mr. Roberts was able to
3 cite with specificity the racial makeup of VTDs,
4 which was completely inconsistent with his
5 non-credible denials that he did not look at
6 race.

7 JUSTICE ALITO: Okay. So then the
8 district court turns around in its opinion and
9 says that his testimony rings hollow. So that's
10 a nice way of saying that he lied, right?

11 MS. ADEN: Yes. And that's what this
12 Court acknowledged was the case --

13 JUSTICE ALITO: Okay.

14 MS. ADEN: -- in Cooper with the --

15 JUSTICE ALITO: It -- it gave three
16 reasons for it, and I want you to tell me which
17 one of these is defensible.

18 The -- the third one is what you just
19 mentioned, his in-depth knowledge of the racial
20 demographics of South Carolina. Is that
21 damning?

22 MS. ADEN: No, not in and of itself,
23 because race consciousness is not is the
24 problem. It's the incredible denial, despite
25 all of the evidence, including his testimony,

1 but also what the experts demonstrate and also
2 what the movement of so many people and just the
3 coincidence that they land on the exact same
4 BVAP.

5 JUSTICE ALITO: All right. That's
6 one.

7 The second one is: "Roberts failed to
8 provide the court with any plausible explanation
9 for the abandonment of his 'least change'
10 approach in drawing the Charleston County
11 portions of Congressional District Numbers 1 and
12 6 or the subordination of traditional
13 districting principles, including maintenance of
14 constituencies, minimizing divisions of
15 counties, and avoidance of racial
16 gerrymandering."

17 So they say he gave no plausible
18 explanation for that?

19 MS. ADEN: That's correct. In fact,
20 Mr. Roberts admitted he abandoned the core
21 priority of least change in CD1.

22 JUSTICE ALITO: Didn't -- and didn't
23 he say that his -- he was aiming to produce a
24 Republican district?

25 MS. ADEN: They -- the Court

1 ultimately accepted that legitimate goal, Your
2 Honor, but the Court recognized in Cooper that
3 using race as a means to get there is
4 constitutionally suspect.

5 JUSTICE ALITO: Yeah. But -- but
6 isn't that a plausible explanation for all of
7 those things?

8 MS. ADEN: The court heard the
9 testimony, and that testimony was not as
10 persuasive as the racial movements, as the
11 expert testimony that, again, they had the
12 opportunity --

13 JUSTICE ALITO: No, but the question
14 is --

15 MS. ADEN: -- to rebut.

16 JUSTICE ALITO: -- is it a -- is it a
17 plausible reason? I mean, did they say, we
18 don't believe Mr. Roberts because, you know, he
19 had a shifty look on the stand and this is a guy
20 with a partisan background? Did they say
21 anything like that? They gave three reasons.

22 MS. ADEN: No, Your Honor. It's --
23 it's plausible, but this Court is not asked to
24 look anew at the record but to look at whether
25 or not in no circumstance would it be plausible

1 that the -- the outcome be what it is, and as a
2 finding of fact, the court was correct.

3 JUSTICE ALITO: All right. So,
4 in this -- and the last one is he admitted that
5 his movement of nearly 17,000 African Americans
6 was inconsistent with the Clyburn staff plan for
7 Charleston County that he claimed to be
8 faithfully following, right?

9 Did he ever say, we followed exactly
10 what -- what Congressman Clyburn asked us to do?
11 Did he ever say that?

12 MS. ADEN: The state makes a big
13 defense that their map is consistent with what
14 Senator Clyburn or Representative Clyburn was
15 seeking. The amicus brief shows that that is
16 not what the record actually reflects.

17 And, more importantly, what the Court
18 found was that Representative Clyburn's partial
19 map did not treat the area of West Ashley, which
20 was so critical to the VTDs that were moved out
21 that sorted voters on the basis of race -- the
22 partial map that Representative Clyburn put
23 forward did not harm West Ashley in the same
24 way.

25 JUSTICE ALITO: Let me come back to

1 the question I asked about why your experts did
2 not produce an alternative map.

3 Dr. Imai produced 10,000 maps, right?

4 MS. ADEN: Correct, for one
5 simulation.

6 JUSTICE ALITO: Yeah, he ran a
7 simulation with 10,000 maps. He never
8 considered politics?

9 MS. ADEN: As Dr. Imai's testimony
10 reflects, that he tested for the criteria that
11 the state was saying they were using in their
12 guidelines, the objective criteria, and Dr. Imai
13 and Dr. Duchin's methods are merely useful in
14 this case as further support, as the district
15 court recognized, to show that race was a
16 significant factor in the design.

17 JUSTICE ALITO: Well, in a -- in a
18 case that's all about disentangling race and
19 politics, how can we possibly give any weight to
20 an expert report that did not take politics into
21 account at all purportedly?

22 MS. ADEN: The district court was
23 confronted with that question and relied upon
24 Dr. Imai's testimony for the findings that it
25 thought were probative or not of the issue, but

1 we do have the Dr. Ragusa and the Dr. Liu
2 un rebutted testimony that did disentangle race.

3 And that served the purpose of an
4 alternative map because we can look at Figure 1
5 in the rebuttal report that Dr. Ragusa includes
6 and look at the VTDs that were available to be
7 moved in in a white -- heavily white precincts
8 that were available to be moved in and those
9 simply were not moved in.

10 So they served the same purpose as an
11 alternative --

12 JUSTICE ALITO: The defense expert,
13 Mr. -- Sean Trende or Trende, evaluated
14 Dr. Ragusa's maps and found that Democrats would
15 win District 1 in over 90 percent of the maps
16 that Dr. Ragusa produced.

17 Did Dr. Imai run a simulation using
18 the political data as well but then decide to
19 shelve it when the results were not favorable to
20 your client?

21 MS. ADEN: That is not what I believe
22 the record reflects, Your Honor.

23 JUSTICE ALITO: It just never occurred
24 to him that politics might have something to do
25 with this?

1 MS. ADEN: Every expert, as I believe
2 Justice Kagan said, is being tasked with
3 particular questions. Not every -- I do not
4 believe that there's any requirement that every
5 expert look at every decision that one might go
6 into a map.

7 Each expert looks at different things.
8 Dr. Ragusa and Dr. Imai -- I mean Dr. Ragusa and
9 Dr. Liu served the purpose of disentangling and
10 showing that race was more predictive than party
11 affiliation.

12 Dr. Imai and Dr. Duchin helped counter
13 this narrative that this was a race-blind draw
14 when all of the evidence demonstrates otherwise.
15 And, frankly, Dr. Duchin's testimony looked at
16 all of the traditional redistricting principles.

17 And I would submit that these were all
18 raised pre-trial, and this is the type of --
19 this is what trial courts are given the
20 authority to do, not to have what is happening
21 here, but as relitigating the validity of expert
22 testimony that the court accepted.

