

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ALABAMA LEGISLATIVE :

4 BLACK CAUCUS, ET AL., :

5 Appellants :

6 v. : No. 13-895.

7 ALABAMA, ET AL.;

8 :

9 and :

10 :

11 ALABAMA DEMOCRATIC :

12 CONFERENCE, ET AL., :

13 Appellants :

14 v. : No. 13-1138.

15 ALABAMA, ET AL. :

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17 Washington, D.C.

18 Wednesday, November 12, 2014

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20 The above-entitled matter came on for oral
21 argument before the Supreme Court of the United States
22 at 10:05 a.m.

23 APPEARANCES:

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25 Appellants.

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2 Appellants.

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7 Ala.; on behalf of Appellees.

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

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 in Case Number 13-895, Alabama Legislative Black Caucus
5 in Alabama -- v. Alabama, and Case 13-1138, the Alabama
6 Democratic Conference v. Alabama.

7 Mr. Pildes.

8 ORAL ARGUMENT OF RICHARD PILDES

9 ON BEHALF OF THE APPELLANTS

10 MR. PILDES: Mr. Chief Justice, and may it
11 please the Court:

12 Alabama employed rigid racial quotas, rigid
13 racial targets to design all its black majority
14 districts based on mere racial statistics alone, and
15 then used only racial demographic data to meet those
16 targets with astonishing precision. These targets were
17 not based on any consideration of what's required under
18 current conditions in Alabama as Section 5 actually
19 requires.

20 Racial quotas in the context of districting
21 are a dangerous business. They can be a way of giving
22 minorities faced with racially polarized voting a fair
23 opportunity to elect, but they can also be a way of
24 unnecessarily packing voters by race in ways that
25 further polarize and isolate us by race.

1 CHIEF JUSTICE ROBERTS: So you want, on the
2 one hand -- they obviously had to move new voters into
3 the majority-minority districts because they were all
4 underpopulated, and they need to move enough so that the
5 minorities have an opportunity to elect candidates of
6 their choice, but they can't move too many because that
7 would be packing, correct?

8 MR. PILDES: Your Honor, we understand that
9 States are in a bind in this situation as has been true
10 under Title VII and under the Voting Rights Act under
11 Section 2.

12 CHIEF JUSTICE ROBERTS: So -- but they have
13 to do that. They have to hit this sweet spot between
14 those two extremes without taking race predominantly
15 into consideration?

16 MR. PILDES: They don't have to hit a sweet
17 pot -- spot. This Court has marked out a legitimate
18 path that States can take and must take to comply both
19 with their Section 5 obligations and with their equal
20 protection obligations not to use the excessive and
21 unjustified use of racial categories.

22 JUSTICE SCALIA: Well, I thought the
23 Section 5 obligation, gee, it -- it used to require that
24 there -- that there be no regression in -- in -- in
25 majority black districts. So if a district went from 69

1 percent black to 55 percent black, you would be in
2 trouble.

3 MR. PILDES: Your Honor, Section 5 has
4 always required no retrogression based on the ability to
5 elect under current conditions.

6 JUSTICE SCALIA: Right.

7 MR. PILDES: So if there's no racially
8 polarized voting --

9 JUSTICE SCALIA: And -- and they're saying
10 that's all we did. You know, these -- these districts
11 were underpopulated with respect to other ones, so we
12 had to move new people in them, and we had to do it in
13 such a way that there was still the 69 percent black
14 population that they're used to be in order to avoid
15 retrogression.

16 MR. PILDES: Your Honor, retrogression has
17 never meant merely reproducing racial statistics purely
18 for their own sake. It's meant preserving the ability
19 to elect, preserving majority and minority districts.

20 JUSTICE SCALIA: Oh, you can say that, but
21 it meant you're -- the only way to be sure you're not
22 doing that is maintaining the same -- the same
23 percentage. And that's certainly the way the Justice
24 Department, in the bad old days, used to interpret it.

25 MR. PILDES: It may be in the first decade

1 or so of the application of Section 5, DOJ employed
2 various kind of practices as you described. As our
3 brief documents in detail, the Department of Justice has
4 routinely precleared plans that reduce black populations
5 as long as they don't reduce the ability to elect.

6 And, indeed, in Alabama in the last round of
7 redistricting, if you look at the blue brief of the
8 Black Caucus at the chart at 8A, you will see that
9 Alabama dramatically reduced black populations in all of
10 its districts in the Senate and in virtually all of its
11 districts in the House. And if you look at that chart,
12 you'll see numbers like a 12-point reduction, a 19-point
13 reduction, a 10-point reduction, 16-point reduction.

14 CHIEF JUSTICE ROBERTS: Why is that? Why
15 is --

16 MR. PILDES: They reduced districts down to
17 56 percent.

18 CHIEF JUSTICE ROBERTS: Why is that? Why do
19 you no longer need as high a percentage of minority
20 voters to maintain a situation where minority voters can
21 still elect their candidates of choice?

22 MR. PILDES: For the reasons that this Court
23 adverted to in Shelby County and the reasons that
24 Alabama rightly celebrates in its briefs. Black turnout
25 and black registration rates in Alabama now routinely

1 equal or even exceed white registration and white
2 turnout rates.

3 JUSTICE SCALIA: You realize, I assume, that
4 you're -- you're making the argument that the opponents
5 of black plaintiffs used to make here. They -- they --
6 they said, you know, by requiring packing of -- of
7 minorities into certain districts, you're reducing their
8 influence statewide so you -- the representatives in --
9 in other districts can ignore what -- what -- what the
10 minority wants because they're all packed into -- that's
11 the argument the other side used to be making.

12 MR. PILDES: Yes, Your Honor. And when the
13 Voting Rights Act legitimately requires the use of race
14 in the face of polarized voting, then there's a national
15 political judgment that reflects the tradeoffs, the cost
16 and the benefits, as there are, to designing these
17 districts. You can --

18 JUSTICE KENNEDY: Suppose -- suppose there
19 are Party A in 2001 takes minorities out of heavily
20 minority districts and puts them into opportunity
21 districts for political purposes. It's for partisan
22 gerrymandering purposes. Assume that.

23 MR. PILDES: Uh-huh.

24 JUSTICE KENNEDY: Party B then gets into
25 power ten years later. It wants to undo what Party A

1 did, and it puts them back into heavily populated
2 districts. Is there a violation when Party B does that?

3 MR. PILDES: There's no --

4 JUSTICE KENNEDY: And its -- and its -- and
5 we'll stipulate that its motive is simply to help its
6 partisan balance --

7 MR. PILDES: If they --

8 JUSTICE KENNEDY: -- or partisan imbalance.

9 MR. PILDES: If they do not use racial
10 classifications, if they do not use excessive racial
11 means to do it --

12 JUSTICE KENNEDY: No, no, they -- they do.
13 They put minorities back into heavily packed districts,
14 just as they took minorities out ten years before.

15 MR. PILDES: Right. But the line this
16 Court's precedents have drawn is precisely the line
17 between partisan motivations in districting and racial.

18 JUSTICE KENNEDY: In both of my
19 hypotheticals, it's partisan. In either case, is there
20 a violation?

21 MR. PILDES: If it's purely partisan in
22 motive and they don't use race, then there's no problem.

23 JUSTICE KENNEDY: No, but -- but they do use
24 race, but it's purely partisan. Your -- the
25 hypothetical is, Case 1, they find minority voters and

1 put them into minority opportunity districts, unpacking
2 the very heavily minority populated districts. Then
3 next party comes in and simply undoes it, and it uses
4 the same calculus, race.

5 MR. PILDES: Your Honor, the --

6 JUSTICE KENNEDY: Are you going to tell
7 me -- is it your position, and I think it may be your
8 position, that in the first case it's permitted and the
9 second case it isn't?

10 MR. PILDES: No, Your Honor. Our position
11 is that race can't be used excessively and unjustifiably
12 in either case. And the three-judge court found --

13 JUSTICE KENNEDY: Was it unjust -- was it
14 unjustified in -- in -- in Case A when they were trying
15 to have more minority opportunity districts?

16 MR. PILDES: If they exceeded their
17 obligations under Section 2 and Section 5, if they went
18 beyond the limited leeway this Court has said that
19 States have, if they have the strong basis in evidence
20 that's required, if they properly interpret the Act,
21 that's the legitimate path States have that this Court
22 has marked out.

23 JUSTICE KENNEDY: Did they do this for
24 partisan purposes?

25 MR. PILDES: Your Honor --

1 JUSTICE KENNEDY: And I'm asking if Party B
2 can then undo it for partisan purposes, because I sense
3 that there's a one-way ratchet here.

4 MR. PILDES: I don't think that's correct,
5 Your Honor, and I understand the concern.

6 If, for partisan purposes, a legislature
7 passed a race-based barrier to voting, that would surely
8 be unconstitutional. They can't use race in the way
9 this Court's cases -- in the Shaw line of cases indicate
10 are beyond the parameters the States have. They have to
11 have a strong basis in evidence.

