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In the Supreme Court of the United States

JOHN H. MERRILL,
IN HIS OFFICIAL CAPACITY AS THE ALABAMA SECRETARY OF STATE, et al.,
Applicants,

v.
MARCUS CASTER, et al.,
Respondents.

APPENDIX TO EMERGENCY APPLICATION FOR STAY: VOLUME 2 OF 2

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, et al., *
Plaintiffs, * 2:21-cv-1291-AMM
vs. * January 4, 2022
* Birmingham, Alabama
* 9:00 a.m.

JOHN MERRILL, in his official *
capacity as Alabama Secretary *
of State, et al., *
Defendants. *

EVAN MILLIGAN, et al., *
Plaintiffs, * 2:21-cv-1530-AMM

vs. *
JOHN MERRILL, in his official *
capacity as Alabama Secretary *
of State, et al., *
Defendants. *

MARCUS CASTER, et al., *
Plaintiffs, * 2:21-cv-1536-AMM

vs. *
JOHN MERRILL, in his official *
capacity as Alabama Secretary *
of State, et al., *
Defendants. *

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
VIA ZOOM CONFERENCE
VOLUME I
BEFORE THE HONORABLE ANNA M. MANASCO,
THE HONORABLE TERRY F. MOORER,
THE HONORABLE STANLEY MARCUS

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1 any part black in District 7.

2 So if we will zoom in briefly into Jefferson County, based
3 on your opinions about the 2021 map that was enacted, does it
4 appear that this map --

11:52:52 5 MR. ROSS: Your Honor?

6 JUDGE MARCUS: Yes, Mr. Ross?

7 MR. ROSS: Outside the scope of her opinions in the
8 state of her earlier testimony on direct.

9 JUDGE MARCUS: Mr. LaCour?

11:53:02 10 MR. LACOUR: Your Honor, we think this is quite
11 important to see if her views are consistent and tell whether
12 she views the enacted map to be a racial gerrymander because it
13 does not elect more than one Democrat or if she would have
14 similar views about any map that splits counties in similar
11:53:31 15 ways.

16 JUDGE MARCUS: I didn't mean to cut you off,
17 Mr. LaCour.

18 MR. LACOUR: I think it goes to credibility and also
19 the constitutionality of the map that we have enacted.

11:53:44 20 JUDGE MARCUS: The objection is overruled. You may
21 proceed with your question.

22 MR. LACOUR: Thank you.

23 JUDGE MARCUS: State it again just so the record is
24 clear. I think it fairly goes to test this witness's expertise
11:54:00 25 in the field that she's testifying about. You may proceed, but

1 if you would put the question again clearly to Dr. Davis again.

2 MR. LACOUR: Yes, Your Honor.

3 BY MR. LACOUR:

4 Q So, Dr. Davis, let's start with District 7. In
11:54:20 5 particular, where District 7 enters Jefferson County, does this
6 bear some resemblance to enacted District 7 in your view?

7 A Does this what?

8 Q Would this version of District 7 bear some resemblance to
9 the enacted version of District 7?

11:54:42 10 A Yes. Yes.

11 Q And does it also appear to include a large percentage of
12 Jefferson County's black population within District 7 and leave
13 other members -- other black Alabamians in Jefferson County in
14 District 6 in a similar way that you have identified for the
11:55:11 15 enacted version?

16 A Yes.

17 Q Of District 7?

18 A Yes.

19 Q Okay. And then I want to scroll down a little to another
11:55:20 20 county split. Looking here at District 2. You see it ventures
21 down into Mobile County and appears to pick up a good portion
22 of the city of Mobile.

23 In your view, would that be suggestive of racial
24 gerrymandering?

11:55:45 25 A I'd have to see the stats for this District 2. But,

1 again, going back to Jefferson County, it pretty much does the
2 same thing and also takes part of Tuscaloosa County, which is
3 black, the city, and I mean, it does the very same thing that
4 the enacted plan does.

11:56:13 5 And going to Montgomery County, where under the whole
6 county plan, Montgomery stays intact. It -- again, it's an
7 effort to pull and concentrate black voters in the Second and
8 then in the Seventh. It's an outcome-based plan. There's no
9 question. And I am not as both my experience and my research
11:56:43 10 tell me is not the best idea. I don't -- I am not interested
11 in outcomes. I'm interested in process.

12 Q Okay. Then I will quickly run through a couple other
13 plans with similar questions. Stop sharing this for the
14 moment.

11:57:07 15 And let me find this other exhibit. Next we have Caster
16 Exhibit 23. This is a different plan also submitted by the
17 Caster plaintiffs.

18 Similar question: It looks somewhat similar to the
19 illustrative plan 1 that you were just talking about, correct?

11:57:54 20 A Exactly.

21 MR. ROSS: Your Honor, if I -- I realize.

22 JUDGE MARCUS: I'm sorry. I'm trouble hearing you,
23 Mr. Ross. I'm sorry.

24 MR. ROSS: Your Honor, I was just raising the same
11:58:10 25 objection that this is outside the scope, and to the extent it

1 goes to her credibility, I understand, but she has no basis for
2 testifying about the Cooper maps or any of the other maps
3 except the whole county plan.

4 JUDGE MARCUS: You may ask the question, but let's
11:58:32 5 move along on this, Mr. LaCour.

6 MR. LACOUR: Absolutely.

7 JUDGE MARCUS: I take it the witness has not before
8 this moment had a chance to review these. You might ask her
9 that.

11:58:42 10 MR. LACOUR: Yes, Your Honor.

11 BY MR. LACOUR:

12 Q Dr. Davis, have you had a chance to review either of the
13 illustrative plan 1 that I showed you a moment ago or
14 illustrative plan 2 that we're looking at right now?

11:58:56 15 A No, I have not.

16 JUDGE MARCUS: So you want to ask her a question just
17 about how it looks; is that correct, Mr. LaCour?

18 MR. LACOUR: Basically, Your Honor, to the extent that
19 I think the look of the 2021 map has featured heavily -- it's a
11:59:22 20 racial gerrymander.

21 JUDGE MARCUS: You may get right at it if you would
22 like. Just ask the question directly.

23 MR. LACOUR: Thank you, Your Honor.

24 BY MR. LACOUR:

11:59:30 25 Q So, Dr. Davis, if you look here, we have a couple of

1 of these redistricting guidelines does not affect your
2 analysis?

3 A Well, different constraints will not affect the analysis
4 possibly. You don't know until you do it, right? So there is,
16:24:50 5 you know, you provide a set of inputs, and then the algorithm
6 will give you based on those inputs. And if you are asking
7 like what would happen if I changed the inputs, like I don't
8 know because I haven't done that. All I can tell you is that
9 given the inputs that I provided in my report, this is the
16:25:12 10 results that I got.

11 Q Dr. Imai, let's move on to $j(v)$.

12 A Okay.

13 Q And this criteria says, the Legislature shall try to
14 preserve the cores of existing districts, right?

16:25:25 15 A Right.

16 Q And did you observe this criteria in your simulations?

17 A Yes. As I mentioned, I did incorporate this particular
18 guideline.

19 Q So you did not consider this; is that right?

16:25:38 20 A That's correct.

21 Q Why not?

22 A Yeah. So as I explained, for the purpose of the analysis,
23 okay, so this is like my -- the goal -- I'm trying to analyze
24 whether or not race played a role in creating the districts
16:25:58 25 under the enacted plan.

1 In order to do that, I need to isolate other factors. So
2 I need to isolate, you know, I want to just look at how the
3 race played a role. So I need to isolate other factors.

4 If I impose this constraint, all the factors that went
16:26:14 5 into the previous plan is going to be carried over, and it's
6 going to affect my analysis. As a result, I will not be able
7 to isolate the role the race played in, you know, in drawing
8 the district boundaries under the enacted plan.

9 Q Dr. Imai?

16:26:35 10 A That's why -- I haven't analyzed the previous plans, so I
11 have no knowledge of what factors went in there.

12 Q So, Dr. Imai, is it right that if your methodology
13 considered what the previous plans looked like, the cores of
14 existing districts, that you would not be able to tell what was
16:26:55 15 caused as a result of those existing districts and as a result
16 of race?

17 A I would have a difficult time isolating the role of the
18 race if I put this constraint.

19 As I said, many factors may have gone into the previous
16:27:14 20 plan, which I haven't analyzed. And so that will -- you know,
21 I will inherit all of that into my analysis, which basically,
22 you know, basically reduces -- get rid of the whole advantage
23 of simulation analysis is the power to isolate these different
24 factors, so that's why I didn't do this.

16:27:38 25 Q Dr. Imai, would it be possible to set a limiting

1 constraint so that your simulations preserves 80 percent of the
2 cores of previous districts?

3 A Yeah. I could -- I could do that. I could incorporate
4 that constraint, add that to my simulation algorithm, yes.

16:27:58 5 Q But that's not something that you have done?

6 A No.

7 Q Here?

8 A No. If someone provides -- if someone wants to
9 incorporate the specific definition of core, then, yes, the
16:28:12 10 algorithm can handle that.

11 Q And so instead, though, your algorithm starts from a blank
12 slate; is that fair?

13 A Yes. That's -- blank slate meaning like, yeah, from
14 scratch.

16:28:26 15 Q Right. Right.

16 A Yeah. But if I may add one thing. Is that okay? Or is
17 that...

18 Q Sure.

19 A So even though I started from the blank slate in my
16:28:44 20 one-MMD analysis, in my testimony, I mentioned that it was
21 remarkable to see that one MMD, you know, overlaps in a great
22 deal with District 7 on the enacted plan, which I assume that
23 also means that overlaps significantly with the District 7 on
24 the previous plan. So even though I didn't tell the algorithm
16:29:08 25 where to create the MMD, when I told the algorithm to get one

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1 MMD, it went there, and in the key difference was the
2 Montgomery.

3 Q So, Dr. Imai, doesn't ignoring some of these factors,
4 cores of districts, communities of interest, et cetera, doesn't
16:29:28 5 that guarantee that your simulated plans may not capture a true
6 representative sample?

7 A So the captures -- I have a mathematical theorem that says
8 it captures -- you present a plan under the set of criteria
9 that I specified. If you change the set of criteria, then, you
16:29:47 10 know, the population of the plans are changed so no longer my
11 sample is guaranteed to be representative of that new
12 population, if that makes sense.

13 So the representativeness is all relative to what factors
14 are used for the simulation.

15 Q Thank you, Dr. Imai. I am going to take these guidelines
16 down.

17 And then, Dr. Imai, I am going to direct your attention to
18 page 9 of your report.

19 A Okay.

16:30:20 20 Q Milligan Exhibit 1, M-1.

21 You say in paragraph 26 that you show, quote, the way in
22 which the enacted plan deviates from the simulated plan implies
23 that race was a predominant factor in drawing the district
24 boundaries of the enacted plan. Did I read that correctly?

16:30:48 25 A Yes.

1 Q What do you mean by implies, Dr. Imai?

2 A Presents empirical evidence for that.

3 Q Okay. And, Dr. Imai, this conclusion would apply not only
4 to the enacted plan, right, but any comparison plan that was
16:31:11 5 compared to your simulations?

6 A I don't want to say that because it depends on the purpose
7 of the analysis if that -- I guess I'm not understanding
8 exactly what you're trying to ask. Sorry.

9 Q So let's say an enacted plan that's different than the
16:31:35 10 plan that actually is enacted, and you still did the
11 comparison. You did the comparison exactly the same. Wouldn't
12 your conclusions apply to that plan, as well?

13 A I -- I feel uncomfortable speculating that because like on
14 this, I have a plan in front of me. It's really hard for me to
16:31:54 15 know whether, you know, I don't want to sort of draw conclusion
16 about something like a hypothetical. I feel uncomfortable
17 doing that.

18 Q Let me back up. I think I have asked a poor question.

19 A Yeah.

16:32:07 20 Q So what you conclude or what you present here is that if a
21 plan deviates from your simulated plans, that implies race was
22 a predominant factor; is that right?

23 A In this particular setting. In this particular, you know,
24 my analysis setting. I just feel uncomfortable speculating if
16:32:31 25 there is another plan that looks very different, how do I, you

1 Q It's not that it is impossible to split the Black Belt,
2 it's just discouraged?

3 A Right. Try to reduce the number of splits, right. So
4 fewer splits of those communities as possible.

17:34:03 5 Q But?

6 A But if you have to split, you have to split because the
7 population constraint, you know, is 50 percent. You don't want
8 to create the district who has fewer population than the, you
9 know, the range that I specify.

17:34:22 10 Q And so in order to include Mobile and Baldwin County in a
11 district, it appears it's necessary to split the Black Belt,
12 right?

13 A That's correct. Yeah. If necessary to split those four,
14 of five, I guess if you reached it.

17:34:38 15 Q Is that also the case for these southeastern counties that
16 aren't included in your definition of the Black Belt but are
17 isolated as a result of that definition?

18 A So, yes, those are also -- yeah. So those are not part of
19 the definition I was given. And, yeah, those are, you know,
17:35:00 20 have to be -- have to go somewhere. And often I think the, you
21 know, the District 2 under the -- under the simulated plan.

22 Q Dr. Imai, I just have a few more questions.

23 So between your initial and rebuttal reports, you
24 generated a total of 30,000 simulated plans, right?

17:35:21 25 A That's correct.

1 Q And of those 30,000 simulated plans, 20,000 of them
2 included an MMD by design, right?

3 A That's right. One MMD by design.

4 Q How many of your 30,000 simulated plans included two MMDs?

17:35:39 5 A None. Because I didn't tell the algorithm to create a
6 second MMD.

7 Q Dr. Imai, if none of your 30,000 simulated plans included
8 two MMDs, wouldn't that indicate that race predominated in a
9 comparison plan that did include two MMDs?

17:36:02 10 MS. EBENSTEIN: I'm sorry. Objection.

11 If I am understanding the question correctly, it's outside
12 the scope of the one MMDs that Dr. Imai just testified he
13 simulated.

14 JUDGE MARCUS: I am not sure I understand the
17:36:15 15 question. So let's begin by having you rephrase it, Mr. Smith,
16 and then we will see whether it's objectionable or not.

17 MR. SMITH: Sure, Your Honor.

18 JUDGE MARCUS: I don't understand the question as you
19 put it.

17:36:27 20 MR. SMITH: Sure. I will reframe.

21 BY MR. SMITH:

22 Q Dr. Imai, none of your 30,000 simulated plans included two
23 MMDs, right?

24 A That's correct.

17:36:37 25 Q So then a plan that does include two MMDs would be an

1 outlier, right?

2 MS. EBENSTEIN: Object -- sorry.

3 JUDGE MARCUS: Do we have an objection?

4 MS. EBENSTEIN: I would object.

17:36:48 5 JUDGE MARCUS: There is an objection, and it is
6 sustained as to the form of the question.

7 MR. SMITH: Your Honor, may I have a moment to consult
8 with my colleagues?

9 JUDGE MARCUS: You sure can.

17:37:02 10 MR. SMITH: Thank you.

11 Your Honor, I pass the witness.

12 JUDGE MARCUS: All right. Thank you.

13 We're beyond -- by my count, it's about 5:37 Central
14 Standard Time.

17:37:59 15 Mr. Walker, I wasn't sure whether you were planning to ask
16 questions or not. I know Ms. Ebenstein is planning to have
17 some redirect.

18 Either way, it would be my intention to break at this
19 point unless you had really only a few. I will give you
17:38:18 20 whatever time you need, but we have gone beyond, and it's been
21 a long day. So you tell me what your pleasure is, and we will
22 proceed.

23 MR. WALKER: Your Honor, I do not intend to ask any
24 questions.

17:38:28 25 JUDGE MARCUS: Okay. So why don't we break at this

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CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Christina K Decker

01-04-2022

Christina K. Decker, RMR, CRR
Federal Official Court Reporter
ACCR#: 255

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, et al., *
Plaintiffs, * 2:21-cv-1291-AMM
vs. * January 5, 2022
* Birmingham, Alabama
* 9:00 a.m.

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1 Q And just to clarify, the American Community Survey data is
2 administered and produced by the U.S. Census Bureau, correct?

3 A Yes.

4 Q So what are your conclusions generally regarding the
15:54:41 5 socioeconomic profile of blacks and whites in Alabama?

6 A Well, whites outpace blacks in almost every single
7 category. I'm hard pressed to think of one where there is not
8 a disparity. And I outline that in my declaration and have a
9 set of charts in the exhibits, which illustrate those
15:55:02 10 disparities and is probably a little easier to get through,
11 just looking at bar charts.

12 Q And those disparities across -- span across education,
13 income, and other metrics, as well; is that right?

14 A Yes.

15:55:18 15 Q Employment?

16 A Unemployment rates, just the whole nine yards, really.
17 It's not -- it's sad in a way that the disparity is that
18 pronounced.

19 Q Thank you.

15:55:33 20 MS. KHANNA: Mr. Cooper, I don't have any further
21 questions at this time. Your Honor, I pass the witness.

22 JUDGE MARCUS: Thank you. Mr. Davis?

23 MR. DAVIS: Thank you, Your Honor.

24 CROSS-EXAMINATION

15:55:41 25 BY MR. DAVIS:

1 Q Hello, Mr. Cooper.

2 A Hello. Long time no see.

3 Q Mr. Cooper, if someone identifies as black in filling out
4 the census, your report does not tell us how that person votes
15:55:57 5 or consider how that person votes, does it?

6 A No.

7 Q Are you making any assumptions in your analysis about how
8 that person votes, knowing nothing about him or her except the
9 color of the skin?

10 A I make no assumptions about voting. That's the job of the
11 *Gingles II and Gingles III* expert.

12 Q Is that true as well for someone who identifies as white
13 when filling out the census?

14 A That's true. I cannot make any kind of statement one way
15:56:29 15 or the other about an individual voter, no.

16 Q And then it would be also true for someone who checks both
17 black and white?

18 A For the -- for the census form, that's true. Of course,
19 we have the voter registration data, which is limited to only
15:56:50 20 one check, so, that's why I'm confident that all our districts
21 are majority-black. Of the two that are considered,
22 majority-black.

23 Q Do you have any understanding, Mr. Cooper, about whether
24 Section 2 requires proportional representation for minority
15:57:06 25 populations?

1 MS. KHANNA: Objection, Your Honor. That calls for a
2 legal conclusion.

3 JUDGE MARCUS: I will allow it insofar as he's telling
4 us what may have shaped or motivated him in drawing it. We
15:57:20 5 will take it. Overruled.

6 THE WITNESS: Well, my understanding is it does not
7 require proportional representation.

8 BY MR. DAVIS:

9 Q Thank you.

15:57:28 10 A But I'm not a lawyer.

11 Q If I understood you correctly, Mr. Cooper, you said that
12 when drawing illustrative plans for a Section 2 case, it is
13 necessary to consider race. Was that your testimony?

14 A Race in a Section 2 case is always in the background as it
15:57:50 15 really is in most plans one would draw anywhere in the country
16 outside of litigation if you are really following traditional
17 redistricting principles.

18 Q You say following traditional principals requires you to
19 district on the basis of race?

15:58:04 20 A You have to make sure that what you are doing is not
21 diluting a subset of the population that is minority in terms
22 of their voting strengths.

23 Q At some point in the process, but that doesn't mean you
24 have to consider race when drafting a plan, does it?

15:58:19 25 A Well, it's a traditional redistricting principle, so like

1 compactness or contiguity, you have to be aware of it as you
2 are drawing a plan.

3 Q Even if it's necessary to consider race when drawing an
4 illustrative plan, that does not mean that it's okay to make
15:58:37 5 race the most important factor, though, does it?

6 A No. One should try to balance the various traditional
7 redistricting principles as I believe I have done.

8 Q You've drawn many plans in many different jurisdictions,
9 correct?

15:58:54 10 A That is correct.

11 Q When you're drawing plans for a jurisdiction, and I don't
12 mean in litigation, I mean you're being hired by a state or a
13 county or school board or someone to draw their plans, how
14 often do you just start with a blank slate with no
15:59:13 15 consideration of how the districts looked before?

16 A Almost never. I would always see what the so-called
17 benchmark plan, the previous plan looked like.

18 Q Do you most often adjust the benchmark plan as necessary
19 to come within appropriate population deviation?

15:59:34 20 A Yes. I mean, I'm always looking at things that need to be
21 changed to comply with traditional redistricting principles
22 and, of course, that would definitely include one person one
23 vote.

24 Q Sure. Now, you said that you considered Alabama's
15:59:53 25 districting guidelines, right?

1 A I did. I reviewed them.

2 Q And you say you complied with our traditional districting
3 criteria, correct?

4 A I believe so.

16:00:04 5 Q Okay.

6 A Criteria very general, so I think so.

7 Q Sure. Does our guideline not -- do our guidelines not
8 include the traditional districting criteria of preserving the
9 core of districts?

16:00:19 10 A They do. And for the six plans I drew that include
11 District 5 in north Alabama, they're almost identical to the
12 District 5 that was drawn by the state. Because I'm also
13 looking at other factors like the minority population and the
14 reality that a second majority-black district could be drawn,
16:00:50 15 the so-called core retention numbers on my plan might not match
16 the state's. But that's okay. That's okay. I don't think
17 that's something to be concerned about.