23 JUSTICE ALITO: All right. Dr. Imai
24 did not control for politics. Did the district
25 court rely on Dr. Liu?

1 MS. ADEN: The court did not
2 specifically rely upon Dr. Liu, but his
3 analyses, as the amici of the political
4 scientists who did the work in Cooper,
5 corroborate that he used the same methods that
6 were faithful to Cooper, and his analyses
7 substantiate Dr. Ragusa's and point in the same
8 direction --

9 JUSTICE ALITO: Did Doctor --

10 MS. ADEN: -- that race was a better
11 predictor than partisanship.

12 JUSTICE ALITO: I'm sorry. Did
13 Dr. Duchin control for politics?

14 MS. ADEN: She did in some of her
15 analyses. If you look at one of her
16 supplemental reports, she looked at how the --
17 the maps were fair when you put particularly the
18 candidates of choice of black voters on the map,
19 and she determined that black candidates
20 performed worse in the enacted map than generic
21 partisan races, which were essentially white-on-
22 white races. So that is one way that she looked
23 at partisanship.

24 But she did not do a disentangling
25 method if that is what you're getting at.

1 JUSTICE ALITO: Okay. Last question.
2 I'm sorry to go on for so long. Did Dr. Liu and
3 Dr. Ragusa use the county envelope method?

4 MS. ADEN: They both did, correct.

5 JUSTICE ALITO: Is that -- is that a
6 sound method?

7 MS. ADEN: It is. It's what
8 Dr. Ansolabehere and Dr. Max Palmer used in
9 Cooper and Bethune-Hill, respectively.

10 JUSTICE ALITO: Under that method, if
11 there are two people who live in the same
12 apartment building, under the county envelope
13 method, could one -- does the analysis take into
14 -- presume that one can be moved and the other
15 can't?

16 MS. ADEN: I believe --

17 JUSTICE ALITO: One could stay in --
18 in -- in a district and the other could move?

19 MS. ADEN: I do not believe that's the
20 case because he's looking -- the county envelope
21 method is relying upon precincts, and so it
22 would not be at that level of detail.

23 JUSTICE ALITO: Does it assume that a
24 -- that all precincts could be moved, regardless
25 of their location?

1 MS. ADEN: Only those within the
2 county envelope, which is reflective of the fact
3 that a county like Berkeley or a county like
4 Beaufort was wholly moved into CD1, so it was
5 fair for Dr. Ragusa and Dr. Imai to assume that
6 any VTD in those counties could have been moved
7 into CD1. And where we saw that they were not
8 is where black voters were at issue.

9 JUSTICE ALITO: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor?

12 JUSTICE SOTOMAYOR: I understood the
13 record the way you did, but I understood that
14 Dr. Liu was asked to produce maps that were
15 consistent with the traditional criteria that
16 the state indicated it had used, correct?

17 MS. ADEN: That is correct, Your
18 Honor.

19 JUSTICE SOTOMAYOR: So he never looked
20 at partisanship because that wasn't one of the
21 criteria that it at first said it had used,
22 correct?

23 MS. ADEN: That is correct, Your
24 Honor.

25 JUSTICE SOTOMAYOR: So I know it seems

1 strange, but as I understood the record -- and I
2 know Justice Alito thinks that it should have
3 been assumed that partisanship would be the
4 defense -- do you know if the answer in this
5 case raised partisanship as a defense?

6 MS. ADEN: I do not believe so.
7 Again, the legislature almost entirely
8 predicated their line drawing during the
9 legislative process on traditional redistricting
10 principles.

11 JUSTICE SOTOMAYOR: So you were
12 relying on what they said during the process?

13 MS. ADEN: What they said. And this
14 Court has been skeptical when legislatures have
15 come up with post-hoc justifications. But
16 what's important here is that the legislature --
17 the court -- the panel accepted their
18 justification, presumed that they would not
19 admit it and then still allow plaintiffs to test
20 whether that was the true reason behind the line
21 drawing and found that it was not. It was less
22 of a predictor than race.

23 JUSTICE SOTOMAYOR: So what your
24 experts showed was that everything they said
25 during the legislative process had to be

1 race-based in some way because that's what the
2 evidence showed. They couldn't explain the
3 large movement of blacks as opposed to whites,
4 blacks as opposed to -- or Democrat --
5 Democratic whites and black. So they had to
6 come up with a different reason for why they did
7 what they did, correct?

8 MS. ADEN: There were indeed shifting
9 reasons, and race as a means for a political
10 goal is constitutionally suspect.

11 JUSTICE SOTOMAYOR: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?
13 Justice Gorsuch?

14 Justice Kavanaugh?

15 JUSTICE KAVANAUGH: On the least
16 change point that you mentioned, my
17 understanding, but I want to get your
18 understanding of the record, was that Senator
19 Campsen wanted Beaufort and Berkeley Counties to
20 be kept whole, he wanted a stronger Republican
21 tilt, and he wanted Representative Clyburn to
22 represent some of Charleston County because of
23 Representative Clyburn's clout in the -- in the
24 Congress and with the Administration.

25 So, if you -- if those things are

1 accurate -- and I just want your understanding
2 of the record -- then doesn't that mean you
3 couldn't draw the first district without some
4 significant changes?

5 MS. ADEN: Those are generally the
6 findings of the court, but the court recognized
7 and detailed in its opinion that when Beaufort,
8 when Berkeley, when Dorchester were brought in,
9 they had black neighbors, and those black
10 neighbors increased the BVAP in CD1 to a
11 politically risky 20 percent and black
12 Charlestonians were offset.

13 Black people were treated one-to-one,
14 traded one in, one out. White voters, the
15 Republican-leaning ones, were individualized and
16 allowed to come into CD1, and white Democrats
17 were even kept in or individualized and allowed
18 to remain in CD1.

19 It's only black people in the design
20 of this district that were treated with racial
21 stereotyping, which is offensive to this -- the
22 Constitution.

23 JUSTICE KAVANAUGH: Right. I
24 understand that principle, of course. But West
25 Ashley was predominantly white and predominantly

1 Democratic and then was moved out, right?

2 MS. ADEN: Yes, but there were
3 significant, still heavily black precincts --

4 JUSTICE KAVANAUGH: Right.

5 MS. ADEN: -- that were moved out
6 alongside of it. And the court addressed this
7 matter --

8 JUSTICE KAVANAUGH: Your point is
9 there's a higher percentage then of blacks than
10 whites moved out?

11 MS. ADEN: And -- and the -- but the
12 court --

13 JUSTICE KAVANAUGH: Is that right?

14 MS. ADEN: That is correct.

15 JUSTICE KAVANAUGH: Because there were
16 a lot of white people moved out of District 1 in
17 West --

18 MS. ADEN: That is correct. And the
19 court confronted the net effect -- argument in
20 its opinion. And when you look at the paragraph
21 about Deer Park, it talks about how you may have
22 a precinct that has 10,000 white people in it
23 and another precinct that has 8500 black people
24 in it, still a minority but still substantial,
25 and the movement of those precincts would

1 notwithstanding affect the overall BVAP of a
2 district.

