TRANSCRIPT OF THE ORAL ARGUMENTS

on Behalf of the Appellants in *Louisiana v. Callais*

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Janai S. Nelson • Oralist
President and Director-Counsel
Washington, DC | October 15, 2025

LDF Legal Defense Fund

SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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LOUISIANA,)

Appellant,)

v.) No. 24-109

PHILLIP CALLAIS, ET AL.,)

Appellees.)

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PRESS ROBINSON, ET AL.,)

Appellants,)

v.) No. 24-110

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Washington, D.C.

Wednesday, October 15, 2025

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

APPEARANCES:

JANAI NELSON, ESQUIRE, New York, New York; on behalf of Appellants Press Robinson, et al.

J. BENJAMIN AGUIÑAGA, Solicitor General, Baton Rouge, Louisiana; on behalf of Appellant Louisiana.

EDWARD D. GREIM, ESQUIRE, Kansas City, Missouri; on behalf of the Appellees.

HASHIM M. MOOPPAN, Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Appellees.

C O N T E N T S

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 24-109, Louisiana versus Callais, and the consolidated case.

Ms. Nelson.

ORAL ARGUMENT OF JANAI NELSON

ON BEHALF OF APPELLANTS PRESS ROBINSON, ET AL.

MS. NELSON: Thank you, Mr. Chief Justice, and may it please the Court:

A mere two years ago, in Allen versus Milligan, a case nearly identical to Robinson, this Court noted that under certain circumstances, it has authorized race-based districting to remedy state districting maps that violate Section 2.

Louisiana affirmed findings that -- sorry. Six appellate judges affirmed findings that Louisiana, in the face of extreme racially polarized voting, packed and cracked Black voters, and it rejected seven non-dilutive maps in favor of one that would give its 58 percent declining white electorate entrenched control over 83 percent of the congressional districts.

Louisiana's creation of a district to remedy that discrimination and to ensure that Black Louisianans have an equal opportunity to participate in the process is constitutional. Precedent, from Brooks to Milligan, from Ex parte Virginia to SFFA, confirm that.

And three facts guard against indefinite use of race. First, not all Section 2 remedies center race. Second, when racialized politics and residential segregation wane, so will the ability to satisfy Gingles. Third, almost every redistricting map is replaced decennially.

My opponents' late-breaking and record-less facial and as-applied challenges seek a staggering reversal of precedent that would throw maps across the country into chaos. If SB8 is unsatisfactory, the proper recourse is to remand and adopt one of the many alternative maps that address the Section 2 violation and satisfy the Constitution, as this Court noted in Milligan.

Congress is undoubtedly aware of Section 2 precedent and can change it if it likes, but, unless and until it does, statutory

stare decisis counsels staying the course.

I welcome your questions.

JUSTICE THOMAS: Counsel, what was the finding or the holding in Robinson and what role does it play in the SB8 map creation?

MS. NELSON: The finding in Robinson was that there was a likelihood of succeeding in a Section 2 claim proving that the State of Louisiana violated Section 2 by packing and cracking Black voters. So there was a Section 2 liability finding under a preliminary injunction, and there was an ordering of a new map to be drawn.

JUSTICE THOMAS: What is the status of that case now?

MS. NELSON: Robinson is concluded, and there's now, as we know, the challenge in Callais that suggests that the map that was created out of -- out of Robinson, SB8, is a racial gerrymander. And that's why we're here today.

JUSTICE THOMAS: So SB8 was the remedy for the Robinson case? I thought that was a preliminary injunction.

MS. NELSON: Yes. There was a

preliminary injunction indicating that we were likely to succeed if we continued to pursue a claim. This is after a five-day hearing with 21 witnesses and a robust record.

So the court found based on that evidence that we were likely to succeed on a liability -- on liability and ultimately instructed the State of Louisiana to draw a correct and constitutional map.

JUSTICE THOMAS: But there was never a full merits determination?

MS. NELSON: That's correct.

JUSTICE THOMAS: SB8 was the -- entirely separate, though, from that litigation?

MS. NELSON: SB8 came after the litigation. It was in response to the court's order to create an opportunity map -- an opportunity district and a second map that would cure the Section 2 violation.

JUSTICE THOMAS: But did the court order this particular map?

MS. NELSON: No. The court gave the State of Louisiana an opportunity, as this Court has suggested it do. It gave it broad

discretion, gave it wide latitude to create a map that it felt was satisfactory. And, ultimately, that is the map that was in effect and elected a congressional delegation in 2022.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Counsel, you began with Allen against Milligan. That case, of course, took the existing precedent as a given and considered Alabama's application of the -- its approach to the evidence and all that under that precedent. Is that -- is that your understanding as well?

MS. NELSON: That's correct. In fact, the case was stayed because this Court held that case in abeyance until it decided Milligan because it understood Milligan to be important to understanding the case in Robinson.

CHIEF JUSTICE ROBERTS: But it was a case in which we were considering Alabama's particular challenge based on its -- what turned out to be an improper evidentiary showing?