18 Q Okay. Well, we do. So but our guidelines don't say
19 preserve the core of District 5, does it? It says preserve the
16:01:12 20 core of existing districts?

21 A Right. But if you start with a plan that prima facia may
22 be violating the Voting Rights Acts, you are going to change
23 districts. And because of that, when I set about to create a
24 second majority-black district, it was clear that I had to
16:01:30 25 change other districts. It was not possible just to do a de

1 minimus change. It required, you know, significant changes to
2 some of the adjoining districts, and because Districts 2 and 7
3 basically line up with the rest of the districts in the state,
4 all the districts except for District 5 have to change.

16:01:49 5 Q Does your report express any opinion or your supplemental
6 report that Alabama's plan violates the Voting Rights Act?

7 A Well, I am not a -- I am not a lawyer or a judge, so I
8 can't make that statement point blank. But I do believe that
9 second majority-black district can be created while adhering to
16:02:08 10 the traditional redistricting principles. Once you take that
11 concept into action, you're going to change the neighboring
12 districts. And because five of the districts are neighboring,
13 that pretty much just leaves you with the only possibility of
14 protecting core retention in District 5.

16:02:27 15 Q So is that a no?

16 A No to what?

17 Q That your report does not include an opinion that
18 Alabama's plan violates the Voting Rights Act?

19 A Well, it shouldn't because I'm not a -- I'm not a lawyer.
16:02:40 20 I'm not a judge. I just drew a plan that demonstrates that in
21 my opinion you can get a second majority-black district. And
22 flowing from that would be perhaps a judicial decision that
23 would say the enacted plan violates the Voting Rights Act.

24 Q Did you or did you not consider the traditional
16:03:02 25 districting criteria of preserving the core of districts that

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1 is in Alabama's guidelines?

2 A I believe I did within the constraints of creating second
3 majority-black districts. I didn't radically change where the
4 districts are located. And I -- except in District 7, I did
16:03:20 5 change District 5 in that particular plan just to make the
6 point that the state could have drawn a more compact district.
7 But beyond that, I have done a pretty good job of keeping the
8 general areas served by each district except for District 1 in
9 the same part of the state. You're looking at me like you're
16:03:48 10 appalled.

11 Q Mr. Cooper I have to apologize. I will say this to the
12 Court, too. I am looking for the right -- I promise you -- I'm
13 trying to share my screen, and I'm making sure that I get the
14 right EF up. I am not meaning to look any way.

16:04:04 15 A Oh. I thought you were looking at me in a --

16 Q No, no.

17 JUDGE MARCUS: You all like fine to me. Let's just
18 proceed with the next question, please.

19 BY MR. DAVIS:

16:04:14 20 Q Mr. Cooper, how does this plan preserve the core of
21 existing districts? And this is your Illustrative Plan 7.

22 A Well --

23 Q Exhibit C-61.

24 A That's right. That's one where I did change District 5.
16:04:32 25 I believe it's a more compact district. It keeps Huntsville

1 whole and does not put a voter in Tuscaloosa in a district
2 that's almost in Chattanooga. So it's a different
3 configuration. I'm not saying it has to be this way. I just
4 thought it would make the point.

16:04:51 5 You could draw District 5 as the state is drawn. And in
6 all the other plans, I basically have.

7 Q Mr. Cooper, did you observe traditional redistricting
8 principle of avoiding incumbent conflicts with your peers in
9 Alabama's guidelines?

16:05:09 10 A I did in Illustrative Plan 5.

11 Q In your other six, you did not observe that traditional
12 districting criteria, did you?

13 A However, I would point out those plans could in all cases
14 probably be modified such that the incumbent in district -- in
16:05:32 15 District 2 could be put in District 2 if not by way of a whole
16 county, all of Coffee County, which is really quite populace,
17 certainly it could be split, and the incumbent could be put in
18 District 2.

19 Q Is it true --

16:05:46 20 A There would be many options for that.

21 Q Is it true --

22 A I want --

23 JUDGE MARCUS: Just let him finish, please. You may
24 finish your answer, Mr. Cooper.

16:05:58 25 THE WITNESS: Oh. I just didn't want to introduce

1 more than six splits to any plan. So for that reason, I
2 didn't, for example, split Coffee County to put the incumbent
3 in the District 2. But there would be other variations. And
4 there's one on the table now that does that. So I have
16:06:16 5 protected all incumbents.

6 BY MR. DAVIS:

7 Q Is it true that in six of your seven illustrative plans,
8 you do not avoid incumbent conflicts?

9 A In six of the seven? But in any of those, I could have
16:06:30 10 probably protected the incumbent and kept a plan in place with
11 two out of seven majority-black districts. It might have
12 required an extra county split, though.

13 Q Have you ever lived in Alabama?

14 A No, I have not.

16:06:50 15 Q Have you spent any time speaking with Alabama voters or
16 election officials about what local communities of interest may
17 be?

18 A No. I mean, I have spoken with folks from Alabama. But I
19 have not spoken with election officials.

16:07:09 20 Q What makes you think that you are better able than 140
21 legislators who live in Alabama and represent local districts
22 -- what makes you think you are in a better position than them
23 to balance traditional criteria where they conflict?

24 MS. KHANNA: Objection, Your Honor. That

16:07:28 25 mischaracterizes his testimony. I don't think he's ever said

1 he's better able than the legislators.

2 JUDGE MARCUS: I will let him answer the question.

3 You may answer.

4 THE WITNESS: I think in the final analysis, even if
16:07:37 5 this case is ruled in our favor, the Legislature will get the
6 first opportunity to develop a remedial plan, and more often
7 than not, that's what happens. Sometimes it doesn't happen.
8 Like in say South Dakota, when ultimately the Legislature
9 refused to create a majority Native American district, so the
16:07:54 10 judge just finally had to order. But normally the Legislature
11 will have the opportunity to develop a plan.

12 In fact, in 2019, in Mississippi in the plan I referenced
13 earlier in my testimony, where I was a consultant, and the
14 plaintiffs' expert in a lawsuit, Section 2 lawsuit that created
16:08:13 15 a new state Senate district in the Delta, initially the judge
16 ordered my plan into place. But then the Legislature came back
17 and said, look, we want to develop a plan. The judge allowed
18 them do that, and the court ordered plan in the end was a plan
19 developed by the Legislature. It included a majority-black
16:08:33 20 district, though.

21 BY MR. DAVIS:

22 Q Mr. Cooper, did I understand you correctly when you said
23 you kept the city of Mobile whole that you split precincts in
24 order to do so?

16:08:52 25 A Some precincts had to be split in order to get to zero

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1 population deviation.

2 Q Okay. Did you have to split precincts in order to keep
3 the city of Mobile whole?

4 A In the configuration that you see in Illustrative Plan 6
16:09:15 5 and 7, I believe I did have to do that in order to meet
6 one person one vote zero deviation.

7 Q Why couldn't you have made that adjustment somewhere else
8 on the map?

9 A Well, perhaps I could have, but then that would have
16:09:27 10 introduced another county split. Yeah. There are an infinity
11 of plans out there one can draw. These are just seven
12 illustrative ones. So I am not saying it couldn't be done. I
13 just haven't produced such a plan so far.

14 Q Why did you not produce any plans that kept Mobile County
16:09:46 15 whole?

16 A I think that more than likely if you keep Mobile County
17 whole it becomes a little problematic to create two
18 majority-black districts.

19 Q Does it make it impossible?

16:09:59 20 A Well, maybe not, but it would require a number of other
21 county splits, I think.

22 Q Did you testify in direct, Mr. Cooper, that in Florida,
23 you have used the measurement of non-Hispanic black instead of
24 any-part black?

16:10:22 25 A No. No. I just said that there may be some places in

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CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Christina K Decker

01-05-2022

Christina K. Decker, RMR, CRR
Federal Official Court Reporter
ACCR#: 255

Date

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, et al., *
Plaintiffs, * 2:21-cv-1291-AMM
vs. * January 6, 2022
* Birmingham, Alabama
* 9:00 a.m.

JOHN MERRILL, in his official *
capacity as Alabama Secretary *
of State, et al., *
Defendants. *

EVAN MILLIGAN, et al., *
Plaintiffs, * 2:21-cv-1530-AMM

vs. *
JOHN MERRILL, in his official *
capacity as Alabama Secretary *
of State, et al., *
Defendants. *

MARCUS CASTER, et al., *
Plaintiffs, * 2:21-cv-1536-AMM

vs. *
JOHN MERRILL, in his official *
capacity as Alabama Secretary *
of State, et al., *
Defendants. *

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
VIA ZOOM CONFERENCE
VOLUME III
BEFORE THE HONORABLE ANNA M. MANASCO,
THE HONORABLE TERRY F. MOORER,
THE HONORABLE STANLEY MARCUS

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1 that Mr. Davis and Mr. Walker have a chance to have a full day
2 to get Bryan on. I only say that if you spill over into
3 tomorrow with *Gingles I, II, and III*, I want to make sure that
4 we have a chance for Bryan to be heard. That won't be a
09:02:29 5 problem for you, Mr. Naifeh?

6 MR. NAIFEH: I don't believe so, Your Honor. We
7 expect that we will get through all of the *Gingles* experts
8 today. And Mr. Bryan, if we don't get to him today, he would
9 still have all day tomorrow.

09:02:43 10 JUDGE MARCUS: So I take it, Mr. Davis, Bryan is set
11 up for either late today or all day tomorrow starting in the
12 morning?

13 MR. DAVIS: Yes, Your Honor. Whether we begin today
14 and finish tomorrow or whether we begin tomorrow, we will be
09:02:57 15 ready to go.

16 JUDGE MARCUS: Thanks very much, and you may proceed,
17 counsel, with your next *Gingles* witness.

18 MR. NAIFEH: The Milligan plaintiffs would like to
19 call Dr. Moon Duchin.

09:03:06 20 MOON DUCHIN,
21 having been first duly sworn, was examined and testified as
22 follows:

23 JUDGE MARCUS: Would you be kind enough to state your
24 name for the record.

09:03:23 25 THE WITNESS: Sure. My name is Moon Duchin, and I am

1 BY MR. NAIFEH:

2 Q Going back to the questions you were asked to consider,
3 were you able to develop any illustrative plans demonstrating
4 whether it's possible to create two majority-black districts in
09:28:39 5 Alabama?

6 A Yes. My report includes plans that I called plan A, B, C,
7 and D.

8 Q And did you use any software to develop the illustrative
9 plans?

09:28:52 10 A I did. I used software in a few ways. As a first step,
11 as an exploratory step, I used algorithms developed in my lab
12 to create -- to generate large numbers of different
13 possibilities that would show me if it was possible to find two
14 majority-black districts. And I found that it was possible.
09:29:22 15 My randomized algorithms found plans with two majority-black
16 districts in literally thousands of different ways.

17 Convinced that that was possible, I then turned to drawing
18 by hand. And I would emphasize that the role of the maps found
19 by the exploratory algorithms was just then inspiration.

09:29:46 20 Seeing that it was possible and with some of the ideas about
21 how it was possible, I then started with a blank slate and drew
22 by hand.

23 I will say a little bit more about that. The hand drawing
24 was done first with the second software package developed in my
09:30:06 25 lab. And here, let me mention that all these software packages

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1 are public, open source, available for inspection by the public
2 and by counsel at any time.

3 So the second package is called Districtr. And in it
4 members of the public can draw their own plans. And we use
09:30:27 5 Districtr -- I use Districtr to draw plans at the level of VTDs
6 or precincts. We haven't talked about those yet. But those
7 are the units of census geography that look a lot like the
8 precincts that people vote in.

9 So the second stage was to draw at the VTD level. And
09:30:47 10 then finally, to balance population, I used finer tools, and in
11 particular, we have a number of Python packages that we use to
12 see the demographics down to the block level, and to understand
13 the properties of plans.

14 Q And you mentioned Python. That is the -- is that a
09:31:11 15 programming language?

16 A Python is a common open source programming language. And
17 it permits many packages, such as what are called Pandas for
18 working with large data frames and GeoPandas for working with
19 Geo-spatial data. I would say that Python is the language of
09:31:33 20 choice in data science.

21 Q Is Python frequently used in redistricting?

22 A I would say that it is.

23 Q You mentioned that when you hand drew plans, you started
24 from a blank slate. So just to clarify, does that mean --
09:31:53 25 did you -- did you start from an existing plan?

1 A No. Only used some of the concepts I had seen in plans
2 that were found by the exploratory algorithms, but literally
3 started with an empty map of the state when drawing.

4 Q Okay. And what kind of data did you use to develop the
09:32:18 5 illustrative plans?

6 A Again, here, as in my research, by far the largest data
7 set is the one from the U.S. Census Bureau, called the
8 PL 94-171. That is block level demographic data that the
9 bureau was directed to compile specifically for redistricting
09:32:40 10 purposes. That is the express function of this data set.

11 In addition, there are number of other highly useful
12 Census Bureau products, such as their TIGER/Line Shapefiles
13 that give you the geographical units. Their American Community
14 Survey, which is an annual survey from which we extract
09:33:03 15 information about Citizen Voting Age Population and so on.

16 Q Okay. Are these the same types of data that you would
17 normally use to create a redistricting plan?

18 A Definitely.

19 Q And you mentioned census geography such as census blocks.
09:33:26 20 What are census blocks?

21 A Okay. So the census maintains a geographical hierarchy of
22 units, which has a central spine with six levels. It starts at
23 the nation, as you would expect, subdivides into states, from
24 states to counties, within counties the next unit is called
09:33:51 25 census tracts. Those divide into block groups which divide

1 into blocks.

2 So blocks are the smallest units of census geography.

3 They're sometimes called the pixels of redistricting. They're

4 the littlest units that you can use as building blocks. There

09:34:10 5 are a great number of them. In the 2010 census there were over

6 11 million census blocks in the nation. They range in

7 population from 0. They're a substantial number of census

8 blocks 0 population to typically a few hundred people, although

9 sometimes you will find census blocks with much larger

09:34:32 10 population, such as if there are group quarters like prisons or

11 dormitories. So that is a brief description, I hope, of census

12 blocks.

13 Q And you also mentioned VTDs. Can you tell us what a VTD

14 is, what VTD stands for and what a VTD is?

09:34:52 15 A Sure. There's a redistricting data program, an office

16 within the Census Bureau, and they undertake every 10 years to

17 communicate with the states and collect information on the

18 boundaries of precincts, which are, as we all probably know,

19 units of election administration that are maintained typically

09:35:17 20 at a local level.

21 And so the bureau collects this information and compiles

22 them into a product called VTDs. They say that stands for

23 voting district, but most people call them voting tabulation

24 districts, VTDs. And so you should think of those as the

09:35:36 25 Census Bureau's version of local election administration units.

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1 That makes them particularly useful for redistricting because
2 since they're in the census hierarchy, we can accurately
3 measure demographics, but they're also well-coordinated with
4 local elections, local election administration.

09:36:00 5 Q And did you use beyond the information from the Census
6 Bureau, did you use any other information or consult any other
7 information when preparing the illustrative plans in this case?

8 A I did. And some other sources are listed in my report.
9 But in particular, I consulted the enacted plans from the
09:36:22 10 state, which I obtained from the state's web sites. I looked
11 in particular at the congressional plan, of course. But also,
12 for example, at the school board of education plan prepared by
13 the state, enacted.

14 Q And did you consult the state's redistricting guidelines?

09:36:42 15 A I did. I did consult the state's redistricting
16 guidelines.

17 Q You mentioned the State Board of Education plan. What
18 did -- why did you obtain information from the State Board of
19 Education plan?

09:36:54 20 A The board of education plan was of particular interest to
21 me because it's an eight-district plan. We've already heard
22 that the congressional district plan has seven districts. But
23 the board of education plan has two that are majority-black.
24 So I was particularly interested to see how the state would con
09:37:17 25 instruct a second majority-black district.

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1 Q And were there other features in the State Board of
2 Education plan that were relevant in drawing the illustrative
3 plans in this case?

4 A One of the things that you'll notice across my plans is
09:37:38 5 the -- having to do with Mobile County and with the city of
6 Mobile. And I was interested to see how that would be handled
7 in a second majority-black district. And so I looked to the
8 board of education for an example.

9 Q Is it your regular practice to look at the redistricting
09:37:58 10 plans for other governmental bodies in determining how to draw
11 an illustrative plan for a different set of districts?

12 A Yes. Definitely. I would call that a standard practice
13 of mine.

14 Q Okay. And you mentioned the Census Bureau's American
09:38:20 15 Community Survey or ACS. What did you use ACS data for?

16 A In this case, I only used ACS data to estimate what's
17 called BCVAP or Black Citizens Voting Age Population as
18 described in my report. I suppose I should clarify. Not only
19 Black Voting Age Population, but the Citizens Voting Age
09:38:46 20 Population of various groups.

21 Q Okay. How did you use the data and the information that
22 you mentioned to create the illustrative plans?

23 A Well, as we discussed, my main question was whether I
24 could make plans that had two majority-black districts while
09:39:10 25 showing great respect for the other additional districting

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1 principles. And so the main way that all this data was used
2 was, in fact, many of the redistricting principles touch on
3 census and demographic data. But in particular, I needed to
4 make sure that the districts I was creating would be over
09:39:34 5 50 percent black.

6 Q Okay. And just sort of mechanically, how do you create a
7 redistricting plan using census data?

8 A Well, as I described, when drawing, I started out with the
9 Districtr program, which lets you select a paint brush like
09:39:57 10 tool and start to color in the VTDs of the state. You can also
11 turn on a feature that captures whole counties. And because
12 county preservation is important, as I'm sure we'll discuss, I
13 tried to take whole counties into a district whenever possible.

14 So typically the way you complete a plan is by first
09:40:23 15 drawing with the largest units counties in this case, getting
16 to a place of very coarsely balanced population, and then going
17 to the next smaller units to tune and balance. And so in this
18 case, from counties, the next units would be VTDs.

19 You can draw a very reasonably balanced plan, a 1 percent
09:40:49 20 balanced plan at the VTD level. But since, as I'm sure we'll
21 discuss, it's the standard practice to balance congressional
22 districts much more tightly. At the last stage, you then break
23 those VTDs down to blocks in order to tune the population.

24 Is that what you had in mind?

09:41:09 25 Q Thank you. Yes. That's helpful.

1 A Okay.

2 Q And so you -- is it fair to say that you drew your
3 illustrative plans at the census block level?

4 A In the end, yes. I found that it was necessary to break
09:41:30 5 some VTDs in order to balance the population. And so I did so
6 at the block level, yes.

7 Q Okay. And when you tune to the block level and see VTDs
8 and then tune the population of block level, how do you decide
9 where to split precincts?

09:41:55 10 A Right. So when splitting precincts -- so, first, I tried
11 to keep as many counties whole as possible but had to break
12 some counties. And then when you decide which precincts to
13 split, those would typically be within the already split
14 counties.

09:42:17 15 By far, the largest consideration when splitting precincts
16 is one of balancing the population. And so by far, the primary
17 consideration is the total population of those blocks so that
18 you can find just the right sizes to balance the population.

19 Q And when splitting precincts to balance the population and
09:42:43 20 selecting blocks to balance the population, do you ever decide
21 where to split the precinct on the basis of race?

22 A I would describe the priority order this way: When you
23 have to split a VTD looking to balance population, as I just
24 said, by far, the first thing that I look at is the total
09:43:03 25 population of the blocks. After that, the next consideration I

1 had was compactness, trying to make kind of less eccentric and
2 more regular boundaries between districts.

3 I -- over the course of the many draft maps made, I did
4 sometimes look at race of those blocks, but really, only to
09:43:32 5 make sure that I was creating two districts over 50 percent.
6 Beyond ensuring crossing that 50 percent line, there was no
7 further consideration of race in choosing blocks within the
8 split VTDs.

9 Q Are you familiar with traditional redistricting
09:43:54 10 principles?

11 A Yes, I am.

12 Q And what are they?

13 A Okay. Well, there are many. But I would identify what I
14 call a big six.

09:44:07 15 So let me very briefly outline them. First is population
16 balance, or one person one vote. And we've discussed that
17 already. That's the idea that we should balance total
18 population across the districts in a plan. The next and also a
19 federal requirement is minority electoral opportunity. And
09:44:32 20 that's through the lens of the Voting Rights Act of 1965, as
21 well as equal protection in the constitution.

22 So those are two nonnegotiable federal requirements.

23 Next, I might list two that are fairly easy to measure.

24 And those -- although not unambiguous, but still readily
09:44:57 25 quantifiable, and those are compactness and contiguity. And

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1 then we come to two that are a little bit I would say harder to
2 measure, but nonetheless very important. And that's respect
3 for political boundaries. By that, we usually mean a priority
4 on keeping intact the counties, cities, and towns generally the
09:45:24 5 municipalities, of a state. And finally, respect for
6 communities of interest.

7 Q And did you consider those principles when developing the
8 illustrative plans?

9 A I certainly did.

09:45:39 10 Q Did you also consider the redistricting guidelines adopted
11 by the state's reapportionment committee?