3 And that's exactly what the court
4 considered and confronted. This is not a new
5 argument being raised. It was considered by the
6 court and it was rejected in its racial
7 gerrymandering finding.

8 JUSTICE KAVANAUGH: The other side
9 makes a point that the original plan that came
10 from Representative Clyburn's office actually
11 had a lower black voting population for District
12 1 than what ultimately emerged. I just want to
13 get your response to that, the relevance of that
14 in the overall record.

15 MS. ADEN: I think it's irrelevant
16 because I don't think that his map determined
17 the -- the sorting that was actually done by the
18 key decisionmakers that the court acknowledged.

19 But even more, if you look to the
20 amici brief that Representative Clyburn's office
21 offers in this case, they provided a partial
22 map, and then, from there, the state drew out
23 the -- a partial map of one district and, from
24 there, drew out the other six districts.

25 So we have no idea what the BVAP of

1 CD1 would be based upon what the record reflects
2 Representative Clyburn was seeking in CD6. And
3 that is detailed in the amici brief that he
4 submitted.

5 JUSTICE KAVANAUGH: Yeah. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 Justice Jackson?

9 JUSTICE JACKSON: So I guess I'm still
10 struggling with this clear error standard and
11 the application in this context. Justice Alito
12 asked a number of questions about the reasons
13 that the district court highlighted for why it
14 did not credit Mr. Roberts' testimony.

15 And I guess, consistent with what I
16 understood the clear error standard to require
17 of us, I -- I didn't know that we were to
18 evaluate whether we agreed or disagreed with
19 each of their findings, whether we would have
20 found -- you know, had a different takeaway from
21 the fact that, you know, his testimony, the
22 district court said it -- it rang hollow. If we
23 thought it didn't rang -- ring hollow, would
24 that be a basis for clear error? Do I not
25 understand what the clear error standard is?

1 MS. ADEN: I don't believe that you
2 do. I believe that the credibility
3 determinations, the ability for the court, as in
4 White v. Regester, as in Cooper, to have
5 listened to the witnesses, is clearly given much
6 deference by this Court, that the racial
7 gerrymandering finding is -- is a clear error
8 finding and the subsidiary findings --

9 JUSTICE JACKSON: Right, but -- and
10 the subsidiary findings --

11 MS. ADEN: -- are also --

12 JUSTICE JACKSON: -- as well so that
13 if the district court said we don't believe he
14 gave a plausible explanation and we look at it
15 and we think the explanation is plausible, that
16 distinction, the fact that we disagree with that
17 particular subsidiary finding, is not the basis
18 for clear error, is that right?

19 MS. ADEN: That is my understanding.
20 It's the total record.

21 JUSTICE JACKSON: So it -- so maybe --
22 maybe you would have clear error if, for
23 example, the district court didn't have any
24 subsidiary findings, if they didn't say anything
25 about Dr. Roberts; they just say, you know,

1 nothing maybe. But, in this case, they did have
2 three reasons, right, why they didn't agree with
3 him? So I guess I just want to be clear as to
4 what we're looking at from -- from the
5 standpoint of clear error.

6 MS. ADEN: I think it's at least three
7 reasons, and I think -- for why the court did
8 not credit all of his reasons for why the map
9 was drawn the way that they did. And it wasn't
10 just that he -- the court just listened to his
11 testimony and said I disagree with you but that
12 that testimony did not align with the other
13 facts in the record, which reflected that race
14 predominance was occurring in this map, and that
15 is overall a finding that's backed up not only
16 by the unrebutted disentangling method but is
17 borne out by the state's own data.

18 JUSTICE JACKSON: All right. Let me
19 ask about the hypothetical that Justice Alito
20 put forward with respect to moving in 900 Trump
21 voters versus -- you know, a district with 900
22 Trump voters and 600 Biden voters versus a
23 district with 700 Biden voters and 600 Trump
24 voters.

25 I may have gotten that wrong, but I

1 think if -- I think his point was that if
2 politics is at play, then, clearly, you'd want
3 to bring in the district with more Trump voters
4 if you are trying to get a Republican tilt.

5 And I think that's -- I think that's
6 right, but I guess what I am trying to
7 understand is how the BVAP stays the same unless
8 you're looking at race so that if you bring in
9 the district with more Trump voters, the
10 assumption, I think, that everybody seems to be
11 operating under is that you would -- that
12 district would likely have more white voters in
13 it because race is correlating with -- with --
14 with politics.

15 And if that's the case, then I would
16 expect bringing that district in, the BVAP would
17 drop. And yet, here, it stayed the same, and I
18 understood your argument to be, because black
19 voters elsewhere were moved out, that race was
20 used to move out black voters in a -- when you
21 brought in the 900 Trump voter district.

22 Is that the point that you're making?

23 MS. ADEN: That is the point that I'm
24 making, that's correct.

25 JUSTICE JACKSON: And you're saying

1 that that is the unlawful application of racial
2 gerrymandering. So even though, as Justice
3 Kavanaugh pointed out, the sort of overall BVAP
4 remains the same, in a situation in which you're
5 bringing in more white voters and moving out
6 black voters, in -- in this kind of
7 circumstance, you're still relying on race in a
8 way that is, you say, improper?

9 MS. ADEN: Yes. Correct. And I would
10 only detail that not only are you moving in
11 white voters, you're moving in black voters, and
12 you're not just -- and then, for those black
13 voters moved in, you're offsetting them by
14 kicking out the black Charlestonians. And
15 that's exactly what the court details in its
16 opinion happened here, the race as the means to
17 achieve this political goal.

18 And I just want to acknowledge also
19 that this is not -- I mentioned at the onset
20 this is not the case of Cromartie, where this
21 Court said the plaintiffs failed to prove racial
22 predominance because we see in the record that
23 they were actually looking at voting behavior
24 data.

25 The record does not reflect -- this is

1 the inverse of that case, where the record
2 reflects they were looking at racial data to --
3 for its predictive purpose and they were every
4 once in a while looking at partisan data to see
5 its connection, but they were relying upon race
6 data and they had no good reason to do that.

7 JUSTICE JACKSON: And as Justice Kagan
8 said, we -- we kind of think that racial -- your
9 argument is that racial data was really kind of
10 driving this because they didn't have a robust
11 set of political data that they were drawing
12 from in order to do this?

13 MS. ADEN: Because, in their mind,
14 they were using race as a proxy for -- to
15 predict partisan behavior.

16 JUSTICE JACKSON: Thank you.

17 MS. ADEN: That's what the record
18 reflects.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MS. ADEN: Thank you, Your Honors.

22 CHIEF JUSTICE ROBERTS: Ms. Flynn.

23

24

25

1 ORAL ARGUMENT OF CAROLINE A. FLYNN
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING NEITHER PARTY

4 MS. FLYNN: Mr. Chief Justice, and may
5 it please the Court:

6 This Court has recognized that cases
7 like these, where state defendants disclaim the
8 use of race in line drawing and argue that any
9 racial disparities are simply the result of a
10 correlation between race and political
11 affiliation, present special challenges for
12 trial courts and require an especially sensitive
13 inquiry.

