

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

O. JOHN BENISEK, ET AL.,)
 Appellants,)
 v.) No. 17-333
LINDA H. LAMONE, ADMINISTRATOR,)
MARYLAND STATE BOARD OF ELECTIONS,)
ET AL.,)
 Appellees.)

Pages: 1 through 72

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MARYLAND STATE BOARD OF ELECTIONS,)

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Appellees.)

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Washington, D.C.

Wednesday, March 28, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

MICHAEL B. KIMBERLY, ESQ., Washington, D.C.;

on behalf of the Appellants.

STEVEN M. SULLIVAN, Solicitor General, Baltimore,

Maryland; on behalf of the Appellees.

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 17-333, Benisek
5 versus Lamone.

6 Mr. Kimberly.

7 ORAL ARGUMENT OF MICHAEL B. KIMBERLY

8 ON BEHALF OF THE APPELLANTS

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

11 All nine Justices in *Vieth* against
12 *Jubelirer* agreed that partisan gerrymandering
13 can violate the Constitution. The principal
14 question presented in this case is whether this
15 Court has the Article III authority to do
16 anything about it.

17 We submit that it does under the First
18 Amendment. According to this Court's First
19 Amendment retaliation and ballot access cases,
20 government officials may not single out
21 particular individuals for disfavored treatment
22 on the basis of the views that they have
23 expressed at the ballot box in prior elections.

24 JUSTICE GINSBURG: Mr. Kimberly, may I
25 ask you a kind of preliminary question? I -- I

1 take it it's -- it's much too late, even if you
2 were successful, for there to be any change for
3 the 2018 election, and if that's so -- and
4 we're only talking about a preliminary
5 injunction here, right?

6 MR. KIMBERLY: We are talking about a
7 preliminary injunction, Your Honor. That's
8 correct.

9 JUSTICE GINSBURG: So how would you be
10 irreparably injured by the denial of a
11 preliminary injunction if the earliest that --
12 assuming you're right, that a redistricting
13 could go into effect would be 2020?

14 MR. KIMBERLY: Well, Your Honor, we
15 don't concede for purposes of this appeal that
16 it's too late to enter relief in time for the
17 2018 election. Congress has enacted a statute
18 that deals with these sorts of circumstances
19 that this Court addressed in Bush against --
20 I'm sorry -- not Bush against Vera, but the
21 statute is 2 U.S.C. 2a(c) --

22 JUSTICE KENNEDY: Is there anything in
23 the record to indicate that experts will tell
24 you, oh, this is -- this is possible? It's --

25 MR. KIMBERLY: That it's possible to

1 enact a new --

2 JUSTICE KENNEDY: That it's possible
3 to comply with the injunction in time for the
4 2018 election.

5 MR. KIMBERLY: There's nothing in the
6 record about that, Your Honor, but that also
7 isn't an issue that the district court has been
8 in -- given an opportunity to address yet.

9 JUSTICE KENNEDY: Well, but you're
10 asking us to then just -- just assume it.

11 MR. KIMBERLY: Well, as a matter of
12 fact, Your Honor, I think what we're asking for
13 is just a remand for reconsideration of the
14 preliminary injunction motion in light of what
15 we take to be the proper legal standards. And
16 so, if our --

17 JUSTICE SOTOMAYOR: Given the
18 equitable principles involved in an injunction,
19 this is -- you waited an awfully long time to
20 bring this suit from the change in 2011, was
21 it? Should that factor into our consideration
22 of whether to uphold or not uphold your
23 request?

24 MR. KIMBERLY: So I think there are
25 two things to say about that, Your Honor. The

1 first is we don't think that that is an issue
2 that's really properly before this Court,
3 unless this Court concluded that it would be an
4 abuse of discretion not to deny the preliminary
5 injunction on that basis. That is a function
6 of the abuse of discretion standard of review
7 and the fact that the lower court hasn't had an
8 opportunity yet to address that question.

9 JUSTICE ALITO: But I don't think --

10 CHIEF JUSTICE ROBERTS: Well, it's not
11 -- it's not just that equitable factor. There
12 are other factors under the preliminary
13 injunction standard, including irreparable
14 harm. And because of your delay, elections
15 have been held under this district in 2012,
16 2014, and 2016. Right?

17 MR. KIMBERLY: Well, I --

18 CHIEF JUSTICE ROBERTS: Is -- is it --

19 MR. KIMBERLY: It is true that those
20 elections have been held. I would not say that
21 it's attributable to our delay in bringing the
22 suit.

23 CHIEF JUSTICE ROBERTS: Well, no, but
24 it's evidence of the question of whether you've
25 been irreparably harmed, that you've been

1 willing --

2 MR. KIMBERLY: Oh.

3 CHIEF JUSTICE ROBERTS: -- to let go
4 the elections in 2012, 2014, and 2016, suggests
5 that maybe 2018, you're not going to be
6 irreparably harmed in a broader sense.
7 Obviously, you argue you would be in this
8 particular election, but if you've been willing
9 to accept that harm in three different cycles,
10 I don't know if we should get concerned about
11 irreparable harm for one more.

12 MR. KIMBERLY: Well, I -- I guess I
13 have a few things to say about that. The first
14 is this lawsuit was initially filed in 2013.
15 True, after one election had taken place, but
16 district courts have entered injunctions
17 against the enforcement of congressional
18 districting maps after elections have taken
19 place many times in the past. So --

20 CHIEF JUSTICE ROBERTS: Well, if you
21 look at 20 -- you -- you did not file the suit
22 presenting this particular theory of the case
23 until 2016.

24 MR. KIMBERLY: No, our -- our position
25 is that this theory of the case has been in the

1 case from the beginning. This was a premise of
2 this Court's reversal and remand of the Fourth
3 Circuit back in 2015 in Shapiro against
4 McManus, that this claim was in the case, that
5 it was a claim that had not yet been foreclosed
6 by any majority opinion of this Court, and,
7 therefore, that it was a basis for convening a
8 three-judge district court.

9 It's true that it did not claim a
10 majority of the attention of the original
11 complaint, but there is -- this Court could not
12 have reached the decision that it reached in
13 Shapiro against McManus if this claim had not
14 been in the case from the get-go, which is --

15 JUSTICE ALITO: I still don't
16 understand what you want to have take place for
17 -- in practical -- in practical terms. You
18 want this case remanded to the district court
19 and you think that after the case is -- we
20 remand the case to the district court, there
21 will be time to adopt a new map to be used in
22 the 2018 election?

23 MR. KIMBERLY: Your Honor, I -- the
24 short answer to that question is that that is
25 an issue for the district court to decide. It

1 is, as I say, not something that we have
2 conceded, and I think it's conceivable that the
3 case could get back down to the district court
4 in time for some form of relief. Certainly,
5 the district court could conclude that there
6 isn't enough time and allow an election to take
7 place under the map as it's drawn. It might
8 look for some sort of interim solution under 2
9 U.S.C. 2a(c).

10 CHIEF JUSTICE ROBERTS: What would
11 that -- what would that --

12 JUSTICE KENNEDY: But -- but if it was
13 ordered by this Court -- an order by this Court
14 indicating, oh, there might be time is going to
15 upset settled expectations. There's -- there's
16 -- people are planning campaigns and so forth.
17 It would be highly -- are you suggesting that
18 it would not be disruptive of the current
19 election scheme in the current election
20 districting for this -- for this Court to
21 remand to consider whether the map should be
22 changed at this late date?

23 MR. KIMBERLY: Well, I -- I think it
24 would perpetuate the same sort of uncertainty,
25 frankly, that's been hanging over Maryland

1 politics from the pendency of this suit all
2 along. I -- I don't deny that, Your Honor, but
3 I don't think this Court has to actually take a
4 position on -- on the time in question one way
5 or another. What we're asking this Court to do
6 is evaluate the legal principles that the
7 district court announced in its decision
8 denying our preliminary injunction motion, to
9 correct them if it sees fit to correct them, or
10 to affirm them otherwise.

11 JUSTICE ALITO: Let me ask you a
12 question --

13 CHIEF JUSTICE ROBERTS: Well, it's not
14 simply a question of -- we have held that, in a
15 preliminary injunction context, you do not have
16 to consider the merits if you think the
17 equities and the irreparable harm questions cut
18 against the grant of a preliminary injunction.

19 MR. KIMBERLY: Well, that's true, but,
20 again, that would be a question, I think, for
21 the district court in the first instance. The
22 question whether or not --

23 CHIEF JUSTICE ROBERTS: No, no, you're
24 asking us to --

25 JUSTICE KENNEDY: Right.

1 CHIEF JUSTICE ROBERTS: -- decide the
2 merits and determine from that whether there's
3 been an abuse of discretion. I understand
4 that.