12 A I did.

13 MR. NAIFEH: And, Mr. Ang, can you please pull up
14 Milligan Exhibit 28? This is Document 88-23.

09:45:51 15 BY MR. NAIFEH:

16 Q The committee's guidelines include additional criteria
17 beyond those you just mentioned?

18 A They do. And if we look at this, we can see the whole
19 first page concerns itself with population and minority
09:46:14 20 opportunity to elect and equal protection. And then if we go
21 on to the next page, that very next on the list is contiguity
22 and compactness, which I've mentioned. At that point, this
23 document gets to Alabama state constitutional requirements,
24 which repeat some of the previously listed concepts, and cite,
09:46:45 25 you know, once again cite contiguity population balance,

1 discuss the number of districts.

2 After that, we get to J, which within J, we introduce
3 other principles that are frequently discussed in
4 redistricting, such as consideration for incumbency. This is
09:47:09 5 where communities of interest are cited. And if we advance to
6 the next page, we will see in part (v) of part j. mention of
7 preservation of the cores of existing districts.

8 I would note that in my reading of this, I noticed in part
9 G here that the criteria identified within j. are stipulated
09:47:39 10 not to be listed in priority order.

11 To me, the reading that I took from this, and I think the
12 reasonable reading is that the ones listed before part j.
13 should be regarded to take precedence. And so I did take this
14 document quite seriously in listing the federal requirements
09:48:05 15 first, followed by compactness and contiguity with concepts
16 like incumbency consideration and core preservation clearly
17 lower ranked.

18 Q So in your understanding, the committee guidelines create
19 a higher hierarchy of certain principles over others?

09:48:25 20 A I think they do. And I think they do so in a manner
21 consistent with what I see in numerous other states.

22 Q Thank you.

23 MR. NAIFEH: Thank you, Mr. Ang. We can take this
24 exhibit down.

09:48:36 25 BY MR. NAIFEH:

1 Q Dr. Duchin, is it possible that different traditional
2 redistricting criteria might conflict with one another?

3 A Yes. It's not just possible, it's common place. The
4 criteria are often intention. And to give just a few examples
09:48:56 5 of that, I think it's clear from what I said a moment ago that
6 exact population balance requires you to break up units and so
7 its intention with respecting political boundaries pretty
8 clearly.

9 Another classic frequently observed example is that
09:49:17 10 compactness can be intention with communities of interest. If
11 you have a well-identified community with important shared
12 interests that itself is residentially located in kind of
13 elongated configuration, then you have a choice to make because
14 keeping that community whole might come at a cost to
09:49:40 15 compactness of your district. That's a frequently observed
16 instance among many where the principles can be in conflict.

17 Q In your experience, is it common to have to make trade
18 offs to -- in observing different redistricting principles?

19 A Absolutely. I would say -- go so far as to say that
09:50:04 20 redistricting is all about those trade offs.

21 Q When you prepared the illustrative plans in this case, did
22 you use -- sorry. I've got that covered.

23 Did you -- are the illustrative plans you developed the
24 only potential plans for a seven-member congressional district
09:50:20 25 in Alabama?

1 A Certainly not.

2 Q Are the illustrative plans that you developed in this case
3 the only potential plans for a seven-member congressional
4 redistricting plan in Alabama?

09:50:39 5 A They're far from the only plans. They're far from -- as
6 you heard me say before, far from the only ones with two
7 majority-black districts. I've seen thousands of examples, and
8 I know that overall, the universe of possibility in Alabama is
9 in the many trillions of trillions. So we're talking about
09:51:02 10 very large number of possible plans over all.

11 Q And so just to follow up on that, if you had a different
12 set of redistricting -- of priorities among the redistricting
13 principles, you could draw -- you would draw a different plan
14 that still contained two majority-minority districts; is that
09:51:25 15 right?

16 A That's absolutely true. And so as you heard me say a
17 moment ago, after the -- what I took to be nonnegotiable
18 principles of population balance and seeking two majority-black
19 districts, after that, I took contiguity as a requirement and
09:51:48 20 compactness as paramount following the guidelines.

21 It would be completely reasonable to take plans like mine
22 to take districts, something like my Districts 2 and 7, which
23 then kind of forces District 1 to look more or less as it does.
24 But with the remaining four districts, there's quite a lot of
09:52:13 25 latitude. You could adopt, then, a priority on maintaining

1 district cores, and easily produce a plan that performs better
2 in that regard, but you would do so at a cost particularly to
3 compactness.

4 So there are certainly trade offs. And I took the reading
09:52:36 5 of the guidelines to put a very high priority on counties and
6 compactness. But while retaining two majority-black districts,
7 many other choices could be made.

8 Q And in seeking to draw two majority-minority districts,
9 was your goal to maximize the Black Voting Age Population in
09:52:58 10 those two districts?

11 A Certainly not. We've seen from the state that it's
12 possible to have a substantially higher BVAP in a district, and
13 I can tell you that it's possible, while having two districts
14 to still have a substantially higher BVAP in a district, that
09:53:19 15 was simply not my goal.

16 Q And were there times in drawing the illustrative plans
17 when you made the decisions that had the effect of reducing the
18 Black Voting Age Population in one of the minority-majority
19 black districts in order to satisfy other redistricting
09:53:35 20 principles?

21 A Definitely. I took, for example, county integrity to take
22 precedence over the level of BVAP once that level was past
23 50 percent.

24 MR. NAIFEH: Mr. Ang, can you please bring up Exhibit
09:53:56 25 M-3? This is Document 88-3, and turn to page 7.

1 Dr. Duchin -- Mr. Ang, could you zoom in on the table?

2 BY MR. NAIFEH:

3 Q Dr. Duchin, please take a look at Table 3, which is
4 labeled, Demographics Broken Out As a Comparison of Black and
09:54:22 5 White Population.

6 A Yes.

7 Q What does this table show?

8 A This table shows the BVAP, the WVAP, BCVAP, and WCVAP. In
9 other words, the black and white shares of Voting Age
09:54:38 10 Population and Citizen Voting Age Population by district in
11 each plan.

12 Q And in each plan, that includes in the enacted plan HB-1?

13 A That's right. HB-1, as well as my plans A through D.

14 Q Okay. And turning down on the table labeled BVAP at the
09:54:59 15 top left, what does this table show?

16 A This shows that -- as I said earlier, HB-1 has one
17 majority-black district, and then drops off to around
18 30 percent while my plans A through D all have two districts
19 over 50 percent black.

09:55:17 20 Q And what definition of black is used to calculate these
21 percentages?

22 A Yes. So here still I'm using that expansive definition
23 that's sometimes called any-part black.

24 Q And then looking over to the table at the top right
09:55:36 25 labeled BCVAP, what does this table show?

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1 A So this is the black share of Citizen Voting Age
2 Population. I will note that sometimes in voting rights
3 enforcement, we look to Citizens VAP, CVAP, because it's taken
4 to be a closer proxy to the electorate because citizens are
09:56:00 5 eligible to vote. And so here I look at BCVAP and find that it
6 -- generally similar that HB-1 still has only one
7 majority-black district, and all four of my plans by this way
8 of counting still have two.

9 Q And in the BCVAP table, which definition of black was used
09:56:29 10 to calculate BCVAP?

11 A So here I'll just say very briefly, I used the ACS to
12 calculate the citizenship share of adults for each racial group
13 and then applied that to the any-part black population.

14 Q So, again, using -- it uses any-part black to estimate the
09:56:53 15 citizenship share of each district?

16 A To be exactly precise, the share, the rate of citizenship
17 does not use any-part black because it's done from the ACS,
18 which doesn't have the ability to count any-part black, so that
19 citizenship rate is used with a single-race black definition,
09:57:18 20 and then is applied to the any-part black map of the state.

21 Q Okay.

22 A This is described in detail in the appendix to this
23 report.

24 Q Okay. And using the any-part black category for BVAP, are
09:57:36 25 there two districts in each of your four plans that contained

1 M-28? This is again the redistricting guidelines
2 Document 88-23.

3 Mr. Ang, can you scroll down? I believe it's the third
4 page. Back up one.

10:24:00 5 THE WITNESS: There we are.

6 BY MR. NAIFEH:

7 Q It's at the bottom of page 2. Is that the definition that
8 you were referring to earlier?

9 A Yes. And so recognized similarities of interests,
10 including but not limited to ethnic, racial, economic, tribal,
11 social, geographic, or historical identities.

12 Exactly.

13 Q And it says there at the bottom that it can include?

14 A It can include in certain circumstances political
10:24:29 15 subdivisions, such as counties.

16 MR. NAIFEH: And can you go on to the next page,
17 Mr. Ang?

18 THE WITNESS: Great. Counties voting precincts,
19 municipalities, tribal lands and reservations, or school
10:24:44 20 districts.

21 MR. NAIFEH: Thank you, Mr. Ang.

22 BY MR. NAIFEH:

23 Q And does -- in your understanding, does the community of
24 interest principle mean that an entire congressional district
10:24:59 25 must form a single community of interest?

1 A No. And I think that's sometimes a common
2 misunderstanding. I don't think that respect for communities
3 of interest means that every district should itself be a single
4 unitary community. That wouldn't work because communities can
10:25:20 5 be of all sizes and are not necessarily the exact size of
6 congressional districts, which after all, are very large, over
7 700,000 people.

8 Instead, I believe that what it means is that communities
9 should be taken into account when you draw so that either
10:25:39 10 they're kept whole within a district, or if it's appropriate,
11 split among several in a way that amplifies their opportunity
12 to be heard by their representative.

13 Q So, in other words, there may be more than one community
14 of interest in a given congressional district?

10:25:59 15 A There certainly will, without fail, be more than one
16 community of interest within a congressional district.

17 Q And are the criteria for or the definition of community of
18 interest, is that an objective definition?

19 A Well, as it's written in law or in guidelines like these,
10:26:21 20 it's, of course, somewhat vague. There have been efforts to
21 try to make it more concrete and more quantifiable, that
22 usually start with a public collection process, as I mentioned
23 a little earlier.

24 Q So when you are serving the public about their communities
10:26:43 25 of interest, is it possible that different people might

1 identify with different communities of interest?

2 A It is a certainty. When you ask people about their
3 communities, the nature of community is that you will get many
4 different kinds of account. Some of them will be continent and
10:26:58 5 will allow you to create a kind of small consensus so that you
6 have a community supported by the testimony of many people.
7 But inevitably, on even more than what some of the other
8 principles, there are trade offs, because communities can and
9 will overlap. So sometimes it's impossible to preserve one
10:27:23 10 without breaking another. So even within this principle, there
11 are trade offs to consider.

12 Q When developing your illustrative plans in this case, what
13 communities of interest did you consider?

14 A So the two communities of interest that I prioritized are
10:27:40 15 the two that I mentioned earlier, which are urban cores and the
16 18 counties that constitute the rural Black Belt.

17 I will mention that I am aware that there are many, many
18 other important and salient communities in Alabama, and I
19 prioritized these two that I believe to clearly and
10:28:05 20 unambiguously correspond to the language in the guidelines.

21 Q And in your opinion, do the illustrative plans respect
22 communities of interest?

23 A Yes. My plans A through D are designed to do so. And one
24 way that they do so is by taking upwards of 16 out of the 18
10:28:29 25 Black Belt counties in each case and keeping those in

1 majority-black districts.

2 Q And you mentioned also that municipalities or counties or
3 other political subdivisions can also constitute a community of
4 interest. Did -- in your opinion, do the illustrative plans
10:28:51 5 respect those communities of interest?

6 A They do. There's a marked respect not only for counties,
7 which I think is unmistakable in the plans, but also for
8 municipalities.

9 And I will note there that because the technical
10:29:08 10 boundaries of municipalities can be very erratic, that on a
11 community level, it's often that urban core that's most salient
12 from a community.

13 Q You also testified the guidelines -- the redistricting
14 committee's guidelines include as an additional criteria the
10:29:36 15 cores of prior districts?

16 A Yes.

17 Q What does preserving the cores of prior districts mean?

18 A Informally, it means that new districts should resemble
19 the previous districts. Often, that's measured in one of two
10:29:53 20 ways; by looking at the area overlap or the territorial overlap
21 between a new district and its corresponding its counterpart in
22 the older plan, or by looking at the population that's either
23 retained or displaced.

24 Q And do the illustrative plans preserve the cores of prior
10:30:17 25 districts?

1 A No. I would characterize my Illustrative Plans A through
2 D as not particularly preserving the cores of the prior
3 districts.

4 Q And why is that?

10:30:30 5 A I judge it to be impossible to have as high of a core
6 preservation as, for instance, you see in the newly enacted
7 plans, while also having two majority-black districts. Just to
8 expand on that briefly, since the older plan has one
9 majority-black district, and then a significant drop off to,
10:30:54 10 you know, about 30 percent, it's again mathematically
11 impossible to create two majority-black districts without a
12 significant level of population reassignment from one District
13 to another. Because I regard the protection of minority
14 electoral opportunity to be a nonnegotiable federal
10:31:19 15 requirement, that necessitates a significant level of core
16 displacement.

17 Q Okay. And so that -- and then in the outside of those two
18 majority-black districts, were there -- can you explain why
19 your plans don't preserve cores to the extent it's of the
10:31:39 20 enacted plan?

21 A Yes. Absolutely.

22 So I read the guidelines to put core displacement as a
23 priority below compactness and the preservation of counties, in
24 particular compactness. And so I would note that one could
10:32:01 25 take my illustrative plans, retain something very much like my

1 Districts 2 and 7 and therefore District 1, and with the
2 remaining four districts, one could adopt a different
3 prioritization. And indeed if core preservation were elevated
4 at that point, it would be quite easy to reconfigure those four
10:32:25 5 districts to more resemble the previous enacted plan. I will
6 just note that you would be doing so expressly at the cost of
7 compactness.

8 Q So, in other words, you read the guidelines as requiring
9 compact districts more than core preservation, but if you read
10:32:44 10 them the other way, you could preserve cores to a greater
11 extent than you did?

12 A I think it's difficult to read them another way, but if
13 you elected to prioritize cores over compactness, you certainly
14 could do so, and that would greatly improve those displacement
10:33:02 15 numbers in my plan while maintaining two majority-black
16 districts.

17 Q And you also testified earlier that protecting minority
18 voting strength is a traditional redistricting criteria. What
19 does it mean to protect minority voting strength for avoid
10:33:28 20 dilution of minority voting strength?

21 A Well, in the context of *Gingles I* demonstration, it means
22 to draw districts that have a majority of -- in this case,
23 Black Voting Age Population while still being maximally
24 respectful to the other traditional principles. In other
10:33:48 25 words, in other words, what's at issue here is the opportunity

1 to elect candidates of choice.

2 Q And what do the illustrative plans do to unable that
3 opportunity?

4 A Well, in particular, here they pass the threshold of
10:34:08 5 50 percent plus 1, so they create two majority-black districts
6 in which I believe together with the evidence of other experts
7 we can see there will be a clear opportunity to elect
8 candidates of choice.

9 Q And so based on what you have told us so far today, did
10:34:33 10 you form an opinion as to whether the black population in
11 Alabama is sufficiently numerous and geographically compact to
12 comprise a majority of voting age population in two
13 congressional districts?

14 A I did. As we heard, there were two majority-black
10:34:48 15 districts, and the plan as a whole is highly respectful of
16 other traditional districting principles, and in particular, is
17 highly compact. The compactness of the plan is itself a
18 demonstration that the population is compact enough to do so.

19 Q And are the illustrative plans the only potential remedy
10:35:10 20 for vote dilution in Alabama's congressional plan?

21 A They are far from the only possible remedy, and I leave it
22 to the Court to determine whether majority-black districts are
23 necessary as a remedy. And here, they're clearly demonstrated
24 to meet the *Gingles I* requirement.

10:35:27 25

1 MR. NAIFEH: Thank you, Dr. Duchin. I have no more
2 questions at this time.

3 JUDGE MARCUS: All right. It looks to me like this
4 might be a convenient time for our break. I have 10:35 your
10:35:42 5 time in Alabama Central Standard and 11:35 in Eastern Standard
6 Time. We'll take a 15-minute break.

7 I take it, Mr. LaCour, you are going to conduct the bulk
8 of the cross, or the cross for the Secretary of State?

9 MR. LACOUR: That's correct, Your Honor.

10:36:03 10 MR. NAIFEH: Your Honor, actually, there was one more
11 issue I wanted to raise with Dr. Duchin.

12 JUDGE MARCUS: Sure. Let's go back so you can finish
13 your direct, and then we'll break. Fire away.

14 MR. NAIFEH: Mr. Ang, can you please bring up
10:36:21 15 Exhibit 48, M-48, that's Document 92-1? And I will note for
16 the Court and for the record that this is one of the exhibits
17 that defendants have objected to, and I would like to lay the
18 foundation for getting it admitted.

19 JUDGE MARCUS: Sure.

10:36:49 20 BY MR. NAIFEH:

21 Q Dr. Duchin, on the screen is the document that has been
22 marked as exhibit M-48.

23 MR. NAIFEH: Mr. Ang, could you scroll through? I
24 think it's three pages.

10:37:06 25 BY MR. NAIFEH:

1 weren't worried about balancing the other factors?

2 A Well, I think my best and fullest answer would be that I
3 do believe other prioritizations of criteria are possible while
4 retaining two majority-black districts. And that in particular
13:10:07 5 as I think I mentioned in direct, if you kept something very
6 much like my District 2 and 7 and, therefore, 1, you have a
7 great deal of latitude with the other four districts to reorder
8 the priorities as you might see fit.

9 Q But maybe with this particular configuration of 2 and 7,
13:10:29 10 you wouldn't have latitude down to just six splits in the
11 counties; is that fair?

12 A Sorry.

13 Q I'm sorry. Go ahead.

14 A Thanks. That's not something I'm prepared to answer in a
13:10:42 15 speculative fashion looking at the map. But something I could
16 certainly sit down with mapping software and explore.

17 Q And I'll just point you here. CD 7, this was from your
18 report, and we looked at these numbers earlier. I am happy to
19 go back if you want to double check them. But I put down that
13:11:05 20 it was 50.24 percent any-part Black Voting Age Population, and
21 if I think we said that 1 percent of Voting Age Population of a
22 typical district is about 5,600 people, so we're talking less
23 than 2,000 people would be your margin for CD 7, correct? So
24 does that sound right?

13:11:32 25 A What exactly is the question? Is the question about

1 removing 2,000 people?

2 Q If you removed -- so if you removed 1,000 black people of
3 voting age from CD 7 and you replaced them with 1,000 non-black
4 people of voting age, that would bring your number down below
13:12:02 5 50 percent, correct?

6 A I don't think 1,000 would be enough from the numbers you
7 were quoting before. It sounded like maybe a few thousand
8 would, but, again, I'd want some time to sit down and get those
9 numbers just right.

13:12:16 10 Q Okay. In any event, the margins are at least -- the
11 margins are somewhat slim for CD 7, fair enough?

12 A I think that the standard is 50 percent plus one person.
13 But 50.24 is certainly less than, say, 51 percent.

14 Q Uh-huh. I will move on to plan C. Zoom out just a
13:12:52 15 little. Can you see that?

16 A I can.

17 Q Okay. And as with the other plans, the map on the left
18 comes from Milligan Exhibit 3 page 4. That's your initial
19 report. The map on the right that corresponds to it is from
13:13:11 20 Tom Bryan's supplemental report, Defendants' Exhibit 4 at page
21 73.

22 So here we've got District 2, and I think this comes from
23 page 8 of your report that shows that it is at 50.06 percent
24 Black Voting Age Population, which by my math, equates to about
13:13:40 25 350 people of voting age? Does that sound sort of in the

1 ballpark?

2 A I think you're asking is it true that .06 percent of the
3 voting age population of a district is a few hundred people?

4 Q Uh-huh.

13:13:56 5 A That sounds reasonable to me.

6 Q Okay. Great.

7 My question here -- we have nine splits in this particular
8 map. I wanted to first ask about the ones here in the
9 southwest corner of the map. What traditional districting
10 principles led you to draw that sliver through Washington and
11 Clarke counties?

12 A Well, I don't specifically recall that decision juncture,
13 but I can imagine that one possibility might have been the
14 compactness of District 7.

13:14:39 15 Q Okay. What leads you to say that, just looking at the map
16 here?

17 A Well, again, if we're looking at the Polsby-Popper
18 measure, or indeed at the Reock measure, in either of those
19 cases, the idealized shape is a circle.

13:15:04 20 Q Uh-huh.

21 A And I can see that this -- it's conceivable -- since you
22 are asking me, I think, to speculate, it's conceivable that
23 this decision was made in order to produce a somewhat rounder
24 District 7.

13:15:17 25 Q Okay. And would another way to do that be to sort of

1 borrow from that hydraulic analogy, move counterclockwise now
2 to maybe pick up some of this intrusion into Jefferson County,
3 and then in the process, make these counties whole?

4 A There are honestly innumerable choices that you face
13:15:49 5 that's really only one of many conceivable ways to balance the
6 decision in a different manner.

7 Q Okay. And so there are numerous ways you could have also
8 potentially made either of these counties whole either as part
9 of District 7 or as part of District 2, correct?

13:16:12 10 A That's correct. And I think that you will find some
11 examples in the other illustrative plans.