14 As part of that inquiry, plaintiffs
15 bear the burden to disentangle race and politics
16 and show that race drove the map-makers'
17 decisions about where to place a significant
18 number of voters. The district court found that
19 plaintiffs had done that here.

20 But this Court has also been clear
21 that on appeal, this Court's job is more
22 straightforward. Racial predominance is a
23 factual finding subject to clear error review
24 even when there's a politics defense.

25 The Court has also repeatedly rejected

1 attempts to impose unjustified evidentiary
2 hurdles as a matter of law on redistrict --
3 redistricting plaintiffs.

4 Defendants' arguments for reversal in
5 this case contradict those settled principles.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: If we find no intent
8 to discriminate or to -- that there was vote --
9 on the vote dilution claim, that's what I'm more
10 interested in, you seem to want us to send it
11 back on that. But, if you find -- we find no
12 intent, should we, or should we just simply
13 resolve it here?

14 MS. FLYNN: So our position on the
15 second claim is that if this Court were not to
16 affirm on the first racial gerrymandering
17 claim --

18 JUSTICE THOMAS: Yeah.

19 MS. FLYNN: -- and not find racial
20 predominance there, that this Court should
21 remand on the second claim because we believe
22 the district court used the wrong legal
23 standards to evaluate that claim.

24 JUSTICE THOMAS: And what should that
25 standard be?

1 MS. FLYNN: So, first, we -- the
2 district court simply sort of took the findings
3 it had made on racial predominance and the Shaw
4 standard and carried them over, but the intent
5 standard is different for an intentional vote
6 dilution claim. It's the Arlington Heights
7 inquiry that this Court --

8 JUSTICE THOMAS: And that is -- it's
9 the -- again, the vote dilution claim. It seems
10 as though those were collapsed into one another,
11 the redistribute -- the redistricting and the
12 vote dilution, and dealt with on -- on the same
13 standard.

14 So I'm wondering, if the standard is
15 intent with respect to the dilution claim, if
16 you don't see that intent here, why should we
17 remand it?

18 MS. FLYNN: Well, I don't think the
19 court -- the district court made the findings
20 under the correct intent standard for you to
21 evaluate that. I mean, as I mentioned, the
22 district court just asked about racial
23 predominance, but they are different intent
24 inquiries.

25 For intentional vote dilution, you're

1 asking about a specific intent to dilute the
2 voting strength of the minority population, not
3 just whether race predominated in the
4 line-drawing decisions.

5 JUSTICE THOMAS: And you're saying we
6 couldn't determine that on the record that's
7 here?

8 MS. FLYNN: I think this Court should
9 follow its usual practice and instruct the lower
10 court about the correct legal standards and then
11 send it back for that decision, determination to
12 be made in the first instance by the court
13 looking at the full record if the Court were to
14 have occasion to reach that second claim.

15 JUSTICE SOTOMAYOR: I guess my --

16 CHIEF JUSTICE ROBERTS: Ms. --

17 JUSTICE SOTOMAYOR: -- question is --
18 I'm sorry, Chief.

19 CHIEF JUSTICE ROBERTS: Ms. Flynn,
20 your office reviews a lot of these voting cases,
21 right?

22 MS. FLYNN: Well, in -- our
23 enforcement work is typically in vote dilution,
24 not in racial gerrymandering per se, but, yes,
25 of course, we've been involved in these cases

1 before the Court.

2 CHIEF JUSTICE ROBERTS: Put -- yeah.
3 Putting that aside, have you ever supported the
4 plaintiffs in a case in which there was no
5 evidence of any direct discrimination, no
6 alternative map, no oddly shaped districts, and
7 a -- volume and volume of political data?

8 Can you think of one where your --
9 your office has done that before?

10 MS. FLYNN: Well, I -- you know, this
11 might be the first case where there hasn't been
12 sort of direct evidence of an attempt at VRA
13 compliance or the like, but I do think that --
14 when you brought up the alternative map, I do
15 think that the -- or the plaintiffs offered
16 expert evidence to answer that same question
17 about was it race or was it politics that were
18 driving the line-drawing decisions.

19 CHIEF JUSTICE ROBERTS: Yeah, that's
20 one of the things I brought up. I also brought
21 up the absence of direct discrimination, the
22 absence of oddly shaped districts, the lack of
23 -- I mean the great volume of political
24 evidence, and throw in another one, anything
25 that all of that has been done, it is alleged on

1 racial basis, to change the population in the
2 district of the desired voters by 1.3 percent?
3 I mean -- I mean, my point is -- is a clear one.

4 Have -- have you ever seen anything
5 like this?

6 MS. FLYNN: Well, this Court has
7 affirmed, I believe, on a circumstantial record
8 I think in North Carolina versus Covington. The
9 Court said that there, the state was completely
10 denying using race. The legislature told its
11 map-maker not to look at race. And this Court
12 still said it was permissible for the district
13 court to find based on demographic information
14 and information about the shape of the district
15 that race was, in fact, relied upon.

16 I'd also say that here, the district
17 court did look at traditional redistricting
18 principles and find that they were subordinated
19 in this instance. For instance, this new
20 district is not contiguous when the previous
21 district was.

22 Of course, there was previously a
23 Charleston County divide, but this is I don't
24 think the case that the traditional districting
25 principles wholly supported the state's story

1 here.

2 And I will sort of go back to the
3 expert evidence in this case. In our view, we
4 think the Ragusa expert and Liu were the most
5 probative on the question we've been talking
6 about today, which is was it race or was it
7 politics that were driving the district lines.

8 And Dr. Ragusa took the methodology in
9 Cooper, arguably improved upon it by looking at
10 VTDs at precincts rather than voter by voter,
11 which is what the Cooper expert did, and then he
12 also ran a regression analysis to further
13 isolate out the effect of race from politics.

14 JUSTICE GORSUCH: Counsel, I -- I -- I
15 want to just explore the alternative map
16 non-requirement requirement thing for a minute.

17 MS. FLYNN: Sure.

18 JUSTICE GORSUCH: Everybody seems to
19 take as given that the legislature here did seek
20 to pursue a partisan gerrymander, if you will,
21 or a partisan tilt, I think, is their preferred
22 term, and that that's permissible under this
23 Court's precedents. We start with that as a
24 given.

25 MS. FLYNN: Mm-hmm.

1 JUSTICE GORSUCH: Right?

2 MS. FLYNN: Yes.

3 JUSTICE GORSUCH: Okay. And that the
4 plaintiff bears the burden of -- of -- of --
5 of -- of overcoming a good-faith presumption
6 that -- that the legislature is doing just what
7 it says, right?

8 MS. FLYNN: Mm-hmm.

9 JUSTICE GORSUCH: How do you prove
10 that they are acting in bad faith without
11 showing that they could achieve their objective
12 some different way?