5 MR. KIMBERLY: Right.

6 CHIEF JUSTICE ROBERTS: And what I'm
7 suggesting, most -- I guess the strongest case
8 is the Winter case from a few years ago, where
9 we said if the equities and the harm question
10 cuts strongly in one direction, we don't have
11 to consider the merits at all without
12 determining that there has or hasn't been an
13 abuse of discretion.

14 MR. KIMBERLY: Well, I'm -- I don't
15 recall what it is exactly the district court in
16 the Winter case -- with which I'm familiar,
17 before this Court, I don't recall what the
18 district court in that case had done.

19 If -- if the district court had
20 reached each of the individual issues, surely,
21 the Court can pick out among the issues that
22 the district court resolved which it wants to
23 base its decision on. And --

24 CHIEF JUSTICE ROBERTS: Well, I think
25 that's exactly -- I think that's exactly right,

1 that the Court can pick out of the different
2 criteria which one it wants to base its
3 decision on. And I think it's part of your
4 challenge today to explain to us why we should
5 pick out the hardest one.

6 MR. KIMBERLY: Well, and -- and the
7 short answer is because that's the one on which
8 the district court based its decision. If this
9 Court were instead to pick out a different
10 factor from the preliminary injunction test and
11 decide that it wants to affirm on that basis,
12 it would basically be taking the discretion of
13 the district court and -- and taking it for
14 itself to exercise.

15 JUSTICE SOTOMAYOR: Let me ask you a
16 practical question. This is a denial of a
17 preliminary injunction. You still have a
18 merits trial to go through or not?

19 MR. KIMBERLY: That also -- yes. We
20 do. Yes, unless there's a summary --

21 JUSTICE SOTOMAYOR: Can you go through
22 that trial without a ruling from us? And, if
23 not, why not?

24 Judge Niemeyer said that there were
25 many open issues in this case, not the least of

1 which was the motivation of the -- of the
2 Governor and his committee for the change at
3 issue.

4 Would that obviate some of the merits
5 questions that are before us if you don't prove
6 that first prong? You have fairly strong
7 evidence to -- to show that.

8 MR. KIMBERLY: Is -- is --

9 JUSTICE SOTOMAYOR: Is your weakness
10 in the other prongs?

11 MR. KIMBERLY: Well, we don't think we
12 have weakness in any of the prongs,
13 respectfully, Your Honor.

14 JUSTICE SOTOMAYOR: No, assuming we
15 accept your test.

16 (Laughter.)

17 JUSTICE SOTOMAYOR: I -- I agree. But
18 assuming we -- we leave it the way it is, what
19 happens?

20 MR. KIMBERLY: Well, I -- I think what
21 -- the concern that we have is if the -- if the
22 case -- so imagine the district court does not
23 enter summary judgment, and the case proceeds
24 to trial. It will proceed to trial on what we
25 take to be a fundamentally misguided view of

1 what we have to prove to establish a First
2 Amendment violation against partisan
3 gerrymandering.

4 What the district court indicated at
5 the preliminary injunction hearing is that it
6 would be open to reopening discovery, allowing
7 us basically to conduct a massive district-wide
8 survey of voters to determine whether or not
9 they would have voted one way or another.

10 All because the district court
11 believed that the -- the primary question on
12 burden is whether all of the electoral outcomes
13 in the district under the map are attributable
14 to that.

15 JUSTICE SOTOMAYOR: There's been a lot
16 of --

17 JUSTICE ALITO: Well, let me ask you
18 about your -- your legal theory then because I
19 -- I probably don't understand it. But, if I
20 understand it, I really don't see how any
21 legislature will ever be able to redistrict.

22 So let's say that a legislature is
23 drawing a particular map or a particular
24 district. Let's say it's a map and they say
25 that -- and they have two possible plans that

1 they're considering. And they both have very
2 low population deviations, exactly the same.
3 The districts in both are compact. The
4 territory is contiguous.

5 But they say, look, did -- plan A
6 gives our party a more than de minimis
7 advantage and plan B gives the other party a
8 more than de minimis advantage. So let's pick
9 the one that favors our party.

10 Now, in your view, that's
11 unconstitutional, I gather?

12 MR. KIMBERLY: Well, if -- if what the
13 map drawers are doing is looking at the way
14 that individuals have voted in the past and on
15 that basis attempting to make it more difficult
16 for them to achieve electoral success moving
17 forward, that is the specific intent and there
18 is a burden imposed as a consequence --

19 JUSTICE ALITO: Yes.

20 MR. KIMBERLY: -- it -- it -- it may
21 well be that --

22 JUSTICE ALITO: The answer to my
23 question is yes?

24 MR. KIMBERLY: It -- it may well be
25 that that would be a violation.

1 JUSTICE ALITO: But hasn't this Court
2 said time and again you can't take all
3 consideration of partisan advantage out of
4 districting?

5 MR. KIMBERLY: I -- I want to be very
6 clear that our theory does not require taking
7 all partisan -- consideration of partisan
8 advantage --

9 JUSTICE ALITO: Well, I don't see how
10 your theory is any different from that, other
11 than -- than a de minimis partisan advantage.

12 MR. KIMBERLY: So there are -- there
13 are two ways in which it's different. The
14 first is there are a range of considerations
15 that map drawers will take into account that
16 bear on the question of partisan advantage.

17 JUSTICE ALITO: Yeah, I know. You
18 have, you know, protection of incumbents and
19 preserving a district that has a particular
20 facility in it and a few other things. Okay.
21 In my example, none of those apply.

22 Your answer is that favoring the
23 political party of the majority in the
24 legislature in a way that's more than de
25 minimis is a violation of the Constitution?

1 MR. KIMBERLY: In -- in two
2 consequences, that -- in two circumstances,
3 that wouldn't be the case. So the first is we
4 also take the position that strict scrutiny
5 applies. And so it certainly is the case that
6 map drawers could consider this sort of
7 information if it's narrowly tailored to a
8 compelling governmental interest, which might
9 include, for example, pursuing a balanced map
10 or pursuing competitive districts.

11 JUSTICE KENNEDY: Well, what -- what
12 would happen if you have the orange party and
13 the green party, the green party's in the
14 minority, orange with 45 and -- orange party
15 55. Then, because of natural population shifts
16 or building new plants and so forth, it
17 switches.

18 Could the legislature say at this
19 point we -- we want, in order to have a
20 congressionally balanced declaration --
21 delegation, change -- change the districting in
22 -- in order to accommodate the new majority?

23 MR. KIMBERLY: I -- it -- it --

24 JUSTICE KENNEDY: It seems to me that
25 that would be definitely to retaliate against

1 certain -- a certain voter. The voter for the
2 orange -- for the orange party who used to be
3 in the majority is now in the minority. He's
4 got a complaint under your view?

5 MR. KIMBERLY: Well, unless, as Your
6 Honor suggested, it's in pursuit of -- of
7 balanced map drawing. I think in that
8 circumstance we've taken the position
9 throughout this litigation that --

10 JUSTICE KAGAN: But is your theory
11 that that would be a compelling interest that
12 could defeat strict scrutiny? In other words,
13 the way I understand your theory is that you
14 would put the state in that position to the
15 test of -- of saying this is a compelling
16 interest, this is the only way we can achieve
17 that interest, and -- and sort of put it
18 through the strict scrutiny hoops, even when
19 the state, you know, wants to achieve balanced
20 districts or wants to undo a former
21 gerrymander, so you would still put the state
22 through a very strict scrutiny test in that
23 case?

24 MR. KIMBERLY: Well, I -- I -- I think
25 the answer is yes, Your Honor, but I -- I think

1 in this circumstance strict scrutiny could do
2 real work, just as this Court in the racial
3 gerrymandering context has generally tolerated
4 the idea, the consideration of race is a
5 compelling -- is -- is a necessary means of
6 achieving the compelling end of complying with
7 Section 2 of the Voting Rights Act for --

8 CHIEF JUSTICE ROBERTS: Well, how
9 would you ever satisfy strict scrutiny in -- in
10 a case like this? In other words, it would
11 seem to me that there are so many alternative
12 approaches that the idea of saying this one way
13 of achieving a particular result was the only
14 possible way.

15 MR. KIMBERLY: Oh, I -- I don't -- I
16 don't think, under the strict scrutiny
17 approach, I don't think it's -- it's
18 necessarily that that particular district as
19 it's drawn is what would have to be necessary.

