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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 first this morning in case 16-1161, Gill versus Whitford.

Mr. Tseytlin?

ORAL ARGUMENT OF MISHA TSEYTLIN
ON BEHALF OF APPELLANTS

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

This Court has never uncovered judicially manageable standards for determining when politicians have acted too politically in drawing district lines. Plaintiff's social science metrics composed of statewide vote to seat ratios and hypothetical projections do not solve any of these problems.

Instead, they would merely shift districting from elected public officials to federal courts, who would decide the fate of maps based upon battles of the experts.

Now, the threshold matter, this Court should hold that federal courts lack jurisdiction to entertain statewide political gerrymandering challenges, leaving for another

1 day the question of district-specific
2 gerrymandering challenges.

3 JUSTICE KENNEDY: I think it is true
4 that there is no case that directly helps
5 Respondents very strongly on the standing
6 issue. You have a strong argument there.

7 But suppose the Court -- and you just
8 have to assume, we won't know exactly the
9 parameters of it -- decided that this is a
10 First Amendment issue, not an equal protection
11 issue.

12 Would that change the calculus so
13 that, if you're in one part of the state, you
14 have a First Amendment interest in having your
15 party strong or the other party weak?

16 MR. TSEYTLIN: No, it wouldn't, Your
17 Honor. And I think the reason for that is,
18 even if it is a First Amendment issue, it is
19 still grounded in the right to vote.

20 And in our country's single district
21 election system, folks only vote in their own
22 district. For example, you might have some
23 vague interest in the party that you associate
24 with having more members in Congress, for
25 example, like a Wisconsin Republican might want

1 more Texas Republicans in Congress.

2 But no one would say that you have a
3 First Amendment or first -- Fourteenth
4 Amendment right in that sort of circumstance to
5 challenge some Texas law that you would, for
6 example, argue led to less Republicans from
7 Texas coming to the Congress.

8 CHIEF JUSTICE ROBERTS: Well, but I
9 think the argument is pretty straightforward
10 which you, in your district, have a right of
11 association and you want to exercise that right
12 of association with other people elsewhere in
13 the state.

14 And if you can't challenge the
15 districting throughout the state, then your
16 claim seems to be -- there is no way for to you
17 to raise your claim.

18 JUSTICE KENNEDY: This of course --
19 and this of course confines it to the state and
20 eliminates the problem of out-of-state, as the
21 way the Chief Justice stated the hypothetical.

22 MR. TSEYTLIN: Well, Your Honor, I
23 don't think it would solve the interstate
24 problem because, of course, the structural
25 relationship of, for example, Mr. --

1 JUSTICE KENNEDY: Let's -- let's
2 assume that it does.

3 (Laughter.)

4 MR. TSEYTLIN: Well -- well, Your
5 Honor, I still think that this Court should be
6 very careful about enacting that kind of
7 doctrine.

8 As we know, race and politics are
9 often correlated in this country, so political
10 gerrymandering claims and racially
11 gerrymandering claims, even if they are
12 ultimately grounded in a different
13 constitutional amendment, will often be raised
14 together.

15 And it cannot be -- possibly be the
16 case that, if there is a showing that the map
17 drawer turned on the racial screen, the person
18 is limited to a single district claim.

19 But if that same map drawer turned on
20 the political screen, then the plaintiff would
21 get access to the holy grail of a statewide
22 claim --

23 JUSTICE SOTOMAYOR: I'm not --

24 JUSTICE GINSBURG: On the question of
25 race, some years ago, this Court dealt with

1 what the -- the so-called "max-Black" plan,
2 said it was a deliberate attempt by the
3 legislature to make as many African American
4 districts as possible.

5 This bears a certain resemblance
6 because the effort here, intentionally, was to
7 create as many Republican districts. So is
8 max-Republican, it -- doesn't it have the same
9 problem that "max-Black" did?

10 MR. TSEYTLIN: Well, Your Honor, that
11 turns to the issue of justiciability, and I do
12 not think that raises the same problems
13 because, of course, politics is not a suspect
14 classification like race.

15 And I think the easiest way to see
16 this is to take a look at a chart that
17 plaintiff's own expert created, and that's
18 available on Supplemental Appendix 235. This
19 is plain -- plaintiff's expert studied maps
20 from 30 years, and he identified the 17 worst
21 of the worst maps. What is so striking about
22 that list of 17 is that 10 were neutral draws.

23 There were court-drawn maps,
24 commission-drawn maps, bipartisan drawn maps,
25 including the immediately prior Wisconsin drawn

1 map. And I think the Court should learn two
2 lessons from this list of 17, 10 of which were
3 neutral.

4 The first lesson is that partisan
5 symmetry is simply not a neutral districting
6 criteria. It is not a neutral method of
7 drawing districts. For if it were, all of
8 these commissions would not be drawing partisan
9 asymmetry maps.

10 The second lesson that this Court
11 should learn from that -- from that list is
12 that plaintiffs are asking this Court to launch
13 a redistricting revolution based upon their
14 social science metrics.

15 JUSTICE ALITO: Before you get too
16 deeply into the merits, which I assume you will
17 want to do in a minute, can I just ask you a
18 question about standing along the lines of
19 those asked by my colleagues?

20 Suppose that it was alleged that town
21 officials in someplace in northern Wisconsin
22 where the Republicans predominate were
23 discriminating against the Democratic candidate
24 for a legislative district by, let's say, not
25 allowing that candidate's signs to be put up

1 along the roadsides, but allowing the
2 Republican signs to be put up along the
3 roadsides, or they were pressuring town --
4 let's just leave it at that.

5 They're discriminating with respect to
6 these signs. Now, who would have standing to
7 raise a First Amendment challenge to that?
8 Would it be just the candidate in that district
9 or maybe voters in that district? Or could a
10 -- a Democratic voter in, let's say, Milwaukee
11 have standing to raise that First Amendment
12 argument?

13 MR. TSEYTLIN: I would certainly
14 think, Your Honor, the candidate would have
15 standing, and I -- I'm not so sure about the
16 voters in the district, but probably.

17 But certainly, voters in Milwaukee who
18 don't vote for that candidate, they're not
19 eligible to vote for that candidate any more
20 than someone in California is eligible to vote
21 for the candidate.

22 And I think we see this --

23 CHIEF JUSTICE ROBERTS: Wait. I'm
24 sorry. Certainly, voters in Milwaukee -- you
25 left out -- would not have standing?

1 MR. TSEYTLIN: They would not have
2 standing.

3 And I -- I think we see this from the
4 testimony of -- of the lead plaintiff, who is
5 the only plaintiff that testified in this case.

6 He was asked, during his testimony,
7 what harm does Act 43 put on you, given that
8 you live in a Democratic-dominated district in
9 Madison under any possible map.

10 Well, he said, I want to be able to
11 campaign for a majority in assembly, which
12 shows that his injury has nothing to do with
13 him as a voter. It's just a generalized
14 interest in more Wisconsinites -- more
15 Wisconsin Democrats being elected, which
16 someone in Wisconsin can have or someone
17 outside of Wisconsin can --

18 JUSTICE GINSBURG: May I --

19 JUSTICE KENNEDY: I think we're
20 anxious to get to the merits, but one more
21 thing on the sign. Suppose the sign in the
22 southern part of the state had -- talked about
23 an issue which was very important to the people
24 in Milwaukee.

25 MR. TSEYTLIN: I think that one could

1 frame a hypothetical where, if it was some sort
2 of a home rule thing, where Milwaukee's right
3 to have certain height buildings was affected,
4 you could have a no longer generalized
5 interest, but we don't have anything like that
6 here.

7 JUSTICE BREYER: All right. So can I
8 do this? Because I think the hard issue in
9 this case is are there standards manageable by
10 a court, not by some group of social science
11 political ex -- you know, computer experts. I
12 understand that, and I am quite sympathetic to
13 that.

14 So let me spend exactly 30 seconds, if
15 I can, giving you, as you've read all these
16 briefs, I have too, this is -- this is where I
17 am at the moment -- not that I'm for this,
18 react to this as you wish, and if you wish to
19 say nothing, say nothing, and it's for
20 everybody because it's a little complicated.

21 When I read all that social science
22 stuff and the computer stuff, I said, well,
23 what -- is there a way of reducing it to
24 something that's manageable?

25 So I'd have step one, the judge says,

1 was there one party control of the
2 redistricting? If the answer to that is no,
3 say there was a bipartisan commission, end of
4 case. Okay?