13 MS. FLYNN: I agree that that could be
14 a probative piece of evidence in some cases, and
15 I think that's what the Court said in Cooper.
16 What we're pushing back on is the idea that you
17 need to have, as a matter of law, for the
18 plaintiffs' case to even get off the ground, an
19 alternative map that checks all the boxes.

20 JUSTICE GORSUCH: No -- I -- I get
21 that, and I'm wondering why. I mean, normally,
22 if a plaintiff bears a burden of proof, you have
23 to show that it would have happened but for, you
24 know, the -- this change in the world.

25 And I think the -- here, the analogy

1 would be -- and I'm just exploring this. I
2 don't know. All right? I could be wrong.
3 Probably am. But, in a but-for world, the
4 legislature could have achieved its partisan
5 purposes, nefarious, happy, whatever you think
6 they are, in some other way without -- without
7 doing what it did that you're objecting to.

8 And, here, there's no -- no evidence
9 that the legislature could have achieved its
10 partisan tilt, which everyone says is
11 permissible, in any other way.

12 MS. FLYNN: So I --

13 JUSTICE GORSUCH: What do we do with
14 that when -- when -- with the presumption of
15 good faith?

16 MS. FLYNN: So I have a couple
17 responses to that. First, I do think the expert
18 evidence answer the same question. An
19 alternative map says, if you were really relying
20 on the thing you said you were relying, wouldn't
21 you have done -- maybe you would have done this
22 other thing instead.

23 JUSTICE GORSUCH: I could have
24 achieved the same partisan objective 15
25 different ways, and with map-drawing technology

1 and computers, you know, they -- they spit out
2 maps by the thousands these days. I would have
3 thought that would have been a relatively modest
4 burden.

5 MS. FLYNN: But it's still --

6 JUSTICE GORSUCH: What am I missing?

7 MS. FLYNN: -- it's still just a way
8 to answer the question what better explains how
9 the lines were drawn. And we think the expert
10 evidence does that.

11 The other thing I would say about
12 creating this kind of requirement as a legal
13 rule, rather than something that can be a piece
14 of evidence that both sides can make arguments
15 about, is that I think it's going to add even
16 more complication to these even very, very
17 complicated cases.

18 So my understanding is that defendants
19 want their alternative map requirement to be
20 limited to circumstances where there is no or
21 meager direct evidence. So I think, first,
22 you're going to have a mini-trial on is this a
23 case where there's sufficient direct evidence or
24 not to bring this rule into play.

25 And then I think you're going to have

1 to have litigation and probably appeals on what
2 the alternative map has to do.

3 JUSTICE GORSUCH: No, I'm not even
4 asking about -- I'm -- I'm -- I'm -- I'm really
5 not interested in whether it's a requirement or
6 not. I'm just -- just as a factual matter,
7 wouldn't it have been the simplest thing to do?
8 If -- if I'm plaintiff and I want to show the
9 defendant can achieve its permissible ends in
10 some other way, I -- I think, in most other
11 scenarios, in -- in a tort case or an antitrust
12 case, is what I'm thinking about, I would show
13 that there were 15 other ways to achieve that
14 which you said you wanted to achieve.

15 And that would -- that would be really
16 strong probative evidence -- whether it's
17 required or not, put -- put that aside -- that,
18 hey, you're not telling the truth about what you
19 were up to here.

20 MS. FLYNN: I agree it can be very
21 probative evidence. I can't really speak --

22 JUSTICE GORSUCH: Should its absence
23 --

24 MS. FLYNN: -- to why it would be
25 easier --

1 JUSTICE GORSUCH: -- should its
2 absence here tell us something?

3 MS. FLYNN: I don't think so, because
4 I think the plaintiffs offered two experts that
5 went un rebutted to answer the same question.

6 I will also just point out that I
7 believe there are maps that are in the record
8 that did have a higher BVAP that stayed based on
9 the 2020 election data as a Republican-leaning
10 district. So, you know, I don't -- I believe
11 those maps are the first House staff plan and I
12 think there was one from a Senator Sabb that
13 also had that.

14 So, you know, whether -- what's
15 easier, easiest for a plaintiff to do to prove
16 their case, I'm not really in a position to sort
17 of speak to their litigation choices, but --

18 JUSTICE SOTOMAYOR: That's the point,
19 isn't it? There were maps that remained
20 Republican-leaning that were rejected, and,
21 instead, there was this unusual movement in and
22 out based on race. That's what the experts
23 showed, that you can't explain the movements
24 based on partisanship, that they can only be
25 explained on the basis of race. That's the

1 burden the plaintiff meets, correct?

2 MS. FLYNN: Yes.

3 JUSTICE SOTOMAYOR: I had this
4 question as I was going through: If you can't
5 get to where you want to go without using race,
6 do you think our law permits that?

7 MS. FLYNN: No, Your Honor. I think
8 that the --

9 JUSTICE SOTOMAYOR: That's the whole
10 point, isn't it? If you can't reach a goal, no
11 matter how laudatory it is, if the only way that
12 you can satisfy yourself for whatever your
13 political reasons are is by using race, that's
14 illegal.

15 MS. FLYNN: Right. This Court said
16 that in Cooper, and the plurality opinion said
17 that in Bush v. Vera as well.

18 JUSTICE SOTOMAYOR: Right.

19 MS. FLYNN: You can't use race as a
20 proxy for a political goal.

21 JUSTICE SOTOMAYOR: So the bottom line
22 is they had maps that were created that reached
23 -- that kept them Republican-leaning and they
24 chose not to use them. For whatever other
25 political reasons, what they went back to was

1 race to make the map they made, correct?

2 MS. FLYNN: That's what the district
3 court found, yes.

4 JUSTICE SOTOMAYOR: All right. Thank
5 you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas?

9 JUSTICE THOMAS: This is just a matter
10 of curiosity. If you can't -- your answer was
11 you couldn't use race to draw the districts,
12 right?

13 MS. FLYNN: Right. Well, you -- or
14 you would be in strict scrutiny land and perhaps
15 VRA compliance would be a reason, but -- right.

16 JUSTICE THOMAS: But you used -- you
17 can use race to draw a majority-minority
18 district?

19 MS. FLYNN: Right. So, if race
20 predominates, and in that circumstance, where
21 the overriding consideration is to draw a
22 majority-minority district and that racial
23 target actually dictates how lines are being
24 drawn on the ground, I agree the first half of
25 the Shaw test would be met, and then you would

1 be in the second half, you would ask the strict
2 scrutiny question of whether or not there was a
3 strong basis in evidence to believe the other
4 requirement.

5 JUSTICE THOMAS: Outside of this
6 context, do we use the predominant standard in
7 -- in our Fourteenth Amendment analysis?

8 MS. FLYNN: I'm not aware of another
9 context besides gerrymandering.

10 CHIEF JUSTICE ROBERTS: Justice Alito?
11 No?

12 Justice -- anything further?

13 Justice Kagan?

14 JUSTICE KAGAN: Ms. Flynn, so if --
15 it's a funny case because it's our first
16 post-Rucho case of this kind. So, before Rucho,
17 right, you could understand completely why it
18 was that map-makers started doing race in order
19 to achieve partisan gerrymanders, because they
20 couldn't do partisan gerrymanders directly.
21 They were afraid that that was going to be found
22 unlawful.