12 Q Okay. And you think one reason that there are nine splits
13 in counties in this plan as opposed to six splits in counties
14 is because of your -- the weight you gave to -- I apologize to
13:16:48 15 flip around there -- was because of the weight you gave to the
16 criteria of ensuring two majority-black congressional
17 districts?

18 A There's no question. And I have consistently acknowledged
19 that I took minority electoral opportunity to be a
13:17:09 20 nonnegotiable principle sought in these plans.

21 I will mention here you're also seeing in some of these
22 decisions a high priority on compactness and, of course, on
23 contiguity.

24 Q And we'll get to that in a minute.

13:17:30 25 Turning next to plan B --

1 MR. NAIFEH: Before we move on to plan B, I want to
2 make sure that all of these demonstratives are being marked.
3 So I think we had one for plan B and one for plan C.

4 JUDGE MARCUS: Did you want to mark this one B? This
13:17:54 5 is plan B?

6 MR. NAIFEH: This is D. We also saw B and C.

7 JUDGE MARCUS: So you are asking him to mark B and C
8 as well as D?

9 MR. NAIFEH: Yes, Your Honor.

13:18:05 10 JUDGE MARCUS: Any objection to doing that,
11 Mr. LaCour? Because what you are showing is not exactly the
12 exhibit as it appears in Milligan 3. Plan C, B, and A are what
13 existed, except you typed in some stuff at the top, right?

14 MR. LACOUR: Exactly. No objections, Your Honor, for
13:18:24 15 plan B.

16 JUDGE MARCUS: Why don't we do this: Why don't we
17 just mark your modifications to Duchin's plans B, C, and D as
18 Defendants' identification 3, 4, and 5? If I have the numbers
19 right, I think that works.

13:18:41 20 MR. LACOUR: Yes, that's exactly right.

21 JUDGE MARCUS: Does that work for you, counsel?

22 MR. NAIFEH: Yes, Your Honor.

23 JUDGE MARCUS: All right. So the record is clear, the
24 exhibits being shown to Dr. Duchin by Mr. LaCour are
13:18:59 25 Illustrative Plans A, B, C, and D, which have been modified to

1 typing at the top of the page, county splits, and the
2 percentage of APBVAP in each of Districts 2 and 7. Is that
3 right?

4 MR. NAIFEH: In addition, they have also added a map
13:19:19 5 from Defendants' Exhibit 4.

6 JUDGE MARCUS: That's on the other part of it. The
7 other part of the page includes a defendants' exhibit from the
8 report of the supplemental report of Mr. Bryan. With that
9 caveat, exhibits 3, 4, 5 -- would it be 3, 4, 5, and 6,
13:19:40 10 Mr. LaCour, the four of them?

11 MR. LACOUR: I believe it's 2 --

12 JUDGE MARCUS: We have already marked -- okay, so it's
13 3, 4, and 5 are marked as defendants' exhibits for
14 identification. You may proceed. Thank you.

13:19:56 15 MR. LACOUR: Great.

16 BY MR. LACOUR:

17 Q Dr. Duchin, we now come to plan D. Thank you for your
18 patience.

19 This is one that splits Jefferson County among three
13:20:10 20 different districts, correct?

21 A That's correct.

22 Q Do you recall what percentage of Jefferson County's black
23 residents ended up in your version of CD 7 and what percent
24 were placed into CDs 4 and CD 6?

13:20:30 25 A I don't think I ever calculated those percentages

1 Q Or that compactness is required by federal law or Alabama
2 law?

3 A I can't speak to whether it's considered to be part of
4 Alabama law, not being an expert in Alabama law.

13:40:13 5 Q Fair.

6 A But I am aware that it's not considered to be federal law.

7 Q Okay. Did you look at Alabama practice, either in this
8 past redistricting cycle or past decades to see whether it
9 looked like the Legislature has been giving compactness that
10 level of priority as opposed to core retention?

11 A My principle means of learning about Alabama practice was
12 a study of the enacted plans from 2021 and from 10 years
13 earlier in 2011. And as one often does, when trying to
14 understand redistricting priorities, I did infer some
15 priorities and interpretations from the properties of those
16 plans.

17 Q And was respect for core retention one of the guiding
18 principles that you were able to infer from looking at the 2011
19 map as opposed -- or when compared to the 2021 map?

13:41:29 20 A Oh, I certainly agree that core retention seems to have
21 been highly prioritized in the creation of the 2021 plan.

22 Q Let's see. Turning now to communities of interest.

23 You referred this morning to the fact that there has not
24 been a sustained effort to map out or quantify all the
13:42:05 25 different communities of interest that might be present in the

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1 state of Alabama; is that correct?

2 A Oh, I think that goes farther than my statement. I just
3 said I wasn't aware of a state effort, and that I had checked
4 the state's redistricting website to confirm that.

13:42:26 5 Q Did you look at past maps to see if you could infer from
6 them any communities of interest?

7 A Well, I think it would be quite difficult to read
8 backwards to reverse engineer, you might say, communities of
9 interest from a map, particularly since, as I said this
13:42:52 10 morning, I don't think that each district itself constitutes a
11 unitary community.

12 But I did get some ideas about splittings from the state's
13 earlier plans, and as I mentioned, from the state's current
14 board of education plan.

13:43:11 15 Q Did you get any ideas about -- the opposite of
16 splittings -- keepings together, if you will, from the past
17 maps?

18 A Did I get any ideas about areas that were kept together,
19 sure. By observation I could see some areas that hadn't been
13:43:34 20 split. I'm trying to stay with the spirit of your question.

21 Q Okay. For example, how far back did you look at past maps
22 from -- past congressional maps from Alabama?

23 A As I've testified, I focused on the last two, on the maps
24 from 2011 and 2021.

13:43:58 25 I have definitely reviewed some older maps, but that would

1 be longer ago and farther from the current process.

2 Q Okay. So you couldn't say, for example, if two gulf
3 counties, Mobile and Baldwin, have been together in the same
4 district for half a century or not?

13:44:18 5 A I couldn't. Not with a high degree of certainty. But I'm
6 willing to believe that that's true at the congressional level.
7 It's certainly the case that Mobile County is split in the
8 current State Board of Education map, and that parts of Mobile,
9 city and county, are connected to parts of the Black Belt.

13:44:45 10 Q I will have a few questions for you about a map in a
11 moment. But returning to communities of interest. You said in
12 your report that it was possible to identify several clear
13 examples of communities of interest of particular salients to
14 black Alabamians.

13:45:06 15 Am I recounting your testimony from this morning correctly
16 that the two you focused on were preserving the cores of urban
17 areas and preserving just the core of the Black Belt?

18 A I would say -- the way I described it is retaining as much
19 of the Black Belt as possible in majority-black districts.

13:45:30 20 Q Okay. Now, the Black Belt counties with the exception,
21 perhaps, of Montgomery, do not contain those large urban
22 centers that you were referring to, correct?

23 A That's right. I would say Montgomery is the clearest
24 exception.

13:45:50 25 Q Okay. So did you take into account any other communities

1 of interest?

2 A The only two kinds that I considered were the two that you
3 just cited.

4 Q Okay. And it's possible there are communities of interest
13:46:18 5 that are relevant to white and black Alabamians alike, correct?

6 A No question about that. In particular, I think urban
7 cores are relevant to black and white Alabamians alike.

8 Q Were you able to infer from looking at the 2011 and 2021
9 maps how the Legislature has applied the community of interest
13:46:43 10 factor in the past?

11 A Well, as I've said --

12 MR. NAIFEH: Asked and answered.

13 JUDGE MARCUS: I think it has been. Sustained.

14 BY MR. LACOUR:

13:46:57 15 Q You know, could community of interest consideration
16 explain why Mobile and Baldwin counties were kept together in
17 2021?

18 A Did you say could it or did it explain?

19 Q Could it?

13:47:09 20 A Could it. Certainly could.

21 Q Could a community of interest explain why the Wiregrass
22 counties were kept together in the 2021 map?

23 A It certainly could.

24 Q Okay. And similar question, could communities of interest
13:47:26 25 considerations explain why Madison and Morgan counties were

1 kept together in the 2021 --

2 MR. NAIFEH: Objection here to this line of
3 questioning. It's calling for speculation.

4 JUDGE MARCUS: Okay to answer if she can give it to
13:47:42 5 us.

6 THE WITNESS: I'm willing to concede that it could,
7 but I was unable to find any systematic description of what
8 communities were considered. I would have indeed been very
9 happy to find such a description.

13:47:53 10 BY MR. LACOUR:

11 Q Could you describe the nature of your inquiry into how
12 that guideline might have been applied? I think you said you
13 looked for anything the state had put together. Did you do
14 anything further?

13:48:09 15 A No, that's all that I did to ascertain whether there had
16 been a state publication or a state collection process.

17 Q Okay. Now, I think you said earlier it was an express
18 goal of yours to keep the Black Belt counties in majority-black
19 districts to the extent you could. Is that fair?

13:48:40 20 A Yes.

21 Q And is it fair to say that you testified this morning
22 that's part of the reason why your compactness scores for CD 1
23 and CD 2 were lower, correct?

24 A That's right. Oops. Sorry.

13:49:01 25 Q Go ahead.

1 A That's right. The elongated east to west nature of the
2 Black Belt itself is the reason that CD 2 is also elongated in
3 east to west fashion and because that's close to the south of
4 the state, that ends up prescribing elongation for District 1,
13:49:26 5 as well.

6 Q Okay. So the goal of a majority-black district or rather
7 the goal of two majority-black districts that held most of the
8 counties in the Black Belt took precedence over compactness in
9 District 2?

13:49:43 10 A No. I can't agree with that. In my understanding of what
11 by Alabamalites should be considered reasonably compact, I used
12 the state's plan as a guide where the least compact district
13 from 10 years ago had a score, a Polsby-Popper score of .13.
14 All of my districts are more compact than that. So I think I
13:50:10 15 was able to maintain reasonable compactness by Alabama
16 standards in my entire plan.

17 Q Now, none of your plans put all 18 Black Belt counties
18 into one district, correct?

19 A That's correct. Although if -- I'm sorry.

13:50:30 20 Q No. Go ahead.

21 A If I remember right, at least one plan puts all 18 Black
22 Belt counties into either District 2 or District 7.

23 Q I'm not a hundred percent certain that's correct. But we
24 can --

13:50:51 25 A I am confident --

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1 Q We can turn to the maps?

2 A Sure. By memory, that's plan D.

3 Q Okay. And -- well, I've got plan D here, so... and

4 Milligan Exhibit 3, page 4. So I believe this is also a Black

13:51:22 5 Belt county, correct, where at least some of it is in

6 District 3?

7 A Indeed, that's right. And that should be Russell, I

8 think.

9 Q I believe --

13:51:32 10 A Which --

11 Q Correct.

12 A In plan C then. Russell is whole and is included in CD 2

13 as is the rest of the Black Belt included in either CD 2 or

14 CD 7.

13:51:46 15 Q Pickens in CD 3 in plan C is CD 4, correct?

16 A So that is not one of the 18 counties traditionally

17 identified with the Black Belt, although I agree with you that

18 sometimes is included on secondary lists.

19 Q Going to page 10 of your report. I think you list here

13:52:20 20 among the 18 Black Belt counties, Pickens county, correct?

21 A That's true that's listed there and not exactly sure which

22 one it is from memory in the map. But I will accept your

23 representation if you're saying that it's excluded in plan C.

24 Q Our count was that the 18 counties were split among at

13:52:53 25 least three districts in each map, but we can certainly compare

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1 and contrast that later.

2 A Sure. I would be happy to do that later.

3 Q I want to get back to -- so do you recall if there was a
4 reason why all 18 counties were not placed into just two
13:53:21 5 districts instead of three?

6 A Well, again, with apologies for repetition, one is
7 balancing as a mapmaker. Quite a formidable number of
8 different priorities, and it's possible that that goal was only
9 attained in 17.5 counties, which is I think what we see in
13:53:43 10 plan B, 17.5 out of 18.

11 I would submit that that's quite a ways towards the goal
12 of securing representation in majority-black districts
13 throughout the Black Belt. And to that I would only add one
14 could certainly get all 18, but it would come at a cost to
13:54:06 15 other principles as we keep hearing.

16 Q Would it potentially come at a cost to two majority-Black
17 Voting Age Population districts?

18 A So now I think you're asking is it possible to get all 18
19 into Districts 2 and 7 in a plan where those remain
13:54:29 20 majority-black, right?

21 Q Right.

22 A I am confident that that's possible. But it would require
23 either more county splits or less compactness and more likely
24 both.

13:54:41 25 Q Okay. So if your goal was to get most of the Black Belt

1 counties both together and into majority-black districts, would
2 it be fair to say the community of interest you were trying to
3 keep together was not so much the Black Belt as it was just
4 black people more generally?

13:55:05 5 A No, I don't think so. I don't think anywhere here or ever
6 have I identified black people, full stop, as a community of
7 interest. Communities of interest, in my understanding, are
8 primarily geographical. And so that would not qualify.

9 Q Okay. I will take this down.

13:55:37 10 Okay. Do you recall from the guidelines a statement we
11 were looking at just a moment ago that says contest between
12 comments will be avoided whenever possible?

13 A That's right. If I recall, that's in that section j. that
14 we discussed.

13:56:00 15 Q Right. And you didn't address incumbents anywhere in your
16 report, did you?

17 A That's right. I did not, although I did obtain a list of
18 incumbent addresses while forming the plans. Those were not
19 part of the primary plan drawing. I did look at the number of
13:56:24 20 districts pairing incumbents at the end, although that's not
21 included in the report.

22 Q Okay. So you know whether the maps place one incumbent in
23 each district or whether they put multiple incumbents in some
24 districts?

13:56:42 25 A From memory, I think it's the case in all four of my

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1 illustrative plans that there were two districts with multiple
2 incumbents, either two incumbents or in some cases even three.

3 Q Okay. And if Tom Bryan's supplemental report indicated
4 that between four and five incumbents in two different
13:57:07 5 districts --

6 A That's consistent -- sorry.

7 JUDGE MARCUS: Let him finish the question. Was there
8 a question there, Mr. LaCour? If there was, let me hear it,
9 please.

13:57:19 10 BY MR. LACOUR:

11 Q Yeah. So if Tom Bryan's report, Defense Exhibit 4 at page
12 16 indicated that your plan places four and five incumbents in
13 districts with each other. Do you have any reason to doubt
14 that conclusion?

13:57:33 15 A No. On the contrary, I agree with that conclusion, that
16 there are either two districts with two incumbents making four
17 overall, or one with two and one with three making five
18 overall.

19 Q And you said you didn't consider incumbents at the outset
13:57:46 20 of your map drawing process?

21 A That's correct.

22 Q Did you consider them at any point in your map drawing
23 process?

24 A I did look at the end state the finalization stage to see
13:58:00 25 whether it would be possible to reduce the incumbency

1 pairing -- not to reduce incumbency itself. And I -- I
2 determined that it would be possible, for instance, to keep
3 Representative Sewell in District 7, which she has represented,
4 and I believe that my plan D does so. That was accomplished
13:58:28 5 with little cost to the other principles.

6 I also satisfied myself that it would be possible to
7 further reduce the incumbency pairing and indeed to reduce it
8 to no pairing at all if we are willing to sacrifice the
9 higher-ranked principles of compactness, and certainly
13:58:50 10 contiguity, but also if we are willing to sacrifice the county
11 integrity.

12 Q And there's a lot to be accomplished if you sacrificed
13 contiguity, correct?

14 A Yes. Although as we heard in the Massachusetts example,
13:59:04 15 not everything.

16 Q Not everything. You don't think it's possible to draw a
17 geographically -- or basically you don't think it's possible to
18 draw a map that is as compact as the maps you have produced as
19 the other criteria to the extent you've applied them also
13:59:29 20 avoids pairing incumbents and results in two majority-black
21 districts?

22 A I think what I'm comfortable saying is that to reduce
23 pairing of incumbents all the way to zero could still be
24 accomplished with two majority-black districts, I think that it
13:59:49 25 can, but at significant cost to the other principles. If I

1 could add one thing.

2 Q Please.

3 A Just to illustrate some of the tradeoffs that that
4 requires, I note in my report that two incumbents actually live
14:00:05 5 not only in the same county, but a few highway exits apart.
6 And so it's clear that to keep those incumbents in different
7 districts, of course one has to split that county. That's just
8 a small illustration that it can literally require sacrifice to
9 the other principles in order to raise the priority on
14:00:31 10 incumbent protection.

11 Q One second. I apologize.

12 Okay. Turning to back to core retention. So you looked
13 at the 2011 map and you looked at the 2021 map. Before you got
14 started drawing your own illustrative maps. And you said
14:01:12 15 earlier that it -- you could infer that core retention might
16 have been important to the 2021 Legislature. Is that fair?

17 A In fact I inferred that it was.

18 Q Okay. I think you testified earlier today that it is
19 impossible to have as high a core preservation as the 2021 map
14:01:36 20 has while having two majority-black districts; is that correct?

21 A Yes, I believe that to be a simple matter of numbers.

22 Q Okay. When you were gearing up your algorithm, did you
23 try to preserve some degree of the core of districts in drawing
24 your first few thousand maps or --

14:01:59 25 A That was -- I'm sorry.

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1 Q Sorry. Go ahead.

2 A That was not a consideration.

3 Q Okay. What preservation like some of the other criteria

4 -- I mean, it could be a matter of degree. Would you agree?

14:02:18 5 A Yes, I would.

6 Q So you could try to preserve 80 percent of the cores of
7 districts or on average try to preserve 80 percent of the cores
8 of districts as one of your goals, correct?

9 A You could adopt that as a goal. That's the question?

14:02:38 10 Q Yes.

11 A Yes, you could.

12 Q And could your algorithm pull that in as constraints or as
13 a preference in producing maps?

14 A Yes, I have done that in the past in other states.

14:02:55 15 Q Okay. But not in this case, correct?

16 A I did not include that in this case.

17 Q Core retention is a traditional redistricting principle,
18 correct?

19 A Well, I would say that like incumbency consideration, it
14:03:13 20 is expressly encouraged in some states and is prohibited in
21 others as a consideration making it somewhat less traditional.

22 Q But it's not uncommon for a legislature when it sets down
23 to draw a new set of maps to start with the old set of maps,
24 correct?

14:03:35 25 A That requires me to speculate about process. Although I

1 do think it's a reasonable inference.

2 Q Okay. In any event, it was inference you made in Alabama
3 for 2021, correct?

4 A That's right.

14:03:51 5 Q So you mentioned the State Board of Education map a few
6 times today. And you said that was informative for you in
7 drawing your illustrative plans?

8 A I considered it. I wouldn't put it high up on the list of
9 considerations, but at some point in the line drawing process I
14:04:26 10 became curious just how that second majority-black district was
11 formed.

12 Q Uh-huh.

13 A And so I looked to that map to give me a sense of
14 priorities that the state had in drawing it.

14:04:43 15 Q Okay. In trying to draw a congressional map in
16 understanding the state's priorities, do you think the way the
17 state drew its 2021 congressional map would be a more
18 informative source, or the way it drew its 2021, eight-member
19 State Board of Education map?

14:05:00 20 A I treated them both as highly informative.

21 Q Okay. Do you think one would be more informative than the
22 other?

23 A That's hard to say. I mean, we are talking about a
24 congressional plan, but if the question that you're seeking to
14:05:20 25 answer is how to make a decision that is not present in the

1 Q Okay. So we are getting close to the end, Dr. Duchin. I
2 appreciate your patience with me today.

3 Returning to something you said near the beginning. You
4 talked about how you used your -- the algorithm and algorithmic
14:15:15 5 computer system to generate a large number of maps.

6 A Yes.

7 Q And you had certain constraints put in on the front end
8 when you started generating those maps. And I believe you said
9 minimum population deviation, I think, was it plus or minus
14:15:34 10 1 percent?

11 A Yes.

12 Q And contiguity was baked in, as well, correct?

13 A Correct. The algorithm always enforces contiguity at the
14 VTD level and the population deviation threshold can be
14:15:52 15 specified by the user.

16 Q Okay. What other constraints did you program in at the
17 outset before you started generating maps?

18 A The only other constraints -- okay. So I doubt that you
19 want to hear specifics, but if you do, I'm happy to expound on
14:16:15 20 any of this, so let me know.

21 The algorithm in general has a strong preference for
22 compactness that's, as you said, baked in. It doesn't have to
23 be set by the user. The way that districts are formed, it's
24 done in a manner that generally strongly favors compactness,
14:16:34 25 particularly by the cut edges definition that I described

1 earlier.

2 The only other constraint that was added in that early
3 algorithmic -- in fact, not a constraint, but an algorithmic
4 preference, was to prefer plans in which there would be a
14:16:54 5 second majority-minority district. And I can explain how that
6 was done, if you would like to hear.

7 Q That would be great.

8 A Sure. So if you look at the BVAP in all seven districts
9 of a plan, we used what's called an objective function. In
14:17:13 10 other words, a function that sets a goal. And that function
11 credited a point to a plan with a majority-minority district
12 and then took the BVAP in the second district, second highest
13 BVAP, and added it to that. So that, for example, a plan with
14 one district at 52 percent and a second at 47 percent would get
14:17:39 15 a 1.47 score.