MS. NELSON: I'm sorry. I --

CHIEF JUSTICE ROBERTS: In other words, we were looking at Alabama's suggestion

that -- how to apply its body of evidence or which evidentiary considerations we should take into account under the existing precedent?

MS. NELSON: That's correct.

CHIEF JUSTICE ROBERTS: Thank you.

JUSTICE JACKSON: But I -- I would ask you to just expound a little bit on why you think then that Allen versus Milligan is relevant or the fact that we held or what we held in that case is relevant to what we're doing here today.

MS. NELSON: Allen versus Milligan is a nearly identical case. There was a similar challenge that -- where -- where we won on a preliminary injunction that there was a Section 2 violation because the State of Alabama in that case cracked and Black -- cracked and packed the Black community, cracked the Black Belt, and, ultimately, this Court found that that was a clear violation of Section 2. Similarly, what we have in Louisiana is a circumstance where Louisiana was constructing a map and had a single district that could elect a preferred Black candidate and had an opportunity to draw a second

district based on the size and geography of its Black population and chose not to do so in the face of seven illustrative maps that made clear that the -- that they were not -- not -- they were not dilutive.

JUSTICE JACKSON: And what we were -- what we, in part, were considering in the context of Milligan was whether or not to change the Section 2 criteria, the Gingles criteria. Is that your understanding?

MS. NELSON: That's right. The State of Alabama --

JUSTICE JACKSON: And we -- and we chose not to. And so --

MS. NELSON: The -- the Court was very clear about that.

JUSTICE JACKSON: And so the parties -- I mean, I under -- I took your initial starting with Milligan to be a suggestion that we not revisit the determination that we made just two years ago that the Gingles test not be revised.

MS. NELSON: That -- that is absolutely correct. And, in fact, Appellees, on page 11 of their supplemental brief, state

that they understand that this Court answered that question clearly that results is a -- a constitutional test, that race can be used to remedy violations, and it therefore isn't making that particular argument.

In fact, even the SG acknowledged that race can be used in a remedial form when necessary. So those questions have been asked and answered by this Court in Allen versus Milligan, and some parties here recognize that those are closed questions.

JUSTICE ALITO: Can I ask you a question about what Milligan means? In -- in Milligan, the Court said that the first Gingles precondition is that "The minority group must be sufficiently large to constitute a majority in a reasonably configured district."

And then it went on to say that "A district will be considered reasonably configured if it comports with traditional districting criteria."

Would you agree that incumbent protection is one of those?

MS. NELSON: Incumbent protection has

been considered a traditional districting criteria. However, we know that protecting an incumbent, like core retention, can continue to perpetuate discrimination, and it does not trump the antidiscrimination principle.

JUSTICE ALITO: All right. If -- if incumbent -- if incumbent protection is a permissible districting criteria, then, under Rucho, isn't seeking partisan advantage also an objective that a legislature may legitimately seek?

MS. NELSON: Not if it comes at the cost of the equal protection principle and the Fifteenth Amendment's prohibition on race discrimination in voting. It is not.

JUSTICE ALITO: Well, if the objective is simply to maximize the number of representatives of a particular party, that's seeking a partisan advantage, it is not seeking a racial advantage, isn't that right?

MS. NELSON: Well, if race is used as a means to seek the partisan advantage, then that is unconstitutional.

JUSTICE ALITO: Oh, sure. Sure.

MS. NELSON: There's no -- there's no

part of --

JUSTICE ALITO: If race is -- if race is used as a proxy for partisan affiliation.

Let me ask you a related question about block voting, which is the second -- figures in the second and third Gingles precondition.

If registered Democrats overwhelmingly vote for Democratic candidates regardless of the candidate's race, is that block voting?

MS. NELSON: If you're looking at it simply from a party perspective, no. We don't judge block voting based on party, we judge it based on race. Racially polarized voting is measuring racial performance --

JUSTICE ALITO: Okay.

MS. NELSON: -- and voting behavior.

JUSTICE ALITO: If -- and, likewise, if Republican -- registered Republicans overwhelmingly vote for Republican candidates, that's not block voting?

MS. NELSON: That's not how we measure voting. We measure voting based on race for purposes of Section 2 because the Constitution forbids race discrimination in voting, not

party discrimination.

JUSTICE ALITO: All right. So, if it happens to be that people of one race or another race overwhelmingly prefer one of the political parties, does that transform the situation into racial voting, or is it still just partisan voting?

MS. NELSON: No. You look at how different races of voters vote and whether they vote in a way that is polarized. And the Gingles test requires us to look not only at that but a number of other features as part of the totality-of-the-circumstances test that suggest that race is playing a role to contaminate the electoral process and submerge minority votes in a way that violates the Constitution. So party cannot explain away a -- a racially polarized circumstance unless we look at the totality of the circumstances.

And I will say, in Robinson, for example, the Court entertained testimony along those lines, as it did in Milligan, and found that it wasn't credible, that the extreme racially polarized voting that we have in the State of Louisiana cannot be explained away by

party.