12 In this case, Alabama didn't even ask the
13 relevant legal question. Alabama didn't ask what is
14 necessary to preserve the ability to elect, what might
15 be necessary to preserve the ability to elect. They
16 just reproduced numbers, statistics, and the way they
17 did it is they just used racial data.

18 JUSTICE ALITO: Well, you began by -- by
19 criticizing Alabama for supposedly imposing quotas. But
20 listening to your argument, it sounds to me that you are
21 just as interested in quotas. You're just interested in
22 lower quotas.

23 MR. PILDES: Your Honor, right --

24 JUSTICE ALITO: So if you -- if they want to
25 keep it at 70 percent, that's -- that may be

1 illegitimate in your view. But if they take it down to
2 the minimum that would be required in order to produce
3 the desired result, that's a -- that's a -- a
4 permissible quota. So why are you using this term
5 "quota" at all?

6 MR. PILDES: We don't have to use the word
7 "quota."

8 JUSTICE ALITO: Well, why did you use it?

9 MR. PILDES: I actually meant to use the
10 word "racial targets." Judge Thompson used the word --

11 JUSTICE ALITO: You think there's a
12 difference between the two?

13 MR. PILDES: Well, there's a lot of
14 rhetorical and inflammatory power in the word "quota."

15 But, Your Honor, the point here is that
16 there must be at least legitimate basis for racial
17 classification.

18 JUSTICE BREYER: So that's to Justice
19 Kennedy's question, I thought your answer would be there
20 isn't a one-way ratchet. That's *Cromartie 2*, isn't it?

21 MR. PILDES: If you're use --

22 JUSTICE BREYER: Doesn't *Cromartie 2* say if
23 you're doing this for political reasons, because many,
24 many African-Americans vote Democrat, all right? And so
25 what they're doing is they're trying to help the

1 Democrats. So, yeah, we're trying to help the
2 Democrats. Okay.

3 If that's what you can -- are doing and they
4 can't really prove the contrary, the burden is on the
5 one attacking the district, whether they are doing it by
6 removing some African-Americans from this one or by
7 putting more into it, it's the same issue. Am I right?

8 MR. PILDES: Yes, you're right. And
9 that's --

10 JUSTICE BREYER: Right. Then it's not a
11 one-way ratchet. It is a two-way ratchet, which --

12 JUSTICE SCALIA: And it's valid in both --
13 in both cases. That's your problem.

14 MR. PILDES: If --

15 JUSTICE BREYER: That's not our case because
16 our case, they don't try to defend on that ground.

17 MR. PILDES: Right. And that's -- your
18 answer is exactly the answer I was trying to give to
19 Justice Kennedy, which is partisan manipulation, this
20 Court has said, may be fine and constitutional, but the
21 one thing you cannot do is use race as a proxy for
22 politics or political affiliation. You cannot use
23 racial targets that don't have a legitimate
24 justification. They're not tied to current conditions.

25 JUSTICE SCALIA: You don't -- I thought you

1 agreed with Justice Breyer.

2 MR. PILDES: I do --

3 JUSTICE SCALIA: But now you're saying you
4 cannot use race as a proxy for political affiliation,
5 but that was his hypothetical --

6 MR. PILDES: I thought --

7 JUSTICE SCALIA: -- that these people were
8 moved because blacks overwhelmingly vote Democrat.

9 MR. PILDES: Your Honor --

10 JUSTICE SCALIA: You're saying that's bad if
11 that's the reason they move them. I don't think he
12 thinks that's bad.

13 MR. PILDES: I understood Justice Breyer to
14 be describing the situation in which you're moving
15 people because they're Democrats. You have voting
16 behavior data. You look at the data. You move people
17 based --

18 JUSTICE SCALIA: No, you're moving them
19 because they're black, and you think blacks will
20 overwhelmingly vote Democrat. That's why you're moving
21 them, because they're black. Because we assume blacks
22 are overwhelmingly Democrats.

23 MR. PILDES: Your Honor, in this area, the
24 Court has said that assumptions like that cannot be the
25 basis of the way district lines are drawn or the way

1 people are classified by race.

2 JUSTICE GINSBURG: Mr. Pildes, because --
3 because your time is running out --

4 MR. PILDES: Yes.

5 JUSTICE GINSBURG: -- there is -- in your
6 presentation, you're saying we are attacking the
7 statewide plan. We are not picking one district or the
8 other. And you have been attacked on that point. The
9 attack is that Shaw claims have to be district by
10 district; they can't be statewide. So I would like your
11 answer to that question. There hasn't been a Shaw
12 claim, as far as I know, that was statewide. They have
13 all been district by district.

14 MR. PILDES: Your Honor, our claim is that
15 the exact same policy was applied in every black-
16 majority district, which is we will use racial data to
17 repopulate as close as we can possibly do it to the
18 exact same black percentage. That's a policy applied in
19 every -- in all 36 districts.

20 JUSTICE SCALIA: And how -- how are your
21 clients hurt by that? It seems to me you have to come
22 up with a client in one of the other districts that
23 would have been, as you put it, more competitive had
24 this packing not occurred.

25 MR. PILDES: Your Honor --

1 JUSTICE SCALIA: I assume that's the harm
2 that -- that you're alleging.

3 MR. PILDES: Your Honor, we -- the record
4 demonstrates that we have plaintiffs or we have members
5 of the ADC in many of the black majority districts at
6 issue, and that at least is sufficient for us to
7 challenge this policy, at least as applied in those
8 districts.

9 JUSTICE SCALIA: I thought the record just
10 showed that you -- you named your plaintiffs by county
11 rather than district.

12 MR. PILDES: But many of the districts are
13 wholly contained within the county. They occupy the
14 full county. We demonstrate in our brief a number of
15 senate districts and many house districts that are whole
16 county districts.

17 JUSTICE SOTOMAYOR: Are you dependent on
18 your district by district challenge? Does your claim
19 rises and falls solely on this statewide point you make?

20 MR. PILDES: By statewide, we simply mean a
21 common policy applied to every district in the State.

22 And Mr. Chief justice, if I may reserve the
23 balance.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.
25 Mr. Schnapper.

1 ORAL ARGUMENT OF ERIC SCHNAPPER

2 ON BEHALF OF APPELLANTS

3 MR. SCHNAPPER: Mr. Chief Justice, and may
4 it please the Court:

5 This Court's Shaw jurisprudence channels the
6 conversation that we're having today. This Court has
7 identified two constitutional claims that could be
8 raised with regard to the use of race in districting.
9 One is intentional dilution of minority votes for the
10 purpose of minimizing their effectiveness and the second
11 one is Shaw. This is -- we're advancing a Shaw claim.

12 JUSTICE SOTOMAYOR: You lost on the dilution
13 claim.

14 MR. SCHNAPPER: We did. We did. The facts
15 material to the Shaw claim are -- were not in dispute at
16 trial. The question is whether they fall within the
17 concept of predominance in this Court's line of
18 decisions.

19 JUSTICE ALITO: Did the district court
20 understand you to be asserting a district-specific --
21 district-specific claims?

22 MR. SCHNAPPER: I think it understood us to
23 be challenging each of the districts.

24 JUSTICE ALITO: Where -- where do you find
25 that in the -- in the opinion of the district court? I

1 thought the district court interpreted you not to be
2 making that claim.

3 MR. SCHNAPPER: I -- we -- we advanced
4 evidence as to the motive that was a motive common to
5 all the districts and then we advanced -- offered
6 evidence about particular districts to illustrate how
7 that was played out. But this is not -- there's no
8 conceptual difference between challenging all 36
9 districts and challenging 36 districts. It -- it's the
10 same claim.

11 JUSTICE GINSBURG: But you mean had specific
12 -- in your proposed findings, you dealt specifically
13 with certain districts and not specifically with others.

14 MR. SCHNAPPER: The specific information
15 dealt with many of the particular districts, but the
16 claim was that all of the districts were the result of a
17 common purpose, that that common -- and that common
18 purpose race was the predominant and overriding --

19 JUSTICE SCALIA: But some of the districts
20 were unchanged. The percentage was exactly the same as
21 it was before. Those are the only districts that your
22 clients were from. How have they been harmed?

23 MR. SCHNAPPER: Our -- our clients -- we
24 have members in all the districts. The theory of harm
25 in the Shaw line of cases --

1 JUSTICE SCALIA: Was that established in the
2 district court, that you have members in all the
3 districts?

4 MR. SCHNAPPER: That was the finding of the
5 district court. The Alabama legislature -- because this
6 concerned the black districts --

7 JUSTICE SCALIA: The finding of the district
8 court was that you have -- you have members --

9 MR. SCHNAPPER: I think it said all or
10 virtually all. But that wasn't -- our standing wasn't
11 in dispute. But the -- the concept of injury in the
12 Shaw line of cases is -- is not injury to the
13 individuals who were in the districts that are -- become
14 whiter because blacks are moved out. That is -- those
15 are the people who don't have standing.