16 Am I making sense so far?

17 Q As much sense as you will make to me.

18 A Thanks for saying. I appreciate that.

19 So -- and then the way the algorithm is what's called a
14:17:58 20 mark-off chain, and it randomly proposes a new district
21 configuration and then flips what you can think of as a
22 weighted coin, and so the probability of acceptance was higher
23 if that score was greater. And in that way, an algorithm like
24 that can be shown -- there's -- my lab has published papers on
14:18:16 25 this topic. An algorithm like that can be shown to do a good

1 job at finding plans that are worthy of consideration in
2 *Gingles I* direction.

3 Q Okay. But you did not run the algorithm without that
4 strong preference for two majority-black districts, then, did
14:18:40 5 you?

6 A I did, in fact.

7 Q Okay. How many maps were generated when you did that?

8 A In fact, I have a publication where I do that in Alabama.
9 And in that paper, we generated 2 million districting plans for
14:18:59 10 Alabama, which I think we'll agree is quite a few. And we
11 found some with one majority-black district, but never found a
12 second with a majority-black district in 2 million attempts.
13 But, again, that's without taking race into account in any way
14 in the generation process.

14:19:19 15 Q Okay. So if you programmed into the algorithm traditional
16 districting criteria that did not include race, and you
17 generate 2 million maps, not one of them would have two
18 majority-black districts in it?

19 A Well, I have to say that I regard minority opportunity to
14:19:42 20 elect as an important traditional principle. So I don't know
21 of a way to talk about the traditional principles that is truly
22 race blind.

23 Q Would -- I think you -- would you characterize a map,
24 then, that -- assuming for a second that principle of
14:20:10 25 avoiding -- put it as minority vote dilution or creating

1 minority opportunity, how would you state the principle? I
2 want to make sure I'm stating it as you would.

3 A Minority opportunity to elect, I have called it, or
4 minority electoral opportunity.

14:20:27 5 Q Okay. So if we remove that sort of more race focused
6 minority opportunity to elect factor from the process and you
7 run your 2 million maps, if you were to get a map that had two
8 majority-minority districts that was manmade, that would
9 suggest as an extreme outlier, correct, if it was purporting to
14:21:00 10 apply the same traditional race blind districting principles?

11 A Just -- as someone who uses that term professionally quite
12 a bit, I think that's a misuse of the term.

13 Q How so?

14 A So the term extreme outlier implies a probability
14:21:21 15 distribution in which you're in the tails. If -- I don't
16 understand any way to construct a probability distribution that
17 reflects the traditional principles and is race blind. As I've
18 said, I think it's part and parcel, in fact, of the
19 nonnegotiable federal level principles. And so I don't know of
14:21:42 20 a way to talk about the traditional principles as a package
21 that is race blind.

22 Q Okay. So you offered no opinion in -- I'm sorry. Please
23 finish if --

24 A Well, I only was going to say that I don't mean to be
14:21:57 25 resisting the question. I am trying to characterize it in

1 language I am comfortable with.

2 Q Yeah. This is helpful.

3 So you don't offer any opinion, then, in this case as to
4 whether you could get -- whether it's possible to draw two
14:22:14 5 majority-minority districts in Alabama that respect traditional
6 districting criteria in a race blind way?

7 A It is certainly --

8 MR. NAIFEH: Objection. That mischaracterizes what
9 she said.

14:22:31 10 JUDGE MARCUS: Let's finish the question. Before you
11 answer, Dr. Duchin, give us a chance. I am not sure I heard
12 the entire question. The objection came in at the tail end of
13 the question. Let's ask it crisply and then we will hear the
14 objection.

14:22:48 15 MR. LACOUR: Thank you, Your Honor.

16 BY MR. LACOUR:

17 Q So Dr. Duchin, you said before that you don't really know
18 how to take into account traditional districting criteria
19 without also including that more race focused criteria of
14:23:03 20 ensuring minority representation, correct?

21 A I do know how to run algorithms that are race blind, but I
22 don't know how to think of those as answering to the
23 traditional principles. They equally -- just to illustrate, I
24 can also run algorithms that don't equalize populations and let
14:23:25 25 some districts get ten times as big as others. But then I

1 think we've departed from the traditional principles.

2 Q Okay. So you offer no opinion, then, in this case,
3 though, as to whether it's possible to draw according to all
4 traditional redistricting criteria minus that one -- the race
14:23:48 5 focus criteria of two majority-black districts in the state of
6 Alabama?

7 A That question I can certainly answer.

8 It is possible, because the world of possibility includes
9 my demonstrative maps, which could be arrived at through a
14:24:07 10 random process. So it is certainly possible.

11 Q Okay. But when you applied a random process in that study
12 you referenced earlier and you drew 2 million maps, not one of
13 them came back looking anything like one of the four
14 illustrative maps, at least when it comes to Black Voting Age
14:24:30 15 Population in two districts?

16 A Well, I can't answer whether one of them had a
17 majority-black district and a second that was 49.999, in which
18 case it could closely resemble one of the ones that I drew.
19 But I can say that my understanding is that race consciousness
14:24:51 20 is expressly permitted in order to achieve minority electoral
21 opportunity, and in particular, in order to draw majority-black
22 districts, stands to reason that one must consider race. And I
23 think the study that I referenced showing that it is hard to
24 draw two majority-black districts by accident shows the
14:25:15 25 importance of doing so on purpose.

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1 Q So -- okay. Sorry. One moment, please. Are you familiar
2 with Dr. Imai -- I'm -- try to say his first name -- I know
3 I'll get it wrong. Dr. Kosuke Imai?

4 THE WITNESS: It's Kosuke and certainly his -- he and
14:25:50 5 I have talked for many years about the development -- or for
6 districting algorithms.

7 BY MR. LACOUR:

8 Q Okay. He also engages in extreme outlier analysis,
9 correct?

14:26:02 10 A He does.

11 MR. NAIFEH: I am going to object. This is outside
12 the scope of direct and outside the scope of her opinions in
13 this case.

14 JUDGE MARCUS: Are you asking her to comment on
14:26:13 15 Dr. Imai's opinion?

16 MR. LACOUR: Your Honor, she said a moment ago that
17 she would reject the --

18 JUDGE MARCUS: I'm asking you whether you are asking
19 her to comment about Dr. Imai's opinions.

14:26:23 20 MR. LACOUR: Not to question his opinions, but to see
21 if her -- his opinions might affect her opinion of what is
22 possible when it comes to drawing majority-black districts in
23 Alabama.

24 JUDGE MARCUS: You might ask if she is familiar with
14:26:44 25 his opinion in this case.

1 BY MR. LACOUR:

2 Q Dr. Duchin, you are familiar with Dr. Imai's opinions in
3 this case?

4 A Absolutely not. In fact, I only very recently learned
14:26:54 5 that he was a witness in this case at all.

6 Q Okay. Would it surprise you if I told you that he drew
7 30,000 sample maps?

8 MR. NAIFEH: Objection.

9 JUDGE MARCUS: Let him finish the question,
14:27:14 10 Mr. Naifeh. Please.

11 BY MR. LACOUR:

12 Q Would it surprise you if I told you that he ran an
13 algorithm that produced 30,000 sample congressional maps in the
14 state that adhered to certain traditional districting criteria,
14:27:31 15 including incumbency which I know your maps did not, and that
16 of the 30,000 maps, not one of them came back with two
17 majority-black districts?

18 JUDGE MARCUS: The objection is sustained.

19 MR. LACOUR: Okay. Let me just have one moment to
14:27:57 20 confer with my colleagues.

21 JUDGE MARCUS: Sure. Take your time.

22 (Mr. LaCour confers with co-counsel.)

23 BY MR. LACOUR:

24 Q Two quick final questions, and then I can let you go.
14:28:24 25 So if you were to learn that Alabama split Mobile County

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CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Christina K Decker

01-06-2022

Christina K. Decker, RMR, CRR
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ACCR#: 255

Date

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, et al., *
Plaintiffs, * 2:21-cv-1291-AMM
vs. * January 7, 2022
* Birmingham, Alabama
* 8:30 a.m.

JOHN MERRILL, in his official *
capacity as Alabama Secretary *
of State, et al., *
Defendants. *

EVAN MILLIGAN, et al., *
Plaintiffs, * 2:21-cv-1530-AMM

vs. *
JOHN MERRILL, in his official *
capacity as Alabama Secretary *
of State, et al., *
Defendants. *

MARCUS CASTER, et al., *
Plaintiffs, * 2:21-cv-1536-AMM

vs. *
JOHN MERRILL, in his official *
capacity as Alabama Secretary *
of State, et al., *
Defendants. *

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
VIA ZOOM CONFERENCE
VOLUME IV
BEFORE THE HONORABLE ANNA M. MANASCO,
THE HONORABLE TERRY F. MOORER,
THE HONORABLE STANLEY MARCUS

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1 comparable districts in the Hatcher plan, you may see a couple
2 of instances there where the Hatcher plan is not as low, just
3 because it does not have boundaries that exactly follow those
4 physical features. But in aggregate, across the board, every
10:21:01 5 measure that you would look at would say the Alabama plan is
6 superior, sometimes significantly so to the Hatcher plan.

7 Q Got it. But the Court, if it wants to look at Table 5.4
8 and 5.5 and compare the scores for each district in the Hatcher
9 plan and the state's plan; is that right?

10:21:24 10 A Right.

11 Q Okay. Let's look at some of the maps you prepared for the
12 Hatcher plan, Mr. Bryan. I want to turn now to Page 44 of your
13 report, Page 44 according to the filing information on the top
14 of the page.

10:21:45 15 What do we see in this map, Mr. Bryan? This Map
16 Appendix 5?

17 A Sure.

18 Q Tell us what you are showing us in this map.

19 A Sure. So this is a -- this is consistent with some of the
10:22:07 20 other maps that we've produced for different plans. It's an
21 outline of the Hatcher plan, and it shows the percent black
22 alone by -- let's see -- this is actually mislabeled. This is
23 a black alone by county map. So I would disregard the label
24 within the map and refer to the map appendix, the title of the
10:22:33 25 map. This is black alone by VTD -- by county.

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1 Q Thank you.

2 Now, this District 2 -- you see my cursor moving, I take
3 it, on the screen?

4 A Yes, I see.

10:22:49 5 Q District 2, which takes part of Mobile County and then
6 goes east, and District 7 which includes this finger into
7 Jefferson County, those are the two majority-black districts in
8 the Hatcher plan, are they not?

9 A That's correct.

10:23:01 10 Q Is there any county in the state that is more than
11 40 percent black population that is not included in either
12 District 7 or District 2 in the Hatcher plan?

13 A There's only two pieces that I see. There's, again, in
14 Jefferson, there's a little portion of the district that goes
10:23:28 15 outside of 7. And then, I think similarly, you move your
16 cursor down and over to the right, that county with 79 percent
17 goes just over the edge. And that's slightly split by
18 district, as well.

19 But other than that, yeah. And 43 right there. Other
10:23:48 20 than that, there's no other 40 percent or greater wholly
21 contained counties in any other districts.

22 Q Let's move to the next map, Map Appendix 6. What are you
23 showing us here?

24 A Yeah. So this would be the Voting Age Population by
10:24:06 25 county overlaid with the Hatcher plan, again showing the high

1 concentrations of population in Jefferson County and Mobile and
2 Baldwin counties.

3 Q Where does it appear, according to this map, that
4 District 7 is getting most of the people that populate this
10:24:26 5 district? Most of the people, regardless of race.

6 A Yeah. The biggest piece would be coming from the area in
7 Jefferson County.

8 Q And where would District 2 be getting most of its total
9 population?

10:24:44 10 A It's a little less clear here because you've -- it is
11 intersecting the Mobile and the Baldwin counties to the
12 southwest. But there is another also another populous county
13 in north central -- 177,427, right in there. So that's a
14 corner, just given that we have 700-and-some thousand
10:25:07 15 population, that county would be contributing
16 disproportionately to the overall plan.

17 Q Yeah. This is Montgomery County, correct?

18 A Yeah. Correct. It's not labeled on my map, but, yeah, I
19 believe that's correct.

10:25:19 20 Q Let's look at Map Appendix 7 on the next page.

21 A Sure.

22 Q What do we see here, Mr. Bryan?

23 A Yeah. So this is the -- this is the plan that shows the
24 percent black alone by the VTDs overlaid with the Hatcher plan.

10:25:37 25 Q Okay. What, if anything, is indicative to you of the map

1 drawers' intention when you look at the splits of, say,
2 Jefferson County, here between 7 and 6, and Mobile County
3 between Districts 2 and 1?

4 A Sure. I'll be careful to put myself in the mindset or
10:26:10 5 speak for the intention of the map drawer. I will speak more
6 so to the appearance or the outcome of the map, if that is all
7 right.

8 Q Assume that's what I asked. Is this any appearance here
9 that jumps out to as an a demographer?

10:26:29 10 A Yes. I would be more precise if I focus on that than
11 intent.

12 As you follow the new District 2 starting kind of over on
13 the eastern edge of the state near the border, near where
14 Columbus is, and you see that the northern edge of District 2
10:26:49 15 starts tracing from east to west across the central part of the
16 state, you can see easily that that line almost precisely
17 exactly follows the contours of the very highest black
18 population VTDs -- can literally go from one to the next and
19 look on the northern edge of that line and see what I call the
10:27:14 20 yellow, red, you know, 10 percent, 20 percent black, and then
21 you go below that line and you immediately see a 60 percent or
22 more black. It is literally like the dividing line of black
23 and much less black population.

24 As you follow that boundary around to the central part of
10:27:36 25 the state through the Black Belt, District 2 turns south and

1 goes down towards Mobile and Baldwin counties. You can see
2 that the map -- and the map that District 2, the boundaries of
3 it go down around Mobile. I think we have another map that may
4 show it in more detail. But we can illustrate that in this
10:27:57 5 plan the boundaries of District 2 went around Mobile, not
6 following a city boundary or any other administrative
7 boundaries. It just followed the edge of where black
8 population was and was not.

9 Similarly, in District 7, you can see that it captures
10:28:18 10 large portions, very carefully captures large portions of black
11 populations. And as you go into Birmingham, Jefferson County,
12 you can see that it nearly perfectly outer bounds only the
13 exact black population VTDs in the northeast corner of
14 Birmingham.

10:28:35 15 Q Why don't we go ahead and look at some of the close-up
16 maps that you prepared.

17 Let's look at Map Appendix 9?

18 A Right.

19 Q What do we see here, Mr. Bryan?

10:28:52 20 A Sure. So the dark line, if you can see carefully enough
21 it's kind of dark black and a purple line. That's the existing
22 district boundaries.

23 The --

24 Q Let me interrupt you. By existing, do you mean the 2011
10:29:08 25 plan?

1 A Yes.

2 Q Okay.

3 A Thank you.

4 The existing 2011 district plan. And what I have done
10:29:16 5 here is I have overlaid, again, with a blue outline where the
6 Hatcher plan boundaries are. And if you look, what the Hatcher
7 plan does, is it kind of follows closely along where the
8 existing districts were, but then I have shown with little blue
9 dots here where the Hatcher plan did what we call an outer
10:29:43 10 bound. That is it went beyond the existing districts and
11 grabbed just the precincts that had the highest concentrations
12 of black population.

13 You can see that there are plenty of VTDs surrounding
14 Birmingham that are colored yellow and orange, reflecting lower
10:30:07 15 black population concentrations. And the plan just really
16 prioritized -- appears to have prioritized making sure that it
17 got the highest black concentration VTDs into the plan.

18 Q Thank you.

19 Let's look at the next map, Map Appendix 10.

10:30:35 20 A Sure.

21 Q What are you showing us with this map, Mr. Bryan?

22 A Yeah. So one of the -- in just looking at the data for
23 the new Alabama plan, what I suspected we were going to find is
24 that there were some VTDs -- I did not know where, but there
10:30:54 25 would be some VTDs where there was black population that would

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Christina K Decker

01-07-2022

Christina K. Decker, RMR, CRR
Federal Official Court Reporter
ACCR#: 255

Date

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, et al., *
Plaintiffs, * 2:21-cv-1291-AMM
vs. * January 12, 2022
* Birmingham, Alabama
* 8:30 a.m.

JOHN MERRILL, in his official *
capacity as Alabama Secretary *
of State, et al., *
Defendants. *

EVAN MILLIGAN, et al., *
Plaintiffs, * 2:21-cv-1530-AMM

vs. *
JOHN MERRILL, in his official *
capacity as Alabama Secretary *
of State, et al., *
Defendants. *

MARCUS CASTER, et al., *
Plaintiffs, * 2:21-cv-1536-AMM

vs. *
JOHN MERRILL, in his official *
capacity as Alabama Secretary *
of State, et al., *
Defendants. *

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
VIA ZOOM CONFERENCE
VOLUME VII
BEFORE THE HONORABLE ANNA M. MANASCO,
THE HONORABLE TERRY F. MOORER,
THE HONORABLE STANLEY MARCUS

CHRISTINA K. DECKER, RMR, CRR
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101 Holmes Avenue, NE
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Proceedings recorded by OFFICIAL COURT REPORTER, Qualified pursuant to 28 U.S.C. 753(a) & Guide to Judiciary Policies and Procedures Vol. VI, Chapter III, D.2. Transcript produced by computerized stenotype.

CHRISTINA K. DECKER, RMR, CRR
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P R O C E E D I N G S

(In open court.)

JUDGE MARCUS: Are the parties ready to proceed?

MR. DAVIS: Defense is ready, and Mr. Byrne the next
08:29:49 5 witness is here and ready, Judge.

JUDGE MARCUS: Okay. Caster plaintiffs are ready?

MS. KHANNA: Yes, Your Honor.

JUDGE MARCUS: And the Milligan and Singleton
9 plaintiffs?

MR. BLACKSHER: Singleton are.
08:30:00 10

MS. WELBORN: Milligan are, as well, thank you.

JUDGE MARCUS: We are going to turn now to your next
12 witness, Mr. Davis.

MR. DAVIS: Thank you, Judge. The defense calls
14 Mr. Bradley Byrne.
08:30:12 15

BRADLEY BYRNE,
16
17 having been first duly sworn, was examined and testified as
18 follows:

JUDGE MARCUS: Thanks very much. And if you would be
19 kind enough to state your name for the record.
08:30:30 20

THE WITNESS: My name is Bradley Byrne, B-R-A-D-L-E-Y,
21 B-Y-R-N-E.
22

JUDGE MARCUS: Thank you very much. And with that,
23 Mr. Davis, you may proceed.
24

MR. DAVIS: Thank you, Judge.
08:30:40 25

1 sixth generation ship builders. Making ships is not like any
2 other manufacturing process because they're so darn big. It's
3 just a lot more to it than making a car, or even making the
4 airplanes that Airbus makes here.

08:44:09 5 So we -- that ship building for the Navy here is a big
6 deal.

7 Q In the years when you were representing this area in
8 Congress, Mr. Byrne, were there any particular issues that you
9 would focus on?

08:44:23 10 A Sure. When you are a Congressman, you're the primary
11 representative for the people in your district in Washington,
12 D.C.

13 So there were a myriad of things that were particular to
14 this district that I had to focus on. The shipyard, for
08:44:43 15 example, very critical that we make sure those ships are
16 authorized and appropriated year after year after year.
17 There's nothing automatic about that. There's a fight over
18 that every year.

19 But it may sound mundane. We had a huge issue here in
08:44:56 20 involving the Gulf Red Snapper, which is the number one fish
21 people like to catch out in the Gulf of Mexico. We have a huge
22 industry in Orange Beach built up around charter boats, people
23 that own their own boats. Think about it. It is not just the
24 fact of the boat, it's you have to buy fuel for the boat, you
08:45:14 25 have to buy ice for the boat, you have to buy bait for the

1 boat, you have to buy beer to go out and have fun in the summer
2 time. It's a huge industry. And we have a real problem with
3 those seasons being artificially shortened, and we had to go
4 work on trying to get those seasons back to a reasonable level.
08:45:32 5 For friends of mine that wanted to go fishing on Saturday, it
6 was for that industry. It was important.

7 We have a program in the federal government called GOMESA.
8 It is an acronym. But basically, it provides a certain
9 percentage of what the federal government gets in off shore gas
08:45:47 10 leases and oil leases that go to the states that border the
11 Gulf of Mexico. That's to help them deal with what could be
12 the very negative effect from that like with the BP oil spill
13 that we had back in 2010. So I was constantly working on that
14 and similar programs.

08:46:03 15 So I actually formed a caucus in Congress called the I-10
16 Caucus because those of us that represented districts in the
17 Gulf Coast had sort of unique problems that we would actually
18 work on together because those same interests weren't shared
19 with our colleagues and our state delegations up in the upper
08:46:21 20 parts of our states. So we would work together on things like
21 that.

22 And then there would be just the stuff that, you know,
23 every industry faces when you deal with federal government
24 regulations. Ship building has all sorts of interesting issues
08:46:36 25 with the Coast Guard, et cetera. So, yeah, I mean, I had to

1 work on those. And really had to become an expert on those
2 issues along with my staff.