5 Step two, is there partisan asymmetry?
6 In other words, does the map treat the
7 political parties differently? And a good
8 evidence of that is a party that got 48 percent
9 of the vote got a majority of the legislature.

10 Other evidence of that is what they
11 call the EG, which is not quite so complicated
12 as the opposition makes it think. Okay? In
13 other words, you look to see.

14 Question 3, is -- is there going to be
15 persistent asymmetry over a range of votes?
16 That is to say one party, A, gets 48 percent,
17 49 percent, 50 percent, 51, that's sort of the
18 S-curve shows you that, you know, whether there
19 is or is not. And there has to be some.

20 And if there is, you say is this an
21 extreme outlier in respect to asymmetry? And
22 there we have Eric Lander's brief, okay? You
23 know that one.

24 And -- and we look through thousands
25 and thousands of maps, and somebody did it with

1 real maps and said how bad is this compared to,
2 you know, the worst in the country.

3 And then, if all those -- the test
4 flunks all those things, you say is there any
5 justification, was there any other motive, was
6 there any other justification?

7 Now, I suspect that that's manageable.
8 I'm not positive. And so I throw it out there
9 as my effort to take the technicalities and
10 turn them into possibly manageable questions
11 for a response from anyone insofar as you wish
12 to respond, and if you wish to say, I wish to
13 say nothing, that's okay with me.

14 (Laughter.)

15 MR. TSEYTLIN: Thank you, Your Honor.
16 I'd like to talk about the third and fourth
17 aspects of that because I think those are --
18 I've already talked about the second a little
19 bit.

20 But with regard to the third, which is
21 persistence, that is exactly the kind of
22 conjectural, hypothetical state of affairs
23 inquiry that was submitted to this Court in
24 LULAC in Professor King's amicus brief because,
25 of course, as your suggestion -- suggested

1 steps recognize, a single election doesn't mean
2 much. A single election, you could have an EG
3 for any particular reason.

4 So you would have federal courts
5 engaging in battles of the hypothetical experts
6 deciding, well, what would it be under this map
7 or that map? So I think that's a non-starter
8 for that reason.

9 Now, with regard to extremity, this
10 was an arg --

11 JUSTICE KAGAN: Well, if I could just
12 stop you there for a second, because I was
13 under the impression that legislators are
14 capable of doing this actually pretty easily
15 now.

16 You know, the world of voting
17 technology has changed a great deal, and when
18 legislatures think about drawing these maps,
19 they're not only thinking about the next
20 election, they're thinking often -- not
21 always -- but often about the election after
22 that and the election after that and the
23 election after that, and they do sensitivity
24 testing, and they use other methods in order to
25 ensure that certain results will obtain not

1 only in the next one but eight years down the
2 road.

3 And it seems to me that, just as
4 legislatures do that, in order to entrench
5 majorities -- or minorities, as the case may
6 be -- in order to entrench a party in power,
7 so, too, those same techniques, which have
8 become extremely sophisticated, can be used to
9 evaluate what they're doing.

10 MR. TSEYTLIN: Well, Your Honor,
11 legislatures don't have to worry about judicial
12 manageability standards. Legislatures don't
13 have to worry about false positives, false
14 negatives. Legislatures don't have to worry
15 about conjecture. They can --

16 JUSTICE KAGAN: What -- what I'm
17 suggesting is that this is not kind of
18 hypothetical, airy-fairy, we guess, and then we
19 guess again. I mean, this is pretty scientific
20 by this point.

21 MR. TSEYTLIN: Well, Your Honor,
22 they're just estimates. They're not all
23 scientific. And let me give you one example
24 from the record --

25 JUSTICE SOTOMAYOR: I'm sorry.

1 They're estimates where you haven't put any
2 social scientist to say that the estimate is
3 wrong. You've poked holes, but every single
4 social science metric points in the same
5 direction.

6 So there are five of them. Your map
7 drawer is one of them, by the way, the person
8 who actually drew these maps, and what we know
9 is that they started out with the court plan,
10 they created three or four different maps, they
11 weren't partisan enough. They created three or
12 four more maps, they weren't partisan enough.

13 And they finally got to the final map,
14 after maybe 10 different tries of making it
15 more partisan, and they achieved a map that was
16 the most partisan on the S-curve.

17 And it worked. It worked better than
18 they even expected, so the estimate wasn't
19 wrong. The estimate was pretty right.

20 So, if it's the most extreme map they
21 could make, why isn't that enough to prove --

22 MR. TSEYTLIN: Well, Your Honor -- I
23 think --

24 JUSTICE SOTOY MAYOR: -- partisan
25 asymmetry and unconstitutional gerrymandering?

1 MR. TSEYTLIN: Well, Your Honor, I
2 think the facts in this case, which is what you
3 were discussing, are significantly less
4 troubling than the facts in the cases that this
5 Court has previously faced, for example,
6 Bandemer and Vieth, and that's for two reasons.
7 One, the map drawers here complied fastidiously
8 with traditional districting principles, which
9 was not true in Bandemer and Vieth.

10 JUSTICE SOTOMAYOR: But they kept
11 going back to fix the map to make it more
12 gerrymandered. That's undisputed. The people
13 involved in the process had traditional maps
14 that complied with traditional criteria and
15 then went back and threw out those maps and
16 created more -- some that were more partisan.

17 MR. TSEYTLIN: That's correct, Your
18 Honor. And, of course, there were computers
19 used --

20 JUSTICE SOTOMAYOR: So why didn't they
21 take one of the earlier maps?

22 MR. TSEYTLIN: Because there was no
23 constitutional requirement that they do so.
24 They complied with all state law --

25 JUSTICE SOTOMAYOR: That's the point.

1 MR. TSEYTLIN: And they complied with
2 all traditional districting principles.

3 JUSTICE ALITO: Can I take you back to
4 -- to Justice Kagan's question about the
5 legislators' use of these techniques? Are all
6 the techniques that are used by politicians in
7 order to try to maximize their chances of
8 electoral success scientific? I think they
9 rely a lot on polls, don't they? How
10 scientific have they proven to be?

11 MR. TSEYTLIN: Of course, Your Honor.
12 Legislatures can very much rest on conjecture
13 whereas courts cannot. If I could reserve the
14 balance of my time.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Ms. Murphy.

18 ORAL ARGUMENT OF ERIN E. MURPHY
19 FOR WISCONSIN STATE SENATE, AS AMICUS CURIAE

20 MS. MURPHY: Mr. Chief Justice, and
21 may it please the Court:

22 Plaintiffs have not identified a
23 workable standard for determining when the
24 inherently political task of districting
25 becomes too political for the Constitution to

1 tolerate.

2 Indeed, the only thing plaintiffs have
3 added to the mix since LULAC is a wasted votes
4 test that identifies court-drawn maps as
5 enduring partisan gerrymanders and conveniently
6 favors their own political party.

7 JUSTICE KENNEDY: You've probably
8 considered the hypo many times. Suppose a
9 state constitution or state statute says all
10 districts shall be designed as closely as
11 possible to conform with traditional
12 principles, but the overriding concern is to
13 increase -- have a maximum number of votes for
14 party X or party Y. What result?

15 MS. MURPHY: I think if -- if you have
16 something that says the ultimate principle that
17 we're going to follow is abandon all other
18 criteria in favor of partisan advantage, at
19 least you're closer at that point --

20 JUSTICE GINSBURG: I don't think -- I
21 don't think that was the question. It was it
22 satisfies all the traditional criteria,
23 contiguous, but it was a deliberate attempt to
24 maximize a number of seats that Republicans
25 would hold.

1 JUSTICE KENNEDY: This is mandated by
2 the state constitution.

3 MS. MURPHY: I don't think that in a
4 world where the legislature is required to and
5 is, in fact, complying with a number of other
6 metrics and is as one of those things taking
7 into account partisan advantage, that you've
8 proven a constitutional violation.

9 JUSTICE ALITO: It's not a -- that's
10 not a manageable standard. It's not a
11 manageable standard that you cannot have a law
12 that says draw maps to favor one party or the
13 other.

14 MS. MURPHY: If it's --

15 JUSTICE ALITO: That seems like a
16 perfectly manageable standard.

17 MS. MURPHY: If it's on --

18 JUSTICE ALITO: You cannot have that.

19 MS. MURPHY: -- the face of the
20 statute, I think you have a different scenario
21 because at least at that point, you know the
22 intent. You know there's no debate to have
23 about the intent of what the legislature is
24 doing and if they are intentionally drawing for
25 one purpose or other purposes.