20 I think, for example, in Arizona, the
21 independent redistricting commission there is
22 told to pursue competitive districts. In order
23 to pursue competitive districts, it's -- it's
24 -- it's likely, I think, that considering this
25 kind of data is necessary. So --

1 CHIEF JUSTICE ROBERTS: But, I mean,
2 your theory is that the legislature acts with a
3 vengeful intent to punish people for the
4 exercise of their First Amendment rights,
5 right?

6 MR. KIMBERLY: Well, the way we put it
7 is disapproval of their past voting history,
8 yes.

9 CHIEF JUSTICE ROBERTS: And they're
10 going to say that in some circumstances that's
11 going to be okay, even though it applies strict
12 scrutiny, it's going to be okay for them to
13 burden their First Amendment rights?

14 MR. KIMBERLY: Well, I -- I think we
15 would take the position, just as in any other
16 First Amendment context that, yes, if
17 consideration of past voting history is
18 necessary to pursue that compelling
19 governmental interest, we tend to think that
20 balanced maps and competitive districts would
21 fit that hole.

22 JUSTICE GINSBURG: But when you start
23 -- when you start with a district that's been
24 skewed and you take that as the baseline and
25 say any deviation from that skewed districting

1 has to get strict scrutiny, there's something
2 wrong with that.

3 I mean, isn't the state able to say in
4 the past this was a gerrymandered district and
5 now we want to undo the gerrymander, and then
6 people who are left out will say: Now we've
7 been diluted, we've -- we've lost the clout
8 that we once had.

9 I mean, isn't there something wrong
10 with using the district as it now exists as
11 your starting point?

12 MR. KIMBERLY: I think there are three
13 things to say about that, Your Honor. And I
14 recognize that this is an important point in
15 the case, so I'd like to be sure to hit all
16 three.

17 The first is our focus on the
18 immediately prior -- the form of the
19 immediately prior district was a reflection of
20 what this Court said in Karcher against Daggett
21 about districts historically having a -- a core
22 around which changes are made.

23 That accurately describes the Sixth
24 Congressional District, which historically has
25 comprised northwest Maryland and around which

1 changes have been made, but that historical
2 core has been preserved.

3 I think probably analytically the more
4 consistent way to think about it is the first
5 precondition under the Gingles framework for
6 approaching racial vote dilution, which is the
7 question whether the targeted minority is
8 capable of forming -- is -- is sufficiently
9 numerous and geographically compact to form a
10 majority of a reasonably drawn district.

11 We knew in this case that that was
12 true because, of course, between 1990 and 2010
13 Republican voters had formed the majority of a
14 reasonably drawn district. That's why in this
15 case we had focused on the way that it had been
16 drawn before.

17 But in a circumstance where the court
18 is looking at whether there has been a
19 maintenance of a prior gerrymander, we think
20 probably the -- the more consistent way to look
21 at it doctrinally and analytically is -- is as
22 I just described under the first prong of the
23 -- of the Gingles preconditions.

24 JUSTICE SOTOMAYOR: May I ask you, is
25 this -- is yours the -- is yours the only test

1 you're proposing? In other political
2 gerrymandering cases, do you see other tests
3 being a possibility?

4 MR. KIMBERLY: Is -- is the question
5 whether we --

6 JUSTICE SOTOMAYOR: Is this the only,
7 versus --

8 MR. KIMBERLY: In -- in this lawsuit,
9 this is -- this is the only --

10 JUSTICE SOTOMAYOR: I didn't ask that.

11 MR. KIMBERLY: I'm sorry. So I --

12 JUSTICE SOTOMAYOR: In other
13 gerrymandering cases.

14 MR. KIMBERLY: Yes.

15 JUSTICE SOTOMAYOR: Do you see the
16 applicability of any other test? You have a
17 lot of amici with different tests, the ACLU.

18 MR. KIMBERLY: Sure.

19 JUSTICE SOTOMAYOR: The others have
20 proposed tests that would address some of
21 Justice Kagan's concern, the entrenchment test,
22 the durability test, that sort of thing.

23 MR. KIMBERLY: Sure.

24 JUSTICE SOTOMAYOR: Why did you
25 disavow those? Do you lose under those?

1 MR. KIMBERLY: Well, our --

2 JUSTICE SOTOMAYOR: Or is yours -- do
3 you think yours is just easier?

4 MR. KIMBERLY: Well, there are two
5 reasons. It was our understanding when we
6 filed the amended complaint back in 2015 that
7 we would not have made out a claim under a
8 number of those other tests, and we were
9 concerned because the focus here really was on
10 the Sixth District and not the map as a whole,
11 that it just wasn't an apt way of thinking
12 about what happened in Maryland.

13 The second reason that we focused on
14 it is because we were concerned about the
15 notion that -- under these other tests, that
16 the injury that was inflicted upon Republican
17 voters in Maryland's Sixth Congressional
18 District could be viewed as being offset by --
19 by allowing effectively gerrymandering other
20 districts in other parts of the state to offset
21 the -- the dilution of votes in the sixth.

22 JUSTICE SOTOMAYOR: Under your theory,
23 do you think the Democrats in the eighth
24 district have a complaint?

25 MR. KIMBERLY: No, I think that's a

1 good example of what would be a de minimis
2 effect. It's true that moving Republicans out
3 of the sixth and into the eighth and Democrats
4 out of the eighth and into the sixth did, in
5 sort of a technical sense, dilute Democratic
6 strength in the eighth district. The DPI there
7 went from 72 to 60. Both are extremely safe
8 Democratic seats. As a practical matter, it
9 made no difference to the outcome of the
10 election in the eighth district. It was --

11 JUSTICE GORSUCH: Counsel --

12 CHIEF JUSTICE ROBERTS: Presumably, it
13 wouldn't satisfy the first part of your test,
14 that this would have been done with a vengeful
15 intent --

16 MR. KIMBERLY: And --

17 CHIEF JUSTICE ROBERTS: -- to get
18 those Democrats?

19 MR. KIMBERLY: And that's exactly
20 right. That's the other way to look at it, is
21 it would just be an accepted political
22 consequence and not the specific --

23 JUSTICE KAGAN: But, Mr. Kimberly --

24 JUSTICE BREYER: So we have many
25 briefs, we have three cases, one, two were --

1 you know, was Wisconsin, there's Maryland, and
2 the one we are holding, I think, is North
3 Carolina.

4 MR. KIMBERLY: Right.

5 JUSTICE BREYER: And -- and there --
6 you've read those briefs probably.

7 MR. KIMBERLY: Yes.

8 JUSTICE BREYER: And they all have
9 slight variations on different themes. And I
10 think you're right when you -- when you -- the
11 same theme maybe but variations, and obviously
12 the problem is what you started with.

13 It seems like a -- a pretty clear
14 violation of the Constitution in some form to
15 have deliberate, extreme gerrymandering. The
16 Court said things like that, but is there a
17 practical remedy that won't get judges involved
18 in every -- or dozens and dozens and dozens of
19 very important political decisions?

20 What would you think of taking the
21 three cases and setting them for reargument on
22 the question of standard and there we'd have
23 all three variations in front of us and we
24 would enable people who have an interest in
25 this subject generally to file briefs, and we'd

1 see them all together and they could attack
2 each other's standards or they could support
3 each other's standards or they could attack any
4 standard? But there we'd have right in front
5 of us the possibilities as -- as -- as thought
6 through by lawyers and others who have an
7 interest in this subject.

8 MR. KIMBERLY: Your Honor, I --
9 obviously, this Court has before it those three
10 cases. I do think it makes sense to think
11 about them all together because I think the
12 consequences of not adopting one or the other
13 theory is -- is alarming and ought to be
14 alarming to anybody.

15 I might add that I think today, as the
16 Campaign Legal Center laid out in its brief in
17 this case, a challenge to Maryland's partisan
18 gerrymander in 2011 would likely succeed under
19 the approach that they've taken. Conversely, I
20 think the Wisconsin map could be invalidated
21 under our approach. It would require a
22 different theory and different evidence,
23 perhaps different plaintiffs. But it's
24 certainly imaginable that the Wisconsin map
25 could be invalidated under our theory.

1 JUSTICE BREYER: But I raise it not
2 for that reason. I raise it because I want to
3 think if there's some harm in doing that that I
4 haven't thought of. Is there some reason --
5 would it be harmful to somebody?