We're talking about racially polarized voting that is above 84 percent, which is more than what this Court found in Thornburg versus Gingles in 1986 --

JUSTICE ALITO: Well, that could be --

MS. NELSON: -- when the numbers were 70 percent.

JUSTICE ALITO: -- I mean, that could be -- that could be easily analyzed by statistics to see whether Black -- whether white Democrats vote for Black Democratic candidates at a lower rate than they do for white Democratic candidates, whether white Republicans vote for -- for Black Republican candidates at a lower rate than they do for white candidates. It's easy to isolate race from that -- from that to see whether there really is racially polarized voting as opposed to partisan polarized voting.

MS. NELSON: That's right. And in the State of Louisiana, that -- that analysis was conducted in the Nairne case, and it was clear that regardless of party, white Democrats were not voting for Black candidates, whether they

were Democrats or not.

And we know that there is such a significant chasm between how Black and white voters vote in Louisiana that there's no question that even if there is some correlation between race and party that race is the driving factor.

JUSTICE KAVANAUGH: Can you comment on the solicitor general's suggestion at page 25 of its brief that the Court should hold that Plaintiffs' illustrative district cannot disregard the state's political objectives and goes on to say Section 2 plaintiffs cannot claim a lack of equal openness where politics rather than race is the likely reason for the State's refusal to create a majority-minority district?

MS. NELSON: Yes. That suggestion would swallow Section 2 whole. As I said, party cannot trump the responsibility of states to ensure that all voters have an equally open electoral process.

The fact that Black voters may correlate with voting Democrat or white voters may correlate with voting Republican does not

deny the fact that there is racially polarized voting. And the totality of the circumstances, including the inability to elect Black candidates in Louisiana on a statewide basis for a number of offices -- there's never been a Black person in Louisiana elected statewide -- is additional indicia that race is playing an outsized role in the electoral process in Louisiana.

And so the idea that you have to show that a party -- that party is the reason for the racially polarized voting would eclipse the entire Section 2 analysis, which is focused on ferreting out and ending race discrimination in the political process.

CHIEF JUSTICE ROBERTS: You've said several times that it's playing an outsized -- outsized role. Is there -- what's the proper size? In other words, what -- are we -- is it wiggle room we're talking about or a significant percentage? What is meant by "outsized"?

MS. NELSON: So this Court has held for -- for a long time, beginning in Shaw and in many cases since, that there's always an

awareness of race. There are always racial considerations and even race consciousness in the districting process.

What becomes potentially unlawful is when race is the motivating factor. That's what Miller versus Johnson taught us, that's what Milligan reaffirmed, that the line between the appropriate use of race and the use of race that will get us into the strict scrutiny territory is the dividing line between motivation and general awareness.

And what I'm explaining here is that when voters are blocked by a -- a -- a white block vote that is so substantial that it usually overrides the politically cohesive vote of Black voters, then we have at least a prima facie case of vote dilution, and then the Court is asked to consider the totality of the circumstances.

If I may address the durational limit question which came up. I'd like to talk about the fact that Section 2 is self-limiting. I know that there is a general concern about the indefinite use of race, and there are several reasons why that concern should be allayed.

First and foremost, there is no precedent to suggest that a statute must dissolve on its own simply because it may require a race remedy. And, as I've mentioned, race is not required by Section 2, but it can be used if that is necessary to address the Section 2 violation.

In addition, the non-discrimination element of the Fifteenth Amendment is a permanent right, and so should be the protection that Section 2 affords.

And, finally, this is a significant concern where Congress was very clear that it did not want to include a durational limit. Congress included a durational limit in Section 5 of the Voting Rights Act. It created a mechanism for reauthorization. It decidedly did not do that in Section 2.

JUSTICE KAVANAUGH: The issue --

JUSTICE BARRETT: Can I --

JUSTICE KAVANAUGH: -- as you know, is that this Court's cases in a variety of contexts have said that race-based remedies are permissible for a period of time, sometimes for a long period of time, decades in some cases,

but that they should not be indefinite and should have a end point.

And what exactly do you think the end point should be or how would we know for the intentional use of race to create districts?

MS. NELSON: Well, Justice Kavanaugh, I -- you raised a very important distinction, and that's between remedies and the statute. So a race-based remedy can and should and -- and -- and usually does have a time limit and a durational limit. Section 2 court-ordered remedies have a time limit, and so that is something that is grounded in our case law. What is not grounded in case law is the idea that an entire statute should somehow dissolve simply because race may be an element of the remedy. So, for example, this case has affirmed Title VII. It has affirmed Section 1982, the Family Medical Leave Act, and also Section 4(e) of the Voting Rights Act in Katzenbach versus Morgan, and never has it suggested that any of those statutes should dissolve in and of themselves --

JUSTICE KAVANAUGH: Well, I don't think it's --

MS. NELSON: -- as opposed to the remedy.