16 In Hays, this Court made clear it's the --
17 it's the individuals in the districts into which blacks
18 are put for the predominant racial purpose of -- for
19 predominant racial purpose. That's -- that's the
20 standing doctrine that this Court has announced in those
21 cases.

22 Predominance involves, under this Court's --

23 JUSTICE SCALIA: I don't understand what you
24 just said. They have a claim because there are too many
25 blacks in their district?

1 MR. SCHNAPPER: No. It's not about the
2 number. The theory of the Court in Shaw is that if race
3 is the predominant purpose in putting blacks into a
4 district, that that will likely result in
5 representational harm in terms of the way the elected
6 officials will act. And that's been the theory of the
7 Shaw claims ever since Shaw.

8 CHIEF JUSTICE ROBERTS: And you think it's
9 possible for the State to navigate between not enough
10 minority members in the district and too many minority
11 members in the district without taking race into
12 account.

13 MR. SCHNAPPER: No, we do -- we do not.

14 CHIEF JUSTICE ROBERTS: Race predominantly
15 into account.

16 MR. SCHNAPPER: But Shaw -- Shaw doesn't say
17 that taking race into account raises a constitutional
18 question in all cases, particularly in -- in the wake of
19 this Court's decision in Easley, which made it clear,
20 finally resolving an issue that had been kicking around
21 for some time, that the fact that race was a factor in
22 drawing a district doesn't trigger strict scrutiny. A
23 majority of the Court held there that for Shaw purposes
24 to trigger strict scrutiny the plaintiff would have to
25 show predominance, that race was the predominant,

1 overriding purpose, meaning it was the criteria to which
2 -- that couldn't be put aside for any other purpose.

3 CHIEF JUSTICE ROBERTS: So -- so they have
4 to navigate between too many and too few, but without
5 race being the predominant consideration.

6 MR. SCHNAPPER: If race, if -- in terms of
7 the Constitution, if race isn't the predominant purpose
8 and dilution isn't involved, then there's no
9 constitutional claim. With regard to Section 5, let
10 me -- I think it would be helpful to understand what the
11 government's interpretation is and has been for sometime
12 about what Section 5 requires. This is reflected in the
13 government's brief at 22 and 23 and in the 2011
14 guidelines.

15 The government's view, and this is how --
16 this has long been understood, is that the black
17 proportion can be reduced to the point where blacks no
18 longer have the -- the ability to elect a candidate of
19 their choice. Until you get to that point, changes are
20 not retrogressive, and that's not the way --

21 CHIEF JUSTICE ROBERTS: Do you think -- what
22 do you think -- well, it's speculative. But I think
23 that if Alabama had reduced the number of minority
24 voters in majority-minority districts in any significant
25 way, the Attorney General would have come down on them

1 like a ton of bricks.

2 MR. SCHNAPPER: That -- that is not correct,
3 Your Honor.

4 CHIEF JUSTICE ROBERTS: He did preclear the
5 plan that you're challenging today.

6 MR. SCHNAPPER: He also precleared the 2001
7 plan which did precisely what you described. The -- the
8 government's view of this is set out in some greater
9 detail in their brief in Georgia v. Ashcroft and in
10 the -- in the oral argument of Mr. Stewart at the time.

11 As they explained then, and this remains their view, and
12 consistent with the way the Department has operated,
13 until -- the numbers can fall until it gets to the point
14 where the ability to elect is in question. The --

15 JUSTICE SOTOMAYOR: I have a problem.
16 Can -- can I just go back to your Shaw-nonShaw?

17 MR. SCHNAPPER: Yes.

18 JUSTICE SOTOMAYOR: Basically, you're saying
19 I don't have a Shaw challenge.

20 MR. SCHNAPPER: I have a Shaw challenge.

21 JUSTICE SOTOMAYOR: All right. You're
22 claiming it's a Shaw challenge, but you don't have to
23 describe the injury. It's a -- it's an ephemeral
24 injury; race played a part in the overall plan, without
25 an effect in a particular district.

1 MR. SCHNAPPER: No, no.

2 JUSTICE SOTOMAYOR: If a particular
3 district --

4 MR. SCHNAPPER: No.

5 JUSTICE SOTOMAYOR: I mean, if it stayed
6 essentially the same, they didn't move the boundaries
7 much, they obviously -- they don't -- it's an all-white
8 district. If they moved the boundaries, it wasn't to
9 include more blacks or anything else. It was just
10 because of -- of geographic divisions. So explain to me
11 why you don't have to prove that you were harmed
12 specifically by the application of this policy.

13 MR. SCHNAPPER: Let me say two things in
14 response to that. First, the -- the theory of Shaw is
15 that if black voters are, for a predominantly racial
16 reason, moved into a district, not just leave it alone,
17 moved into a district for predominantly racial reasons,
18 that would strict scrutiny. Now --

19 JUSTICE SOTOMAYOR: But that wasn't true
20 any --

21 MR. SCHNAPPER: Yes, it is. Yes, it is,
22 Your Honor. When one of the member of the court said
23 the districts hadn't changed, I think what he meant was
24 that the black percentage hadn't changed. All of these
25 districts changed. They were underpopulated by on

1 average about 15 percent. There's an average of 6,000
2 voters, individuals, put in every house district, 20,000
3 in every senate district.

4 JUSTICE ALITO: Well, explain -- now that
5 you're talking about districts, could I come back to the
6 question I asked at the beginning, so that I understand
7 what we have to decide. On page 128 of the Joint
8 Appendix, there's a paragraph in the district court
9 opinion that explains what the district court understood
10 to be -- to be before it on the issue of intentional
11 discrimination. I see nowhere any indication that the
12 district court construed your pleadings and your other
13 submissions to raise a claim about any specific
14 district.

15 The third point is we construe the filings
16 of the Democratic Conference plaintiffs as arguing that
17 certain senate districts constitute racial gerrymanders.
18 There's nothing with that with respect to your client.
19 Maybe I'm missing something. So if that's how the
20 district court understood your position, then maybe it
21 was wrong, but that would be the threshold question we'd
22 have to decide, wouldn't it be, that if you have to be
23 district-specific, we would have to say the district
24 court misunderstood the claims that you were asserting?

25 MR. SCHNAPPER: I think in the context of

1 the way the case was litigated and tried and the briefs
2 at the time, it was -- everybody understood the
3 plaintiffs were challenging all of the majority-black
4 districts.

5 JUSTICE ALITO: The district court
6 understood that? Then why did it include this paragraph
7 and why did it not go through any districts that it saw
8 you as challenging? It went through some that it saw
9 the other plaintiffs as challenging, none with respect
10 to you.

11 MR. SCHNAPPER: We think in the context in
12 which the case was litigated, there was no conceptual
13 difference between challenging all the 36 districts and
14 challenging 36 individual districts. The reason the
15 opinion reads the way it does is that the State didn't
16 contend and we didn't contend that there was different
17 district-specific purposes afoot. The State's account
18 of this, which everyone accepted, was that the State had
19 a common purpose in adding those thousands of
20 individuals to each district, which was to -- which was
21 to continue the black percentage as it had been all
22 along. It was a purpose common to all of them.

23 JUSTICE KAGAN: And, Mr. Schnapper, isn't it
24 right that after trial, when you submitted proposed
25 findings of fact and conclusions of law, in fact, you

1 did reference particular districts? You referenced
2 Senate Districts 18, 19 and 20. In another place, you
3 talked about all the majority-black districts in the
4 State's black belt, and you explained how your theory of
5 the case related to each one of those districts.

6 MR. SCHNAPPER: We did. This -- this is
7 somewhat analogous to the Teamsters decision from back
8 in the 1970s. For the government to prove racial
9 discrimination in promotions, it made out a pattern and
10 practice case by offering evidence that was class-wide,
11 that affected all the individual blacks and Hispanics,
12 and then offered some individual stories. But the claim
13 was for all of the individuals who worked in those -- in
14 those facilities.

15 JUSTICE BREYER: To get there, we'd have --
16 you're talking, about, second, we construe the filings
17 of the Black Caucus plaintiffs as arguing that the acts
18 as a whole constitute racial gerrymandering, so we'd
19 have to say that was wrong, they didn't get the
20 complaint right, send it back.

21 So if we're going to have to send it back, I
22 guess what you'd have to -- would there be anything
23 wrong with saying this: Look, tell the plaintiffs
24 please to point district by district to the fact that
25 the primary motive here was racial. I don't think that

1 would be too hard. We have loads of evidence on that.