6 Because I do see an advantage. You
7 could have a blackboard and have everyone's
8 theory on it, and then you'd have the pros and
9 cons and then you'd be able to look at them all
10 and then you'd be able see perhaps different
11 ones for different variations and, you know,
12 that's -- maybe there are different parts of
13 gerrymandering that rises in different
14 circumstances, dah-dah-dah. You see the point.

15 MR. KIMBERLY: Sure.

16 JUSTICE BREYER: Okay. You can't
17 think of a reason not to do it?

18 MR. KIMBERLY: Well, I mean, the --
19 the immediate reason, I suppose, would be the
20 intervening 2018 elections. But if -- if the
21 Court is disinclined to think that there's time
22 for a remedy in any event, then perhaps there
23 wouldn't be. That certainly isn't an issue
24 that we're willing to concede. As we say, I
25 think it would be an issue for the district

1 court in our case on remand, just as it would
2 be in Wisconsin or North Carolina.

3 JUSTICE GINSBURG: What do you -- what
4 do you think would be permissible? You -- you
5 said your theory allows for de minimis
6 exceptions.

7 MR. KIMBERLY: Right.

8 JUSTICE GINSBURG: So what falls in
9 the de minimis category?

10 MR. KIMBERLY: Well, I think a good
11 example would be -- as I was just describing to
12 Justice Sotomayor, it would be what happened in
13 the Eighth Congressional District. We have --

14 JUSTICE SOTOMAYOR: That's not de
15 minimis. You're saying there's no burden at
16 all. You're saying there wasn't an intent to
17 burden their association.

18 MR. KIMBERLY: Well, that's -- that's
19 -- I think -- I think you can get at the --

20 JUSTICE SOTOMAYOR: All right. So
21 that's different than de minimis.

22 MR. KIMBERLY: But I think you can get
23 at it both ways. It certainly is also the case
24 that I think you can eliminate that -- that
25 claim under the intent prong. I think you

1 could also eliminate it under the burden prong.

2 JUSTICE KAGAN: Well, may I give you a
3 hypothetical that gets to Justice Ginsburg's
4 question? Suppose you had a district and there
5 was a reapportionment and we realized we have
6 to add 15,000 votes -- voters to this district.

7 And they looked at the numbers and
8 they said: You know what, if -- this is a
9 solid Republican district, but if we add 15,000
10 voters from a Democratic area, we're going to
11 turn this into a highly competitive district.

12 Would -- you would now force the state
13 to meet a strict scrutiny burden on that,
14 wouldn't you?

15 MR. KIMBERLY: I think in that
16 circumstance -- it sounds like what's going
17 to -- I just want to --

18 JUSTICE KAGAN: We are taking 15,000
19 of the bluest blue voters, and we're parking
20 them in this district in order to convert the
21 district from a safe Republican district to a
22 competitive district.

23 How do you analyze that?

24 MR. KIMBERLY: I think -- and just to
25 be clear that I have it straight, if the point

1 is that lawmakers in --

2 JUSTICE KAGAN: We want another
3 Democratic senator.

4 MR. KIMBERLY: -- in Annapolis --
5 exactly. They -- they say we -- we disapprove
6 of these voters electing a Republican in this
7 district, we're going to move these Democrats
8 in to prevent them from doing it again in the
9 future, yes, I think that that could be --
10 again, depending on the strict scrutiny
11 question and depending also on the burden
12 question, that could, indeed, be a violation of
13 our theory.

14 JUSTICE GORSUCH: Counsel, one
15 question I have about causation for you.
16 Before the district court, it appeared that you
17 conceded that you had to prove but-for
18 causation, that but for the alleged
19 gerrymander, the outcome would have been
20 different in these last three elections. And
21 the district court expressly rejected a lower
22 standard, rejecting some metaphysical could-be
23 burden in favor of the but-for cause test.

24 In this Court, you seem to now be
25 backing away from the but-for cause

1 requirement, as best I can tell, in favor of
2 something the district court might have
3 described differently.

4 And I wonder how could it be an abuse
5 of discretion for the district court to have
6 proceeded on the basis of a concession before
7 it that you're now backing away from?

8 MR. KIMBERLY: Well, to be clear, we
9 -- we believe that but-for causation is an
10 element of the claim. We just don't think it's
11 ours to prove. We think under Mt. Healthy
12 burden-shifting --

13 JUSTICE GORSUCH: I understand that.
14 But before the district court, you took the
15 position you had to prove it, according to the
16 district court's opinion.

17 MR. KIMBERLY: I --

18 JUSTICE GORSUCH: According to -- your
19 brief is saying our burden is to show.

20 MR. KIMBERLY: Yes. Right. No, that
21 -- so that -- that is a line taken out of a
22 brief --

23 JUSTICE GORSUCH: Right.

24 MR. KIMBERLY: -- that's really
25 twisted to mean 180 degrees of what it actually

1 meant.

2 JUSTICE GORSUCH: So the district
3 court twisted your concession?

4 MR. KIMBERLY: It misunderstood --
5 Your Honor, it misunderstood what we were
6 saying. We said -- we said very clearly in the
7 context in which that sentence is taken that we
8 did not have to prove that every election
9 forevermore would be --

10 JUSTICE GORSUCH: No. What it said
11 was -- it didn't say that. So I think you're
12 twisting perhaps what the district court said.
13 What the district court quoted you as saying is
14 our burden is to show that purposeful dilution
15 was a but-for cause of the losses in 2012, '14,
16 and '16.

17 MR. KIMBERLY: And -- and, Your Honor,
18 that was a description of the factual arguments
19 that we had made in the case about how it was
20 that we were describing the burden at that
21 point. That is not something that we --

22 JUSTICE GORSUCH: All right. How can
23 it be an abuse of discretion for the district
24 court to have relied on that concession?

25 MR. KIMBERLY: Because that -- I mean,

1 that concession -- first of all, it's not a
2 concession. It's taken out of context, as I
3 say, to mean something other than what it
4 meant.

5 But I -- I think it's wrong to say
6 that that is -- that that is the basis on which
7 the district court based its decision. It
8 based its decision on the view that, in order
9 to prove an actionable burden in any partisan
10 gerrymandering case, the plaintiffs have to
11 come forward and show that electoral outcomes
12 have been changed in the past and will continue
13 to be changed until the map is altered. And
14 that is not what this Court -- that is not a
15 position that we took in the district court.

16 JUSTICE GORSUCH: One more along these
17 lines for you. In Factual Findings 11 and 12,
18 the district court found that plaintiffs had --
19 had conducted no statistical sampling to show
20 an alternative cause might not have been
21 responsible; namely, that people just preferred
22 the candidate.

23 MR. KIMBERLY: Right.

24 JUSTICE GORSUCH: And it had nothing
25 to do with gerrymandering. How do we -- how do

1 we address that factual finding and call it an
2 abuse of discretion, the decision here, when
3 plaintiffs failed to rule out other potential
4 causal factors for the results here?

5 MR. KIMBERLY: Well, there are two
6 things to say about that. The first and, I
7 think, the easiest way to address it is through
8 the legal question of whether Mt. Healthy
9 burden-shifting applies here, whether it's on
10 the state, when a prima facie case of
11 discrimination has been made, to come forward
12 with neutral justifications for the action that
13 it took.

14 If we're right about that question,
15 then it wasn't our burden to put that evidence
16 before the Court in any event. But I think the
17 other way to think about it, to call it abuse
18 of -- of discretion is, frankly, because it's
19 clear error.

20 The court didn't take account of the
21 strong evidence that we have about the
22 reliability of the metrics that the map drawers
23 themselves used to work the gerrymander in this
24 case. That includes the PVI and the -- well,
25 the map drawers didn't rely on the PVI, but

1 they relied on the DPI.

2 We have evidence uncontested in this
3 case that those metrics are reliable ways of
4 predicting electoral outcomes.

5 That they are reliable is a premise of
6 partisan gerrymandering to begin with. If they
7 weren't reliable, we wouldn't see partisan
8 gerrymandering at all because it would be a
9 fool's errand. We know that not to be the
10 case.

11 We have strong evidence in the case
12 demonstrating that, more likely than not, the
13 electoral outcomes and the dilution of votes in
14 the district was attributable, as common sense
15 suggests, to the way that the -- the map
16 drawers drew the lines.

17 And so I think you have the legal
18 error under Mt. Healthy burden-shifting and, as
19 to the factual question, it's simply a -- a --
20 a -- a clear misreading of the record before
21 the district court.

22 If I may reserve my time.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Sullivan.

1 ORAL ARGUMENT OF STEVEN M. SULLIVAN

2 ON BEHALF OF THE APPELLEES

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

5 The plaintiff's First Amendment
6 retaliation claim fails to -- to provide a
7 manageable standard for evaluating partisan
8 gerrymandering for three principal reasons.