JUSTICE KAVANAUGH: I'm sorry to interrupt. I don't think it's the statute. It's the particular application of the statute that entails the intentional deliberate use of race to sort people into different districts. That particular aspect, I'm guessing -- I'm asking what you think the time limit on that should be, or there really shouldn't be a time limit. I -- I think you might be saying there shouldn't be a time limit unless Congress chooses one.

MS. NELSON: I am saying that. I'm saying there should not be a time limit. But I -- I also think it's critical to emphasize that Section 2 does not require a race-based remedy in all circumstances.

JUSTICE JACKSON: Is that because --

JUSTICE BARRETT: Can I ask --

JUSTICE JACKSON: -- is that --

JUSTICE BARRETT: I just wanted to follow up on Justice Kavanaugh's question. What if this is an exercise of Congress's enforcement power? If we're looking at the

City of Boerne test and we're saying it has to be congruent and proportional, would that affect Justice -- your answer to Justice Kavanaugh's question, that if it's going above and beyond what the Fifteenth Amendment requires of its own force, but Congress has actually chosen the Voting Rights Act as a remedy, does that affect the question of whether it can go on indefinitely or not, that at some point it becomes not congruent and proportional?

MS. NELSON: No, I don't think it does. First, Boerne should not apply to Section 2.

JUSTICE BARRETT: Just assume -- assume --

MS. NELSON: Assuming -- assuming that it does.

JUSTICE BARRETT: The premise of my question is assume that it does.

MS. NELSON: Sure. Assuming that it does, as you know, in Boerne, this Court held up the Voting Rights Act as the paradigmatic example of congruence and proportionality. The fact that the Voting Rights Act at times may

require a race-based remedy does not change the fact that Congress, with its enlarged powers as defined by Ex parte Virginia and the line of cases forward, can address conduct that is beyond what the Fifteenth Amendment addresses.

It doesn't need to simply parrot the Fifteenth Amendment. It can address conduct that is even considered constitutional in order to ensure that race discrimination in voting does not go undetected, uncorrected, or undeterred, in the words of the Senate report supporting --

JUSTICE JACKSON: So, Ms. Nelson --

MS. NELSON: -- the 1982 amendments.

JUSTICE JACKSON: -- I -- I guess I wonder if it -- if it would be helpful at least as I'm thinking about it, because I think this is a very important question, to -- to understand, I think, that you're saying that Section 2 is not a remedy in and of itself. It is the mechanism by which the law determines whether a remedy is necessary.

MS. NELSON: That's absolutely correct.

JUSTICE JACKSON: So it's a law that

is just encouraging or requiring a check-in. It's like a tool. It's like a -- a tape measure that we're looking as to whether or not certain circumstances exist, and those circumstances that Congress is worried about is unequal access to electoral opportunity. And Section 2 tells you we have to look for those circumstances, and then the Court says, yep, they exist in this situation under Section 2 and so now a remedy is required.

And in our case law, we then say, okay, State, it's up to you to figure out what that remedy will be. And maybe that remedy involves race consciousness, maybe it doesn't. Whatever. But Section 2 itself is just the measure by which we determine that a remedy is required.

MS. NELSON: That's absolutely correct.

JUSTICE JACKSON: And so that's why it doesn't need a time limit, because it's not doing any work other than just pointing us to the direction of where we might need to do something.

MS. NELSON: That's right. And its

usage becomes less and less as we see racially polarized voting and residential segregation decreasing. The Katz amicus brief in this case shows that in the past decade, Section 2 cases have decreased by 50 percent.

JUSTICE JACKSON: Because the plaintiffs can't make the showing.

MS. NELSON: They cannot make the showing.

JUSTICE JACKSON: It's a pretty bare -- it's a pretty significant showing to -- to establish that unequal opportunity of electoral processes is happening in a situation.

MS. NELSON: That's correct. Gingles is an exacting test. It is data-obsessive. It brings in experts and many other forms of evidence to establish a racial violation. There are many cases where the plaintiffs fail in bringing the Gingles I precondition or Gingles II or Gingles III before they even get to the totality-of-the-circumstances test.

JUSTICE JACKSON: So, if we're talking about a time limit, you would say maybe it's with respect to the remedy that is used to

respond to the -- to the problem that we've identified under Section 2, but the Section 2 tape measure itself doesn't need a -- a life cycle? It's just --

MS. NELSON: No.

JUSTICE JACKSON: Yeah.

MS. NELSON: That's correct. I mean, the Fifteenth Amendment is -- is permanently enshrined in our Constitution, and Section 2 is there to effectuate that prohibition of race discrimination on voting and does not require a time limit.

JUSTICE JACKSON: Thank you.

MS. NELSON: With the time I have remaining, I'd like to mention that there are many proposals on the table that have been presented by my colleagues on the other side, and a number of them resurrect the intent standard that this Court was very clear about and Congress was extraordinarily clear about knowing that results is key to ensuring that we do not continue to have rampant racial discrimination in voting.