3 Q Obviously, a longer snapper season would benefit the
4 people who enjoy going out in the Gulf and fishing. Does it
08:46:54 5 have any benefit to other residents of the First District
6 having a healthy fishing industry?

7 A Okay. That's an industry around it. There are charter
8 boat fleets, people that work on charter boats. There are
9 people that run marinas. There are people that sell fuel.
08:47:10 10 There are people that sell ice. There are people that sell
11 bait. There are people that, you know, provide condos and
12 hotel rooms that people stay in when they go fishing.

13 I mean, I remember when I was first elected and I had a
14 meeting with the people in Orange Beach that were in that
08:47:24 15 industry, and the room was just crammed full of people. I
16 never really thought of it that clearly before just how many
17 people were touched by the fact that we do or do not have a
18 good snapper season. And it was a major motivation to make
19 sure that we got that problem solved because it touched so many
08:47:41 20 different lives and touched so many different jobs.

21 Q Would issues that you worked on such as is the snapper
22 season or a healthy port or a healthy ship building industry,
23 would they help both the black and the white residents of the
24 First District?

08:47:55 25 A Oh, yeah. I mean, people down here, we have people of all

1 races that are working in all of these industries. And it's a
2 major source to get good high paying jobs. So it's a benefit
3 to everybody that we do that.

08:48:15 4 Q Uh-huh. Are you familiar with the Wiregrass region in the
5 Second District?

6 A I am. I told you earlier that I was a chancellor of
7 post-secondary education for the state of Alabama. And we had
8 three or four colleges in the Wiregrass region. We had a
9 number of vacancies in those colleges, so I had to go through
08:48:37 10 presidential searches. When you do a presidential search for a
11 community college, you have to involve the community. You have
12 to get involved with the community. You have to understand
13 that community.

14 So, for example, Lurleen B. Wallace Community College in
08:48:55 15 Andalusia, Alabama, that's Covington County, I spent a lot of
16 time in Andalusia because we had to build a vacancy there. So,
17 yes, I have spent a lot of time in the Wiregrass of Alabama
18 because of that position.

19 Q Tell me how the interest of the Wiregrass would compare to
08:49:13 20 the interest of the counties that are in the First
21 Congressional District.

22 A Well, what I described to you before is in the First
23 Congressional District southwest Alabama, something's built
24 around the water, okay? The Wiregrass is built around a couple
08:49:29 25 of things. Fort Rucker, which an Army helicopter training base

1 there in Ozark is a big part of the Wiregrass. Troy State
2 University is a huge part of the Wiregrass.

3 People in the Wiregrass sort of revolve around Dothan down
4 at the southern end and Montgomery at the northern end. And
08:49:53 5 they have agricultural interests that are different from the
6 agricultural interests that will be out here in southwest
7 Alabama. They don't have a nursery industry like we have here.
8 We have major wholesale nursery businesses here. They don't
9 have major watermelon crops. They don't have major pecan
08:50:13 10 crops. They're more built in to peanuts and cotton and cattle.

11 So they face, for example, during -- during in Andalusia,
12 Alabama, you face more towards Troy or Ozark or Dothan. You
13 don't face down here in southwest Alabama. In addition, it's
14 kind of hard to get from Mobile to the Wiregrass. We don't
08:50:36 15 have really good highway connections over there. So it's not
16 easy for people from there to come here or for people from here
17 to go there.

18 So they sort of face to the southeastern part of the
19 state. We face to the southwestern part of the state.

08:50:52 20 Q If you were representing the Second District, would you
21 focus on the same issues that you are focused on when
22 representing the First?

23 A No, sir. For example, I was on the Armed Services
24 Committee, and with the Navy shipyard, I am going to be focused
08:51:07 25 on Navy stuff.

1 If I represented the Second Congressional District, I
2 would be focused on the Army and particularly Army helicopters.
3 That's what they do at Fort Rucker.

4 In this district, I was focused for higher education
08:51:21 5 reasons on the University of South Alabama. If I represented
6 the Second District, I would be focused on Troy. Now, Troy has
7 a different mission from the University of South Alabama. They
8 have an international presence. So working with Troy would be
9 very different from working for the University of South
08:51:36 10 Alabama. Troy doesn't have a medical school, but it has a
11 whole lot of other stuff that's pretty darn important. So
12 there would -- and the agricultural interests I just described
13 are very different.

14 So I would think being the congressman from the Second
08:51:51 15 District requires a different level of expertise and level of
16 expertise that I feel like I had to have to represent this
17 district.

18 Q I want to share another screen now, Mr. Byrne. And this
19 is Milligan Exhibit 3, page 7 of that exhibit.

08:52:11 20 These are some proposed congressional maps that one of the
21 plaintiffs' experts presented, I will represent to you,
22 Mr. Byrne.

23 Review just say these -- here's Plan A and B, and then I
24 will scroll down to Plan C and Plan D, as well.

08:52:29 25 Focus on any of those, and tell us what's your reaction

1 is. Do you see any issues with representing these districts?

2 A Yes. If you look at Plan A and Plan B, you see it takes
3 in part of Mobile County, all of Baldwin County, and then goes
4 east into the Wiregrass legion. So you would essential have to
08:52:56 5 become an expert on two different regions altogether, two
6 different communities of interest. I know that's important for
7 those proceedings.

8 Then if you look at that district just above it, that
9 district is essentially part of the Black Belt and part of
08:53:14 10 southwest Alabama. So the person representing that district
11 would essentially have to have two very dramatically different
12 sets of expertise. I think it would be very difficult to be
13 the congressman for either of those districts not just the fact
14 you would have this vast geographic area you would have to
08:53:33 15 cover, but you would be covering two very different communities
16 of interest.

17 Q Uh-huh. Why would it make it more difficult to represent
18 a district if it encompassed different communities of interest?

19 A Well, for example, if you represented that blue district
08:53:50 20 at the very bottom, you would have to be an expert on things
21 involving Navy shipyards and Army helicopter bases. You would
22 have to be an expert when it comes to agricultural issues like
23 everything from wholesale nurseries, watermelons, pecans, to
24 peanuts, cattle production, and cotton production. You would
08:54:13 25 have to be focused on two major universities that have very

1 different missions. You would have to be focused on Dothan.
2 You would have to be focused on Andalusia. You would have to
3 be focused on Brewton, Mobile, and then all of Baldwin County,
4 which is the fastest growing county in the state.

08:54:30 5 So I am not saying you couldn't do it. It would be
6 extremely difficult to do it, and you would find yourself
7 somewhat diffused in your ability to be an effective advocate
8 for that region.

9 Q What do you mean by diffused?

08:54:44 10 A Well, there's only so many hours in the day for a
11 congressman and the staff that that congressman has. And there
12 are hundreds if not thousands of issues in Washington. And you
13 have got to figure out what your focus is going to be on. And
14 focus is very important for a member of Congress because
08:55:02 15 there's just not enough bandwidth, and there's only 435
16 congressmen, and you are one of them.

17 So you really have to figure out where am I going to put
18 my time? Where am I going to put the resources of my staff?
19 What fights am I going to fight. If you are fighting a whole
08:55:21 20 bunch of different fights because you have to, because you have
21 got that many interests in your district, you are not going to
22 be effective on each one of those. The more you can sort of
23 focus your energies, the more effective you will be.

24 I will give you an example. Everybody in the House of
08:55:32 25 Representatives and the staff and the leadership, et cetera

1 knew that I was interested in a bridge across Mobile Bay,
2 fixing the snapper problem, and gaining the ships authorizing
3 and appropriated for the shipyard here. Literally, I had the
4 Speaker come up to me on the floor and say, we get it. It's
08:55:50 5 that bridge, it's those ships, and it's those fish. Now, when
6 they know that, they know they have got to make me happy on
7 that to get my votes. If they don't make me happy on that,
8 they are not going to get my votes.

9 Now, if I say I have 20 different things I want you to
08:56:03 10 make me happy on, they will say, look, I am not going to make
11 you happy on 20 things. You tell me what your priorities are.
12 We will help you get those things done, and then you will be a
13 part of the team. That's how it works. Anybody that tries to
14 be like out there fighting on every fight tends not to win any
08:56:22 15 fight.

16 Q Let's say you represented -- I guess I should show you the
17 maps again. If you represented a blue district, do you see any
18 difficulty in just getting around and visiting your
19 constituents?

08:56:35 20 A Yeah. It's a long way from Mobile to Dothan. Actually,
21 the way you get from Mobile to Dothan is that you get on
22 Interstate 10, you drive east through the Florida panhandle,
23 and then you get just north of Panama City you turn north. So
24 it's about a three to three-and-a-half hour drive from Mobile
08:56:58 25 to Dothan.

1 And north of there to Henry County, that's a county just
2 north of Houston County, it's even further than that. And so
3 in order to represent the people in Abbeville who deserve good
4 representation, even if you just visited there for an hour, you
08:57:13 5 would spend three-and-a-half, maybe four hours just to get
6 there and that much going back, so it's a long haul.

7 And the interests as I said of that southeastern part of
8 the state are very different than the interests in the
9 southwestern part of the state.

08:57:27 10 So when you finish with having your meetings in an area
11 like that, go back to Washington, you have to decide, all
12 right, what I am going to focus on? What are the priorities
13 for this sort of sprawling district with all these different
14 interests?

08:57:39 15 And somebody is going to lose out. That's just the way it
16 is. There's only so much bandwidth for a congressman, and that
17 person has to decide what am I going to focus on? Am I going
18 to help the shipyard in Mobile, or am I going to help Fort
19 Rucker?

08:57:54 20 Q Where do you think a congressman or congresswoman who
21 represented the blue district would want to have local offices?

22 A Well, you clearly want to have your main office Mobile,
23 but you want to have as pretty significant office as you can
24 afford in Dothan. You are only allotted so much money as a
08:58:13 25 congressman for your office, staff, and your office rent. So

1 you have got to spread that over Mobile and Dothan. And
2 Baldwin County is the fastest growing county in the state. You
3 have to have a presence in Baldwin County for a lot of
4 different reasons.

08:58:31 5 Then I guess you try to find some way to put something in
6 Andalusia. That's kind of more centrally located
7 geographically. But as I said, and I can say it's really hard
8 to get from here to Andalusia. Andalusia is a pretty hefty
9 drive from here. Not as far as Dothan, but it's still a hefty
08:58:51 10 drive because there's no good highway to get there.

11 Q Look at this yellow district or tan, the one above the
12 blue district.

13 Let's say there was a primary election in that district,
14 and someone was running to be the Democratic candidate, and
08:59:09 15 that someone was from Mobile. There was another person running
16 in the primary from Montgomery. Do you have any thoughts on
17 who might have a stronger base of support geographically?

18 A I would think that if you were from Montgomery, you would
19 have a stronger chance than if you're representing that part
08:59:29 20 that's in Mobile.

21 The Black Belt -- what those counties primarily look like
22 to me, the Black Belt is kind of its own thing. It's got very
23 rural, very agricultural. And they look more to Montgomery
24 than they look to Mobile for sure. So I would think somebody
08:59:50 25 from Montgomery would have a better shot at that district than

1 somebody from Mobile.

2 Q Do you think it possible, Mr. Byrne, if you had a map in
3 Plan A or Plan B that you could have, say, a congressman for
4 the blue district from Dothan or Andalusia and a congressman
09:00:10 5 for the yellow district from Montgomery so that you had no one
6 in Congress from the Mobile region?

7 A That could happen, yeah. It's kind of hard to know
8 exactly what parts of Mobile County are being taken with those
9 two plans. But if you dilute the vote in Mobile County, that
09:00:29 10 obviously is going to make the vote of the rest of that
11 district -- those two districts more important. So, yeah, you
12 could have a congressman from Dothan under both of those plans
13 and a congressman from Montgomery and not a congressman from
14 Mobile, which would be a tragedy for the people down here.

09:00:45 15 Q Why would it be a tragedy for the people down there?

16 A I'm not saying somebody from Dothan or Montgomery wouldn't
17 care about this area. But as I said before, you wouldn't have
18 somebody that's focused, focused on the port, focused on the
19 shipyard, focused on our fishery in the Gulf of Mexico, focused
09:01:01 20 on the nursery issues we have here. They just -- they're just
21 not enough bandwidth to be as focused as I was able to be
22 focused. I could walk in a room and talk about any of those
23 issues and master it. If I had to represent those other areas,
24 as well, or somebody from the other areas had to represent
09:01:22 25 Mobile, I just don't think that you could master it.

1 Q Do Mobile and Montgomery ever compete each other, in terms
2 of trying to recruit businesses, for example?

3 A Not that I know of. Their economic development plan,
4 their industrial plan is very different from ours. Montgomery,
09:01:45 5 for all the right reasons, has really focused on two things --
6 automotive, obviously with the Hyundai plant there and all the
7 suppliers of the Hyundai plant, but also because of their Air
8 Force presence, they really focus on how they can magnify
9 Maxwell Air Force Base and things that are a part of that.

09:02:05 10 I think they have made a very smart decision to do that,
11 by the way, but that's a different economic plan than what we
12 have done here. So we're as much trying to help them because
13 of the port. So as anything else, I don't really think we
14 believe ourselves that we're competing with them.

09:02:23 15 Q Would you have any concerns with the congressional map
16 that divided the Mobile region along racial lines?

17 A Yes.

18 Q What would those be?

19 A Well, when you are a Congressman, you should be
09:02:39 20 representing everybody and thinking about how I do X is that
21 going to affect everybody in my district? You shouldn't be
22 thinking about, I am going to do this because it helps black
23 people, or I'm going to do this because it helps white people.
24 I am going to do this because it helps everybody. And if you
09:02:55 25 help everybody, everybody rises. That's what you want.

1 Mobile is a little bit different from the rest of the
2 state. We do not have the same history during the Civil Rights
3 movement that Selma, Montgomery, Birmingham did. We had a
4 mayor here named Joe Lang who worked with a Civil Rights leader
09:03:14 5 down here named John LeFlore. And so we didn't have some of
6 the violence, the extent of the violence that you saw in the
7 other parts of the state. We tried to work through our issues
8 because we thought it was more important for us to work through
9 those issues and work together to try to figure out a way to
09:03:31 10 live together harmoniously. Were we perfect about it? No, we
11 did not. But we didn't have the problems you saw in the rest
12 of the state because we at least made the effort to work
13 together.

14 Q When you said that you worked -- that you served on the
09:03:47 15 state school board, correct?

16 A Yeah.

17 Q I want to share a map now which is Defendants' Exhibit 26.
18 This is the 2001 map, Mr. Byrne. I know -- I think you
19 were in the State Senate then, weren't you?

09:04:08 20 A In 2001, I was still on the state school board.

21 Q Okay. So which district did you represent in the state
22 school board?

23 A District number 1.

24 Q Thank you. Did you ever get calls from people in, say
09:04:25 25 District 5 when you were on the school board?

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1 A I did. There was some people in Monroe County, I
2 remember, and maybe Clarke County who thought I was their state
3 school board member, and they would call me, and I would always
4 call the member for that district when they did and ask him or
09:04:42 5 her because it changed if they wanted me to help those people,
6 and they would say, please. And I would go up there and talk
7 with them and explain to them I was not their school board.

8 Q Now, I want to share a newer map. This is from Caster
9 Exhibit 1, which for the record, was Mr. Cooper's report. This
09:05:12 10 is page 19 of that report. And I will represent to you,
11 Mr. Byrne, this is the new state school board map that was
12 passed by the Legislature this cycle just a couple of months
13 ago.

14 What thoughts if any do you have about this map, in
09:05:26 15 particular, the way the blue district includes part of Mobile
16 and Baldwin County is constructed?

17 A Well, I testified before the Legislature Redistricting
18 Committee that I felt like Mobile and Baldwin County should be
19 kept whole and contiguous. So to the extent that this map
09:05:47 20 includes a district that comes from Montgomery all the way into
21 Mobile County, I didn't much like it.

22 Q Why did you not like it?

23 A Because Mobile County school system is the largest school
24 system in the state. And it has unique issues because it's the
09:06:06 25 largest in the state. And I felt like we needed a school board

1 member who was focused on Mobile County as well as the other
2 counties. I had Baldwin and Escambia as well. But there were
3 so many issues with the Mobile County school system, a lot of
4 my time was spent focused on that. And if you break it up into
09:06:25 5 two different people, you don't really have that level of
6 focus.

7 I'm not saying that the people that represent those two
8 districts aren't working as hard as they can. I'm sure they
9 are. But it's very difficult to be focused on the Mobile
09:06:37 10 County school system if you have got almost all the Black Belt,
11 which that district up in the northern part is and a big chunk
12 of the Wiregrass, which the lower part of the -- the lower
13 district is.

14 Q Someone who has served both in Congress and on the state
09:06:56 15 school board, how do the roles of those two offices compare to
16 each other, Mr. Byrne?

17 A They're very different. You're on the state school board,
18 you are focused on educational issues. That's it.

19 Now, there are some work force development issues that go
09:07:13 20 with that, et cetera. But that's pretty much it. You are just
21 focused on educational issues. When you are in the United
22 States Congress, you are focused on a large number of issues.
23 I mean, it's almost everything comes within the purview of the
24 United States Congress from foreign policy, defense policy,
09:07:32 25 health care, to internal security, and education, as well. I

1 was on the Education and Labor Committee in the House of
2 Representatives. And one of the problems I had as a
3 congressman is that people expected you to be knowledgeable on
4 so many different things.

09:07:48 5 Now, at least you have got a staff in Congress. When I
6 was on the state school board, I had no staff. I had to rely
7 upon the staff of the State Department of Education, and they
8 had other things to do.

9 So it was difficult to me to be on the state school board.
09:08:03 10 But at least I could just focus on one set of issues and try to
11 master them.

12 And so it was very different being in both of those roles.
13 But I enjoyed both of those roles.

14 Q Considering the different roles between the school board
09:08:17 15 and the congressman, even if you assumed it made sense to split
16 Mobile County in a school board map, does that mean it would
17 make sense to do so in a congressional map?

18 A No. It would not make sense. At least on the school
19 board, you are focused on one set of issues. So if I'm from
09:08:38 20 Montgomery and I have got half of Mobile County from Mobile and
21 I have part of the Wiregrass, at least, I have got a
22 geographically diverse area. At least, I'm really only focused
23 on a very set, defined set of issues.

24 Now, they are very important issues. Don't get me wrong.
09:08:56 25 But at least I could focus on those issues and try to make sure

1 as I go from county to county that I am applying what I know on
2 these issues to each one of those counties as they are very
3 different.

4 Q When you campaigned for Congress in the different
09:09:11 5 elections, Mr. Byrne, what parts of your district would you
6 campaign in?

7 A All of them. I had a -- go ahead.

8 Q Would you campaign in areas that were both more -- would
9 you campaign in neighborhoods or areas that had a large
09:09:30 10 African-American community?

11 A Oh, yeah. You can't run for Congress in this district --
12 I will just make sure -- to be clear -- in this district
13 without touching every part of it. And I made a concerted
14 effort to go everywhere. In fact, if you look at my schedule,
09:09:49 15 I spent a disproportionate amount of my time in the more rural
16 areas than I did in more populated areas, because if you want
17 to go up to Monroeville, you might as well spend some time in
18 Monroe County.

19 There are parts of Monroe County that are almost
09:10:07 20 completely African-American. There's a little town in north
21 Monroe county called Beatrice that's 50/50. I had a town ball
22 in Beatrice. Someone said, why in the world would you bother
23 spending time in Beatrice because it's so small? I said they
24 deserve to be represented, too. So I went to all parts of my
09:10:25 25 district.

1 Prichard probably didn't give me 5 percent of the vote in
2 my elections. I probably lost there by a huge margin. But I
3 would go and have town hall meetings and campaign in Prichard
4 because I believed the people in Prichard deserve to have a
09:10:42 5 good congressman.

6 Q When you ran for Congress, Mr. Byrne, did you run as a
7 candidate of any political party?

8 A Yes. I was a Republican.

9 Q Why are you a Republican, Mr. Byrne?

09:10:54 10 A Because the Republican Party is closer to the conservative
11 principles that I believe in than the Democratic Party is. I
12 started out as a Democrat, but I felt like by 1997 I guess is
13 when I switched parties, the Democratic Party had migrated away
14 from what were my principles. Not putting down the Democratic
09:11:15 15 Party if people are Democrats. I have friends who are
16 Democrats and work with a lot of Democrats, but I just felt
17 like the Republican Party is more closely aligned with where I
18 stood on issues and principles.

19 Q Did you work with Democrats when you were in Congress?

09:11:31 20 A Oh, yes. All the time. I will give you two examples. I
21 served on the Armed Services Committee. Every year, the only
22 bill the Armed Services Committee works on is the National
23 Defense Authorization, which we have passed out of the Congress
24 every year since John Kennedy was president. Those bills are
09:11:53 25 always bipartisan 100 years ago percent of the time. We work

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1 -- from the very beginning of the years, we work on that bill.
2 We consciously work together to make sure that bill, the bill
3 that authorizes the defense of this country is something that
4 we can all vote for.

09:12:08 5 So we work at being bipartisan, very much so.