9 First Amendment retaliation does not
10 even try to answer the perennial question of
11 how much is too much politics in a
12 redistricting process that this Court has
13 called inherently political.

14 JUSTICE SOTOMAYOR: I don't know. He
15 says not at all. He says it -- it's too much
16 if that's all you're doing.

17 MR. SULLIVAN: Well, no.

18 JUSTICE SOTOMAYOR: That's basically
19 as I read his argument.

20 MR. SULLIVAN: Well, it depends on --

21 JUSTICE SOTOMAYOR: If that's all
22 you're doing, then it's too much.

23 Now, under that test, he might lose,
24 because you're claiming there were other
25 reasons for this.

1 But that's an issue of fact for the
2 jury, I think. You have some pretty damning
3 evidence that it might not have been. You have
4 your own mayor saying -- your own governor,
5 pardon me --

6 MR. SULLIVAN: Used to be my mayor.

7 JUSTICE SOTOMAYOR: Yeah, your own
8 governor saying that he felt duty-bound to
9 ensure that his party won. And there are
10 basically statements to that effect here.

11 So that tells -- that gives you a
12 standard. You may not like it, but it does
13 give you a standard.

14 MR. SULLIVAN: Well, two things, Your
15 Honor. One is elsewhere in the brief
16 plaintiffs disavow that they have to show how
17 much is too much. They actually say that in
18 words.

19 Two, that kind of intent --

20 JUSTICE SOTOMAYOR: Well, how much is
21 too much is when, I think, balled up in the
22 question of which there -- I -- I grant you
23 they're a little bit equivocal of who bears
24 this burden, but they're -- they are saying
25 that we have to show that there's some form of

1 entrenchment, that the intent is to ensure that
2 only Democrats will be capable of winning in
3 this district for the life of the census or the
4 life of this boundary.

5 So you -- you have a -- you have some
6 form of too much.

7 MR. SULLIVAN: But what they're really
8 relying on is the intent, which they would
9 equate with retaliation. But it's the same
10 intent which the court recognized in Bandemer
11 is ever present.

12 JUSTICE KAGAN: Well, Mr. Sullivan,
13 let's say you're right, that they have not
14 shown us how much is too much, that they have
15 suggested that in any forum, when there's
16 partisan advantage, the courts should be
17 intervening.

18 But we don't have to say something
19 like that to deal with this case because,
20 however much you think is too much, this case
21 is too much.

22 (Laughter.)

23 JUSTICE KAGAN: I mean, I think.
24 You'll tell me I'm wrong. But, as Justice
25 Sotomayor said, you know, from the Governor,

1 from Congressman Hoyer, people were very
2 upfront about what they were trying to do here,
3 which was to create another Democratic
4 district. And they did that. Only 10,000
5 people had to be removed from this district as
6 a result of one person/one vote.

7 What -- what the Maryland legislature
8 did was to shuffle 360,000 people out and bring
9 in 350,000 people. The result of that is that
10 the district went from 47 percent Republican
11 and 36 percent Democratic to exactly the
12 opposite, 45 percent Democratic and 34 percent
13 Republican.

14 I mean, how much more evidence of
15 partisan intent could we need?

16 MR. SULLIVAN: Well, you might want
17 intent to create something other than a
18 competitive district, which is what Maryland
19 created. It went from a safe Republican, plus
20 13 Republican, to a plus 2 Democrat. And in 19
21 --

22 JUSTICE KAGAN: Plus 2. You're
23 referring to the single election? Is that what
24 you're referring to?

25 MR. SULLIVAN: Well, Cook evaluated

1 the first election after the redistricting,
2 which is the most important one where you can
3 judge the effectiveness of it.

4 JUSTICE KAGAN: I mean, Democrats have
5 now prevailed in three straight elections,
6 including in an election which was a wave
7 Republican election.

8 So the effects were exactly what the
9 intent would suggest: A long-standing
10 Republican incumbent is unseeded by a
11 Democratic newcomer, who withstands a wave
12 election, who prevails three straight times.

13 I mean, it appears that the Maryland
14 legislature got exactly what it intended, which
15 was you took a Republican district, like a safe
16 Republican district, and made it into not the
17 safest of Democratic districts but a pretty
18 safe one.

19 MR. SULLIVAN: Well, no, it's not
20 safe. It was judged competitive. And in that
21 first election, 2012, the incumbent Republican
22 had seven -- count them -- seven -- seven
23 opponents in the Republican primary. The total
24 vote for those opponents exceeded the vote for
25 the incumbent.

1 Those seven candidates did not run for
2 office, presumably because they thought it was
3 a waste of time to run for the seat as a
4 Republican in the Sixth District. They
5 considered it to be competitive. And so they
6 ran, as we often do --

7 JUSTICE BREYER: Competitive, the --
8 the -- the idea that's being advanced is
9 extreme gerrymandering. Okay? A
10 hundred percent is extreme. No other reason
11 for doing this other than partisanship. That's
12 an example of extreme gerrymandering.

13 And the election result changed.
14 That's an example of harm. And there is
15 nothing else put forward, okay, except you did
16 put something forward: There's been
17 gerrymandering in the past, we're trying to
18 cure it. Something like that. We've seen that
19 in other cases. Okay. Say no. The last
20 reason is not good enough. You have to start
21 somewhere.

22 Second, there is an example of an
23 effect, and, three, it's 100 percent partisan.
24 That's the reason. That's extreme.

25 Now could we say that? Yes, I think

1 we could. But the problem is that's not going
2 to solve other cases and we'll never have such
3 a record again. I mean, the people who do the
4 gerrymandering are not stupid.

5 (Laughter.)

6 JUSTICE BREYER: And -- and they --
7 they will never have such a record. And,
8 therefore, we will not do much to deal with a
9 problem of serious dimensions that is national.
10 All right?

11 So what do we do? Just say good-bye?
12 Forget it? And, as, you know, you've read
13 these briefs, if you think what's happened now
14 is something, wait until you see those
15 computers really working. You've read that.
16 I've read it.

17 Okay. What do you think?

18 MR. SULLIVAN: Well, I don't know if
19 I'm smart enough to exceed all of the knowledge
20 that's been applied to this question by this
21 Court for a generation.

22 But we do think that the equal
23 protection law, which is what Baker v. Carr
24 looked to when it first embarked on this
25 project, to have the courts oversee

1 redistricting, provides the -- the best hope
2 for a standard, therefore, to emerge.

3 And -- and -- and First Amendment,
4 there are cases outside of -- retaliation has
5 never been used to evaluate a statute that's
6 otherwise out.

7 JUSTICE BREYER: Okay. Say equal
8 protection law. You get to the same place, you
9 see, because we have 100 percent here, or
10 that's -- the record could be read that way,
11 get to the same place.

12 That's why I was thinking you've got
13 to get all these standards lined up together,
14 you know, and you have to have people
15 criticizing each one back and forth and see if
16 any of them really will work or some work in
17 some cases and some work in other cases and it
18 depends on the type you have.

19 I -- I mean, that isn't squarely
20 addressed by the lawyers because they're
21 focused on their one case, et cetera.

22 MR. SULLIVAN: Let's --

23 JUSTICE BREYER: What do you think?

24 MR. SULLIVAN: Well, there hasn't been
25 100 percent showing of it was the only purpose

1 here. Eliminating the crossing of the
2 Chesapeake Bay, which had happened in the early
3 '90s, caused the -- the need to move 125,000
4 people in the First District alone.

5 So as everyone who -- all the experts
6 who testified in this case in deposition
7 acknowledged that, if you move one line, it
8 affects the whole map.

9 JUSTICE KENNEDY: Suppose the Maryland
10 constitution had a provision that required that
11 partisan advantage for one party be the
12 predominant consideration in any districting.
13 Lawful or not?

14 MR. SULLIVAN: That would be viewpoint
15 discrimination, Your Honor, which the court
16 would evaluate on the face of the statute.
17 But, here, we have a facially valid statute
18 that doesn't have any content along that line.

19 JUSTICE KENNEDY: Well, you -- you --
20 you can have viewpoint discrimination with --
21 without challenging something on its face. It
22 goes either way.

23 MR. SULLIVAN: Well, in Christian
24 Legal Society versus Martinez, the Court
25 pointed out that if it's content neutral --

1 JUSTICE KENNEDY: Well, why is the
2 hypothetical viewpoint consideration and what
3 happened here not viewpoint consideration? I
4 don't understand the difference.