1 JUSTICE KAGAN: Well there are plenty
2 areas of law, Ms. Murphy, where we look at
3 intent beyond the face of a statute. And, you
4 know, sometimes that's harder than other times.
5 We understand it can be difficult. We
6 understand in other cases it can be easy. But
7 we do it all over the place in our law. We
8 don't -- we don't say, oh, if it's not on the
9 face of the statute, we're never going to look
10 at it.

11 So if your answer to Justice Alito is
12 well on the face of the statute, that's
13 certainly a manageable standard, I guess I
14 would ask why not if it's not on the face of
15 the statute? But you absolutely -- you know,
16 but you have good evidence that there was the
17 intent here, and you have good evidence that
18 the intent led to a certain kind of effect,
19 which was to entrench a party in power.

20 MS. MURPHY: I think what
21 differentiates this from a lot of other
22 contexts is that here we have opinion after
23 opinion from this Court, dissenting opinions,
24 concurring opinions, plurality opinions, what
25 have you, saying that considering politics in

1 districting is not in and of itself inherently
2 unconstitutional.

3 JUSTICE GORSUCH: Ms. Murphy --

4 MS. MURPHY: So just finding the
5 intent isn't a problem.

6 JUSTICE KAGAN: There is a difference
7 --

8 JUSTICE GORSUCH: I'd like to go back
9 to Justice Breyer's question, and it would be
10 helpful to get an answer for me on that. What
11 criteria would a state need to know in order to
12 avoid having every district and every case and
13 every election subject to litigation? Because
14 the -- the standards given in -- in the lower
15 court here was, well, a little bit of partisan
16 symmetry problem, a little bit of an efficiency
17 gap problem, not a real set of criteria.

18 And here, you know, is it 7 percent,
19 how durable, how many elections would we need?
20 How much data would we have to gather? Walk us
21 through Justice Breyer's question and provide
22 some answers, if you -- if you would.

23 MS. MURPHY: Sure. So I think some of
24 the problems with the criteria that have been
25 suggested, in particular with the tests that

1 focus on these symmetry metrics, is that so far
2 the metrics that we have, I mean, they identify
3 false positives roughly 50 percent of the time.

4 And I don't know how a legislature is
5 supposed to comply with criteria that can't
6 differentiate between a court-drawn map and a
7 map drawn for partisan advantage. So, when you
8 start with this partisan symmetry concept, you
9 automatically have the basic problem that you
10 have to have some way to decide what is the
11 appropriate partisan asymmetry.

12 JUSTICE GORSUCH: Okay. But what are
13 the questions -- you know, I need two years or
14 two cycles worth of data. I need an S curve of
15 a certain shape and size. I need an efficiency
16 gap of something. What are the numbers, what
17 are the criteria we'd have to fill in as a
18 constitutional matter in order for a state to
19 be able to administer this?

20 MS. MURPHY: Well, I mean with all due
21 respect, I -- I -- I'm not convinced that there
22 are manageable criteria for the courts to be
23 putting on legislatures for how to go about
24 this process. And I certainly don't think that
25 anyone in this case has identified that.

1 JUSTICE GORSUCH: But if you could try
2 to answer --

3 MS. MURPHY: But I would suggest that,
4 you know, one of the starting points for me
5 would have to be that traditional districting
6 criteria should matter in the analysis.

7 If you have a legislature that has
8 started by saying we're going to comply with
9 everything that we're supposed to do, not only
10 as a legal matter, but also all of these
11 practical constraints, we're going to draw
12 districts that comply --

13 JUSTICE GINSBURG: Ms. Murphy, because
14 your time is running out, I would like to ask
15 you what's really behind all of this. The
16 precious right to vote, if you can stack a
17 legislature in this way, what incentive is
18 there for a voter to exercise his vote?
19 Whether it's a Democratic district or a
20 Republican district, the result -- using this
21 map, the result is preordained in most of the
22 districts.

23 Isn't that -- what becomes of the
24 precious right to vote? Would we have that
25 result when the individual citizen says: I

1 have no choice, I'm in this district, and we
2 know how this district is going to come out? I
3 mean that's something that this society should
4 be concerned about.

5 MS. MURPHY: Well, a -- a couple of
6 responses to that, Your Honor. First of all,
7 it's inherent in our districting scheme that
8 there are plenty of people who are always going
9 to be voting in districts where they know what
10 the result is going to be. And that has
11 nothing to do with partisan gerrymandering; it
12 has to do with the geography of politics and
13 the fact that some of us just live in districts
14 where --

15 JUSTICE GINSBURG: Some of us but --

16 MS. MURPHY: -- we know that our vote
17 will come out one way or another.

18 JUSTICE GINSBURG: In Wisconsin,
19 before this plan, was it the case that when it
20 was something like 49 out of 99 districts were
21 uncontested, nobody -- the election was --
22 wasn't contested because the one party or the
23 other was going to win.

24 MS. MURPHY: Well, I don't think you
25 can quite draw that conclusion from the fact

1 there's uncontested races. I mean, the reality
2 is that political parties have to make
3 decisions about where to put their resources,
4 and they're going to have to do that for
5 reasons that, again, have nothing to do with
6 districting for partisan advantage. They have
7 to do with the fact that drawing districts is
8 always going to reflect political calculations
9 and it's always going to be driven by
10 communities of interest, and communities of
11 interest sometimes feel very strongly about one
12 political party rather than another.

13 JUSTICE KENNEDY: I have to say that I
14 don't think you ever answered the question: If
15 the state has a law or constitutional amendment
16 that's saying all legitimate factors must be
17 used in a way to favor party X or party Y, is
18 that lawful?

19 MS. MURPHY: I think it's -- on the
20 face of the constitution as a requirement the
21 district must -- the legislature must comply
22 with, then that could be your instance of a --
23 a problem that can be actually solved by the
24 Constitution, but it's quite different to me
25 when you have a facially neutral districting --

1 JUSTICE KENNEDY: Is that an equal
2 protection violation or a First Amendment
3 violation?

4 MS. MURPHY: Well, it's a little hard
5 to say at this point because, you know, it
6 really just hasn't been fully explored, this
7 concept of how you would come at all this from
8 a First Amendment perspective. I think this
9 comes back to really the standing question --

10 JUSTICE KENNEDY: Well, you said
11 there's a Constitution -- is it equal
12 protection?

13 MS. MURPHY: I think the question -- I
14 mean, it would be who has standing to bring --

15 JUSTICE KENNEDY: Well, assume
16 standing. I'd like the answer to the question.

17 MS. MURPHY: Yes. It would be an
18 unconstitutional, if it was on the face of it,
19 and I think that that would be better thought
20 of probably as an equal protection violation,
21 but you could think of it just as well, I
22 think, as a First Amendment violation in the
23 sense that it is viewpoint discrimination
24 against the individuals who the legislation is
25 saying you have to specifically draw the maps

1 in a way to injure, but, again, I --

2 JUSTICE SOTOMAYOR: Could you tell me
3 what the value is to democracy from political
4 gerrymandering? How -- how does that help our
5 system of government?

6 MS. MURPHY: Sure. Well, I would
7 point to --

8 JUSTICE SOTOMAYOR: You -- you almost
9 concede that it doesn't when you say if a state
10 filed -- has a constitutional amendment or has
11 a law that says you must comply with
12 traditional criteria, but you must also
13 politically gerrymander, you're saying that
14 might be unconstitutional?

15 MS. MURPHY: It might be, but I don't
16 think that necessarily means that districting
17 for partisan advantage has no positive values.
18 I would point you to, for instance, Justice
19 Breyer's dissenting opinion in Vieth which has
20 an extensive discussion of how it can actually
21 do good things for our system to have districts
22 drawn in a way that makes it easier for voters
23 to understand who they are account -- who the
24 legislature is. It produces values in terms of
25 accountability that are valuable so that the

1 people understand who isn't and who is in
2 power.

3 JUSTICE SOTOMAYOR: I really don't
4 understand how any of that -- what that means.
5 I mean, it -- it's okay to stack the decks so
6 that for 10 years or an indefinite period of
7 time one party, even though it gets a minority
8 of votes, can't get a minor -- gets a minority
9 of votes, can get the majority of seats?