23 But now that Rucho has come about and
24 -- and all these partisan gerrymandering claims
25 have been held to be non-justiciable, you know,

1 some people might sort of say, well, I don't get
2 it. Like, why do people keep using race when
3 they can just do it directly? Just do -- use
4 the election data, do the partisan
5 gerrymandering.

6 You know, doesn't the fact that they
7 can do it directly suggest that they're not --
8 why would you need race as a proxy? So that's
9 my question to you.

10 Why would map-makers in general and in
11 this case use race as a proxy to do partisan
12 gerrymandering now that you could just, like, do
13 partisan gerrymandering?

14 MS. FLYNN: So I don't know that I'm
15 in a position to speak to in general, but in
16 this case, as has been discussed earlier today,
17 there was evidence in the record that the
18 political data the map-makers had available was
19 sort of limited and imperfect. It was a single
20 election that wasn't congressional, and it was
21 not looking at the durability of voting across
22 multiple elections.

23 So, there -- given the evidence that
24 voting is racially polarized in South Carolina,
25 it was plausible for the district court to find

1 that the map-makers would have relied on race as
2 a more durable proxy in the hopes of achieving
3 their political end.

4 CHIEF JUSTICE ROBERTS: Justice
5 Gorsuch?

6 JUSTICE GORSUCH: Your brief also
7 makes the point that it would have been
8 plausible for the district court to have come to
9 the exact opposite conclusion it came to here
10 and that it would have been just as plausible
11 for them to find, as Justice Kagan alluded to,
12 that the simplest explanation was they wanted to
13 do politics and they did politics.

14 How does that -- how should we think
15 about that under our clear error standard?

16 MS. FLYNN: So we've made that point
17 in previous cases before this Court as well. We
18 think that the clear error standard doesn't ask
19 what is the most plausible reading of the record
20 or whether, on the whole, more evidence supports
21 one outcome than the other. It asks just
22 whether the district court's is plausible based
23 on the entirety of the evidence, and so --

24 JUSTICE GORSUCH: And -- and how does
25 that fit with the presumption of good faith that

1 we -- because we're reviewing state legislative
2 actions here, that we ask people, lower courts,
3 to make sure that they're -- they're not
4 overstepping their bounds and -- and getting too
5 involved in state and local politics?

6 MS. FLYNN: We think the -- the
7 presumption of good faith is sort of baked into
8 how the burdens work here and also that in this
9 particular case, the plaintiffs did have the
10 obligation to disentangle race and politics.
11 And we also think that the predominant standard
12 is a very high standard that also accounts --
13 that doesn't, you know, find predominance met
14 based just on racial awareness or race
15 consciousness. And so we think setting the bar
16 that high is what affords respect to
17 legislatures' districting choices in this area.

18 JUSTICE GORSUCH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh?

21 JUSTICE KAVANAUGH: Just to follow up
22 on Justice Gorsuch's question, how would a
23 district court look at this exact same
24 evidentiary record and come to the opposite
25 conclusion in your view?

1 MS. FLYNN: I think the expert
2 evidence played a very big role here. You know,
3 I think the district court is in a very good
4 position to make the kind of assessments about
5 methodology that we've been discussing here
6 today.

7 JUSTICE KAVANAUGH: But you've looked
8 at this record and you obviously concluded that
9 the district court could have said no, that
10 expert evidence is not sufficiently reliable or
11 probative in light of the overall record to
12 support the plaintiffs' case?

13 MS. FLYNN: Well, we think that the
14 expert evidence is a big part of it. We think
15 that there were credibility findings here that
16 might have come out differently with a different
17 three-judge panel possibly. It's kind of hard
18 to tell because we weren't there seeing the
19 witnesses firsthand.

20 And, you know, we -- we take the point
21 that these are just difficult cases, as this
22 Court said in Cooper, when there is a political
23 defense being raised and so you can often
24 describe or attribute certain oddities in
25 district lines to being politics or race.

1 And so, given that, we recognize that
2 district courts have a -- a tough job here to
3 sort of just look at the entirety of the
4 evidence and figure out whether or not the
5 plaintiffs can carry their burden.

6 JUSTICE KAVANAUGH: To -- to pick up
7 on Justice Kagan's question and I think a big
8 theme of the other side's briefing is, why would
9 we do this when we have the political data?
10 Justice Kagan mentioned that. And that's all
11 over the briefs and the amicus briefs on their
12 side.

13 And then I think the main response is
14 the political data is not good enough to achieve
15 the end they want to achieve of a greater
16 Republican tilt.

17 Do you agree with that?

18 MS. FLYNN: Yes. We agree there's
19 evidence in the record for the district court to
20 -- to find that, yes.

21 JUSTICE KAVANAUGH: Right. What if we
22 disagree on that point about the strength of the
23 political data? I think an earlier question
24 Justice Kagan mentioned that -- that asked about
25 the reliability of that data or how probative

1 that data is.

2 Suppose we think that data is fairly
3 probative. Does the whole case that -- that
4 plaintiffs had, the district court's conclusion
5 then all fall because that's really the linchpin
6 of the response to the main argument that the
7 state's giving, which is we relied on this
8 political data, the response is that political
9 data is no good, so you couldn't have been.

10 If that data is good, should we
11 reverse?

12 MS. FLYNN: No, I don't think so. I
13 think there is also the fact that the BVAP in
14 CD1 stayed basically frozen even after about
15 190,000 people were being moved in and out of
16 the district. I think there's the --

17 JUSTICE KAVANAUGH: Can't that show
18 correlation?

19 MS. FLYNN: I'm not sure it can. I
20 mean, I -- it's -- I'm not sure that defendants
21 have shown that inevitably you would have
22 arrived at that exact same BVAP given those line
23 drawings.

24 I mean, the line-drawing decision in
25 Charleston County are what we're talking about,

1 how people were moved in that area to achieve
2 what the district court found was a racial
3 target. So there's that.

4 There's the -- the disparities in
5 white voters -- or black voters being taken out
6 and white voters being left in, even of the same
7 political party. The district court did have
8 credibility findings here. And there was also
9 the expert evidence that isolated out race from
10 political affiliation and said race explains the
11 lines here.

12 JUSTICE KAVANAUGH: Why do you think
13 2020 presidential election data is not reliable,
14 probative, or whatever term you want to use
15 there, or sufficiently reliable or probative
16 that it would have made sense to rely on that?

17 MS. FLYNN: I think looking at just
18 one, and there's evidence in the record about
19 all of this, but looking to just one election
20 and not an election for the race that you're
21 actually studying, my understanding is that when
22 we do functional analyses of voting patterns, we
23 look at multiple elections and, you know, hope
24 to be able to look at voting patterns in races
25 that are actually at issue with the districts

1 we're talking about.