6 The other example I give you is this: Shortly after
7 President Trump was elected, this "Me-Too" movement came out.
8 And we discovered that we have "Me-Too" problems in United
9 States Congress. But we also discovered that members of the
09:12:28 10 United States Congress weren't subject to the same processes
11 that the private sector was subject to under Title VII of the
12 1964 Civil Rights Act.

13 Now, I spent a career as a labor employment attorney
14 telling small, medium-sized businesses in Alabama what they had
09:12:44 15 to do to comply with that law. And here in Congress, the body
16 that passed that law was not holding itself under the same set
17 of accountability processes.

18 So I worked with a very liberal Democrat congresswoman
19 from California, Jackie Speier, and we put together a bill that
09:13:04 20 made Congress be as accountable, even more accountable than we
21 hold people in the private sector, and that bill that Jackie
22 and I put together passed the United States House unanimously,
23 passed the United States Senate unanimously, and is a law of
24 the United States now. And those are just two examples.

09:13:20 25 I worked all the time in a bipartisan manner, because I

1 firmly believe that the best legislation in Washington is
2 bipartisan legislation. The hardest legislation to pass in
3 Washington is partisan legislation. And it's always a problem,
4 always.

09:13:36 5 So I enjoyed working the bipartisan fashion. I know you
6 look up there now and think, they're completely divided. They
7 can't get along. And there are problems. Don't get me wrong.
8 But there are still people up there, former colleagues of mine
9 on both sides of the aisle that understand what I say is true,
09:13:53 10 and they're still trying to work together to make things happen
11 and happen in the right way.

12 Q When you served on the delegation with Congresswoman
13 Sewell for the Seventh District, did you have the opportunity
14 to work with her on any issues?

09:14:09 15 A Oh, all the time. All the time. We shared Clarke County.
16 We actually had joint town halls together.

17 If she had an issue that affected her district, you know
18 uniquely, she would call on the other members of the delegation
19 to help her, and we always did, 100 years ago percent of the
09:14:26 20 time. And she always helped us. We all worked together. It
21 wasn't like it was unique to her.

22 So Terry was a part of a group called Faith and Politics.
23 I assume she is still a part of it. That's the group that
24 brings the pilgrimage to Alabama every year around the
09:14:47 25 anniversary of the Edmund Pettus Bridge March from 1965. She

1 wanted to make sure that when that group came here to Alabama,
2 which would bring couple hundred people, people from Congress,
3 people from business and industry, people from foundations, she
4 wanted to make sure that we were all working together, that
09:15:08 5 they saw Alabama, the Alabama delegation working together.

6 So I always participated in that pilgrimage with her.
7 Usually on Saturday mornings when she did her program either at
8 Brown Chapel in Selma or the Dexter Avenue Baptist Church in
9 Montgomery, she would ask me to be sort of her sidekick for it,
09:15:27 10 so that we could get up and tell the people from all the other
11 parties of America here's a Democrat and Republican, black
12 woman and white man working together on issues that matter to
13 the people of Alabama, in particular, matters that revolve
14 around Civil Rights.

09:15:40 15 And I was always honored that she felt comfortable enough
16 to ask me to do that. And I can tell you, you can sit in that
17 room with some of the people in that room like John Lewis who
18 we lost last year, and you realize what people in this state
19 went through to get us the quality of life we have got today --
09:15:58 20 to get to today. I feel like a little bitty nothing compared
21 to people like that. But it was an honor always to be with
22 Terry and to work with her on -- whether it's the pilgrimage or
23 other things that were important to our district.

24 Q When you were in Congress, Mr. Byrne, were there any
09:16:17 25 issues you worked on to devote your time and your political

1 capital towards that you thought and expected to have a
2 particular benefit to your African-American constituents?

3 A Just about everything. If I am doing something that's
4 going to benefit the economy in southwest Alabama, it's going
09:16:36 5 to benefit African-Americans in my district, of course, it is.
6 If you go to the various businesses in this area, and I
7 traveled and met with workers in every one of these industries.
8 It was always black and white. That's the nature of our work
9 force down here. I mean, whether you are at a chemical plant,
09:16:56 10 steel plant, ship building plant, airplane, you are going to
11 have a mixed group of people.

12 So every time I was doing something for the economy. But
13 I particularly felt like I was helping them every time we
14 worked on education issues. And this goes back to my state
09:17:13 15 school board days. I think the number one Civil Rights issue
16 in Alabama today is the fact that we don't give a quality
17 education to black people like we do the white people. And I
18 really feel strongly about that. We are not going to have the
19 sort of gains and advances and progress we need in this state
09:17:30 20 until we make more improvements to our education system.
21 That's true across the country, but I am more focused on
22 Alabama.

23 Q Have you spent any time working with HBCUs, Mr. Byrne?

24 A Yes, sir. HBCUs are historically black colleges and
09:17:48 25 universities. We had several of them in the two-year college

1 system in Alabama include Bishop State here in Mobile. So when
2 I was on the state school board, I worked with them. When I
3 was chancellor of post-secondary education I worked with them.
4 And by the way, including Tuskegee, and then when I got to
09:18:06 5 Congress, a congresswoman from North Carolina named Alma Adams
6 asked me to be a co-chair with her of the HBCU Congressional
7 Causas. So for five years I guess it was, I was the co-chair
8 of the HBCU Congressional Caucus.

9 Q Did you spend time working on community health centers?

09:18:33 10 A Oh, yes. We have several community health centers here in
11 the district. I've gotten to know them pretty well. I am very
12 impressed with the quality of health care that they provide to
13 their patients. And I was a strong advocate for them and
14 continue to be a strong advocate for them because I think that
09:18:56 15 they provide quality health care close near where people live,
16 so it's community plan, and it's the best way I think to get
17 primary health care to people in those communities. So I am a
18 strong supporter of community health center.

19 Q Back to your co-chairmanship on the HBCU caucus, I am not
09:19:21 20 suggesting this was the reason you did it, but did you receive
21 any recognition for your service in that area?

22 A I did. The Thurgood Marshall Fund gave me an award
23 three years. Probably one of the awards that I am the most
24 proud of. Thurgood Marshall Fund works to provide funding,
09:19:40 25 private funding to HBCUs across America. And I had no idea

1 they were going to give me an award, and it just knocked me out
2 when they did. I remain in contact with them. I still
3 continue to work with them even though I am not in Congress
4 because I am a huge believer in HBCUs, and I think what the
09:19:59 5 Thurgood Marshall Fund is doing and the United Negro College
6 Fund, both of them together are doing great work for those
7 colleges, and I think they are important to America.

8 Q Just a few more questions, Mr. Byrne. And I will remind
9 you. We want to make sure the Court understands your testimony
09:20:15 10 that Ms. Decker can take it down. We will try to slow down
11 just a little. I want to -- when you were in Congress, did you
12 consider yourself to be the representative of both Republicans
13 and Democrats in your district?

14 A Yes.

09:20:30 15 Q Did you consider yourself to be the representative of both
16 the white and African-American constituents in your district?

17 A Absolutely, yes.

18 Q I want to share a screen now, Mr. Byrne. This is Milligan
19 Exhibit 5. It is the report of one of their experts, Dr. King,
09:20:57 20 and she is offering opinions on certain issues. I want to read
21 this introduction section into the record so you can get some
22 context. Dr. King writes, White law makers in Alabama learned
23 long ago to color mask their public statements, just as they
24 have learned to color mask the legislation intended to protect
09:21:22 25 their racial prerogatives.

1 Not since the high tide of brazen white supremacy when
2 George Wallace proclaimed, segregation forever, have public
3 figures been so bold.

4 MS. WELBORN: Mr. Davis, this is Dr. Bagley's report,
09:21:43 5 not Dr. King's report.

6 MR. DAVIS: I apologize for that confusion. Yes.
7 Thank you for the correction.

8 BY MR. DAVIS:

9 Q Then Mr. Bagley after giving some examples says this.

09:22:03 10 JUDGE MARCUS: I think you have to just -- as we
11 proceed, Mr. Davis, just take your time and speak right into
12 the speaker.

13 MR. DAVIS: Thank you, Judge.

14 BY MR. DAVIS:

09:22:16 15 Q I will read now an excerpt into the record from Milligan
16 Exhibit 5, the Bagley report.

17 Dr. Bagley writes, Representative Bradley Byrne of the
18 State's First Congressional District when he was vying for a
19 Senate seat aired a campaign ad in which he condemned black
09:22:36 20 people by placing their images in a fire.

21 The television spot begins with Byrne staring into a wood
22 fire in a backyard and lamenting the loss of his brother in the
23 armed services. He shifts to lamenting the course the country
24 is taking as the faces of black and brown people appear in the
09:22:56 25 fire. Former national football league quarterback Colin

1 Kaepernick appears in the fire as Byrne calls him an entitled
2 athlete dishonoring the American flag. Members of the
3 congressional caucus known as the Squad, Ilhan Omar and
4 Alexandria Ocasio Cortez appear in the fire and are accused of
09:23:17 5 attacking America and cheapening 9/11. No white people appear
6 in the fire.

7 My question to you, Mr. Byrne, is: Is there anything you
8 care to say in response?

9 A Yes, sir. That ad was about my brother. And the fire was
09:23:38 10 a fire in the fire pit at our hunting camp that he and I used
11 to sit around all the time. So that ad was about my brother.

12 Now, the fact that I'm contrasting a rich, NFL quarterback
13 named Colin Kaepernick who won't stand up during the national
14 anthem with my brother's service who made far less than Colin
09:24:01 15 Kaepernick makes and literally contracted a disease during one
16 of his deployments with the 20th Special Forces group that
17 killed him, I think that's a legitimate thing for me to raise.
18 I have grave disagreements with Representative Alexandria
19 Ocasio Cortez and Representative Omar. But I can tell you I
09:24:18 20 never had any negative interaction with either one of them.

21 Representative Alexandria Ocasio Cortez, actually, her
22 office was in my office building. And when she was relatively
23 new, she couldn't find her way to her office and literally
24 stopped me in the hallway and asked me, can you tell me where
09:24:36 25 my office is? I said, yes, ma'am, and I told her where it was.

1 And we sort of developed a personal rapport just because she
2 got to the moment of weakness, which we all have in Congress by
3 the way. It's easy to get lost in those buildings.

4 So we never really had a political conversation, but we
09:24:50 5 would have these personal sort of, you know, informal social
6 interactions. I disagree with her on the issues, but I don't
7 have any problems with her as a person.

8 The same is true for Ms. Omar. Now, Ms. Omar served on
9 the Education and Labor Committee with me. So we would have
09:25:07 10 interactions about education issues, and we had some
11 disagreements about -- but there was no -- that was really
12 about my brother. It was not about those other people. And
13 the fact that we used them was to simply contrast them and
14 their positions with the service that my brother had rendered
09:25:29 15 to our country.

16 Q Was it your intention to single out anyone because of
17 their race?

18 A No. I singled out Mr. Kaepernick because he won't stand
19 up during the national anthem, and there are plenty of black
09:25:43 20 athletes that stand up during the national anthem by the way.
21 I have noticed that's not as what a lot of people try to
22 portray it to be.

23 And I am singling out Ms. Alexandria Ocasio Cortez and
24 Ms. Omar because of their attacks against America. They attack
09:25:56 25 American values. And I think it's perfectly within the realm

1 of what's appropriate dialogue to say, I expect somebody that's
2 making this money as Colin Kaepernick to stand up during the
3 national anthem, and I don't think members of Congress should
4 be attacking the country.

09:26:12 5 Q Mr. Byrne, I want you to think of the people who are
6 involved in congressional campaigns, whether it's a candidate
7 or someone considering a run, that person's staff, volunteers,
8 and then I want you to assume that a couple of weeks before the
9 January 28th deadline, the congressional map changes from the
09:26:40 10 way it's usually been and what the Legislature passed to all of
11 a sudden it changes to something like what the plaintiffs are
12 representing excuse me -- what the plaintiffs are proposing.

13 Do you see any issues that would cause with congressional
14 campaigns?

09:26:57 15 A Yes, sir. First of all, we have primaries in four months,
16 general election in ten months. Once you turn the calendar to
17 the beginning of the year, you have that primary staring you in
18 the face, you have already set your campaign in place. You
19 already have your plan in place. You have already got
09:27:17 20 volunteers set up ready to go. You have got, you know, the
21 campaign ad messaging already worked out. And you are hitting
22 the ground running.

23 So if you change my district on me with that little time,
24 it's going to put a substantial burden on my ability to refocus
09:27:33 25 my campaign, conduct my campaign, get volunteers, et cetera.

1 And particularly if you give me a new geographic area that I
2 haven't represented before, where I don't have, you know, the
3 natural contacts, et cetera, that's a huge problem for any
4 community. And I don't -- and that's true for any candidate,
09:27:52 5 Democrat, Republican, people that are long-time public office
6 holders, people that are brand new. It could be a tremendous
7 difficulty.

8 Q Mr. Byrne, you said you went to a public hearing where
9 some of these districts were at issue. Why did you go to the
09:28:13 10 public hearing? Why are you here today to talk to the Court
11 about districts?

12 A Number one, I am a citizen, so I have -- so I am not just
13 any citizen. I mean, I served on the state school board, held
14 a district for eight years. I served in the United States
09:28:33 15 House of Representatives representing one of the districts for
16 seven years. I have, you know, a unique set of understandings
17 about what it's like to represent these areas. And I felt like
18 I owed it to the system. I owed it to the public to stand up
19 and say -- as somebody that's actually done this work, these
09:28:51 20 districts the way I'm proposing them makes sense this way.

21 And the most important thing I was trying to say is keep
22 this particular community together. Keep these communities
23 together. Don't pull southwest Alabama apart because we work
24 together down here. Mobile area Chamber of Commerce doesn't
09:29:13 25 just do economic development for Mobile County. They also do

1 it for Washington County.

2 JUDGE MARCUS: Let me stop you for a second,
3 Mr. Byrne. You cut out. The sound cut out for a minute. So
4 take your time and just repeat what you just said if you would,
09:29:29 5 please.

6 THE WITNESS: Yes, sir. What I have been the most
7 concerned about is that people that pull apart southwest
8 Alabama and have different parts being represented -- we work
9 together down here in southwest Alabama. The example I used
09:29:48 10 was the Mobile area Chamber of Commerce, the economic
11 development for both Mobile County and Washington County,
12 because we're so closely connected.

13 We need to stay together down here. We have a group
14 called CAP, Cultural Alabama partnership, that pulls together
09:30:05 15 these counties so that we have common representation, common
16 advocacy efforts with the Alabama Legislature and the members
17 of Congress. So keep us together. Don't pull us apart. Let
18 us be one group of people that work together for our region of
19 the state and maximize the benefits that we want to get for our
09:30:27 20 people down here.

21 MR. DAVIS: Thank you, Mr. Byrne. I have no further
22 questions and pass the witness at this time.

23 JUDGE MARCUS: Thank you, counsel. Cross-examination
24 in what order did you propose to proceed on behalf of Milligan
09:30:40 25 and Caster and the Singleton? And we leave that up to you.

1 MS. WELBORN: I will be going first for the Milligan
2 plaintiffs, Your Honor.

3 JUDGE MARCUS: All right. And, Mr. Whatley, would you
4 be going second or the Caster folks going second?

09:30:57 5 MR. WHATLEY: Doesn't matter to me, Your Honor.

6 JUDGE MARCUS: I leave that up to you. So let's
7 begin --

8 MR. WHATLEY: I am happy for the Caster plaintiffs to
9 go second.

09:31:03 10 JUDGE MARCUS: All right. Thanks very much.
11 Ms. Welborn, you may proceed with your cross-examination.

12 MS. WELBORN: Thank you.

13 CROSS-EXAMINATION

14 BY MS. WELBORN:

09:31:10 15 Q Representative Byrne, my name is Kaitlin Welborn, and I
16 represent the Milligan plaintiffs. Good morning.

17 A Good morning.

18 Q So I'd like to talk about the current redistricting plan
19 first. You had no direct role in drawing the current

09:31:25 20 congressional map in Alabama, right?

21 A I didn't have any direct role, but I did testify before
22 the committee.

23 Q But other than that, you did not do anything to --

24 A That's correct.

09:31:37 25 Q -- help draw the congressional map?

1 A That's correct.

2 Q And you did not provide any input to Mr. Hinaman, the map
3 drawer?

4 A I did not know Mr. Hinaman.

09:31:49 5 Q I'm sorry?

6 A I don't think I know him.

7 Q Okay. And you did not speak with Representative Pringle
8 about the 2021 map?

9 A I did.

09:31:59 10 Q You did?

11 A Yes.

12 Q I'm sorry?

13 A He is the chair of the committee, and I testified before
14 the committee.

09:32:08 15 Q Okay. But did you speak to Representative Pringle outside
16 of the public hearing?

17 A I don't believe I did, no.

18 Q Okay. And did you not speak with Senator McClendon
19 outside of the public hearing?

09:32:22 20 A I don't believe I did, no.

21 Q And you did not speak with Secretary Merrill's expert
22 Thomas Bryan?

23 A No, ma'am.

24 Q Okay. You first ran for Congress in a special election in
09:32:34 25 2013, right?

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1 MR. LACOUR: Thank you, Your Honors.

2 This case represents an extraordinary attack on an
3 ordinary map.

4 We have here an equal protection claim that lacks any
14:50:52 5 mention of the current Legislature's intent, and we have a
6 Section 2 claim in which the plaintiffs themselves have proven
7 through two of their experts that you could not draw two
8 majority-minority districts if you drew based only on
9 traditional race-neutral districting principles.

14:51:09 10 So plaintiffs' equal protection claim fails because
11 traditional race -- redistricting principles were not
12 subordinated to race in the 2021 Legislature's map. And
13 plaintiffs' Section 2 claims fail at *Gingles I* because in each
14 of their 11 illustrative plans, traditional redistricting
14:51:28 15 principles are subordinated to race.

16 But before I get into the merits any further, I did want
17 to touch on the fact that the burden is incredibly high here.
18 Not only are they seeking an injunction, which is an
19 extraordinary and drastic remedy in and of itself, they're
14:51:46 20 asking for what essentially would be a mandatory injunction
21 where the burden would need to be even higher on them.

22 Let me move to the other laptop closer. Is this a little
23 bit clearer?

24 JUDGE MARCUS: It is. Thank you.

14:52:10 25 MR. LACOUR: Thank you.

1 that because of what she was asked to do as a *Gingles I* expert,
2 she took the 50 percent as a nonnegotiable threshold. And then
3 she only bent and broke insofar as was necessary not to come
4 under 50 percent. So, for example, I think -- and I don't have
15:44:13 5 the cite handy, but my memory is that she testified that after
6 50 percent, for example, she took not splitting counties to be
7 of greater priority.

8 Why is that inconsistent with the Section 2 mission? I
9 completely understand your argument as to why it's inconsistent
15:44:32 10 with the idea that we ought not be separating voters based on
11 race for constitutional purposes.

12 But in the limited universe of a Section 2 claim, why is
13 that hierarchy so long as it respects other traditional
14 districting principles insofar as it can along side the
15:44:57 15 50 percent threshold, why is it inconsistent with Section 2?

16 MR. LACOUR: Because I don't think that's what the
17 Court was referring to when it said reasonably compact. Again,
18 reasonable compactness analysis takes into account traditional
19 districting principles. And drawing a non-compact district to
15:45:16 20 benefit a racial group is not a traditional districting
21 principle. If it is, it makes their whole two Section 2
22 compactness argument self-referencing and really
23 indecipherable.

24 They're saying, we could draw a reasonably compact map
15:45:30 25 consistent with traditional districting principles if we ignore

1 some of them in favor of race. But that means it's not
2 reasonably compact. That's why the Supreme Court has said
3 Section 2 does not require a state to draw based on
4 predominantly on racial lines a district that's not reasonably
15:45:48 5 compact. What that necessarily means is that reasonable
6 compactness has to be without reference to race.

7 Now, like I said, if she drew two maps consistent with
8 racial -- consistent perfectly with traditional districting
9 principles, and one had two majority-minority districts and one
15:46:09 10 didn't, it would be perfectly fine for her to pick the one that
11 had the two majority-minority districts.

12 But what she testified to was that she drew 2,000 such
13 maps, 2000. Not 2000. 2 million. I am sorry. I was off by
14 the three zeros. 2 million maps where she didn't even plug in
15:46:28 15 all of our traditional districting principles into the
16 algorithm constraints. She had even more discretion than the
17 Legislature would have had to go out looking for majority
18 population to put within a district. And not one of them came
19 back above 50 percent. I mean, not one of them came back with
15:46:47 20 two districts above 50 percent.

21 And I -- so I don't know how it could be even -- how it
22 could be any clearer that race predominated.

23 I mean, it's not even a one in a million map we have in
24 front of us. These are maps you would never expect to see.

15:47:03 25 And I don't see how it could be that -- to return to the text

1 of Section 2, we are talking about equal opportunity and
2 whether anyone has had equal access so political process denied
3 them based on account of race. I mean, is the Legislature's
4 failure to completely scrap several race-neutral traditional
15:47:28 5 districting principles and bend others in favor of race, like
6 isn't a refusal to do that somehow denying someone equal
7 opportunity? I think the answer is obviously no.