2 Now, if the primary is racial -- and this is
3 the crucial part -- they then to justify this have to
4 show that they are making a -- and I don't know what
5 word -- reasonable attempt, good faith reasonable
6 attempt, some other word, to comply with the section,
7 old Section 5 requirements, with the Section 5
8 requirements. And now they have to do it over again
9 anyway and so they do it over again, and if in fact some
10 of the questions suggest that that is what they were
11 trying to do; and you'd have evidence there that said,
12 no, no, that isn't what they were trying to do. They
13 didn't even read the guidelines of the attorney general.
14 They didn't even look at what happened in the past.
15 They made no such attempt. All right. So would there
16 be, from your point of view, anything wrong with that
17 holding?

18 MR. SCHNAPPER: Well, Your Honor, I think
19 with regard to the question of justification, we think
20 it doesn't make any sense, in light of this Court's
21 decision particularly in Shaw 2, to send it back. The
22 Court's decision makes clear that there are three
23 parameters to the way you assess this: First, what they
24 did is to be judged by the correct interpretation of the
25 statute, not what they might have thought in good faith

1 it meant. Second -- and the word "correct" is in a
2 number of this Court's Shaw decisions.

3 Secondly, that the purpose to comply with
4 the correct interpretation has to have been their motive
5 at the time; and secondly, at the time, not at trial,
6 but back when they did this, they had to then, in 2012,
7 have had a strong basis in evidence for concluding that
8 not using all these different numbers would have
9 violated the statute. They don't -- they can't satisfy
10 any of those things. They can't go back -- you could
11 send the case back to the district court, but you can't
12 send the case back to 2012 and have them change the
13 purpose or change the evidence before them.

14 So, unless you're going to change the
15 standard of strict scrutiny this Court has applied in
16 Shaw and other affirmative action-related cases, you
17 could not do that. It's just -- it's years too late for
18 them to solve those problems.

19 JUSTICE SOTOMAYOR: I'm still having a
20 psychological problem with your point. There were three
21 reasons. You're saying merely because it was one among
22 the three, it necessarily was predominant as to each
23 district created. The example or hypothetical I posited
24 for you was the primary reason above all others that
25 they said is the 2 percent district, and there may be

1 districts among these 36 that, as I indicated, had
2 contiguous populations that didn't make a difference
3 about race. So it didn't -- they are not affected by
4 this policy. Why should we undo that?

5 MR. SCHNAPPER: Okay. Okay. I'm just going
6 to answer the one last question. In fact, as the
7 analysis of the precinct-splitting shows, with perhaps
8 two exceptions, there is race-based precinct-splitting
9 on the border of every one of the majority-black
10 districts in question here. It wasn't a situation where
11 they just took the neighboring districts and they turned
12 out to replicate, to be just the ratio that they wanted.
13 It was very, very calculated and race-based.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 General Verrilli.

16 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.,
17 FOR THE UNITED STATES, AS AMICUS CURIAE
18 SUPPORTING NEITHER PARTY

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

21 The key point in this case is that Shaw
22 claims require district-specific analysis. The district
23 court departed from that principle and in our judgment
24 the plaintiffs' main theory also departs from that
25 principle, and I'd like to address --

1 JUSTICE KAGAN: I don't understand why
2 that's so, General. I mean, what the plaintiffs are
3 saying is yes, we have common evidence, not all together
4 usual in a Shaw claim, but here they have evidence.
5 It's a policy statement that retrogression was going to
6 be a very main priority. I think it was number 2. And
7 retrogression was defined in a certain way, as requiring
8 the maintenance of black voting population. And that
9 was going to be taken into account in every single
10 majority minority district.

11 Now, the fact that there's evidence, the
12 principal evidence in the case, that relates to every
13 single district and so in a sense the evidence is
14 statewide, does not make it any less a district by
15 district case.

16 GENERAL VERRILLI: That may be right,
17 Justice Kagan, but it also doesn't prove that race
18 predominated in the Shaw sense with respect to each
19 specific district, and let me try to explain why. The
20 test under Shaw is whether race predominates to the
21 derogation of traditional districting criteria. And so
22 it may be that in some districts, the effort to maintain
23 the same African American population resulted in
24 judgments that -- to draw the districts in ways that
25 derogated from traditional districting criteria, such as

1 compactness and maintaining communities of interest, but
2 it may be in other districts that it didn't, and I can
3 provide specific examples of that.

4 JUSTICE KAGAN: Well, I guess I would
5 appreciate specific examples, because it seems to me as
6 sort of a going-in matter that when you say this is the
7 most important thing except for the Reynolds inquiry,
8 this is the most important thing, that necessarily it's
9 going to affect the way you redraw or who you put into
10 the districts.

11 GENERAL VERRILLI: Well --

12 JUSTICE KAGAN: You might not reach the
13 target in every single district, but necessarily you're
14 saying we are prioritizing this race-based -- this
15 race-based thing, criterion, in a way that's going to
16 affect every judgment we make.

17 GENERAL VERRILLI: But the question under
18 Shaw, Your Honor, as we read the Shaw line of cases, is
19 whether that is done in derogation of traditional
20 districting criteria.

21 JUSTICE KAGAN: Well, how can it not be? If
22 you have three priorities or three criteria and you say
23 this is the absolute most important criteria, it's just
24 the natural effect of that is going to be to minimize
25 the other two criteria.

1 GENERAL VERRILLI: No, that's not
2 necessarily true. Sometimes they will conflict,
3 sometimes they won't. And I think the example -- I can
4 give you examples I think that would illustrate that
5 from the record.

6 For example -- now, there weren't specific
7 findings about these districts in the district court's
8 opinion, so I'm not trying to say this is what the
9 district court found. But with respect to some
10 districts, for example, House District 67, the State
11 argues that that was a district in which you are going
12 to have essentially an African American percentage at
13 the percentage that the district was drawn at no matter
14 how you drew it, and that was because the surrounding
15 populations around that district were all of comparable
16 African American percentages. So whatever choice you
17 made in order to get to the 2 percent
18 one-person-one-vote threshold was going to involve
19 moving African Americans. And we'd submit that's not a
20 situation in which race predominated over traditional
21 districting criteria. It's a -- it's situation in which
22 traditional districting criteria drove the decision.

23 There may, however, be other districts --
24 and Senate District 26 is one that comes to mind, in
25 which, where you had this movement of 14,500 people into

1 a district, which was in the City of Montgomery and
2 surrounding areas, all but 35 of whom were African
3 American. And if one looks at that map -- and actually,
4 it's very difficult to discern on the small maps that
5 are in your materials. But if you can get a blow-up of
6 it, what you will see in that map is that the so-called
7 "crab claws" that the parties describe that extend out
8 from the district capture African American populations.
9 What they do is carve out the white part of the City of
10 Montgomery and attach it by a very narrow land bridge to
11 the next --

12 JUSTICE KENNEDY: But suppose they did that
13 based on economic data?

14 GENERAL VERRILLI: Then I think it would not
15 be a problem, Your Honor.

16 JUSTICE KENNEDY: But it results in the same
17 thing.

18 GENERAL VERRILLI: Right. But it wouldn't
19 -- it wouldn't be race predominating over traditional
20 districting criteria. And I will go back and try to
21 answer the question that Your Honor posed earlier about
22 when partisanship can be a justification and when it
23 isn't. I think it's a very technical answer, but I
24 think if a State were to move electoral precincts from
25 one district to another, the entire electoral precinct,

1 because there you would have the data on how people
2 voted in that precinct, that would -- that would not
3 raise a problem under the Shaw analysis because you
4 clearly would be making a decision for partisan reasons.

5 But when you split a precinct and you move
6 just based on census block information, there you don't
7 know how the people in the census block voted. What you
8 know is their race. And so at that point if you're
9 using race as a proxy -- and I think that's what
10 Mr. Pildes was trying to describe to Your Honor, when
11 you're using race as a proxy in that circumstance, that
12 would violate what this Court has said in all of its
13 Shaw cases is the constitutional norm at stake here
14 because you're making an assumption. You're
15 stereotyping in that situation, so it's --

16 JUSTICE KENNEDY: And that's true at the
17 outset if you move them by race in order to increase
18 their capacity to influence districts?

19 GENERAL VERRILLI: Well, that's a difficult
20 question, Your Honor, but I think if you're -- if you're
21 -- if you're moving people by race in order to ensure
22 that you're not violating the Voting Rights Act that
23 seems to be one thing.

24 JUSTICE KENNEDY: But then it's a one-way
25 ratchet.

1 GENERAL VERRILLI: No, I don't think it is a
2 one-way ratchet, Your Honor, because you can move in
3 both directions, just move precincts and not -- and not
4 census blocks.

5 JUSTICE ALITO: General, you say that the
6 district court erred in addressing the claim of racial
7 gerrymandering on a statewide rather than a
8 district-specific basis. I would assume that that was
9 an error on the part of the district court only if a
10 district-specific claim was asserted by the plaintiffs,
11 but you don't address that issue.