2 I think there's also --

3 JUSTICE KAVANAUGH: Would you think
4 looking at 2020 and figuring out were you a
5 Trump voter or were you a Biden voter is not
6 probative to whether you're going to vote for
7 Nancy Mace or not in the next election?

8 MS. FLYNN: I think there is evidence
9 discussing about how voters are more likely to
10 -- at least I believe that white voters are more
11 likely to switch over and vote for a candidate
12 in a presidential race and not, you know, switch
13 across party lines to do that.

14 And given that evidence, I think it
15 was plausible for the district court to reason
16 that there would be a reason to rely on race in
17 order to achieve the political goal.

18 JUSTICE KAVANAUGH: Okay. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 JUSTICE BARRETT: So I think the
22 difficult thing about this case is that clear
23 error review, we owe a lot of deference to the
24 district court's findings. But we're also
25 reviewing it in light of the legal standards,

1 and I'm not -- I'm talking about factual, I'm
2 not talking about the arguments that there was
3 legal error here, but we're reviewing it in
4 light of the fact that the plaintiffs bear an
5 exceedingly heavy burden when they're trying to
6 disentangle race and politics and that we give
7 the legislature a presumption of good faith.

8 So we're asking whether the district
9 court made a clear error in light of the fact
10 that it was judging the factual record with
11 those things into account.

12 And the Chief Justice has outlined,
13 you know, kind of the sum I think in a -- in a
14 pretty concise way of the evidence which was all
15 circumstantial here.

16 I think there's a reason why
17 Dr. Ragusa's report keeps coming up, is because
18 it was the best of the expert reports that
19 actually did try to disentangle race and
20 politics, which was the key question here.

21 And you pointed out, and -- and so
22 did -- so did the Respondent, that they didn't
23 point out an alternative map, but they had
24 expert evidence that was just as good because it
25 made similar points. But this is my question

1 about Dr. Ragusa's evidence.

2 Did it control for factors like
3 contiguousness and compactness? Because
4 Respondent pointed out in trying to address this
5 problem, which I think is one, you know, that
6 we've all been asking about and struggling with,
7 that, you know, Respondents said, well, some of
8 the experts testified about traditional
9 districting criteria and some testified about
10 attempts to disentangle race and politics, and
11 they were all showing different things, but did
12 anybody consider all of them?

13 Because it seems to me like that would
14 be really relevant evidence. And I want to be
15 sure that I'm understanding Dr. Ragusa's
16 testimony and its assumptions accurately.

17 So what's -- what's your view on that?

18 MS. FLYNN: So the county envelope
19 methodology essentially looks at the area from
20 which voters or, in this case, precincts, can be
21 drawn by looking at the counties that previously
22 constituted or overlapped with CD1, and he -- so
23 that, I think, has these considerations built
24 into the analysis because he's looking at, as
25 the expert did in Cooper, which this Court

1 credited, looking at basically what is the
2 available area from which the -- the map-makers
3 had to draw.

4 And I would also say that, you know,
5 my friend has made the point that, you know,
6 it's -- your -- theoretically possible that you
7 can go pretty deep into a county under that
8 analysis, but that is what the map-makers did.

9 They took in the entirety of two
10 counties and went to their furthest reaches when
11 they drew the map, and so I think it was
12 reasonable for Dr. Ragusa's analysis to do the
13 same thing in figuring out the area from which
14 he could draw.

15 JUSTICE BARRETT: And last question:
16 How do you think we should think about clear
17 error review in the kind of situation that I
18 outlined where the plaintiffs' burden was so
19 heavy below because of the good-faith standard
20 and because of the heavy burden that a plaintiff
21 bears in trying to disentangle race and
22 politics?

23 How do you think that should affect
24 our review of the facts?

25 MS. FLYNN: I think Cooper spoke to

1 this and said that it doesn't affect how clear
2 error works. It doesn't affect -- it doesn't
3 create some kind of a pro -- a pro-defendant
4 presumption on review. It's still factual
5 findings. It's still this Court's usual
6 Anderson standards for looking at those.

7 JUSTICE BARRETT: Okay. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

10 JUSTICE JACKSON: Yeah, I just wanted
11 to ask about the question that Justice Kavanaugh
12 asked with respect to our own assessment of the
13 presidential election data and whether or not
14 it's reliable.

15 Is that a finding of fact or that we
16 would owe sort of clear error review deference
17 to the district court's determination, or is
18 that something we are apt to or allowed to take
19 into account ourselves?

20 MS. FLYNN: I think that's evidence
21 that's in the record that renders the district
22 court's finding of a racial target and the
23 legislature's use of race plausible. So, no, I
24 don't think you have to --

25 JUSTICE JACKSON: No, in other words,

1 are we looking at a de novo? So what -- what
2 result from the fact that we might disagree
3 about the fact that the district -- about the
4 reliability of the presidential election?

5 Do we owe the district court deference
6 with respect to their determination that having
7 that data, you know, was -- was not enough and
8 that race was actually at issue here? Do we owe
9 them any deference with respect to that?

10 MS. FLYNN: So I do want to be
11 careful. I'm not sure there was a specific
12 finding in the district court opinion about this
13 question of the 2020 data.

14 JUSTICE JACKSON: I see.

15 MS. FLYNN: And so I think this is --
16 because this Court's looking at the -- all the
17 evidence in the record to determine whether the
18 findings the district court made were plausible,
19 that's why I think this is coming up.

20 JUSTICE JACKSON: Okay. And -- and
21 with respect to this question about maps and
22 alternative map, I'm just wondering whether or
23 not an alternative map is helpful with respect
24 to the contention that the district was being
25 oddly manufactured with respect to who was being

1 moved in or out.

2 This is similar to the question that I
3 asked plaintiffs' counsel. My understanding is
4 that politics is driving it at a sort of meta
5 level, and the map-maker identifies a
6 Republican-leaning district that he would like
7 to include. That Republican-leaning district
8 has both white and black voters in it. And so
9 one would assume that just by that move, the
10 BVAP goes up. I don't know if that's right, but
11 I'm just -- I'm walk -- I'm walking it through.

12 But, in this situation, the BVAP stays
13 the same at the end of the day and we have
14 evidence that the map-maker went into the rest
15 of the district and moved out a certain number
16 of Democratic-leaning voters who happened to be
17 black or plaintiffs say because they were black,
18 but that's what makes the BVAP remain the same.
19 It's that we've now moved out black Democrats to
20 account for, I guess, the Republican-leaning
21 district that we have included.

22 Is the use of race in that way, you
23 know, I have now got a higher BVAP than I want,
24 and I'm moving out black voters, not white
25 Democrats, black Democrats, in order to bring

1 the BVAP down, is that a violation in -- in this
2 world?

3 MS. FLYNN: Yes. And we think that
4 was a very probative piece of evidence that
5 contributed to the district court's finding.

6 JUSTICE JACKSON: And what would a map
7 do? If that's the kind of violation that I am
8 trying to establish as the plaintiff, I guess
9 what I don't understand is why having an
10 alternative map is going to illuminate that in
11 any way.