And the absence of it or -- or the declining ability to show a Section 2 case is

because of the success of Section 2 over the past four decades. And we would be reckless if we determined that Section 2 somehow is no longer needed simply because it has been so successful in rooting out racial discrimination in voting.

There's also, as I mentioned at the outset, a very easy and elegant solution to this case. If SB8 is not satisfactory, if the Court believes, as the Callais panel did, that the State violated the Constitution in constructing SB8, it should remand and use one of the many alternatives that are available that meet Section 2 and also comply with the Constitution.

The liability finding in Robinson is undisturbed and it must be remedied. If SB8 is the inappropriate remedy, there are many other options for this Court to pursue.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

Justice Alito?

JUSTICE ALITO: Yeah. Let me pick up with where you left off, which related to the

illustrative map in -- in the Robinson case, and let me go back once again to what we said, what the Court said, in Milligan.

The minority group -- this is the first Gingles precondition. The minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district.

Did the Robinson court apply that, or did the Robinson court simply say that the district in question in the illustrative map, the second minority -- majority-minority district in the illustrative map, was compact? There's a big difference between the compactness of the minority group and the compactness of a district.

MS. NELSON: All of the seven illustrative maps that we presented to the Robinson court were geographically compact. They met every traditional redistricting criteria. They even beat the State's maps on the very criteria that the State set forth that it was pursuing in the redistricting process.

JUSTICE ALITO: Well, that wasn't my question. My question was, did the Robinson

court find that the minority group was compact as opposed to the district being compact?

MS. NELSON: Yes, it did.

JUSTICE ALITO: There's a very serious --

MS. NELSON: Yes, it did.

JUSTICE ALITO: I believe it didn't and nor did the -- did the Fifth Circuit on appeal in that. And there's a big difference, and there's a serious question about whether the Black population within the district in question in the illustrative map was geographically compact.

You have people from a rural area in the northwest part of the state and you have people from an urban area many miles away combined in a district just for the purpose of getting over the 50 percent BVAP.

MS. NELSON: So, Justice Alito, you might be referring to SB8 as opposed to the illustrative maps.

JUSTICE ALITO: No, I'm referring to the illustrative map, although the same may be said about SB8, but I'm referring to the illustrative map. But we can -- we -- we -- we

don't need to argue about what was done in the case, but it's my firm recollection that what the district court did and what the Fifth Circuit did on appeal was not to apply the correct standard under Milligan.

Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: Counsel, I would note that the State's maps join people in districts from the far north all the way down and across the state.

MS. NELSON: That's correct.

JUSTICE SOTOMAYOR: The -- the map that it put into effect. So the district wasn't compact and neither were the interests necessarily compact, except that they were white voters, correct, and Republican?

MS. NELSON: Correct.

JUSTICE SOTOMAYOR: All right. Now you have not addressed the issues of the unconstitutionality, which is what this reargument was about. Justice Barrett mentioned congruence and proportionality. Others have suggested that our Harvard case is

appropriate. One, Louisiana has said that the use of race in any way violates the Equal Protection Clause.

Would you give us a couple of lines on why those -- assuming, as the Chief did, that Mulligan and all of our cases and precedents support you --

MS. NELSON: Sure.

JUSTICE SOTOMAYOR: -- the others are now saying, the ad -- your adversaries are saying, even if it does, we should still declare this unconstitutional. I don't know that you've addressed that.

MS. NELSON: Happy to. So SFFA is an entirely different case from the one before the Court at the moment. SFFA made clear that there's -- it is still constitutional to use race to remedy specified discrimination, which is what we have in the State of Louisiana, what we showed before the Robinson court. So SFFA is, in fact, working more in our favor, we believe, than supporting our opponents.

And there are many distinctions between this case and the SFFA case. For example, Section 2 is a decidedly remedial

statute. SFFA involved the diversity rationale involving a admissions process with a university, not a statute that is derived from Congress's enforcement powers under the Reconstruction Amendments that deals with remedying discrimination.

That is a very clear distinction. This Court has been clear in Shaw, in SFFA, in Croson, in Fullilove, that you can use race in a limited way to remedy racial discrimination.

The other factor that makes SFFA reconcilable with Milligan, which is controlling here, is that we know both decisions were issued within three weeks of one another. It is illogical to think that this Court issued the SFFA decision and Milligan in the same term, in the same month even, and somehow those cases work at cross-purposes with one another.

So, in our view, it is very clear that the case law in -- before this Court supports the use of race as needed once there has been a showing of specified discrimination. And the Section 2 test gives the Court an inference of intentional discrimination to draw upon.

Congress was very intentional in crafting the results test to balance the concerns of getting at all discrimination in our electoral processes but also being mindful of a potential allegation of racism against states and other state actors.

And so Section 2 requires neither a confession nor an accusation of racism. It looks strictly at results, which this Court has upheld on numerous occasions, including most recently in Milligan, but before that, in Lopez, in Boerne, in -- in City of Rome written by Justice Marshall for this Court, made very clear that results is constitutional and that the use of race is permissible in remedying discrimination.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: Ms. Nelson, were Section 2 to cease to operate in the way that you just described to prevent vote dilution in districting, what could happen? What would the results on the ground be?