12 GENERAL VERRILLI: Yes. I'm happy to
13 address it now, Your Honor. I actually think this is
14 quite a murky question. I think, Your Honor -- we agree
15 Your Honor is quite right that the district court did
16 appear, and JSA 128 is the place where it seems clear
17 that they did to appear, to assume that this was a
18 statewide claim. In some respects, one can understand
19 why, because the basic theory is that the motive
20 influenced every district and it did adjudicate the case
21 on that basis.

22 So it would seem to me that one outcome here
23 would be to say that Shaw -- the proper understanding of
24 Shaw is that claims have to be made on a
25 district-specific basis and that the plaintiffs here

1 didn't -- didn't propound cognizable claims under Shaw
2 and that would be one resolution here. But I have to
3 say, the record is somewhat murky on this. Judge
4 Thompson in dissent did say that he thought that the
5 claims were district-by-district specific. Justice
6 Kagan has identified some information in the record. So
7 another option might be to articulate the correct
8 district-specific standard and leave it to the district
9 court on remand to sort out whether the plaintiff has
10 his facts --

11 JUSTICE KAGAN: But you don't deny that a
12 statewide policy can refer to every district or every
13 majority minority district in the State?

14 GENERAL VERRILLI: No. No, we don't deny
15 that, but that's not enough -- our point is that's not
16 enough to trigger strict scrutiny. You have to look and
17 see whether it's implemented in a manner that is in
18 derogation of traditional districting criteria district
19 by district.

20 JUSTICE KAGAN: But again -- and I don't
21 want to press it if you've given me your best answer to
22 it -- if a policy says we're going to prioritize this
23 particular criteria, which here was the mistaken
24 understanding of retrogression, if a policy says, we're
25 going to prioritize this over everything else, it seems

1 to me that that's pretty good evidence of a violation.

2 GENERAL VERRILLI: Only if again -- I guess
3 I am just going to repeat myself, but if it's in
4 derogation of traditional districting criteria --

5 JUSTICE KAGAN: But if the policy says that
6 it's going to prioritize it over everything else, that
7 means it going to be in derogation of tradition
8 districting criteria.

9 GENERAL VERRILLI: When they conflict --

10 JUSTICE KAGAN: Sometimes they might fail.
11 Sometimes you're not going to be able to prioritize it
12 over everything else, but the intent is still to
13 prioritize it over everything else.

14 GENERAL VERRILLI: But the question is --
15 let me take a step back because I think it might help to
16 put it in this context.

17 A challenge, a Shaw challenge, is a
18 challenge to a facially neutral government action. The
19 lines on the map are what are being challenged here.
20 That's the government action. Those lines are facially
21 neutral. They may, in fact, reflect a violation of the
22 Constitution under Shaw if race predominated in the
23 placement of those lines in derogation of traditional
24 districting criteria. But that's what you've got to
25 prove, and the mere existence of this motive doesn't

1 prove it for each district, and that's our point.

2 If I could, I just would like to raise one
3 point in my remaining time going back to the question of
4 what Section 5 retrogression required. Mr. Chief
5 Justice, you asked that question.

6 JUSTICE GINSBURG: And when you do that,
7 will you also tell us what effect, if any, the
8 preclearance should have.

9 GENERAL VERRILLI: Yes. So -- and the two
10 are quite related. I think Professor Pildes referred
11 you to this charge, but the key thing is to look at not
12 the difference between 2001 and the current plan, but
13 the difference between the 1993 plan and the 2001 plan.

14 The Justice Department cleared the 2001 plan
15 that Alabama submitted, and you will see for every
16 single district listed there, with maybe one exception,
17 there were significant reductions in the minority
18 percentages in those districts. So Alabama knew
19 perfectly well that it was completely consistent with
20 its obligations under Section 5 to reduce the districts.

21 CHIEF JUSTICE ROBERTS: You asked for a
22 remand. The result of the remand may well be Alabama
23 has to redistrict; is that right?

24 GENERAL VERRILLI: Yes.

25 CHIEF JUSTICE ROBERTS: And when they do so,

1 that would not be subject to Section 5, correct?

2 GENERAL VERRILLI: Certainly correct.

3 That's certainly correct.

4 CHIEF JUSTICE ROBERTS: And that's not a
5 concern for you?

6 GENERAL VERRILLI: Well, it's not a concern
7 for us. It is what it is, Mr. Chief Justice. If on
8 remand the district court concludes that some of these
9 districts violated the Constitution, then Alabama will
10 have to -- the legislature will get its first chance to
11 a legislate a fix and Section 5 won't be a basis for
12 them to take any action.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 Mr. Brasher.

15 ORAL ARGUMENT OF ANDREW L. BRASHER

16 ON BEHALF OF RESPONDENTS

17 MR. BRASHER: Thank you, Mr. Chief Justice,
18 and may it please the Court:

19 I think the Court should begin with the
20 district court's fact-finding, because the district
21 court expressly found that race did not predominate and
22 the Court can affirm on that basis and avoid addressing
23 questions about Section 5 and redistricting that are
24 unlikely to arise again because of this Court's decision
25 in Shelby County.

1 On page 144 of the jurisdictional statement
2 appendix, the district court expressly found that we did
3 not impose a quota. The court said that we imposed,
4 quote, "no bright-line rule," and what the court meant
5 is that we preserved the core of existing districts, we
6 followed preexisting district lines, we followed roads,
7 we followed county lines, municipal lines, we met the
8 needs of incumbents, and we preserved communities of
9 interest.

10 The plan that we proposed -- the plan that
11 we passed is a status quo plan. The whole point of this
12 plan was to preserve the status quo because the
13 Republican Party had won a majority in the legislature
14 for first time in 130 years.

15 CHIEF JUSTICE ROBERTS: But the other side
16 says it was impermissible for you to preserve the status
17 quo because the opportunity for minority voters in the
18 majority minority districts to participate in the
19 electoral process had improved to the extent that
20 maintaining the status quo would be characterized as
21 packing.

22 MR. BRASHER: Well, actually, if you look
23 at -- well, two responses to that, Your Honor. The
24 first is that if you look at the amicus brief filed in
25 support of neither party by political scientists, they

1 show that black voter turnout and white voter turnout
2 and registration actually equalized in 1998. So -- so
3 there actually isn't some difference between the
4 districts in 2010 and -- and the new ones that we
5 propose with respect to those criteria.

6 The second point, I guess, I would make to
7 that is that our -- our redistricting criteria -- our
8 nonracial redistricting criteria were coextensive with
9 the objective here to preserve these majority-black
10 districts as they have been. And what I mean is that
11 the objective of these nonracial redistricting criteria
12 was to preserve the status quo. And so I think that's
13 what the United States Solicitor General was getting at,
14 is that it's difficult to disentangle the notion that we
15 should preserve the status quo with the majority-black
16 districts.

17 JUSTICE KENNEDY: Is -- is it fair to -- to
18 read the pleadings and -- and the submission in this
19 case as saying that the State did not defend this plan
20 on the basis that it was for partisan purposes, but that
21 it was to comply with Section 5?

22 MR. BRASHER: I don't --

23 JUSTICE KENNEDY: Is that -- is that a fair
24 reading of the -- A, of the red brief and, B, of what
25 the district court found?

1 MR. BRASHER: I don't think it's a fair
2 reading of either, Your Honor, and this is the reason
3 why. Certainly, with respect to specific districts
4 here, when they were actually challenged, we were able
5 to respond and say this was for partisan political
6 reasons. One of those districts, for example, was
7 Senate District 11, which was specifically challenged by
8 the Alabama Democratic Conference, and the district
9 court held that the changes to that district were based
10 on politics.

11 Now, with respect to the plan as a whole,
12 our response has always been that there is a lot of
13 factors that went into drawing the plan as a whole and
14 when it's drawing any specific district. And I think
15 it's important here that the Plaintiffs have never
16 proposed a redistricting plan that actually meets our
17 race-neutral redistricting criteria, especially the
18 2 percent deviation in population that the legislature
19 adopted. And I think that's important for three
20 reasons.

21 JUSTICE KAGAN: Are you really saying that
22 that's a pleading requirement, that they have to come in
23 with a plan that meets all the rest of your criteria?

24 MR. BRASHER: I do not believe that is a
25 pleading requirement. I believe it's an evidentiary

1 issue and I think the Court held that much in Cromartie.
2 And I think it's important for three reasons. First,
3 the legislature adopted that 2 percent deviation to end
4 the previous partisan gerrymander that the Democrats
5 adopted in 2001, where they systematically
6 underpopulated majority-black districts and
7 overpopulated majority-white districts in Republican
8 areas of the State, and that's why the Plaintiff's
9 brought a partisan gerrymandering claim in the district
10 court below.