12 MS. FLYNN: Right. I think an
13 alternative map could show a different way the
14 lines could have been drawn and show whether or
15 not there are different ways to do it that it
16 could accomplish some or all of the defendants'
17 goals, but I don't think it's the only way to
18 answer this core question of what was driving
19 the decisionmaking. And --

20 JUSTICE JACKSON: And, in fact, if
21 this dynamic is what is really bothering me, for
22 example, as the plaintiff -- I'm putting myself
23 in their shoes -- it doesn't necessarily even
24 make sense to me that you would produce a map to
25 prove that dynamic is happening. You would have

1 expert testimony in the way that you have, you
2 would, you know, explain it all through, but I
3 don't -- I guess I just don't see how a map
4 would be helpful if -- if that's the dynamic
5 that I'm trying to focus on.

6 MS. FLYNN: I think that it was very
7 reasonable for plaintiffs to offer expert
8 testimony to that. I think the other evidence
9 speaks to it as well. I do think that cases
10 have sort of a different mix of circumstantial,
11 sometimes with direct, and you just kind of have
12 to take the record and see what -- persuasive
13 conclusions can be drawn for it without any --

14 JUSTICE JACKSON: So the government's
15 position is that you don't necessarily have to
16 have a map and you don't necessarily have to
17 have direct evidence. We've been hearing a lot
18 about the lack of direct evidence in this case.

19 Is there a world in which you can put
20 together a case that demonstrates that race is
21 actually operative in this environment without
22 direct evidence and without a map?

23 MS. FLYNN: Yes.

24 JUSTICE JACKSON: Thank you.

25 MS. FLYNN: Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Rebuttal, Mr. Gore?

4 REBUTTAL ARGUMENT OF JOHN M. GORE
5 ON BEHALF OF THE APPELLANTS

6 MR. GORE: Today's argument
7 underscores why the alternative map requirement
8 is so vital. It ensures that racial
9 gerrymandering cases remain focused on racial
10 discrimination and not partisan disputes. It
11 also ensures that the grave finding of racial
12 gerrymandering rests on actual evidence of
13 racial predominance and not malleable expert
14 analysis.

15 If Dr. Ragusa were correct that race
16 better explains the enacted plan than politics,
17 it should have been very easy to draw an
18 alternative map that disentangled the two and
19 preserved the Republican political lean in
20 District 1. Appellees failed that requirement.
21 They did put alternative maps into the record,
22 so they obviously had the capacity to do that,
23 and all the alternative maps turned District 1
24 into a majority Democratic district.

25 We've heard from counsel for the

1 United States about two plans in the record, the
2 House Staff Plan and the Sabb Plan. Neither of
3 those increased the Republican tilt like the
4 enacted plan did, and neither was as compliant
5 with traditional districting principles, so
6 neither of those plans would have been enacted.
7 In fact, Senator Campsen became involved in
8 drawing the enacted plan and sponsoring it
9 precisely because the House Staff Plan imperiled
10 District 1 and threatened to turn it into a
11 majority Democratic district.

12 Counsel for the other side mentioned
13 Gomillion. But, in Gomillion, there was an
14 alternative map because there had been prior
15 municipal boundaries of Tuskegee that were
16 perfectly square before the redrawing that was
17 done in an intentionally discriminatory way. So
18 that map also underscored that there was
19 intentional discrimination in Gomillion, which
20 is a totally different case from this for -- for
21 a host of reasons otherwise.

22 Let me address the point about
23 election data. The district court did not find
24 that the 2020 presidential election data was
25 unreliable. The district court actually itself

1 relied on that data. It used that data to
2 illustrate the correlation between race and
3 politics. It thought that data was reliable.
4 And all the direct evidence showed that it was
5 reliable and far more reliable than racial data
6 that doesn't address white voters and doesn't
7 address voting and turnout.

8 The reason that the General Assembly
9 used only one year of election data is a very
10 simple one in the record: that 2020 was the
11 first year that the Election Commission
12 allocated absentee votes down to the precinct
13 where the voter lives instead of at the county
14 level. So it was more accurate and finely tuned
15 data, political data, than any election data
16 that had come before in the history of South
17 Carolina.

18 This is a circumstantial case with
19 very weak circumstantial evidence. There's no
20 direct evidence. There's no alternative map.
21 Here, we have a plan that complied with
22 traditional districting principles in Charleston
23 County and in District 1 and did so better than
24 all of the alternatives that were presented at
25 trial.

1 There was a mention of contiguity.
2 The district court also made no finding about
3 contiguity. The enacted District 1 is
4 contiguous. It's contiguous by water. Every
5 plan drawn in Charleston County is contiguous by
6 water because Charleston County contains islands
7 and rivers. So there's nothing suspect about
8 the contiguity of this particular plan.

9 We heard about the Covington case.
10 That was a remedial case. That was a remedial
11 case where the panel had already found racial
12 gerrymandering, sent it back to the legislature,
13 and then determined that the legislature had not
14 adequately fixed the problem. It's not a case
15 in which there was only weak circumstantial
16 evidence to support a finding of racial
17 gerrymandering.

18 We heard today that the legislative
19 record gave no indication that the General
20 Assembly was drawing lines based on politics.
21 That's completely incorrect. The guidelines
22 from both the House and the Senate permitted the
23 General Assembly to draw based on politics, to
24 draw communities of interest based on politics.
25 And the House guidelines went even further.

1 They allowed the General Assembly to draw around
2 communities of interest defined by voting
3 behavior, which is exactly what the General
4 Assembly did here.

5 Senator Margie Bright Matthews, who
6 was a Democrat who opposed the enacted plan,
7 said on the floor of the Senate that it was
8 about politics. She even disclaimed the
9 allegation that it was about race. She said
10 that Senator Campsen had drawn based on how
11 people voted, including in West Ashley.

12 This also -- this political goal also
13 was made clear in discovery. Mr. Roberts
14 testified to it in his deposition. Senator
15 Campsen, Senator Massey, and also Representative
16 Jordan. There were production of emails and
17 documents and text messages, including from
18 Representative Jordan, establishing that the
19 General Assembly had pursued a political goal.

20 We've heard a lot of discussion today
21 that Mr. Roberts or others were aware of race.
22 But mere awareness of race does not prove racial
23 predominance. The question here is whether race
24 was actually used to draw lines in a
25 predominantly way -- in a -- in a predominant

1 manner.

2 That did not happen on this record,
3 and the district court's own description of what
4 the General Assembly did disproves it. It said
5 that the first move was to move in Berkeley and
6 Beaufort Counties whole. Once you do that, you
7 end up --

8 CHIEF JUSTICE ROBERTS: You can finish
9 your sentence.

10 MR. GORE: -- you could -- you could
11 -- you end with a district with a 20 percent
12 BVAP that's also majority Republican.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 The case is submitted.

16 (Whereupon, at 12:09 p.m., the case
17 was submitted.)

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