5 MR. SULLIVAN: Well, it -- it comes
6 down to how the Court evaluates that kind of
7 statutory challenge, which it has traditionally
8 done on the face of the statute.

9 JUSTICE KENNEDY: My question to you
10 was, A, was that invalid, the hypothetical? I
11 believe, if I can conclude that your answer is
12 no, that's not constitutional.

13 MR. SULLIVAN: Yes, that -- on the
14 face of the statute --

15 JUSTICE KENNEDY: How is this case
16 different?

17 MR. SULLIVAN: Well, we don't have a
18 statute that establishes a preference for one
19 party or the other. It's --

20 CHIEF JUSTICE ROBERTS: Well, but, I
21 mean, the redistricting is a statute, isn't it?

22 MR. SULLIVAN: Yes.

23 CHIEF JUSTICE ROBERTS: Well, that
24 seems to be a statute that -- that prefers one
25 party over another.

1 MR. SULLIVAN: But on its face, it's a
2 series of metes and bounds. It's the longest,
3 most boring deed you've ever written. It
4 doesn't have any -- it doesn't have any
5 particular content.

6 JUSTICE KAGAN: Well, suppose,
7 Mr. Sullivan, that the Maryland legislature
8 passed a statute. What is -- Maryland is about
9 a 60/40 Democratic/Republican state?

10 MR. SULLIVAN: Just about --

11 JUSTICE KAGAN: Is that right?

12 MR. SULLIVAN: Just about --
13 Democratic.

14 JUSTICE KAGAN: Yes, 60 -- 60/40.
15 Suppose the Maryland legislature passed a
16 statute and said, in the next round of
17 reapportionment, we're going to create seven
18 Democratic districts and one Republican
19 district.

20 MR. SULLIVAN: I think it would have a
21 similar result to the question from Justice
22 Kennedy. It would be on its face --

23 JUSTICE KAGAN: Well, that is what
24 then -- I mean, the Chief Justice said the --
25 the reapportionment statute is that statute.

1 MR. SULLIVAN: Well, it isn't on its
2 face in that --

3 JUSTICE KAGAN: The districting
4 statute is that.

5 MR. SULLIVAN: It would require --
6 rather than using a traditional well-developed
7 standard, the Court would have to depart from
8 its traditional well-developed standard of
9 evaluating viewpoint discrimination on the face
10 of the statute as it's done in recent cases
11 where it doesn't --

12 JUSTICE KENNEDY: So -- so, if you
13 hide the evidence of what you're doing, then
14 you're going to prevail?

15 (Laughter.)

16 MR. SULLIVAN: Well, I don't think
17 it's hiding by stating the statute for where
18 the boundary lines are as they've always been
19 stated. That's not hiding what's being done.

20 CHIEF JUSTICE ROBERTS: Well, let's
21 talk about the boundary lines for -- for a
22 second. People have been talking about the
23 statistics and the numbers. Is it appropriate
24 in a case like this to look at what the
25 district looks like in terms of the boundaries

1 and the extent to which it complies with
2 traditional redistricting criteria?

3 I mean, part of the issue here is you
4 have people from, you know, Potomac joined with
5 people from the far west panhandle. I mean,
6 they both have farms but the former, hobby
7 farms.

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: And the -- any
10 others -- the others are real farms.

11 MR. SULLIVAN: Well, there's a lot in
12 the record that you'll find. The Census
13 considers most of the people in the western
14 Maryland part of the state to actually live in
15 urban areas, according to the Census. But I --
16 the -- Congress abandoned the geographic
17 requirements as early as 1911, was the last
18 time they put contiguity and compactness in a
19 apportionment statute. So it's not in the --
20 it's not in the Constitution. It's not in the
21 governing statute.

22 But if you were going to look at that
23 kind of traditional thing, then you --

24 CHIEF JUSTICE ROBERTS: Well, it just
25 seems to me -- I've read a lot in the record --

1 but worried about, you know, going over
2 Chesapeake Bay and drawing a district, and that
3 makes a lot of sense, but it's not just water
4 that separates --

5 MR. SULLIVAN: Right.

6 CHIEF JUSTICE ROBERTS: -- people, and
7 -- and part of the objection here to the way it
8 was redrawn is that it's -- it doesn't seem to
9 have any internal logic.

10 MR. SULLIVAN: Well, it would be
11 harder to justify the -- what the plaintiffs
12 want to call the benchmark district, which
13 extended the sixth all the way across the state
14 to far Harford County, which is as far from
15 western Maryland as you can get without
16 plopping into the Chesapeake Bay.

17 So, if you want to say let's judge it
18 by geographic and traditional methods, then you
19 couldn't justify the benchmark district that
20 plaintiffs want to point to, which is the old
21 sixth. This new district looks much more
22 traditional. In fact, it has Montgomery County
23 in it, which was the traditional layout of the
24 Sixth District until that was changed in 1990,
25 which paved the way for Roscoe Bartlett to be

1 able to get elected, unlike his previous try
2 for the seat where he lost by 49 points.

3 JUSTICE GINSBURG: Mr. Sullivan, in
4 the racial gerrymandering case, there was a
5 period when "max-black" was the effort. And it
6 seems to me that what we have here is
7 "max-Democratic." And if "max-black" was no
8 good, why should "max-Democratic" be okay?

9 MR. SULLIVAN: There's a couple of
10 reasons. One is factual, that in this record,
11 it's -- there's uncontested evidence in the
12 record that the legislators could have, without
13 much difficulty, drawn a map that would have
14 resulted in eight Democratic and zero
15 Republican congresspersons. So, factually,
16 it's not a "max-Dem" plan.

17 Secondly, in the other case, I believe
18 you're concerned about racial gerrymandering,
19 which is drawn from a history of exclusion of
20 African Americans from our political process,
21 something that Republicans can hardly claim,
22 certainly not today, where our federal
23 government and our state government, as it
24 happens, both controlled by Republican party.

25 So it's a much different --

1 JUSTICE SOTOMAYOR: But we haven't --

2 CHIEF JUSTICE ROBERTS: Counsel,
3 you've made -- just to clear up, I meant to ask
4 it before, a factual question. You said the
5 state was 60/40 Democrat/Republican?

6 MR. SULLIVAN: Yes, Your Honor.

7 CHIEF JUSTICE ROBERTS: But that's
8 just identified party. How -- what's the
9 percentage of independents in Maryland?

10 MR. SULLIVAN: Well, I'm not sure. In
11 this particular district, it's about
12 20 percent, in the Sixth District. I do -- I
13 do know that. It's 20 percent.

14 CHIEF JUSTICE ROBERTS: Is that a
15 pertinent consideration in deciding whether
16 something's been a partisan gerrymander?

17 MR. SULLIVAN: Well, I think it's --
18 it's important because, here, both major
19 parties are in the minority as far as
20 registration in that district. Neither is the
21 majority. They could have made it that way,
22 but they didn't.

23 So they -- the independent vote is --
24 is critical because, in the election that --
25 the first election, the Democrat won more of

1 the independent vote than the Republican. The
2 redistricting lines couldn't have caused that
3 to happen. That happened because of the views
4 of those voters and the strength of that
5 candidate.

6 CHIEF JUSTICE ROBERTS: As a general
7 matter in partisan gerrymandering cases, do you
8 -- do you have any theory about how you're
9 supposed to take independent voters into
10 account?

11 MR. SULLIVAN: Well, I think they have
12 rights too, and I think what gets lost in --
13 certainly, in plaintiffs' theory, perhaps in
14 some of the others, is what about all the
15 people that aren't part of a major party? They
16 don't enter into the calculus for this First
17 Amendment retaliation, presumably they're
18 retaliated in every act of the legislature.

19 JUSTICE KAGAN: But isn't it true,
20 Mr. Sullivan, just as a matter of fact, that
21 most people who are independents tend to lean
22 pretty strongly one way or the other over many
23 election cycles?

24 MR. SULLIVAN: Well, I've heard some
25 analysts call them as -- as the angry white

1 vote, but I don't know that that's true. I
2 don't know if you look at the --

3 JUSTICE KAGAN: I wasn't suggesting
4 that they were anything in particular, just,
5 you know, people who call themselves
6 independents and who, in fact, are not members
7 of a political party, you know, tend to -- not
8 all of them, but many of them, tend to vote
9 pretty consistently one way.

10 And this is why when mapmakers do
11 their mapmaking, they look not only to party
12 registration; they look to the way people vote,
13 and what they find is that more members than
14 just the members of the political party -- more
15 voters vote pretty consistently.