11 And the second reason is what I was alluding
12 to earlier, and that's in Easley v. Cromartie, the Court
13 held that the first step of a racial gerrymandering
14 claim is to show that there's some conceivable way to do
15 this differentially that creates greater racial balance.
16 And the facts that they -- they've never produced a plan
17 that actually does that is a serious problem. And that
18 makes sense, because if you want to see if race was
19 predominant in redistricting, you take race out and then
20 you run it again and you see what happens.

21 JUSTICE KAGAN: Mr. Brasher, I mean, let me
22 just give you some numbers here from -- from some of
23 these districts. Right? HD 52, you needed to add 1145
24 African Americans in order to maintain the percentage of
25 African-American voters, which was your number 2

1 criterion. You added 1143. You missed by 2. HD 55,
2 you needed to add 6981. You added 6994. SD 23, 15,069.
3 You hit at 15,185.

4 I mean, those numbers speak for themselves,
5 don't they? That in each of these cases, you were
6 determined, come what may and disregarding other
7 criteria, to maintain the black voting age population.

8 MR. BRASHER: I don't think that shows that
9 for two reasons. First, I agree with the United States
10 Solicitor General that the question here is whether we
11 subordinated race-neutral redistricting criteria to hit
12 these targets.

13 JUSTICE KAGAN: That was just a coincidence?

14 MR. BRASHER: No. But that goes to my
15 second point, is those House districts that you were
16 reading off are in the City of Birmingham. The City of
17 Birmingham has over 200,000 people in it, 73 percent
18 black.

19 JUSTICE KAGAN: Well, it's 73 percent, and
20 you hit that 73 percent exactly.

21 MR. BRASHER: Well, and that's my point.
22 There are at least going to be some of those House
23 districts in Birmingham that are 73 percent black and I
24 do not believe that in a place where there's more than
25 200,000 people and 73 percent of them are black you need

1 to subordinate race-neutral redistricting criteria to
2 draw a 73 percent black district.

3 JUSTICE KAGAN: Well, I think you kind of do
4 actually, because, I mean, you're trying to repopulate
5 these districts, and many of these districts, yes, there
6 are many, many, many African Americans. But as you just
7 suggested, there are also white people. And you did it
8 so that you, you know, completely replicated the exact
9 percentage figure.

10 MR. BRASHER: Well, I'll give you another
11 example of what I mean. House District 67, which we
12 talk about in our briefs, is a single-county district.
13 It's always been a single-county district. It's a
14 single-county district in our plan, and it's a
15 single-county district in every plan that the Plaintiffs
16 propose. And it's always going to be 70 percent black
17 because that county is 70 percent black.

18 And I think the same thing could be said
19 about many of the neighborhoods in Birmingham, is that
20 these neighborhoods are 73 percent black and that's how
21 we hit the numbers. And they certainly haven't proven
22 otherwise.

23 I also think that the 2 percent -- the
24 failure to propose a 2 percent plan is important because
25 a 10 percent plan, the plans that they actually have

1 proposed, are drastically different from a 2 percent
2 plan. It's like comparing a plan with 100 districts to
3 one with only 80 districts. Their Senate districts can
4 vary by 14,000 people, and ours can only vary by around
5 2,000 people.

6 And -- but even though these -- these plans
7 are drastically different with respect to the criteria
8 that the legislature adopted here, many of their
9 districts have exactly the same black population
10 percentage as our districts. This is clearest if you
11 look at on page 36 of our brief where we lay out the
12 Senate districts and their own proposed plans next to
13 the Senate districts and our proposed plan. And you'll
14 look and you'll see Senate District 18, 19, 20, some of
15 the Senate districts that Justice Kagan was talking
16 about earlier, are almost exactly the same in all three
17 plans.

18 If you look at Senate District 33, it's
19 exactly the same in our plan and in the Black Caucus's
20 proposed plan. The evidence was that the only way you
21 could draw Senate District 33 with a different black
22 population percentage --

23 JUSTICE KENNEDY: What about District --
24 Senate District 26?

25 MR. BRASHER: Senate District 26 was above

1 70 percent black in the previous plan and it's above
2 70 percent black in our plan and in the Black Caucus's
3 plan. Now, it's not exactly on target, but the
4 Plaintiffs testified in this case that the area of
5 Montgomery City that we're talking about here is
6 99 percent black.

7 And because that was one of the Senate
8 districts that they actually challenged, we have
9 actually good-faith credibility determination from the
10 trial court because the drafters actually testified
11 about why they made the changes to Senate District 26
12 they made, and they said that because of the way
13 populations shifted, they had to change an adjoining
14 district, Senate District 30, which required changes
15 to -- to all of the rest of the districts. And that
16 left a county, sort of an orphan county, Crenshaw
17 County, that is a rural county south of Montgomery.
18 They explained that what they did is they took part of
19 Senate -- former Senate District 26, took it out to make
20 a way to connect the rural Crenshaw County to the rest
21 of Senate District 25, which is already predominantly
22 rural.

23 JUSTICE ALITO: Well, the Solicitor General
24 just said that if you look at that district, it has a
25 very bizarre shape and the effect of the bizarre shape

1 is to pull in predominantly African-American areas and
2 exclude predominantly white areas. Is he correct on
3 that?

4 MR. BRASHER: Actually, I respectfully
5 disagree with him about that. I -- if you look at the
6 comparison map, it's in the Joint Appendix on 197, you
7 can see a comparison between the former district and the
8 current district. And what you'll see is up at the
9 right -- I'm sorry, the -- let me try and orient
10 myself -- the left -- the left part of Montgomery
11 County, that's where the former district used to be. It
12 was part of Senate District 25 that came into the middle
13 of that district, sort of a -- kind of came in the
14 middle of it. And what the drafters did here is they
15 drew the lines closer to the City of Montgomery, and
16 they preserved that part of Senate District 25 that came
17 in the middle of it. What they -- the only thing they
18 did is they took some precincts and some parts of
19 precincts, kind of along those lines, and they moved
20 them from Senate District 25 to Senate District 26.

21 And I want to also just correct something
22 that the -- my friend the Solicitor General said. We
23 didn't just move black voters into that district. We
24 also moved Hispanic voters into that district, we moved
25 white voters into that district. We made changes to

1 that --

2 JUSTICE KAGAN: Mr. -- Mr. Brasher, I mean,
3 usually in these cases you're looking at these
4 funny-shaped districts and you're trying to figure out
5 from the shape and from other matters whether race has
6 been used instead of traditional districting criteria.
7 But this is a very sort -- you know, sort of sui generis
8 Shaw claim, because here the principal evidence in the
9 case is not all the circumstantial stuff that we usually
10 do. It's a policy statement from the State that says
11 race non-retrogression is going to be our principal
12 criterion except for Reynolds, and then a clear
13 testimony from the people who were applying that policy
14 statement that they thought that that meant maintaining
15 the black voting age population, something which is a
16 mistaken understanding of what retrogression entails.

17 But, you know, you don't have to look at all
18 the circumstantial evidence about the shape of districts
19 when you have a policy statement from the State saying
20 this is our number one criterion except for Reynolds and
21 this is how we understand it in such a way that it's
22 going to ensure that a 68 percent district stays a
23 68 percent district and a 52 percent district stays a
24 52 percent district and so on.

25 MR. BRASHER: Well, just two quick responses

1 to that, Justice Kagan. And the first is that the State
2 is always going to say that complying with Federal law
3 was a top priority because Federal law is supreme. And
4 so if simply --

5 JUSTICE KAGAN: But this is much more than
6 that. This is very specific saying where the -- the --
7 the two legislators principally in charge of this said
8 this is what we understand the requirements are, that
9 we're going to maintain the black voting age population
10 in each district.

11 MR. BRASHER: Well, that brings me to my
12 second point, which is that imagine had we done the same
13 thing that the plaintiffs are suggesting, and we had
14 hired a political scientist to tell us that 55 percent
15 should be the target. I don't think that we could say
16 race predominated in that circumstance, just because we
17 had a different target. And so I think they are
18 bringing effectively a circumstantial case here. They
19 have the fact that we said that this was our objective
20 under Section 5 --

21 JUSTICE KENNEDY: Well, Justice Kagan's
22 question points up the fact that the defenders of this
23 plan did not rely on the fact that it was a political
24 gerrymander and, of course, they said it was the
25 2 percent call, but the basis was race in order to

1 comply with Section 5.

2 MR. BRASHER: And my point about that is
3 certainly with respect to specific districts, they were
4 based on partisanship, and so had they challenged
5 specific districts, we would have responded in kind with
6 respect to those specific districts. But they never
7 challenged specific districts below.

8 And I think to answer Justice Alito's
9 question, to my friends on the other side, I think you
10 should look at document 194 which is the Black Caucus'
11 posttrial brief. And although they certainly mention an
12 occasional specific district, they didn't have any
13 evidence. I guess this goes back to Justice Kagan's
14 question. This is a circumstantial case because the
15 only evidence --

16 JUSTICE GINSBURG: Considerable evidence on
17 the Senate District 26.

18 MR. BRASHER: Senate District 26 was
19 challenged by the Alabama Democratic Conference, which
20 has now not brought a Shaw claim with respect to
21 district 26. And because they specifically challenged
22 that district, you actually have, like I said, a
23 credibility determination by the district court about
24 the testimony with respect to that specific district.