MS. NELSON: I think the results would be pretty catastrophic. If we take Louisiana as one example, every congressional member who

is Black was elected from a VRA opportunity district. We only have the diversity that we see across the South, for example, because of litigation that forced the creation of opportunity districts under the Voting Rights Act.

Every justice in Louisiana has been elected through a VRA opportunity district, and nearly all legislative representatives have been elected on those same districts. So Louisiana alone is an example of how important it is to have Section 2 continue to be enforced to create these opportunities.

We also know that after majority-minority districts have been created, they often no longer need the same population to continue to provide an equally open electoral process for minority voters. So it is an intervention that has been crucial to diversifying leadership and providing an ability of minority voters to have an equal opportunity to participate in the process, but it also isn't a permanent remedy. It -- it corrects itself over time, and it's only triggered when those extreme conditions exist.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

JUSTICE GORSUCH: When it gets to the remedy side, do you think a plaintiff in a Section 2 case has to come up with a -- a map where race doesn't -- isn't the predominant factor in -- in the map, or is it okay for a federal court to use a map on the remedial side that intentionally discriminates on the basis of race?

MS. NELSON: You do -- you do not have to use race to create the remedy in a map. And I think that Milligan --

JUSTICE GORSUCH: No, I'm asking whether one can. Sometimes you don't have to.

MS. NELSON: Yes.

JUSTICE GORSUCH: I understand that. I'm asking, is it acceptable under Section 2 as -- as you understand it, given our precedents, for a court to intentionally discriminate in a remedial map on the basis of race?

MS. NELSON: Not -- not in those words. Not for a court to intentionally

discriminate, but I think it depends. There may be a circumstance where the only possible remedy is the limited use of race.

I will say that I think those circumstances are rare. And the permissibility of race is constrained by strict scrutiny. This Court has a very clear precedent around ensuring that race does not motivate the line drawer in a way that requires a map to be drawn that isn't narrowly tailored, that uses race for race's sake.

There are already constraints between Gingles and Shaw that keep the use of race within constitutional bounds.

JUSTICE GORSUCH: I understand that. But, you know, one -- one argument is often, well, once you've found a Section 2 violation, you've got a compelling interest to go ahead and -- and discriminate on the basis of race in your remedial map. And I'm just wondering, do you endorse that view or -- or do you reject that view?

MS. NELSON: I don't endorse the concept of discriminating on the basis of race. If discrimination has been established under

Section 2 and a state determines that it needs a very precise incision of race in order to remedy that Section 2 violation, then Section 2 and this Court's precedent supports that.

JUSTICE GORSUCH: So a federal district court can sometimes, to remedy a Section 2 violation --

MS. NELSON: Well, not a federal district court. I'm sorry. I'm glad you -- I'm glad you emphasized that.

JUSTICE GORSUCH: Well, if I might just finish the question.

MS. NELSON: Yes.

JUSTICE GORSUCH: You know, sometimes federal district courts order maps. And you're saying sometimes acceptable for a federal district court to order a map that intentionally discriminates on the basis of race?

MS. NELSON: I -- I -- I -- I disagree with that formulation. So, first and foremost, states and plaintiffs, as they put forth illustrative maps, cannot put forth maps that discriminate and that use race in -- in excessive fashion.

The only actor that has broader leeway are states because we give states breathing room, we give states wide latitude in order to balance their political interests and concerns.

JUSTICE GORSUCH: So federal district courts can't discriminate on the basis of race and remedies, but states can?

MS. NELSON: Federal district courts can only order maps that are constitutional, and, again, the constitutional boundaries are between Gingles and Shaw --

JUSTICE GORSUCH: I understand that.

MS. NELSON: -- which sometimes permit race.

JUSTICE GORSUCH: But you said states have more breathing room. So do they have the breathing room to intentionally discriminate on the basis of race when you are --

MS. NELSON: They don't have breathing room to intentionally discriminate on the basis of race. They have breathing room to use race to remedy their own discrimination.

JUSTICE GORSUCH: Okay. Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: I guess the hang-up there is the word "discriminate." But your answer is that they can intentionally use race in those circumstances, correct --

MS. NELSON: That --

JUSTICE KAVANAUGH: -- the federal district court?

MS. NELSON: If -- if needed. If needed. And there are -- there are often a wide range of possibilities and alternatives that don't require that.

JUSTICE KAVANAUGH: And then I think you said so long as it's not excessive, and you mentioned strict scrutiny as well, correct?

MS. NELSON: Correct.

JUSTICE KAVANAUGH: But part of strict scrutiny, again, is the temporal limit that's been part of strict scrutiny for a long time. And I think your answers earlier to that to me and when you were talking with Justice Jackson were, well, Congress, defer to Congress. But, when we're applying the Equal Protection Clause or, as Justice Barrett said, the Fifteenth Amendment, congruent and proportionality, or Fourteenth Amendment, deferring to Congress is,

I think, not what we're supposed do.