16 MR. SULLIVAN: Well, I don't know if
17 our record would support that, Your Honor. You
18 may be correct, but the record -- we have
19 statements from experts in our -- Dr. Lichtman
20 testified that the independent vote tends to be
21 a transitional period for voters who are
22 unhappy with their former political party and
23 -- and they may or may not move to the other
24 one.

25 So we don't know which direction

1 they're moving. Are they moving away from the
2 Democrats and parking themselves as
3 independents for a few years before becoming
4 Republican or, vice versa, they're just
5 disenchanted with Republican views.

6 JUSTICE GORSUCH: Along the lines of
7 things we don't know, we've been talking about
8 the intent of the legislature, but what effect
9 does the -- does the fact that this map was
10 subsequently approved by the people themselves
11 have when we're trying to determine intent?
12 This went up for voter referendum, as I
13 understand it --

14 MR. SULLIVAN: Yes, it did.

15 JUSTICE GORSUCH: -- and passed with
16 64 or so percent of the vote.

17 MR. SULLIVAN: Yes. And some of our
18 plaintiffs were active in getting that
19 referendum on the ballot. Well, in the
20 Schuette case, Justice Kennedy wrote how that
21 raises First Amendment issues of its own
22 because the people have spoken and they've
23 expressed themselves, and they did so
24 overwhelmingly to support this plan, including
25 in 10 out of 12 counties where the majority of

1 voters are Republican.

2 So for -- this is not, as many a
3 redistricting case might be presented to you,
4 as a blow for democracy. This would be a blow
5 against democracy.

6 CHIEF JUSTICE ROBERTS: What did the
7 referendum question ask?

8 MR. SULLIVAN: It asked if -- if the
9 voters approved the plan that had been drawn
10 up.

11 JUSTICE BREYER: No, it said --

12 CHIEF JUSTICE ROBERTS: Is that what
13 it said, the plan that had been drawn up? I
14 thought it -- well, I can look at it.

15 MR. SULLIVAN: Well, it's a more
16 elaborate statement. What the statement --

17 CHIEF JUSTICE ROBERTS: It is a more
18 elaborate statement. My point is you're
19 relying on what the -- the response to the
20 referendum. And, certainly, I think your --
21 your friends on the other side suggest that the
22 question -- the -- the phrasing of the question
23 on the referendum was opaque.

24 MR. SULLIVAN: Yes, Your Honor. That
25 issue was litigated by the proponents of the

1 referendum in state court, and they lost both
2 at trial and appellate court. In a case called
3 Parrott versus McDonough that is cited in the
4 Judicial Watch brief, the court found that the
5 language of the referendum was sufficient on
6 its face to apprise voters, especially when
7 viewed in conjunction with the individual
8 notice that voters received from the Board of
9 Elections that were fully explaining the issue
10 and the map as it existed.

11 JUSTICE BREYER: Now here is the --
12 here it is, I think, if my clerk got it right.
13 Are you for or are you against the following
14 text: Establishes the boundaries for the
15 State's eight United States congressional
16 districts based on recent Census figures, as
17 required by the United States Constitution?

18 MR. SULLIVAN: Yes.

19 JUSTICE BREYER: Well --

20 MR. SULLIVAN: And they were --

21 JUSTICE BREYER: -- I mean, it doesn't
22 even tell you there what establishes it. I
23 mean, what --

24 MR. SULLIVAN: No, but they were --
25 they were sent a notice that it had a fuller

1 explanation.

2 JUSTICE BREYER: Notice. Have you --
3 do you read all of the notice -- I mean, maybe.

4 MR. SULLIVAN: Notice, but they do
5 read the paper. And the -- the -- the
6 plaintiffs themselves rely on in their second
7 amended complaint, if you look at the fine
8 print at the bottom of some of their maps,
9 drawn from the extensive press coverage in the
10 run-up to the referendum, many of them critical
11 of the map, talking about it as a gerrymander.

12 This referendum was not held in a
13 vacuum. And in Schuette, the Court said we're
14 not going to presume that the voters are not
15 smart enough or well informed enough to make
16 their decisions.

17 JUSTICE BREYER: Got that point, but I
18 have a different question --

19 MR. SULLIVAN: Sure.

20 JUSTICE BREYER: -- which I haven't
21 thought of, so you may have it. I have not
22 thought of the answer to this question.

23 Let's suppose that you do have
24 100 percent district drawn to help the
25 Democrats, and suppose also in the next

1 election the Democrat was elected, not the
2 Republican.

3 Now, if you said that was
4 unconstitutional, and there's no other reason
5 given, all right, now, in other words, extreme.
6 If that's the holding of the court -- I'm not
7 saying it would be, I'm just saying assume
8 it -- how would that hurt independents? Is
9 there a way that would hurt independent voters?
10 That holding.

11 MR. SULLIVAN: Well, if independent
12 voters had support of that Democratic candidate
13 on the merits of that candidate because they
14 thought that candidate was the better
15 candidate, as happened in the Sixth District
16 when independent voters voted very heavily for
17 the Democratic candidate, then you would be
18 harming them if you were -- if you were -- I
19 don't know if you were going to think about
20 invalidating an election, which the Court
21 hasn't tended to do, but it -- it would be
22 hurting them as well and blaming them for a
23 problem that they didn't create.

24 JUSTICE SOTOMAYOR: We have found
25 standards on things like how many -- what's the

1 burden of treating different political parties
2 to a requirement of signatures to get on the
3 ballot. And we've said in those situations we
4 look to the nature of the burden. We look to
5 the expense. We -- we look to a variety of
6 different factors to inform the seriousness of
7 the burden.

8 The First Amendment has worked well in
9 those cases. Are you just merely suggesting it
10 can't work well here because the redistricting
11 process is so complex? Is that your only
12 reason? Or is it -- what exactly makes it
13 workable in one context but not particularly in
14 this one?

15 MR. SULLIVAN: Well, there's two parts
16 of that, Your Honor, if I may. One is if we're
17 looking at retaliation, which has never been
18 used as a means of testing a statute, it's been
19 used in the executive part of the government
20 when it's employing people when it's
21 contracting, where speech -- where the
22 government's consideration of protected speech
23 and political affiliation is generally
24 restricted; whereas when government enacts a
25 redistricting statute, it's legislating, which

1 always involves consideration of speech,
2 including, of course, political speech.

3 But if you're talking about more
4 generally First Amendment law as it affects
5 elections, the right of association, the right
6 to proselytize, to organize, to get on the
7 ballot --

8 JUSTICE SOTOMAYOR: But not to
9 discriminate.

10 MR. SULLIVAN: To cast a ballot.

11 JUSTICE SOTOMAYOR: You -- you
12 answered Justice Kennedy --

13 MR. SULLIVAN: Right.

14 JUSTICE SOTOMAYOR: -- by saying you
15 don't have a right to discriminate.

16 MR. SULLIVAN: Right. But those cases
17 go up to the point of voting. But as far as I
18 know, they don't address the results of the
19 election, which is what partisan gerrymandering
20 claimants care about.

21 They're not claiming they didn't get
22 to vote. They're not claiming their candidate
23 didn't get on the ballot. They're not claiming
24 any of those things that have been addressed --

25 JUSTICE SOTOMAYOR: But the whole --

1 the whole purpose of a gerrymandering attack is
2 that I am being discriminated against or at
3 least the theory of their case because of the
4 views I have expressed over time, and that
5 those views want to be silenced by the other
6 side.

7 MR. SULLIVAN: But those are the same
8 types of things that come up anytime you're on
9 the losing side of legislation. And this Court
10 has repeatedly denied that opportunity to -- to
11 try to turn it into a legal issue and a way to
12 get redress, the fact that one's views did not
13 prevail in the legislature.

14 JUSTICE SOTOMAYOR: Are you
15 essentially saying -- are you agreeing that
16 gerrymandering is not justiciable?

17 MR. SULLIVAN: Well, not -- we're
18 arguing that on this claim that plaintiffs are
19 bringing, the First Amendment retaliation, that
20 it would not be a manageable standard. We're
21 not stating that --

22 JUSTICE SOTOMAYOR: So go back to my
23 question, why? Would you -- do you agree with
24 the court below that it can be made manageable
25 if you introduce the test that it suggests

1 plaintiff has to undertake?

2 MR. SULLIVAN: No, no, because --

3 JUSTICE SOTOMAYOR: So answer why.

4 The court there seemed to agree, certainly the
5 dissent, Judge Niemeyer, thought it was
6 manageable, but why do you disagree with the
7 majority? The majority is basically saying it
8 could be -- it could be, though, but you have
9 to prove these other things.