25 JUSTICE GINSBURG: Let me ask you about this

1 Section 5 mistake. Isn't it so that both the district
2 court and Alabama were laboring under the impression
3 that retrogression meant you have to keep the same
4 numbers?

5 MR. BRASHER: The district court made an
6 express fact-finding here that our goal was to prevent
7 substantial reductions in black population in the
8 preexisting majority black districts.

9 JUSTICE GINSBURG: And if that's a
10 misunderstanding of what Section 5 requires, then the
11 whole thing is infected by that mistake.

12 MR. BRASHER: Well, I disagree with you
13 respectfully about it being a misunderstanding, because
14 I think in 2006, Congress told us that we could not
15 diminish the ability to elect the black voters in a
16 preexisting majority black district.

17 My friend, Professor Pildes, testified
18 against the inclusion of that language in Congress, and
19 he told them that if they included that language, it
20 would "lock into place" the majority black districts in
21 the South. If you cannot diminish the ability to elect,
22 that means if there's a safe majority black district
23 where there's a 100 percent chance that black voters can
24 elect their candidates of choice, you cannot drop that
25 to where they simply have a 50 percent chance, or a 60

1 percent chance. And that was what we were setting out
2 to do. And this Court said that States get leeway in
3 complying with Section 5 and the Equal Protection Clause
4 and we do not have to hit things right on the dot.

5 JUSTICE KAGAN: Mr. Brasher, I guess I don't
6 understand your response to Justice Ginsburg. I mean,
7 there are different interpretations of what those 2006
8 amendments mean, right? Under one interpretation, it
9 was basically a codification of Justice Souter's
10 opinion, and so majority minority districts could be
11 transformed into influence districts.

12 On another stricter interpretation, perhaps,
13 no majority minority districts had to stay majority
14 minority districts. But in no interpretation does a 76
15 percent district have to stay a 76 percent district when
16 circumstances change and when the ability to elect
17 candidates of one's choice does not require it.

18 MR. BRASHER: Well, this is what Justice
19 Souter said in his dissent in Georgia v. Ashcroft. He
20 said, "If racial elements consistently vote in separate
21 blocks," which it's conceded they do in Alabama,
22 "decreasing the proportion of black voters would
23 generally reduce the chance that the minority group's
24 favored candidate would be elected."

25 The majority opinion in Georgia v. Ashcroft

1 agreed with that as well. And the district court in
2 Georgia v. Ashcroft, which I think that Congress was
3 trying to go back to, said, "If existing opportunities
4 of minority voters to exercise their franchise are
5 robust, a proposed plan that leaves those voters with
6 merely a reasonable or fair chance of electing a
7 candidate of choice may constitute retrogression."

8 And the testimony from the plaintiffs' own
9 expert here was that majority black districts in Alabama
10 that are only 55 percent black would only give those
11 voters a reasonable opportunity to elect.

12 JUSTICE BREYER: Suppose we, I don't know, I
13 want to know what you think about the practicalities of
14 sending this back. Assume -- assume in the back of my
15 mind just relying on State policy is this. A State
16 legislator gets up and says, in our State, there's a
17 history of discrimination against black people. There
18 are very few black representatives in this body. I
19 would like to find a way of drawing district lines so
20 that we have a few more. Okay?

21 That's the normal way this case comes up.
22 This is an obverse and odd situation. All right. I
23 don't know that that statement should automatically
24 disqualify his plan. Maybe we should look a little
25 further into it and see what they actually did.

1 Suppose I start there. And then I say,
2 okay, you go proceed district by district. I suspect
3 they will be able to prove that at least in some
4 districts, at least in some, the statement of the
5 legislator here did prevail and did make a difference.

6 Now, if that's so, they don't have Section 5
7 to rely on as a defense. So I don't know what the
8 defense is possibly going to be. And since we can't
9 even think what the defense is, why don't they just redo
10 this plan over in the legislature and save everybody a
11 lot of time and trouble. What's your response to that?

12 MR. BRASHER: There are a couple of
13 responses. The first is, I think --

14 JUSTICE SCALIA: I thought it was a lot of
15 trouble to redo a plan. Is it not a lot of trouble?

16 MR. BRASHER: It is a lot of trouble.

17 JUSTICE BREYER: So my point of my question
18 is you want to go to that lot of trouble before a lot of
19 extra trouble in court proceedings, or do you want to go
20 to that trouble right off the bat and get it over with?

21 I expect you'd have an answer to that, and
22 I'm not taking a point of view. I just want to know
23 what your response is.

24 MR. BRASHER: Well, to respond to that
25 pointed question, this plan was passed after 21 hearings

1 held throughout the State of Alabama. It was passed
2 after extensive legislative negotiations. It was passed
3 in a special session of the Alabama legislature that was
4 called for purposes of enacting a redistricting plan.
5 So we do not want to go back through that process --

6 JUSTICE BREYER: Of course you don't, but my
7 question is, is there going to be a defense left that
8 could stop you from having to go back?

9 MR. BRASHER: Yes.

10 JUSTICE BREYER: What?

11 MR. BRASHER: I think the United States
12 agrees with me that the question here is whether there
13 was a strong basis in evidence for us to believe at the
14 time that we passed this plan that we had to comply with
15 Section 5, and I think we have that defense, even if we
16 are litigating district by district. But let me --

17 JUSTICE GINSBURG: What does it mean to
18 comply with Section 5? And that's where you can say it
19 strongly -- it complies -- everybody agrees that that
20 counts, compliance with Section 5, strong interest in
21 doing that. But if you think Section 5 means you got to
22 preserve the same numbers and that's not what Section 5
23 means, then the whole premise on which the district
24 court based its decision was wrong.

25 MR. BRASHER: Well, I don't think so,

1 because I think the district court's decision was
2 premised on the fact that race was not the predominant
3 factor in this plan. But to go to that question about
4 Section 5, we adopted a very reasonable Section 5
5 preclearance strategy here. It was the exact same thing
6 that Georgia did in 2005 and that Congress said in the
7 House report when it reauthorized Section 5 in 2006 --

8 JUSTICE SCALIA: If that turns out to be
9 wrong, I guess you're still not guilty of using race.
10 You're still trying to comply with Section 5 as opposed
11 to being racist; right?

12 MR. BRASHER: That's exactly right. They
13 did make intentional discrimination claims in the
14 district court --

15 JUSTICE KENNEDY: If the district court said
16 that race was not the purpose, what in the district
17 court's view was the purpose of the plan?

18 MR. BRASHER: Well, I don't think there's a
19 need for a district court to identify any one specific
20 purpose.

21 JUSTICE KENNEDY: I'm asking in this case,
22 what do you think?

23 MR. BRASHER: Yes.

24 JUSTICE KENNEDY: Was it the presumption
25 that they wanted to assure preclearance under Section 5

1 and for that reason used race? So when you say the
2 district court said, well, race was not the purpose, it
3 was close to the purpose because they were trying to use
4 Section 5 and use race for that reason.

5 MR. BRASHER: Well, it was certainly --

6 JUSTICE KENNEDY: That's a very fine
7 distinction.

8 MR. BRASHER: It was certainly a purpose
9 that went into the majority black districts, but it was
10 not the predominant motive in the way these laws were
11 drafted.

12 JUSTICE SCALIA: Don't you have to use race
13 to comply with Section 5?

14 MR. BRASHER: That's right.

15 JUSTICE SCALIA: Is there any way to comply
16 with Section 5 without using race?

17 MR. BRASHER: There is not.

18 JUSTICE KAGAN: But you don't have to use
19 race in this way, Mr. Brasher. Nobody would say that
20 Section 5 required you to maintain a 78 percent district
21 and a 78 percent district was no longer needed with
22 respect to a group's ability to elect a candidate of
23 choice.

24 MR. BRASHER: Well, I respectfully disagree
25 with that. And once again, we followed the same

1 preclearance strategy that Georgia followed in 2005.
2 And that Congress -- remember, Congress made a record in
3 2006 to try to reauthorize Section 5 and part of that
4 record was them saying that Georgia's plan from 2005,
5 which kept all of their majority black districts exactly
6 the same was a good thing. We did the same thing in
7 this redistricting cycle that other States did in this
8 redistricting cycle. We actually did the same thing
9 that the plaintiffs did when they were in charge of the
10 legislature in 2001. There's been some inconsistency on
11 that. The only difference is they tried to hit targets
12 from the 1993 plan as they were in 1993, and we simply
13 tried to keep the districts the same from 2010 to 2012.