10 MS. MURPHY: With all due respect, you
11 know, I would certainly dispute the premise
12 that the decks are stacked here. At the end of
13 the day, what matters is how people vote in
14 elections and that's what's going to determine
15 the outcomes, as it has in Wisconsin where the
16 Republicans have won majorities because they've
17 actually won the majority of the vote in most
18 of the elections over the past four years.
19 Thank you, Your Honor

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Counsel.

22 ORAL ARGUMENT OF PAUL M. SMITH

23 ON BEHALF OF APPELLEES

24 CHIEF JUSTICE ROBERTS: Mr. Smith?

25 MR. SMITH: Mr. Chief Justice, and may

1 it please the Court. What the state is asking
2 for here is a free pass to continue using an
3 assembly map that is so extreme that it
4 effectively nullifies democracy.

5 As this case illustrates, it's now
6 possible even in a 50/50 state like Wisconsin
7 to draw a district map that is so reliably and
8 extremely biased that it effectively decides in
9 advance who's going to control the legislative
10 body for the entire decade.

11 CHIEF JUSTICE ROBERTS: Maybe we can
12 just talk briefly about the standing issue.

13 It is a little arresting to have a
14 rule that we establish that when your claim is
15 racial gerrymandering, it has to be limited to
16 your district, you can't complain about racial
17 gerrymandering elsewhere in the state, but
18 here, if the claim is going to be political
19 gerrymandering, you can raise claims about
20 whole statewide issues even if there is no
21 argument that you're gerrymandered, like the
22 first plaintiff who votes in Madison, his vote
23 isn't diluted in any way, and yet he is able to
24 complain about voting anywhere in the state.

25 MR. SMITH: Well, Mr. Chief Justice, I

1 think that standing has to follow from the
2 nature of the injury and that follows from the
3 nature of the constitutional violation.

4 A racial gerrymandering claim, a Shaw
5 v. Reno claim, is an attack on a particular
6 district for being drawn with excessive focus
7 on race. In that situation, the injury has to
8 be localized to the place where that district
9 is.

10 Partial -- partisan gerrymandering has
11 the same word in it, but it's an entirely
12 different kind of injury because it involves
13 dilution of votes. Racial gerrymandering is
14 analytically distinct from any dilution case.

15 JUSTICE ALITO: I don't understand --

16 CHIEF JUSTICE ROBERTS: What about --
17 what about the sign hypothetical? You know,
18 you're up in far north of Wisconsin and
19 somebody is taking down the signs for the one
20 candidate in the far south.

21 That affects that individual's -- the
22 strength of his vote for the state-wide
23 purposes. Is he really have standing to
24 complain about that?

25 MR. SMITH: Well, Your Honor, I think

1 you could decide that while it might have some
2 de minimis effect on the interest of any
3 Democrat attempting to carry out that group's
4 political agenda, that it's sufficiently de
5 minimis that you wouldn't want to give standing
6 to people outside the directly affected area.

7 JUSTICE ALITO: Why -- why is it de
8 minimis? It seems to me it's exactly the same
9 thing. If you have a system, let's extend it
10 to many towns that are controlled by the
11 Republicans and they're taking down all the
12 Democratic signs. And if that's an effective
13 strategy, it will mean fewer members of the
14 legislature are Democrats and, therefore, the
15 interests of the Democratic voter in Milwaukee
16 or Madison will be impaired. It seems like
17 exactly the same thing.

18 MR. SMITH: Well, Your Honor, if you
19 had a systematic effort in a lot of places by
20 members of one party to prevent the other party
21 from campaigning effectively, I think that
22 anybody in the Democratic Party in the state
23 would have standing.

24 JUSTICE ALITO: All right. Well,
25 let's look at the race issue.

1 So you have a state where there you
2 have an African American voter in -- in a -- in
3 one part of the state who wants to complain
4 that districts in another part of the state are
5 -- are packed or cracked and, as a result of
6 that, there are going to be fewer African
7 Americans in the legislature than there should
8 be.

9 And that's going to impair that
10 person's interests, including, I would suppose,
11 their right of association. What is the
12 difference between those two situations?

13 MR. SMITH: Well, Your Honor, that's a
14 Section 2 vote dilution claim and I think that
15 the law appropriately limits standing in that
16 situation to people who live in the region of
17 the state where there's an absence of an
18 additional minority district.

19 You wouldn't want to assume that some
20 African American from a different part of the
21 state has a collective interest with people
22 over here in this part of the state just
23 because of race. That's just stereotyping.
24 But with party, people join the party to -- to
25 work together to achieve a collective end. So

1 you're not --

2 CHIEF JUSTICE ROBERTS: Well, but
3 that's equally stereotyping. Sometimes people
4 vote for a wide variety of reasons. Maybe the
5 candidate, although he's of a different party,
6 is a friend, is a neighbor. Maybe they think
7 it's a good idea to have the representatives
8 from their district to balance out what they
9 view would be necessary -- likely candidates
10 from other districts.

11 MR. SMITH: Maybe they do --

12 CHIEF JUSTICE ROBERTS: I don't think
13 it's any more -- any less stereotypical to say
14 that people are going to vote for parties
15 because they support everything the party does
16 statewide.

17 MR. SMITH: Well, but to have
18 standing, I think you'd want to find plaintiffs
19 who do that, Your Honor. And certainly the
20 plaintiffs we have here are thorough going
21 supporters of the disfavored party. Their
22 party has been punished by the law of the State
23 of Wisconsin. And I think that the -- the
24 standing issue ought to be satisfied by the
25 description of what our claim is, which comes

1 right out of Justice Kennedy's concurrence in
2 Vieth where -- this is on page 86-A of the
3 jurisdictional statement, The White Appendix.

4 It's just a two-sentence description
5 of our claim: "First Amendment concerns arise
6 where a state enacts a law that has the purpose
7 and effect of subjecting a group of voters or
8 their party to disfavored treatment by reason
9 of their views. In the context of partisan
10 gerrymandering, that means that First Amendment
11 concerns arise where an apportionment has the
12 purpose and effect of burdening a group of
13 voters' representational rights."

14 So the group is -- is the targeted
15 people, those are the people who have the
16 injury, the injury to their First Amendment
17 interests, and anybody in the group has --
18 ought -- should be able to -- to bring a First
19 Amendment argument saying --

20 JUSTICE KAGAN: Mr. Smith.

21 CHIEF JUSTICE ROBERTS: Mr. Smith --
22 do you have standing? Well, Justice Kagan?

23 JUSTICE KAGAN: In a one-person
24 one-vote case, does one person in an
25 overpopulated district have standing to

1 challenge not only that district, those
2 district lines, but the entire state map?

3 MR. SMITH: That is true. That is the
4 way that it's been handled ever since the
5 Reynolds case.

6 JUSTICE KAGAN: And why is that, and
7 does it -- is it an analogy to this case?

8 MR. SMITH: Well, it's certainly a
9 helpful analogy. It's not exactly the same
10 because they have to live in an overpopulated
11 district rather than an underpopulated
12 district.

13 But those are the people in -- who
14 suffer vote dilution because they're living in
15 the overpopulated districts. And the Court has
16 said not only does that person have standing to
17 challenge their own district but also to
18 challenge the entire map and make all of the
19 districts closer in population. That's just
20 the way that's been handled since the '60s.

21 CHIEF JUSTICE ROBERTS: Mr. Smith, I'm
22 going to follow an example of one of my
23 colleagues and lay out for you as concisely as
24 I can what -- what is the main problem for me
25 and give you an opportunity to address it.

1 I would think if these -- if the claim
2 is allowed to proceed, there will naturally be
3 a lot of these claims raised around the
4 country. Politics is a very important driving
5 force and those claims will be raised.

6 And every one of them will come here
7 for a decision on the merits. These cases are
8 not within our discretionary jurisdiction.
9 They're the mandatory jurisdiction. We will
10 have to decide in every case whether the
11 Democrats win or the Republicans win. So it's
12 going to be a problem here across the board.

13 And if you're the intelligent man on
14 the street and the Court issues a decision, and
15 let's say, okay, the Democrats win, and that
16 person will say: "Well, why did the Democrats
17 win?" And the answer is going to be because EG
18 was greater than 7 percent, where EG is the
19 sigma of party X wasted votes minus the sigma
20 of party Y wasted votes over the sigma of party
21 X votes plus party Y votes.

22 And the intelligent man on the street
23 is going to say that's a bunch of baloney. It
24 must be because the Supreme Court preferred the
25 Democrats over the Republicans. And that's

1 going to come out one case after another as
2 these cases are brought in every state.