So what -- if we're not just deferring to Congress, is there anything you can point us to that would not allow it to extend forever, the -- the intentional use of race, which you acknowledged in response to Justice Gorsuch?

MS. NELSON: Sure. Well, we maintain that there does not need to be a durational limit, but there is some guidance that this Court could consider. So, for example, in Grutter, the Court, Justice O'Connor suggested that affirmative action did not need to endure beyond another 25 years. She forecast that another generation might need affirmative action. And, ultimately, this Court thought otherwise in SFFA.

So that sort of runway, that advance notice, that -- that expression of an ability for Congress to intervene if it disagrees with the Court or decides it wants to remedy on its own, that is the type of guidance I think this Court should consider if it feels that it must pursue a durational limit on -- on Section 2. And, again, we don't believe that's necessary.

JUSTICE KAVANAUGH: Do you -- Justice

Kennedy in 1994 in Johnson versus De Grandy said a couple things that I just want to get your reaction to. He said the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions, and he added that explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause.

Do you take issue with what he said there?

MS. NELSON: No. What I think is missing from the understanding of Section 2 is the work that it has done to advance the goal of ridding our electoral process of race. It brings racial groups together.

And, as I mentioned earlier, many of the VRA opportunity districts ultimately convert to non-majority-minority districts. Not all VRA opportunity districts are majority-minority districts. And, in fact, we see greater racial harmony and less racially polarized voting as a result of Section 2

districts.

So Section 2 is addressing a preexisting problem. It is not producing it. And, in fact, it reduces it more broadly across society.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: So we've assumed without deciding -- this is picking up on Justice Gorsuch's questions -- that complying with Section 2 is a compelling interest for purposes of the Fourteenth Amendment.

MS. NELSON: Correct.

JUSTICE BARRETT: And now this is kind of picking up on some of Justice Alito and Justice Thomas's questions earlier. How are we to think about that when we're thinking about the Robinson litigation? Because it was a preliminary injunction, and Louisiana, of course, argued there that, no, it -- it wasn't a violation of Section 2 to have those maps.

So when -- I mean, I guess, how do we judge the compelling interest in avoiding a violation of Section 2? If the State doesn't

really think it violates Section 2 and it hasn't been finally adjudicated yet, how do we approach the -- assuming that compliance with Section 2 is a compelling interest, how do we think about that in a context like Robinson?

MS. NELSON: So states can, for good reason, draw a map that addresses Section 2 prophylactically. Here, we have a finding from a district court based on a robust evidentiary record that we were likely to succeed on our Section 2 claim.

This is not the first case. There are many cases that have provided the basis for an opportunity map to be drawn just on a preliminary injunction motion. And, again, that was -- that finding by the lower court was affirmed by two federal panels of the Fifth Circuit. And this Court had an opportunity to revisit the Robinson litigation and did not.

JUSTICE BARRETT: But -- but what if -- I mean, district courts sometimes make errors of law, right? So what if the district court -- I guess I'm trying to figure out how much weight then the district court's finding has in comprising that -- that compelling

interest in avoiding the Section 2 violation. Do you see what I mean?

Like, what if the -- what if the district court was just wrong, and what if the State thinks that the district court was wrong?

MS. NELSON: Well, the -- the State has already conceded that it did --

JUSTICE BARRETT: Okay. Never mind.

MS. NELSON: The State already conceded that it should comply with the Robinson decision.

JUSTICE BARRETT: Right. I mean, it got complicated here because of all of the other litigation. But just why don't you just strip out what happened and answer the question. Like, at the time Robinson was decided, if the -- if Louisiana thought that the Robinson court was wrong, that the district court was wrong, but it didn't -- it wanted to avoid the court-imposed map, wanted the opportunity to draw its own map, Justice Kavanaugh has been asking you what role race can play without running afoul of the Equal Protection Clause.

And the State would have to say at

that point: Well, we're weighting race heavily because we have a compelling interest in avoiding a Section 2 violation. And the State's position might be we don't actually really think that we violated Section 2, but we have a litigation risk. We know that if we don't draw this other map, the court may impose one.

On that understanding, on -- on those facts, not concessions and whatever is made, is that then a legitimate compelling state interest when there is the possibility and the State, in fact, thinks that the district court was wrong?

MS. NELSON: It is still a compelling governmental interest. The State can do what it did here, which is to appeal to the Fifth Circuit, and the Fifth Circuit considered the same evidence and unanimously found that the Robinson court was correct. Yet another Fifth Circuit panel also affirmed that decision.

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: So, in essence, are

you saying in response to Justice Barrett that it's a compelling interest nonetheless because the State has an obligation under our Constitution and under Section 2 to provide an equally open electoral process?

MS. NELSON: That's correct.