14 JUSTICE ALITO: Could I follow up on
15 Justice Breyer's exploration of what would happen if
16 this was done over? I assume that Section 5 would not
17 be a consideration so long as a new coverage formula is
18 not adopted by Congress. Is that correct?

19 MR. BRASHER: Correct. If the legislature
20 were to pass new plans, I do not think that they would
21 have to comply.

22 JUSTICE ALITO: And the legislature could do
23 whatever it wants if it's -- if it relies purely on
24 partisanship rather than on race.

25 MR. BRASHER: That is correct.

1 JUSTICE ALITO: And to what degree would or
2 could -- to what degree would the legislature be
3 justified in doing and to what degree would it be
4 required to take into account the degree, if any, to
5 which Section 2 imposes something like a retrogression
6 requirement?

7 MR. BRASHER: Well, I think --

8 JUSTICE ALITO: And do we know what that
9 might be?

10 MR. BRASHER: I really honestly do not know
11 how Section 2 would necessarily apply in this
12 circumstance because by complying with Section 5 here,
13 we -- we necessarily complied with Section 2 because
14 it's a lesser standard.

15 But I do think that it's -- the fact that we
16 could have done, if we -- if the plans are vacated, they
17 are very likely to just be the same plans
18 reauthorized --

19 JUSTICE ALITO: What would happen if you --
20 if you're -- if on a do-over, the objective was to
21 produce maximum Republican representation in both houses
22 of the legislature. And the way in -- and in doing
23 that, there was a drastic reduction in the number of
24 African-American senators and representatives. Would
25 that be a violation of Section 2?

1 MR. BRASHER: Not necessarily. There would,
2 obviously, be a lot more that would go into that
3 analysis whether that violated Section 2. You'd have to
4 look at each individual district and see if they can
5 make a Section 2 claim. I mean, one of the issues in
6 this case is that this plan actually gives proportional
7 representation to black voters in Alabama. There are
8 about 25 percent black voting age population in Alabama,
9 and they have about 25 majority black districts in the
10 House and about 20 -- I'm sorry, about 25 percent
11 majority black districts in the House and about 25
12 percent majority black districts in the Senate. And so
13 this is -- this plan meets Section 2 in that regard in
14 the sense that it gives proportional representation.

15 But I do not know what would happen, quite
16 frankly, if this -- if the Court were to vacate these
17 plans and the legislature were to just do a do-over.

18 And I would -- to go back to the 2 percent
19 deviation, these are very sophisticated parties on the
20 other side of this case with very sophisticated counsel.
21 The reason they've never proposed any way to do this
22 following our own race-neutral redistricting criteria is
23 because they know that the 2 percent deviation here
24 prevents them from gerrymandering districts to help
25 white Democrats get elected because it would be very

1 simple. The 2 percent deviation was adopted at the very
2 beginning of this redistricting process, so the
3 plaintiffs had a year, while they were on the committee,
4 the reapportionment committee, to come up with their own
5 2 percent plan. And instead, they just proposed these
6 10 percent deviation plans in the legislature.

7 And then we had a year of litigation for
8 them to come up with own 2 percent plan, and they --
9 they didn't do that. And that's what the district court
10 was getting at when the district court said that -- you
11 know, the district court said race did not predominate
12 because we followed race-neutral redistricting criteria,
13 and then the district court suggested, you know what,
14 you know what this case is really about, it's about the
15 2 percent population deviation. Because --

16 JUSTICE KAGAN: Mr. Brasher, you're
17 suggesting that there's some necessity for a 2 percent
18 plan, but there is no necessity for a 2 percent plan.
19 States have routinely gone up to 10 percent without
20 getting into trouble under Reynolds. So that can't
21 insulate your plan from this kind of challenge, can it?

22 MR. BRASHER: Well, I think it can, and for
23 this reason, is because we're in charge of adopting our
24 race-neutral redistricting criteria. And under Easley,
25 if the plaintiffs want to prove that race predominated

1 in a plan, the first step of that, and certainly the
2 easiest way to do it, is to propose some other way of
3 meeting race-neutral redistricting criteria that
4 provides greater racial balance.

5 And they haven't proposed any way to do
6 than, and the plans that they did propose, even though
7 they are 10 percent plans, are very, very similar in
8 many of these majority black districts. So not only
9 have they not proposed a 2 percent plan that's our
10 criteria, but they actually -- the plans they did
11 propose are not -- not that different.

12 I think at the very least, the fact that the
13 plaintiffs have never proposed any way to do this
14 redistricting that actually meets the State's
15 race-neutral redistricting criteria underscores that you
16 cannot find that the district courts fact-finding here
17 was clearly erroneous, that race did not predominate,
18 and I think the Court should affirm on that basis.

19 Let me address the question of remand for a
20 second here. The United States has said that the Court
21 should remand this case. But the United States'
22 position on that is internally inconsistent because the
23 United States agrees that the population percentages
24 alone in the districts are not sufficient for the
25 Plaintiffs to have met their burden of proof to show

1 that race predominated.

2 But that's the only evidence they introduced
3 about these districts, and that's why the district court
4 said, to the best that I can tell, these are statewide
5 challenges because the only evidence in the record,
6 whatever they may have said, the only evidence in the
7 record about these districts was just population
8 statistics.

9 JUSTICE BREYER: You'd look at the -- you'd
10 look at the complaint, when I look at the complaint, I
11 suspect I'll find something about districts. It's
12 certainly true that, sort of taking the US point of
13 view, the -- it's quite clear the -- to me anyway, that
14 the court decided on the basis of a statewide plan. So
15 if it's wrong about that, then they ought to have a
16 chance to go back and make their claim district by
17 district and have a decision on that basis.

18 MR. BRASHER: Well -- and once again, I
19 don't think -- they may have brought claims with respect
20 to each individual district. I don't think they do. I
21 think if you look at the complaint, you won't find that.

22 But even if they did, the only evidence that
23 they introduced about any of these districts are the
24 statistics alone, and the United States agrees with me
25 that that's insufficient for them to have met their

1 burden of proof. So I don't see how you could reverse
2 the district's fact-finding as clearly erroneous that
3 race didn't predominant, given that all they introduced
4 was statistics.

5 I think The Court should affirm on the basis
6 of the fact-finding and not reach questions about
7 Section 5.

8 Unless the Court has any other questions,
9 that ends my -- thank you.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Professor Pildes, you have two minutes
12 remaining.

13 REBUTTAL ARGUMENT OF RICHARD PILDES

14 ON BEHALF OF THE APPELLANT

15 MR. PILDES: Thank you very much, Mr. Chief
16 Justice.

17 If I can, I'd like to address --

18 JUSTICE SOTOMAYOR: Is he right on that last
19 point? Earlier, one of the two of you said that if you
20 looked at the division of precincts, it was done on the
21 basis of this policy in almost every district. Was that
22 shown below?

23 MR. PILDES: We introduced all of that
24 precinct splitting information below and in our proposed
25 findings of fact, Document Number 196, some of which is

1 reproduced in one of the briefs. We made exactly this
2 point, yes, Your Honor.

3 JUSTICE SOTOMAYOR: What other -- besides
4 the statistics, what other evidence did you present?

5 MR. PILDES: Your Honor, we --

6 JUSTICE SOTOMAYOR: I can go back to the
7 Joint Appendix, but I just want a summary of it from
8 you.

9 MR. PILDES: Your Honor, the key fact we
10 presented, I think, that hasn't been discussed here is
11 that the Alabama Constitution prohibits the splitting of
12 counties. And they say they had a Supremacy Clause
13 obligation to meet these racial targets, and that meant
14 they could override the Alabama's -- the Alabama
15 Constitution's protection of county boundaries and all
16 other State traditional districting principles.

17 And the 2 percent rule works the same way.
18 If that's actually a Federal constitutional requirement,
19 they can also override the key protections against
20 partisan gerrymandering. The very that few exist, the
21 only hard constraints, the county boundaries are
22 political subdivision boundaries, and it means they can
23 manipulate the all-important county delegations in the
24 Alabama legislature by breaking counties into multiple
25 districts and then deciding who runs the county by

1 putting their district in there.

2 Now, a second question we answer that I
3 think has been very important in this discussion -- and,
4 by the way, I don't want to lose track of the fact that
5 on remand, the Alabama legislature will have to comply
6 with the whole county provisions, or at least they can't
7 use this Federal excuse to split them.

8 The way most States do this is they either
9 start with traditional districting principles in the
10 core of existing districts and they look to see at the
11 end have we maintained the same number of
12 majority-minority districts, or if they start with a
13 number at the beginning, which they're not required to,
14 they ask what's necessary in current conditions to
15 preserve the ability to elect today.

16 That's what Alabama did in its 2001
17 submissions. It actually said that the number for the
18 ability to elect was a 55 percent black voting age
19 population. That's in its official submissions to the
20 United States.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 The case is submitted.

23 (Whereupon, at 11:15 a.m., the case in the
24 above-entitled matter was submitted.

25

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