3 And that is going to cause very
4 serious harm to the status and integrity of the
5 decisions of this Court in the eyes of the
6 country.

7 MR. SMITH: Your Honor --

8 CHIEF JUSTICE ROBERTS: It is just
9 not, it seems, a palatable answer to say the
10 ruling was based on the fact that EG was
11 greater than 7 percent. That doesn't sound
12 like language in the Constitution.

13 MR. SMITH: Your Honor, first thing I
14 would say in response to that is that those
15 challenges are already being brought. Partisan
16 gerrymandered maps get challenged -- they get
17 challenged in other ways, under the one person,
18 one vote doctrine, under the racial
19 gerrymandering doctrine, under Section 2. And
20 -- and so you're getting those cases. Most of
21 the -- the statewide redistricting maps in this
22 country are challenged every 10 years in some
23 way or another.

24 What -- what would make the system
25 work better is if people could bring a

1 challenge to what they actually think is wrong
2 with the map, which is that it's anti-
3 democratic, it decides in advance that one
4 party is going to control the state government
5 for 10 years and maybe for 20 years because
6 they can replicate it at the end of the 10
7 years and do it again.

8 That is the real problem. And I think
9 what -- what the Court needs to know is it's --
10 this is a cusp of a really serious, more
11 serious problem as gerrymandering becomes more
12 sophisticated with computers and data analytics
13 and a -- and an electorate that's very
14 polarized and more predictable than it's ever
15 been before. If you let this go, if you say
16 this is -- we're not going to have a judicial
17 remedy for this problem, in 2020 you're going
18 to have a festival of copycat gerrymandering
19 the likes of which this country has never seen.

20 And it may be that you can protect the
21 Court from seeming political, but the country
22 is going to lose faith in democracy big time
23 because voters are going to be like --
24 everywhere are going to be like the voters in
25 Wisconsin and, no, it really doesn't matter

1 whether I vote.

2 JUSTICE ALITO: Well, Mr. Smith --

3 CHIEF JUSTICE ROBERTS: No, but you're
4 going to take this -- the whole point is you're
5 taking these issues away from democracy and
6 you're throwing them into the courts pursuant
7 to, and it may be simply my educational
8 background, but I can only describe as
9 sociological gobbledygook.

10 MR. SMITH: Your Honor, this is --
11 this is not complicated. It is a measure of
12 how unfair the map is. How much burden can the
13 party --

14 JUSTICE BREYER: Can you say this?
15 Look, don't agree with me just because it
16 sounds favorable, because he won't in two
17 minutes. Can you answer the Chief Justice's
18 question and say the reason they lost is
19 because if party A wins a majority of votes,
20 party A controls the legislature. That seems
21 fair.

22 And if party A loses a majority of
23 votes, it still controls the legislature. That
24 doesn't seem fair. And can we say that without
25 going into what I agree is pretty good

1 gobbledygook?

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: And if you
4 need a convenient label for that approach, you
5 can call it proportional representation, which
6 has never been accepted as a political
7 principle in the history of this country.

8 MR. SMITH: Your Honor, we are not
9 arguing for proportional representation. We
10 are arguing for partisan symmetry, a map which
11 within rough bounds at least treats the two
12 parties relatively equal in terms of their
13 ability to translate votes into seats.
14 That's --

15 CHIEF JUSTICE ROBERTS: That sounds
16 exactly like proportional representation to me.

17 MR. SMITH: Proportional
18 representation is when you give the same
19 percentage of seats as they have in percentage
20 of votes. That's what proportional
21 representation means. And our -- our claim
22 simply doesn't remotely do that. It says if
23 party A at 54 percent gets 58 percent of the
24 seats, party B when it gets 54 percent ought to
25 get 58 percent of the seats. That's symmetry.

1 That's what the political scientists
2 say is the right way to think about a map that
3 does not distort the outcome and put a thumb on
4 the scale. Now what --

5 JUSTICE ALITO: Mr. Smith, can I just
6 say something -- ask you a question about the
7 political science? I mean, I -- gerrymandering
8 is distasteful. But if we are going to impose
9 a standard on the courts, it has to be
10 something that's manageable and it has to be
11 something that's sufficiently concrete so that
12 the public reaction to decisions is not going
13 to be the one that the Chief Justice mentioned,
14 that this three-judge court decided this, that
15 -- this way because two of the three were
16 appointed by a Republican president or two of
17 the three were appointed by a Democratic
18 President.

19 Now, it's been 30 years since
20 Bandemer, and before then and since then,
21 judges, scholars, legal scholars, political
22 scientists have been looking for a manageable
23 standard. All right.

24 In 2014, a young researcher publishes
25 a paper, Eric McGhee publishes a paper, in

1 which he says that the measures that were
2 previously -- the leading measures previously,
3 symmetry and responsiveness, are inadequate.
4 But I have discovered the key. I have
5 discovered the Rosetta stone and it's -- it is
6 the efficiency gap.

7 And then a year later you bring this
8 suit and you say: There it is, that is the
9 constitutional standard. It's been finally --
10 after 200 years, it's been finally discovered
11 in this paper by a young researcher, who
12 concludes in the end -- this is the end of his
13 paper -- after saying symmetry and
14 responsiveness have shown to be -- looked to be
15 inappropriate, "The measure I have offered
16 here, relative wasted votes, is arguably" --
17 arguably -- "a more valid and flexible measure
18 of -- of partisan -- of partisan
19 gerrymandering."

20 Now, is this -- is this the time for
21 us to jump into this? Has there been a great
22 body of scholarship that has tested this
23 efficiency gap? It's full of questions.
24 Mr. McGhee's own amicus brief outlines numerous
25 unanswered questions with -- with this theory.

1 What do you do in -- in elections that
2 are not contested? Well, then you have to --
3 you have to make two guesses. How many people
4 would have voted for the winning candidate if
5 it had been a contested election? How many
6 people would have voted for the losing
7 candidate if it had been a contested election?

8 One of the judges in the court below
9 asks: Why do you calculate EG by map, by
10 subtracting from the votes obtained by the
11 winner, 50 percent of the votes, instead of the
12 votes obtained by the runner up? And
13 Mr. McGhee says: Well, I have an answer to
14 this, and I have a forthcoming paper and I'll
15 answer it in the forthcoming paper.

16 (Laughter.)

17 JUSTICE ALITO: And there are all of
18 these questions. This is -- 2017 is the time
19 to jump into this? That's a question.

20 MR. SMITH: Is there a question there,
21 Your Honor?

22 JUSTICE ALITO: Yes, there is a
23 question there. There's about 10 of them.

24 (Laughter.)

25 MR. SMITH: I would say this if I

1 might, Justice Alito. In Vieth, the Court
2 appropriately laid down a challenge and said if
3 you want us to do this, you've got to give us a
4 lot more than you've given us. You've got to
5 give us two things, a substantive definition of
6 fairness and a way to measure it so we can
7 limit judicial intervention to the really
8 serious cases, and so we won't have the Court
9 entering into the political fray all the time,
10 but we'll have standards that say you go this
11 far, we're going to go -- we're going to go
12 after you, but in the meantime, anything less
13 serious than that, we're going to leave to the
14 political branches.

15 And so the social scientists stepped
16 up and said we have three different ways to
17 calculate asymmetry, not just one. The
18 median-mean measure; the partisan bias measure,
19 where you're equalizing to 50/50; and the --
20 the efficiency gap. And in this case, they all
21 come to the exact same conclusion that this is
22 one of the most extreme gerrymanders ever drawn
23 in -- in living memory of the United States,
24 one of the five worst out of the 230 maps that
25 Professor Jackman studied.

1 And so there is no -- there's no
2 question here about this being the --
3 maximizing one party control as far as they
4 could go. As Justice Sotomayor was saying,
5 they pushed the limits and pushed the limits
6 and pushed the limits. And it --

7 JUSTICE KAGAN: Mr. Smith, may I --
8 I'm sorry. Please.

9 MR. SMITH: Please go ahead, Your
10 Honor.

11 JUSTICE KAGAN: I -- I think that this
12 symmetry idea is both an intuitive and an
13 attractive principle. So, if the first
14 question was do you have a substantive
15 principle, I actually think you do.

16 The second question is, is there
17 ways -- are there ways to make sure that not
18 every district is subject to challenge as
19 violating that principle? And so I'd like to
20 hear you talk about that.

21 How is it that we are not going to
22 create a world in which in every district
23 somebody can come in and say: A-ha, there's
24 been a violation of partisan symmetry; we're
25 entitled to a redrawn map?