10 MR. SULLIVAN: It starts with a
11 specific intent, the retaliation requires. As
12 the Court recognized in O'Brien, the intent
13 when it comes to legislation is so diffuse.
14 Many people are involved.

15 JUSTICE SOTOMAYOR: Counsel, given
16 their evidence, they certainly have enough to
17 go to a jury on that question --

18 MR. SULLIVAN: They've got --

19 JUSTICE SOTOMAYOR: -- whether there
20 really was any legislative intent outside of
21 the gerrymandering.

22 MR. SULLIVAN: They don't have
23 anywhere near the number of affidavits they
24 would need from the legislators that actually
25 voted or from the more than 1.5 million

1 Marylanders who approved the plan in a
2 referendum.

3 That's the kind of diffuse intent that
4 comes into play when you're talking about
5 legislation, and, here, legislation that's been
6 taken to referendum. It's so far different
7 from the kind of cases that the district court
8 was citing where you have an employer and you
9 know, you know, I fired this employee, it's not
10 very complex to figure out what the intent was
11 and who did what to whom.

12 That's not what you're talking about
13 with legislation.

14 JUSTICE KAGAN: I guess I don't quite
15 understand that, Mr. Sullivan. In the racial
16 gerrymander cases, this is exactly what we do
17 in much harder circumstances, actually.

18 I mean, it's the same in the sense
19 that we look to what legislators say. We look
20 to what mapmakers say. We look to a variety of
21 pieces of circumstantial evidence about how the
22 districting turned out, about what was done.

23 And the reason I say it's harder there
24 than it is here is because there we have to
25 deal with the kind of confluence of race and

1 politics. But here, when you look at this kind
2 of maneuvering and it's all about -- what else
3 is it, except about politics?

4 And we would look to the exact same
5 things that we look to in our consistent line
6 of racial gerrymandering cases.

7 MR. SULLIVAN: Well, I would refer you
8 to plaintiffs' expert -- if you want to say
9 that this is not involving the interplay
10 between race and politics, you should look at
11 the expert report in the record from
12 plaintiffs' expert, Dr. Morrison, who talks
13 about one of the reasons that the plaintiffs
14 are aggrieved is because the make-up of the
15 prior district was much less diverse racially
16 and ethnically than the new district. And they
17 are being forced to be part of a district with
18 a more diverse population in Montgomery County.

19 So I don't know if you can say that
20 this case --

21 JUSTICE KAGAN: I think my main point
22 was that we just -- we do this, we -- we -- we
23 -- we do it when we deal with racial
24 gerrymandering cases, even if you want to say
25 to me that this is no easier than that, I would

1 say back -- I guess I would argue with that,
2 but -- but my main point was even if it's no
3 easier, we do it all the time.

4 MR. SULLIVAN: But you do it under the
5 Equal Protection Clause and not the First
6 Amendment. That's where your -- your cases
7 will tell you to go.

8 JUSTICE KAGAN: But we would be
9 looking at the same things. We would be
10 looking at the same kind of direct evidence,
11 the same kind of statements. We would be
12 looking at the same circumstantial evidence
13 that has to do with where the lines were drawn
14 and how they were drawn. So it's -- it's all
15 the same kind of evidence, isn't it?

16 MR. SULLIVAN: No. When you get to
17 the end of the process, there needs to be a
18 showing of totality of circumstances with
19 historical and sociological evidence of
20 exclusion of that minority, which simply is not
21 the case when you're talking about Republicans.

22 They have -- they're a major party.
23 They've been in control of government
24 oftentimes, as they are now.

25 JUSTICE KAGAN: I guess -- I guess

1 what I was suggesting was that we're looking to
2 the same things to discover intent in each
3 circumstance.

4 MR. SULLIVAN: You -- you may be
5 looking at similar types of evidence, but as
6 far as I know, you have not applied the First
7 Amendment retaliation rubric to that analysis,
8 as plaintiffs want you to do here.

9 JUSTICE GINSBURG: Is there anything
10 --

11 CHIEF JUSTICE ROBERTS: Well, one
12 difference between -- one difference between
13 the race and partisanship is that we've always
14 recognized that a certain degree of
15 partisanship is acceptable. We've never
16 recognized that a certain degree of racial
17 discrimination is acceptable.

18 MR. SULLIVAN: That's true, Your
19 Honor. And it would be very hard if, in the
20 racial segregation law, where the Court has
21 said you need to remove all vestiges, root and
22 branch. This Court said in Vieth that
23 redistricting is root and branch political.

24 How are you going to give it the same
25 approach? Do you eliminate all evidence of

1 partisanship? And if you can't eliminate --
2 eliminate all of it, how do you judge where the
3 line is?

4 And, again, we get back to how
5 plaintiffs have not presented the Court with a
6 test that gives you that line.

7 JUSTICE BREYER: We've had briefs in
8 other cases that do try to answer that question
9 pretty directly. You know, you -- you look to
10 see what the reason is and why is there
11 partisanship, ask the defendant.

12 And then given that reason, is there,
13 you know, no real explanation, that just
14 doesn't work. And you can, you know, with
15 these experts, you can run it through computers
16 and you can get somebody who will look at this
17 and they'll say: Well, this is a -- if this
18 was the reason, why is it this is in the top
19 5 percent of doesn't satisfy the reason without
20 the partisanship? You've read those briefs.

21 MR. SULLIVAN: Yes.

22 JUSTICE BREYER: Okay. And the
23 problem is they're complicated, but not
24 impossible, right?

25 MR. SULLIVAN: Well --

1 JUSTICE BREYER: So -- so we're back
2 -- that's why I'm back to where I started.

3 MR. SULLIVAN: I'm -- I'm not saying
4 it's impossible. And we -- we're not taking
5 the position that it is not possible for this
6 Court to come up with a manageable standard.
7 We're just trying to explain why this one isn't
8 manageable.

9 And the Court has looked for so long,
10 I would hate for it to settle on something less
11 than a valid and workable standard.

12 Unless there are further questions.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Two minutes, Mr. Kimberly.

16 REBUTTAL ARGUMENT OF MICHAEL B. KIMBERLY

17 ON BEHALF OF THE APPELLANTS

18 MR. KIMBERLY: I'd like to come back
19 to something that Justice Kagan raised about
20 intent.

21 The fact is when it comes to
22 legislative intent, this Court does it. When
23 it comes to the question of burdens imposed on
24 voting rights in the ballot access cases, this
25 Court does that as well.

1 Our position is that the -- the burden
2 properly understood under the First Amendment
3 and applied in this context is the same burden
4 that this Court has recognized in the ballot
5 access cases. It's -- it's making it more
6 difficult -- deliberately making it more
7 difficult for particular citizens to achieve
8 electoral success because their views are
9 disapproved by those in power; in this case in
10 Annapolis.

11 The Court, having postponed
12 jurisdiction, I think the question of
13 justiciability is squarely presented to it. I
14 understand that the Court has some concerns
15 about the posture of the case coming up as a
16 preliminary injunction.

17 At the same time I think the lower
18 court is looking for this Court's guidance on
19 whether the sort of approach that we proposed
20 here is justiciable, and it's one that the
21 Court should proceed on.

22 We would take the position that
23 Justice -- excuse me, that Judge Niemeyer took
24 below that the appropriate approach is to think
25 about whether citizens have been deliberately

1 burdened because of the views that have been
2 expressed in their prior voting histories.

3 And I guess what I would say is if
4 that -- if that approach isn't going -- is --
5 is going to work in any case, it's going to
6 work in this one because here the evidence is
7 unequivocal that this was the intent. And,
8 point in fact, the political composition of the
9 district turned 180 degrees. It went from
10 Republican to Democrat, just as the map drawers
11 intended.

12 And if I could just quickly come back
13 to a point -- concern that the Chief Justice
14 raised at the argument in Gill against
15 Whitford, I think the average person on the
16 street understands what partisan gerrymandering
17 is about.

18 It's about map drawers singling out
19 individuals because of the way that they have
20 voted and making it more difficult for them to
21 achieve electoral success when plaintiffs --
22 may -- may I finish my thought?

23 CHIEF JUSTICE ROBERTS: Sure.

24 MR. KIMBERLY: When plaintiffs succeed
25 in proving that map drawers have succeeded in

1 rigging an election, they ought to be entitled
2 to relief. The average person on the street
3 will understand that.

4 For those reasons we ask the Court to
5 reverse. Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. The case is submitted.

8 (Whereupon, 11:06 a.m., the hearing
9 adjourned.)

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