JUSTICE JACKSON: I mean, I guess what I'm trying to really wrap my mind around is the different stages of this case and, like, the different questions at issue because it's complicated.

But I think the beginning of the whole thing is the requirement of equal protection in the Constitution and Congress's determination under Section 2 to make sure that that is being provided to minority groups in the electoral process by having a statute that requires states to provide equally open electoral processes.

I mean, that's what we said in Milligan. We were very clear that individuals lack an equal opportunity to participate when a state's electoral structure operates in a manner that minimizes or cancels out their voting strength. I mean, everybody -- I don't

think there's a disagreement that we have this initial goal, which is providing equal opportunity.

And so then the Robinson court is asked under Section 2, is this a situation in which that's not happening? And they go to trial and they bring in a lot of evidence and they do the thing, and the Robinson court says, yes, this is that situation. Fine.

I guess I don't understand why the Robinson court's decision is before us right now, because what I understood is that as a result of the Robinson court's decision, Louisiana then enacts a map that it believes will remedy the violation that the Robinson court has identified, and we're here on a challenge about that map. That, I think, we call is a Shaw problem. We're --- we're here deciding whether they can use race as a remedy, as people say they did in the construction of this map.

So I guess I'm not even clear why the Robinson court's initial identification of the problem is being questioned as a compelling interest because there's an interest in not

having an unequal electoral system, right?

MS. NELSON: That's correct. The Robinson decision is absolutely not before this Court. There's no record in the Callais case to support that.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Ms. Nelson?

REBUTTAL ARGUMENT OF JANAI NELSON

ON BEHALF OF APPELLANTS PRESS ROBINSON, ET AL.

MS. NELSON: Twenty-eight months ago, this Court made it pellucidly clear that Section 2 is constitutional and that there need not be a race-neutral map that is presented as part of the illustrative maps. Many questions that are presented by my opponents on the other side have been asked and answered in Milligan.

What is also clear is that Louisiana is emblematic of the ongoing need for Section 2. For example, we're talking about how close this may come to intent or results. If we look simply at the evidence here in Louisiana, we see that Louisiana had shifting justifications for its map. Whenever it was presented with a map that met or beat its criteria and gave Black voters an equal opportunity to participate in the process, it rejected those maps.

The court in Robinson also relied on the fact that there has never been a Black candidate elected on a statewide basis. Even when white Democrats won an election in 2019, Black Democrats lost. My opponents here would like to make this a partisan issue because they believe the case law will enable their case to prevail. But it does not. This is about race.

Section 2 in the Voting Rights Act is laser-focused on eliminating racial discrimination from our electoral process regardless of party. And if we look at many of the Black Congress people who were elected, they came out of Section 2 opportunity districts. They don't have to be majority-minority districts. Many of them are crossover districts.

And so, if we remove Section 2, we also recognize that there will likely be a resurgence of discrimination because Section 2 plays a deterrent effect. States are drawing maps with Section 2 in mind. In fact, Local Rule 21 in Louisiana says that the State must comply with Section 2. The fact that HB1, which was the original map, was pre-cleared by

the Department of Justice means very little.

Retrogression is an entirely different standard from what Section 2 is looking at. Retrogression means the State of Louisiana cannot go backwards. Section 2 is talking about whether there is active discrimination right now preventing the additional opportunities for Black voters who meet all of the Gingles preconditions to have an equal opportunity to participate in the process.

Requiring plaintiffs to control for party is helpful if that evidence exists, and it did to some extent in Robinson, where we put on evidence about Democratic elections and the preferences of white voters that still preferred white Democrats over Black Democrats. But that is not the only question.

If that evidence is available, and I will remind the Court it's not often available if there aren't primary elections or if we are looking at more down-ballot elections, not just the congressional elections at issue here, that evidence is useful, but if there is significant racially polarized voting, that has already been shown to be probative of intentional -- of

discrimination that comes very close to intentional discrimination.

What Congress did in Section 2 was strike a very careful balance of using factors like White v. Regester, like the Zimmer factors, to bring us as close to a finding of intent without making the full accusation and without requiring that conclusion on the part of courts.

So we should not downplay, as my opponents have, the robust nature and exacting requirements of a Gingles test and also remind ourselves that the City of Rome in 1980 made very clear that Congress can address effects beyond what the Fifteenth Amendment requires.

I'll close by saying that in Bush v. Vera, this Court said that it must be particularly concerned about changing its decisions or rejecting stare decisis in cases that involve a sensitive political context like the one -- like this one.

That calls the Court's legitimacy into question in a new unique way. My opponents here have not done the labor of showing that precedents should be overturned. They haven't

addressed Janus. They haven't addressed Ramos. They've simply said that we should overturn or tweak the precedent that governs Section 2.

And I would say that there's no record to support that in this case, and this Court would be remiss to not require that if it is entertaining any significant modifications of Section 2.

Any further neutering of Section 2 would resurrect the Fifteenth Amendment as a mere parchment promise, and we ask the Court to remand.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:35 p.m., the case was submitted.)

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