1 What's the threshold? Where do you
2 draw the line?

3 MR. SMITH: Well, the --

4 JUSTICE KAGAN: Because this -- this
5 -- it seems to me that this map goes over
6 pretty much every line you can name.

7 MR. SMITH: That's true.

8 JUSTICE KAGAN: But where do you draw
9 the line in another case and another case?

10 MR. SMITH: Well, Justice Kagan, the
11 great virtue of these three different measures,
12 none of which were presented to the Court in
13 Vieth when I argued the Vieth case -- and I
14 didn't do a very good job -- is that they each
15 allow you to assign a number to each
16 gerrymander and that allows you to compare them
17 across the country and back in history. And,
18 therefore, it is possible to draw a line.

19 Now, in addition to just measuring the
20 degree of asymmetry, the other thing that's
21 important to do is to measure the likelihood of
22 durability of that asymmetry. And you do that
23 with the sensitivity testing so you make sure
24 you don't have the kind of map that, with a
25 small swing of voting over the next decade, is

1 going to flip over, as the map in Pennsylvania
2 in Vieth actually did. That -- if we had the
3 right tests, the ones that I'm now presenting
4 to you, we wouldn't have won that case in -- in
5 2004.

6 But this map is never going to flip
7 over. The evidence is unequivocal that the
8 Democrats would have to have an earthquake of
9 unprecedented proportions to even have a chance
10 to get up to 50 votes out of 99.

11 CHIEF JUSTICE ROBERTS: All of those
12 predictions -- I mean, Bandemer predicted the
13 Democrats would never be able to attain a
14 majority. It was 50/50 the next election, and
15 they got a majority the one after that. You
16 already mentioned Vieth. It was five days,
17 right, after the District Court said, oh, the
18 -- I forget who it was -- Republicans are never
19 going to get elected. And they won every
20 single race. Predicting on the basis of the
21 statistics that are before us has been a very
22 hazardous enterprise.

23 MR. SMITH: The technique of
24 sensitivity testing, which was done by the
25 Defendants' expert in the -- in the process of

1 drawing the map to make sure that they were
2 drawing a permanent, non-flippable gerrymander,
3 and then done again by the experts for the
4 Plaintiffs in this case in court and tested by
5 the court, is a -- a method by which you
6 identify one thing about the map: Does it have
7 a lot of swing districts in it, a lot of
8 competitive districts in it? Because if it
9 does, you can have a map that looks very biased
10 in one year when all those districts go one
11 way, but it might flip over. That was
12 Bandemer. That was Vieth.

13 That is not this case. They spent
14 their entire time in that -- those four months
15 in that locked room doing two things, trying to
16 maximize the amount of bias and eliminating
17 systematically competitive districts, reducing
18 it down to something less than 10 when it had
19 been up around 20, and then even though those
20 10, they tinkered with it and tinkered with it
21 to make sure that even of that 10, they thought
22 they could get at least seven. They ended up
23 getting eight and then eventually all 10.

24 CHIEF JUSTICE ROBERTS: Mr. Smith are
25 --

1 JUSTICE KAGAN: Mr. Smith, are you
2 suggesting that we should be looking for
3 outliers or are you suggesting that we should
4 be trying to filter out all manner of partisan
5 consideration, or is it someplace in between?

6 MR. SMITH: Your Honor, the word
7 "outlier" is probably an appropriate one.
8 Certainly, we don't think -- and we've followed
9 the lead of this Court in Justice Kennedy's
10 concurrence and other decisions of this Court
11 -- that all partisanship is unconstitutional.

12 What you need is a method by which the
13 extreme gerrymander, the one that is
14 fundamentally anti- democratic and is going to
15 last for the full decade, can be identified and
16 held unconstitutional. And that -- that's the
17 only thing we're asking you to do here.

18 JUSTICE GORSUCH: So, Mr. Smith, what
19 is the formula that achieves that? Because the
20 court below didn't rely on efficiency gap
21 entirely. It looked also at the partisan
22 symmetry test. It reminds me a little bit of
23 my steak rub. I like some turmeric, I like a
24 few other little ingredients, but I'm not going
25 to tell you how much of each.

1 And so what's this Court supposed to
2 do, a pinch of this, a pinch of that? Or are
3 we supposed to actually specify it's going to
4 be the Chief Justice's formula of the
5 efficiency gap of 7 percent for the country?
6 Is that what you're asking us to do? What is
7 it that you want us to constitutionalize?

8 MR. SMITH: Well, Your Honor, the
9 first thing I want to make clear is -- is that
10 symmetry is what's being measured by the
11 efficiency gap, by the other two tests that I
12 mentioned. Symmetry is the underlying
13 substantive --

14 JUSTICE GORSUCH: Well, but there are
15 different tests for measuring symmetry --

16 MR. SMITH: Right.

17 JUSTICE GORSUCH: -- right?

18 MR. SMITH: Right. There are.

19 JUSTICE GORSUCH: There is the test
20 you previously proposed. Now there is the
21 efficiency gap test. And the Court relied on
22 both and said a little bit -- a pinch this and
23 a pinch of that --

24 MR. SMITH: Right.

25 JUSTICE GORSUCH: -- and we're not

1 telling you how much of each. So --

2 MR. SMITH: Well, I think it's fair --

3 JUSTICE GORSUCH: -- so that doesn't
4 seem very fair to the states to me, to -- to
5 know how to -- what they're supposed to do to
6 avoid the kind of litigation we're talking
7 about. As I understand the efficiency gap test
8 itself, and tell me if I'm wrong, that it would
9 yield about a third of all the districts in the
10 country winding up in court.

11 MR. SMITH: Not true. Not true.

12 JUSTICE GORSUCH: Now, that's what the
13 other side says. So tell me where that's wrong
14 and tell me what test you'd have this Court
15 adopt.

16 MR. SMITH: Well, first of all, I -- I
17 would go with the -- the screens that Justice
18 Breyer mentioned, the first one being it has to
19 be a one-party state. That one-third figure
20 they keep throwing around ignores the fact that
21 a number of those maps were drawn either by
22 commissions or by courts or by divided
23 legislatures.

24 And so they get -- those all get taken
25 off the table from the very beginning. If you

1 have a one-party state, you then have to
2 measure whether it's unusually asymmetrical,
3 pretty extreme, and we --

4 JUSTICE GORSUCH: How? I am still
5 stuck on Justice Breyer's question.

6 MR. SMITH: You can use the -- you can
7 use any of those three tests that were all
8 applied here.

9 JUSTICE GORSUCH: Any of them?

10 MR. SMITH: Yes.

11 JUSTICE GORSUCH: Any -- any of the
12 three?

13 MR. SMITH: And if they don't -- I --
14 I would suggest you apply all of them, and --

15 JUSTICE GORSUCH: All of them?

16 MR. SMITH: -- if they disagree, that
17 would -- that would tell you maybe this isn't
18 the right case to be holding something
19 unconstitutional. That might be a fly in the
20 ointment. But the court below did not set the
21 --

22 JUSTICE ALITO: Excuse me. Isn't it
23 true that --

24 MR. SMITH: -- the line -- I'm sorry.

25 JUSTICE ALITO: Just on that, isn't it

1 true that you could -- you can get very high
2 levels of -- very high EG based on factors that
3 have nothing to do with gerrymandering? The
4 political geography can lead to it; protection
5 of incumbents, which has been said to be a
6 legitimate factor, can lead to a high EG;
7 compliance with the Voting Rights Act can
8 affect that?

9 MR. SMITH: Certainly, there are
10 various factors that -- that -- other than
11 partisan bias that can lead you to draw a map
12 that does not have a zero EG.

13 In our test, with the intents
14 requirement, the effects requirement, and the
15 justification requirement, all of those
16 problems are taken care of either at the intent
17 stage or at the justification stage.

18 JUSTICE ALITO: How are they taken
19 care of at the justification stage? The
20 proposal is to run many -- you know, millions
21 of -- of alternative maps to see whether using
22 some traditional districting requirements, you
23 can produce a map that has a lower -- a lower
24 EG. But my understanding is that when that's
25 done, those maps do not take into account

1 either incumbent protection or compliance with
2 the Voting Rights Act, both of which can have a
3 very big effect. It's just one of the dozens
4 of uncertainties about this whole process.

5 MR. SMITH: Actually, they do -- they
6 do take into account the Voting Rights Act.
7 The Chen study that was discussed in one of the
8 amicus briefs and is discussed somewhat in the
9 merits briefs here, where they -- he produced
10 200 randomly generated maps of Wisconsin using
11 all the state's traditional criteria, he
12 started with the minority districts that were
13 already drawn by the state in Act 43 and kept
14 those in place.

15 And so then he generated -- randomly
16 generated maps, and he found that the degree of
17 bias created by the political geography in
18 Wisconsin is minute, modest, a little bit,
19 something -- just like what the District Court
20 found, maybe 1 or 2 percent, not even remotely
21 like what they have in the map. And so --

22 JUSTICE KAGAN: Would it be fair to
23 require plaintiffs to provide those maps, many,
24 many of them, so that one can tell whether the
25 actual map is an outlier?

1 MR. SMITH: Well, I think in the cases
2 going forward after this -- these technologies
3 are there, they will be in the record in almost
4 every case. It has become the state of the
5 art.

6 Whether it ought to be something that
7 the plaintiffs have to produce as part of their
8 initial case, I'd have to think about it. It
9 certainly could be done that way.

10 There are -- as the Lander brief and
11 the -- and a couple of other briefs and -- and
12 the -- the political geographers' brief all
13 show, people who have developed a capacity for
14 generating random maps that teach you a lot of
15 lessons about the effects of neutral criteria
16 -- of where people live and allow you to say
17 that has nothing to do with the degree of bias
18 that we have here. And I think it will become
19 a part of how these cases are decided at the
20 justification stage. It may also become
21 evidence of intent or of -- of how severe the
22 effects are.

23 It can be useful in a whole variety of
24 ways. Now that, again, social science has
25 stepped up to the challenge.

1 JUSTICE KAGAN: So, for an example,
2 that becomes a way to filter out the effects of
3 geography from the effects of partisan
4 advantage?

5 MR. SMITH: Yes, Your Honor. I would
6 say that at the remedy stage, if they -- if
7 they come back with a remedy map that matches
8 the sort of neutral geography, even if it's
9 somewhat favorable to the -- the party that's
10 in charge, that should be okay. They don't
11 have to go to zero just to -- at the remedy
12 stage, but they have to come up with something
13 much less extreme than their intentional
14 gerrymandering, one that basically makes
15 democracy no longer function because,
16 basically, gerrymanders now are not your
17 father's gerrymander. These are going to be
18 really serious incursions on democracy if this
19 Court doesn't do something. And this is really
20 the last opportunity before we see this huge
21 festival of new extreme gerrymanders all done
22 along the model of Wisconsin but probably even
23 more serious.

24 I -- I would commend the political
25 scientists' brief, which talk about the

1 revolution in data analytics that has happened
2 since this map was drawn. You're going to see
3 people coming in and -- and slicing and dicing
4 a very polarized electorate to the point where
5 one -- one-party control will be guaranteed.
6 That's going to become the norm. Indeed, in
7 any one-party state, if you don't do it that
8 way, they're going to say, you know, that's
9 malpractice. Why aren't you doing what
10 Wisconsin did?

11 JUSTICE GINSBURG: Mr. Smith, will you
12 clarify what you mean by one-party state?
13 Here, we know that the maps were drawn by the
14 Republicans and every -- everybody else was
15 excluded, even some Republicans were excluded.

16 But suppose the legislature has a
17 Republican majority, but there are Democrats,
18 say it's 60/40, 40 percent Democrat, and the
19 redistricting is done by the legislature. Does
20 -- does that count? Would you count that as
21 one party?

22 MR. SMITH: I do, Your Honor. I think
23 if there's a majority, one party has a majority
24 in both houses of the legislature and the
25 governorship, the fact that there -- there are

1 some representatives of the other party in a
2 minority status would not negate the
3 possibility that the thing was --

4 JUSTICE GORSUCH: Mr. Smith, is that a
5 -- is that a republican form of government
6 claim?

7 MR. SMITH: I think it's a First
8 Amendment claim and equal protection claim. I
9 -- I'm not going to try to revive the
10 republican form of government clause at this
11 late stage.

12 JUSTICE GORSUCH: Isn't that -- isn't
13 that exactly what you're trying to do, though?

14 MR. SMITH: No.

15 JUSTICE GORSUCH: You're saying it's a
16 one-party rule and that would violate a
17 republican form of government guarantee.
18 Wouldn't that be the more specific
19 constitutional provision to look to, rather
20 than the generic equal protection clause?

21 MR. SMITH: Well, I --

22 JUSTICE GORSUCH: For that matter,
23 maybe we can just for a second talk about the
24 arcane matter, the Constitution.

25 And where exactly do we get authority

1 to revise state legislative lines? When --
2 when the Constitution authorizes the federal
3 government to step in on state -- state
4 legislative matters, it's pretty clear. If you
5 look at the Fifteenth Amendment, you look at
6 the Nineteenth Amendment, the Twenty-Sixth
7 Amendment, and even the Fourteenth Amendment,
8 Section 2, says Congress has the power, when
9 state legislators don't provide the right to
10 vote equally, to dilute congressional
11 representation. Aren't those all textual
12 indications in the Constitution itself that
13 maybe we ought to be cautious about stepping in
14 here?

15 MR. SMITH: Well, I don't think
16 there's anything unusual about using the First
17 Amendment and the Fourteenth Amendment to
18 regulate the abusive management of state
19 elections by state government. That's what the
20 Court has been doing.

21 JUSTICE GINSBURG: Where did
22 one-person/one-vote come from?

23 MR. SMITH: That's what Reynolds vs.
24 Sims, and Baker vs. Carr, did and a number of
25 other cases that have followed along since.

1 And the fact that Congress could conceivably
2 regulate this problem under the Fourteenth
3 Amendment does not mean that the Court should
4 not.

5 There is a number of cases, the term
6 limits case, Cook vs. Gralike, where Congress
7 could have used the elections clause to fix a
8 problem, but the Court said, well, in the
9 absence of Congressional action we're going to
10 regulate an abusive, a misuse of the power to
11 run federal elections, and in this case it is
12 state elections, you would have to rely,
13 Congress would have to rely on Section 5 of the
14 Fourteenth Amendment, and maybe they could in
15 theory, but this is a problem which --

16 JUSTICE GORSUCH: Do you see any
17 impediment to Congress acting in this this
18 area?

19 MR. SMITH: Other than the facts that
20 politicians are never going to fix
21 gerrymandering. They like gerrymandering.

22 (Laughter.)

23 MR. SMITH: This is -- the problem in
24 this area is if you don't do it, it is locked
25 up. The voters of Wisconsin can't get it on

1 the ballot without the legislature's consent.
2 And that is true in most of the states that
3 don't have commissions now.

4 And so you have -- we're here telling
5 you you are the only institution in the United
6 States that can do -- that can solve this
7 problem just as democracy is about to get worse
8 because of the way gerrymandering is getting so
9 much worse.

10 JUSTICE ALITO: You paint a very dire
11 picture about gerrymandering and its effects,
12 but I was struck by something in the seminal
13 article by your expert, Mr. McGhee, and he says
14 there, "I show that the effects of party
15 control on bias are small and decay rapidly,
16 suggesting that redistricting is at best a
17 blunt tool for promoting partisan interests."

18 So he was wrong in that. He's right
19 with the EG. That's the Rosetta Stone, but he
20 is wrong in that.

21 MR. SMITH: Your Honor, I would have
22 to see what that sentence is saying in context.
23 I'm quite confident Mr. McGhee does not think
24 that redistricting is not -- is a non-problem
25 or that --

1 JUSTICE ALITO: Well, that's what he
2 said.

3 MR. SMITH: -- or that gerrymandering
4 is a non-problem. Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you, Mr.
6 Smith. Mr. Tseytlin, you have five minutes
7 remaining.

8 REBUTTAL ARGUMENT BY MISHA TSEYTLIN
9 ON BEHALF OF APPELLANTS

10 MR. TSEYTLIN: I would like to begin
11 by answering Justice Kennedy's question.

12 A facially discriminatory law in a
13 state would violate the First Amendment because
14 it would stigmatize that party. This case --
15 this Court's cases could not be clearer that
16 when you have neutral lines -- neutrally,
17 facially neutrally lines, the question is not
18 of partisan intent, because there will always
19 be partisan intent.

20 The question is have the plaintiffs
21 presented a burden on representational rights
22 based upon a limited, precise,
23 judicially-amenable standard. There has been
24 nothing new presented to this Court.

25 Basically what the plaintiffs have

1 done here is they have taken Professor King's
2 amicus brief from LULAC, they have taken the
3 exact same central concept, partisan asymmetry,
4 and they've recycled it here. There is nothing
5 new before this Court.

6 Second, we have heard something about
7 the various tests that they are now proposing.
8 There was only one test that was subjected to
9 adversarial scrutiny in this case, in a
10 four-day trial. That efficiency gap test
11 proved so fatally flawed that the District
12 Court rejected it as the test and plaintiffs
13 abandoned it as the primary test on appeal.

14 And then my final point about the
15 scare tactics, about what will happen next.
16 Plaintiff's expert did a comprehensive study
17 from 1972 at the -- when the Baker
18 redistricting had happened, to 2014. And he --
19 and you can look at that study. The chart on
20 that study is on Supplemental Appendix 227.

21 It shows that the asymmetry was worse,
22 was worse in 1972 than in 2014. You are always
23 going to have scare tactics. You are always
24 going to have partisan intent.

25 We have not had any advancement in

1 terms of what has been presented to this Court
2 since LULAC where this Court properly
3 criticized partisan asymmetry as not a neutral
4 standard that has uniform acceptance.

5 And we have asked for those reasons
6 for this Court to reverse the District Court.
7 Thank you, Your Honors.

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

10 (Whereupon, at 11:03 a.m., the hearing
11 was concluded.)

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1	absolutely ^[1] 21:15 abusive ^[2] 60:18 61:10 acceptance ^[1] 65:4 accepted ^[1] 41:6 access ^[1] 6:21 account ^[4] 20:7 28:23 54:25 55:6 accountability ^[1] 28:25 achieve ^[1] 33:25 achieved ^[1] 16:15 achieves ^[1] 50:19 across ^[2] 37:12 47:17 act ^[5] 10:7 54:7 55:2,6,13 acted ^[1] 3:13 acting ^[1] 61:17 action ^[1] 61:9 actual ^[1] 55:25 actually ^[10] 14:14 16:8 26:23 28:20 29:17 39:1 46:15 48:2 51:3 55:5 added ^[1] 19:3 addition ^[1] 47:19 additional ^[1] 33:18 address ^[1] 36:25 administer ^[1] 23:19 adopt ^[1] 52:15 advance ^[2] 30:9 39:3 advancement ^[1] 64:25 advantage ^[6] 19:18 20:7 23:7 26:6 28:17 57:4 adversarial ^[1] 64:9 affairs ^[1] 13:22 affect ^[1] 54:8 affected ^[2] 11:3 32:6 affects ^[1] 31:21 african ^[4] 7:3 33:2,6,20 agenda ^[1] 32:4 ago ^[1] 6:25 agree ^[2] 40:15,25 ahead ^[1] 46:9 airy-fairy ^[1] 15:18 al ^[3] 1:3,6,20 alito ^[19] 8:15 18:3 20:9,15,18 21:11 31:15 32:7,24 40:2 42:5 44:17,22 45:1 53:22,25 54:18 62:10 63:1 alleged ^[1] 8:20 allow ^[2] 47:15 56:16 allowed ^[1] 37:2 allowing ^[2] 8:25 9:1 allows ^[1] 47:16 almost ^[2] 28:8 56:3 already ^[4] 13:18 38:15 48:16 55:13 alternative ^[1] 54:21 although ^[1] 34:5 amendment ^[27] 4:10,14,18 5:3,4 6:13 9:7,11 26:15 27:2,8,22 28:10 35:5,10,16,19 59:8 60:5,6,7,7,17,17 61:3,14 63:13 american ^[3] 7:3 33:2,20 americans ^[1] 33:7 amici ^[1] 1:20 amicus ^[6] 2:8 13:24 18:19 43:24 55:8 64:2	amount ^[1] 49:16 analogy ^[2] 36:7,9 analysis ^[1] 24:6 analytically ^[1] 31:14 analytics ^[2] 39:12 58:1 another ^[8] 3:25 25:17 26:12 33:4 38:1,23 47:9,9 answer ^[10] 12:2 21:11 22:10 24:2 27:16 37:17 38:9 40:17 44:13,15 answered ^[1] 26:14 answering ^[1] 63:11 answers ^[1] 22:22 anti ^[2] 39:2 50:14 anxious ^[1] 10:20 anybody ^[2] 32:22 35:17 appeal ^[1] 64:13 appearances ^[1] 1:16 appellants ^[6] 1:4,18 2:4,14 3:8 63:9 appellees ^[4] 1:7,22 2:11 29:23 appendix ^[3] 7:18 35:3 64:20 applied ^[1] 53:8 apply ^[1] 53:14 appointed ^[2] 42:16,17 apportionment ^[1] 35:11 approach ^[1] 41:4 appropriate ^[2] 23:11 50:7 appropriately ^[2] 33:15 45:2 arcane ^[1] 59:24 area ^[3] 32:6 61:18,24 areas ^[1] 21:2 aren't ^[2] 58:9 60:11 arg ^[1] 14:10 arguably ^[2] 43:16,17 argue ^[1] 5:6 argued ^[1] 47:13 arguing ^[2] 41:9,10 argument ^[15] 1:13 2:2,5,9,12 3:4,7 4:6 5:9 9:12 18:18 29:22 30:21 35:19 63:8 arise ^[2] 35:5,11 around ^[3] 37:3 49:19 52:20 arresting ^[1] 30:13 art ^[1] 56:5 article ^[1] 62:13 asks ^[1] 44:9 aspects ^[1] 13:17 assembly ^[2] 10:11 30:3 assign ^[1] 47:15 associate ^[1] 4:23 association ^[3] 5:11,12 33:11 assume ^[5] 4:8 6:2 8:16 27:15 33:19 asymmetrical ^[1] 53:2 asymmetry ^[12] 8:9 12:5,15,21 16:25 23:11 45:17 47:20,22 64:3,21 65:3 attack ^[1] 31:5 attain ^[1] 48:13 attempt ^[2] 7:2 19:23 attempting ^[1] 32:3 attractive ^[1] 46:13 authority ^[1] 59:25 authorizes ^[1] 60:2	automatically ^[1] 23:9 available ^[1] 7:18 avoid ^[2] 22:12 52:6 away ^[1] 40:5 <hr/> B <hr/> back ^[7] 17:11,15 18:3 22:8 27:9 47:17 57:7 background ^[1] 40:8 bad ^[1] 13:1 baker ^[2] 60:24 64:17 balance ^[2] 18:14 34:8 ballot ^[1] 62:1 baloney ^[1] 37:23 bandemer ^[5] 17:6,9 42:20 48:12 49:12 based ^[5] 3:21 8:13 38:10 54:2 63:22 basic ^[1] 23:9 basically ^[3] 57:14,16 63:25 basis ^[1] 48:20 battles ^[2] 3:21 14:5 bears ^[1] 7:5 become ^[5] 15:8 56:4,18,20 58:6 becomes ^[4] 18:25 24:23 39:11 57:2 begin ^[1] 63:10 beginning ^[1] 52:25 behalf ^[8] 1:18,22 2:4,11,14 3:8 29:23 63:9 behind ^[1] 24:15 below ^[3] 44:8 50:20 53:20 best ^[1] 62:16 better ^[3] 16:17 27:19 38:25 between ^[3] 23:6 33:12 50:5 beverly ^[1] 1:3 beyond ^[1] 21:3 bias ^[6] 45:18 49:16 54:11 55:17 56:17 62:15 biased ^[2] 30:8 49:9 big ^[2] 39:22 55:3 bipartisan ^[2] 7:24 12:3 bit ^[6] 13:19 22:15,16 50:22 51:22 55:18 blunt ^[1] 62:17 board ^[1] 37:12 body ^[2] 30:10 43:22 both ^[4] 46:12 51:22 55:2 58:24 bounds ^[1] 41:11 branches ^[1] 45:14 breyer ^[3] 11:7 40:14 52:18 breyer's ^[4] 22:9,21 28:19 53:5 brief ^[7] 12:22 13:24 43:24 56:10,12 57:25 64:2 briefly ^[1] 30:12 briefs ^[4] 11:16 55:8,9 56:11 bring ^[4] 27:14 35:18 38:25 43:7 brought ^[2] 38:2,15 buildings ^[1] 11:3 bunch ^[1] 37:23 burden ^[2] 40:12 63:21 burdening ^[1] 35:12 <hr/> C <hr/>
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