8 And you look at *Abrams*, again, keep in mind, I think they
9 hone in a lot on proportional representation. And you see it
15:47:48 10 throughout. But, of course, throughout the briefing -- but, of
11 course, Section 2 expressly says proportional representation is
12 not the benchmark. And we know it can't be the benchmark
13 because Georgia in the '90s had 27 percent black population
14 just like Alabama today. They have 11 districts they can work
15:48:08 15 with. We only have seven.

16 And even then the district court said, Section 2 only
17 gives me free reign to draw one majority-minority district,
18 9 percent of the state's black population -- or 9 percent of
19 the state's congressional districts were majority black, even
15:48:27 20 though 27 percent of the state's black population -- or blacks
21 made up 27 percent of the black's population, and the Supreme
22 Court affirmed that.

23 I think then in vote dilution itself, you heard about vote
24 dilution from plaintiffs. I mean, it diluted against what?
15:48:44 25 Against what standard? And proportional representation is not

1 the standard. It was an interesting discussion with Dr. Duchin
2 talking about Massachusetts and the Republicans there. And
3 because the Republican population in Massachusetts is so evenly
4 dispersed across the state, I mean, what she testified to was
15:49:02 5 that it is literally impossible to draw even one majority
6 Republican congressional district in Massachusetts, despite the
7 fact that there are nine congressional districts from the state
8 and despite the fact that Republicans regularly register about
9 a third, 35 percent in statewide elections.

15:49:22 10 So proportion representation is not the right baseline.
11 The right baseline is what would you expect from a race-neutral
12 draw of the districts? And we didn't have time to go out and
13 get an expert with an algorithm to produce 10,000 maps. But
14 the plaintiffs did. And we know what came back. 30,000 maps
15:49:44 15 from Dr. Imai, none of which have two majority-black districts,
16 and 2 million maps from Dr. Duchin, none of which have two
17 majority-black districts.

18 So, again, unless you are going to impute race as a
19 traditional districting principle in the Section 2 compactness
15:49:59 20 analysis, which I think the Court pretty expressly rejected in
21 *Abrams* when they found the three-judge court's decision in that
22 case, there is no way they can satisfy *Gingles I*. It's a
23 mathematical impossibility.

24 JUDGE MANASCO: Thank you. I think you answered my
15:50:16 25 question.

1 JUDGE MARCUS: Thank you very much, Mr. LaCour. We
2 will take our usual break of 15-minute break and then come back
3 with the rebuttals, and we will finish up this afternoon.
4 Thank you all. We will be back in 15 minutes.

16:17:48 5 MR. LACOUR: *Favors* was the longer quote.

6 JUDGE MARCUS: Why don't you give us the full title of
7 that case that came under the Eastern District of New York.

8 MR. LACOUR: *Favors v. Cuomo*, 881 F. Supp. 2d 356, 362
9 -- or at 362. That's Eastern District of New York 2012.

16:18:20 10 JUDGE MARCUS: Thank you much. We will take a
11 15-minute break at this point.

12 (Recess.)

13 JUDGE MARCUS: The parties are ready to begin the
14 reply at this point? Do I have that right, Mr. Blacksher,
16:29:24 15 Ms. Khanna, and Mr. Ross?

16 MR. BLACKSHER: Yes.

17 MR. ROSS: Yes, Your Honor.

18 MS. KHANNA: Yes, Your Honor.

19 JUDGE MARCUS: All right. Thank you.

16:29:34 20 Mr. Blacksher? We will take it in the same order that the
21 arguments were made by the plaintiffs.

22 MR. ROSS: Your Honor, if I may, the Caster plaintiffs
23 have allowed the Milligan plaintiffs to go next.

24 JUDGE MARCUS: I'm sorry. You mean the Singleton
16:29:55 25 plaintiffs.

1 MR. ROSS: Oh I'm sorry. I believe it will go
2 Singleton, Milligan, and then Caster. I'm sorry, Your Honor.

3 JUDGE MARCUS: Thank much. Mr. Blacksher, you may
4 proceed.

16:30:04 5 MR. BLACKSHER: Judge, you made -- Judge Marcus, you
6 made a -- asked an important question.

7 If the Court rules for the plaintiffs, what should it tell
8 the Legislature to do? Because whatever this Court tells the
9 Legislature -- what it tells the Legislature it did wrong, and
16:30:39 10 what it tells the Legislature it must do right in the future is
11 going to be the benchmark for redrawing congressional districts
12 probably for several more decades.

13 So it seems to us that the choice is between telling the
14 Legislature that it must draw districts by beginning with a
16:31:05 15 racial target, or whether it should draw districts by beginning
16 with traditional districting criteria, we believe that if this
17 Court were to rule for the plaintiffs -- the Milligan and
18 Caster plaintiffs on their Section 2 claims without addressing
19 their Fourteenth Amendment claims, that necessarily says to the
16:31:35 20 Legislature the 2021 enacted plan violated the Voting Rights
21 Act because it did not contain two majority-black districts,
22 per *Bartlett vs. Strickland*. Now, that's going to say to the
23 Legislature that they should begin any remedial plan with a
24 racial target.

16:32:01 25 What the Singleton plaintiffs have proposed is that the

1 Court say to the Legislature the problem with your 2021 plan is
2 that it perpetuated a gerrymander that violated traditional
3 districting principles by splitting Jefferson, Tuscaloosa, and
4 Montgomery counties for the purpose of reaching a racial
16:32:29 5 target, namely a black-majority district. And, therefore, you
6 should begin again solely with race-neutral principles which
7 are historically in Alabama, whole counties, and see what kind
8 of plan you can draw, and then to achieve the lowest
9 practicable population deviation, and then look to see whether
16:33:01 10 or not it complies with Section 2 of the Voting Rights Act.

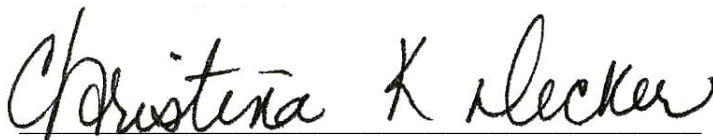
11 If it does not comply Section 2 of the Voting Rights Act
12 by providing blacks the opportunity to elect candidates of
13 their choice that Section 2 guarantees, then your plan must be
14 modified however is necessary to accomplish that statutory
16:33:24 15 objective.

16 So that's critical to us. We have been interested from
17 the beginning in the Singleton case, our clients are interested
18 in trying not only to win a lawsuit for 2022, but to try to get
19 our redistricting process back on track. That's something that
16:33:54 20 legislators and ordinary citizens and incumbent members of
21 Congress can understand and apply without having to have a
22 statistician with algorithms next to their elbow.

23 Let me respond to something that Mr. LaCour said. He's
24 characterized the Singleton plaintiffs' claims as a novel
16:34:31 25 Fourteenth Amendment claim. It is nothing but novel. And let

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

01-12-2022

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, et al., *
Plaintiffs, * 2:21-cv-1291-AMM
vs. * January 26, 2022
* Birmingham, Alabama
* 1:00 p.m.

JOHN MERRILL, in his official *
capacity as Alabama Secretary *
of State, et al., *
Defendants. *

EVAN MILLIGAN, et al., *
Plaintiffs, * 2:21-cv-1530-AMM

vs. *

JOHN MERRILL, in his official *
capacity as Alabama Secretary *
of State, et al., *
Defendants. *

MARCUS CASTER, et al., *
Plaintiffs, * 2:21-cv-1536-AMM

vs. *

JOHN MERRILL, in his official *
capacity as Alabama Secretary *
of State, et al., *
Defendants. *

TRANSCRIPT OF HEARING
VIA ZOOM
BEFORE THE HONORABLE ANNA M. MANASCO,
THE HONORABLE TERRY F. MOORER,
THE HONORABLE STANLEY MARCUS

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P R O C E E D I N G S

(In open court.)

JUDGE MARCUS: Good afternoon. We set this case down for an additional conference really as a way to see where we are, what the status is at this point.

If you would all be kind enough to state your appearances on the record, we would be much appreciative. For Milligan?

MR. ROSS: Deuel Ross for the Milligan plaintiffs.

JUDGE MARCUS: Good afternoon again to you, as well.

And for Caster?

MS. KHANNA: Abha Khanna for the Caster plaintiffs.

JUDGE MARCUS: Good afternoon to you, as well.

And Singleton.

MR. BLACKSHER: Jim Blacksher for the Singleton plaintiffs, Your Honor.

JUDGE MARCUS: Good afternoon to you.

For the Secretary of State and for the intervening defendants.

MR. DAVIS: Hello, Judge. Jim Davis is here. Mr. LaCour is also on line. And Mr. Walker is here with me for the --

JUDGE MARCUS: Welcome to all of you, as well.

I did also want to make clear -- the clerk asked me to double check this -- that the folks we have in the Zoom are only folks participating in the proceeding. Otherwise, there's

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1 another link that anyone can use, that the public can use to
2 zero in on and fully follow our proceedings today.

3 Having said that, I really wanted to throw out to each of
4 you to tell me exactly what the status of the case is, where
13:01:23 5 the Legislature is, in regard to the memorandum opinion and
6 order that we had issued on the 24th of January.

7 With that, I thought we would turn first to you,
8 Mr. Davis, on behalf of the State.

9 MR. DAVIS: Thank you, Judge.

13:01:41 10 As you know, we have exercised our right to appeal. We
11 have sought a stay with this Court. And if it's declined, we
12 intend to seek a stay from higher courts.

13 As far as the Legislature is concerned, they are looking
14 at this issue. Discussions have begun. They are in a special
13:01:58 15 session at the moment on another important issue. But we have
16 already started looking at this.

17 That's really, Judge, all the information that I have at
18 this point. How long it would take, whether they would be
19 successful is simply too early to say.

13:02:13 20 JUDGE MARCUS: The reason, of course, that we raise
21 it, as you have all pointed out, time is something of an issue
22 here. We have said repeatedly, and we made this observation in
23 the order that we had entered, that reapportionment is
24 primarily the duty and the responsibility of the State. And
13:02:38 25 federal courts are barred from intervening in state

1 apportionment in the absence of a violation of federal law
2 precisely because it is the domain of the states to conduct
3 apportionment in the first place. Putting it differently, each
4 state has a sovereign interest in implementing its
13:02:59 5 redistricting plan.

6 And so even when a federal court finds that a
7 redistricting plan violates federal law, the Supreme Court has
8 repeatedly said that redistricting and reapportioning
9 legislative bodies is a legislative task, which the federal
13:03:19 10 courts should make every possible effort not to preempt.

11 If and only if the State Legislature is unable to adopt a
12 remedial map that complies with federal law in sufficient time
13 to address the upcoming elections in November of this year and
14 in May for the primaries, only then would it fall to a federal
13:03:52 15 court to take on the unwelcome obligation of devising a -- and
16 imposing a reapportionment plan. And that's obvious clear
17 hornbook law. And so we obviously look, Mr. Davis, to the
18 Alabama Legislature for guidance and input in this connection.

19 We set some time deadlines here that we thought were
13:04:27 20 reasonable and were consistent with the ability to craft a new
21 map and implement it in sufficient time for the elections that
22 are coming up down the road. But that's why we really wanted
23 to get your best sense and the sense of the intervening
24 defendants, Mr. McClendon and Mr. Pringle, of where we are and
13:04:56 25 whether we have to start down this road because the Legislature

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1 may be unable to do it.

2 So it's really for that reason that we wanted to sort of
3 crystalize it, bring all of this to a head, and see where you
4 were in that regard.

13:05:16 5 MR. DAVIS: Thank you, Judge.

6 Obviously, we disagree with the Court's ruling, but we do
7 agree it is appropriate to give the Legislature the first shot.

8 That's what has begun. Whether they will be able to do so
9 or how long it will take is simply too soon to tell.

13:05:32 10 JUDGE MARCUS: Do you have any idea when you will be
11 able to give us an answer to that question?

12 MR. DAVIS: Certainly the Court's order says that
13 Senator McClendon and Representative Pringle should report back
14 in two weeks. I would think probably it will take less than
13:05:49 15 that time to know whether or not they will be able to do
16 something. But certainly within two weeks they will know if
17 there's any chance of getting it through the Legislature.

18 JUDGE MARCUS: Right. You understand our concern is
19 that we don't want to be in a position two weeks from now where
13:06:09 20 we're starting from square one at that point, to pick a
21 cartographer, and a numbers cruncher, and a special master,
22 which might take us to implement another two weeks, and
23 therefore put the whole thing off four weeks. You appreciate
24 that dilemma.

13:06:26 25 MR. DAVIS: Well, I appreciate it. We think it's

1 already too late to put plans in --

2 JUDGE MARCUS: I understand.

3 MR. DAVIS: Yes. So we certainly appreciate it. We
4 understand the Court's concern. I simply have no further
13:06:36 5 information.

6 JUDGE MARCUS: All right. Other comments, either from
7 counsel for Mr. McClendon or Mr. Pringle?

8 MR. DAVIS: I don't have comments, Your Honor. There
9 is a question that I think the Court may be able to clear up
13:06:54 10 about the order.

11 The order states that the January 28th qualifying deadline
12 is extended for 14 days. I think we know what the Court's
13 intent was, that it was to extend the deadline for
14 congressional candidates only, but the broadness of the
13:07:13 15 language is causing some confusion in the public.

16 JUDGE MARCUS: Let me make that point abundantly
17 clear.

18 This order, these hearings were concerned only with the
19 congressional hearings and the congressional map. And in order
13:07:29 20 to make that crystal clear, if you think it would be helpful,
21 we will put out a supplemental order to that effect making it
22 absolutely clear this order was only dealing with what was
23 properly before this three-judge court, which dealt solely with
24 the congressional map.

13:07:48 25 MR. DAVIS: That's certainly what we thought, Judge.

1 And, yes, Mr. Hugh Evans, who is general counsel for the
2 Secretary, is with me, as well. And he is indicating to me
3 that that would be helpful for the Secretary to provide proper
4 guidance to the party candidates.

13:08:02 5 JUDGE MARCUS: I think that's something we can take
6 care of forthwith. As soon as we're done, we can get something
7 out to you this day that makes that point crystal clear.

8 Comments from counsel for Milligan, Caster, and Singleton?
9 Mr. Ross?

13:08:21 10 MR. ROSS: Thank you, Your Honor.

11 Our concern is the same as the Court's, that the --
12 whatever happens with the Legislature or with their attempt at
13 a stay, that the Court hopefully can begin the process now of
14 potentially looking for a special master.

13:08:38 15 So if the Court would like, the Milligan plaintiffs are
16 willing to work with the other plaintiffs' groups, and, if
17 necessary, we're happily to work with the defendants as well on
18 naming some potential special masters for the Court.

19 JUDGE MARCUS: You understand in that regard what we
13:08:54 20 would need if we are put into the position where we have to
21 draw the map would be we would need to select a cartographer,
22 as well as somebody -- let's use the infelicitous term -- a
23 numbers cruncher, along with the special master. So our needs
24 would cover both a special master and someone or some folks to
13:09:27 25 do the actual tasks pursuant to whatever specific instructions

1 we may give them.

2 Other thoughts, Mr. Ross?

3 MR. ROSS: No, Your Honor. If you would like us to,
4 we are happy to get with the other parties and get some names
13:09:47 5 to you in the next few days.

6 JUDGE MARCUS: All right.

7 Ms. Khanna, on behalf of the Caster plaintiffs?

8 MS. KHANNA: I agree with Mr. Ross, Your Honor, that
9 it makes sense while the Legislature is proceeding to get
13:09:58 10 our -- to get -- for the Court to get its ducks in a row by
11 identifying potential special masters, and perhaps securing
12 them so that we're ready in the event that the Legislature is
13 unable to draw new maps that are remedial maps.

14 The Court mentioned a numbers cruncher. I know there are
13:10:18 15 several names that we can all discuss and we can submit in
16 writing, I think is probably more fruitful.

17 My understanding is many of them more experienced special
18 masters do both map drawing and map evaluation. So they can
19 evaluate maps to see whether or not they're performing for
13:10:31 20 minority candidates, or performing various metrics, as well.

21 So it might be that those -- I am not sure what the Court
22 has in mind, but that special master exists in one person, but
23 certainly we can offer more options to the Court.

24 JUDGE MARCUS: Thank you.

13:10:46 25 Mr. Blacksher?

1 MR. BLACKSHER: So, Your Honor, it may be premature
2 for me to raise this with the Singleton plaintiffs or the
3 Singleton plaintiffs to raise this, but in the Court's
4 injunction you said because it's on statutory grounds and
13:11:04 5 because Alabama's upcoming congressional elections will not
6 occur on the basis of the map that is allegedly
7 unconstitutional, we decline to decide the Singleton
8 plaintiffs' constitutional claims at this time. And our
9 question really is what happens if this Court or a higher court
13:11:23 10 stays the preliminary injunction? Would that be an appropriate
11 time we would be concerned at that time our concerns would be
12 heard?

13 JUDGE MARCUS: Yes, I understand. And that's a matter
14 that we could take up if we had to. We will ultimately rule,
13:11:41 15 of course, on your constitutional claims. And the claims were
16 made on constitutional grounds by Mr. Ross on behalf of the
17 Milligan folks, as well as though their theory and
18 argumentation is a little bit different than yours, they also
19 challenge the map HB-1 on constitutional grounds.

13:12:07 20 So we just followed the classic admonition that a court
21 ought not to decide a constitutional issue before it has to do
22 so. And we thought given our preliminary injunctive ruling and
23 memorandum opinion about Section 2, that we were not at that
24 stage.

13:12:30 25 And it's not to say, Mr. Blacksher, you are not entitled

1 to a ruling on that. It's just we did not think we ought to
2 address that issue at this point.

3 Let me turn to my colleagues, Judge Manasco and Judge
4 Moorner, and ask them if they had any additional questions,
13:12:53 5 observations, or comments.

6 Judge Manasco?

7 JUDGE MANASCO: None from me.

8 JUDGE MARCUS: Judge Moorner?

9 I don't think we can hear you, Judge Moorner.

10 JUDGE MOORER: I'm sorry. No questions.
13:13:27

11 JUDGE MARCUS: All right. Well, let me run a couple
12 of other thoughts by you.

13 But one of the things that we -- by "we," I mean Judges
14 Moorner, Manasco, and myself -- were thinking about if it
13:13:47 15 becomes necessary for the Court to draw the maps, of doing
16 something like the following, and we throw it out to you for
17 your comments. And we welcome your input from the State, as
18 well as from the plaintiffs, about your judgment about the most
19 efficacious way to do this.

13:14:12 20 We would first be looking for someone or some group to
21 help us draw the maps. We've thought about pairing together or
22 coupling either Mr. Hinaman, who is an experienced
23 cartographer, along with Dr. Cooper; or pairing up Mr. Hinaman
24 with Dr. Duchin, but using some combination of them to actually
13:14:47 25 be the arm of this Court to do the drafting itself.

1 And, of course, pursuant to Rule 53 of the Federal Rules
2 of Civil Procedure, and pursuant to the inherent power of this
3 Court, we would be selecting a special master, as well, and in
4 addition to the folks that we would select for the purposes of
13:15:20 5 actually drawing the maps.

6 The reasons we focused on the three of them, quite
7 candidly, was we wanted to share this with you because we very
8 much want your input and guidance, was in the case of Hinaman,
9 who is a very experienced cartographer. He has been at it, and
13:15:39 10 he's done this map three times, going back to '92, again in
11 2011, and in 2021. And in the cases of Dr. Duchin and
12 Mr. Cooper, this Court was satisfied and found that they were
13 exceedingly qualified in their relevant fields. And so we
14 thought that it might make sense to pair them in the process
13:16:09 15 and use them as an arm of this Court for that task.

16 And this is just preliminary thinking on our part. But we
17 candidly wanted to think out loud with you, Mr. Davis and
18 Mr. Walker, and with you, Mr. Ross, Mr. Blacksher, and
19 Ms. Khanna, to get your comments about it.

13:16:33 20 You may want to think about it. You may not want to
21 comment now, but which we will happily give you.

22 But what are your thoughts? Mr. Davis, any comments?

23 MR. DAVIS: Not at this time, Judge. I think I will
24 take you up on your offer to let us confer among ourselves and
13:16:50 25 perhaps with Mr. Hinaman before I share any thoughts with the

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1 Court. I think I need to discuss that with my colleagues.

2 JUDGE MARCUS: Sure.

3 Mr. Ross?

4 MR. ROSS: Your Honor, I think we have some concerns.

13:17:01 5 I think we would propose an alternative whereby perhaps the
6 Court could set some dates or deadlines by which our experts
7 could propose alternative maps.

8 So whether, you know, Dr. Duchin could propose some maps
9 that are different than the illustrative maps that she proposed
13:17:25 10 that perhaps do things like protect incumbents, or other issues
11 that, you know, the Court identifies, or the defendants
12 identify. And then the Court would have an opportunity -- we
13 would have some guidance from the Court on what they would like
14 to see. And she could produce some maps for the Court and she
13:17:41 15 could give testimony.

16 JUDGE MARCUS: Let me just make two observations for
17 you in that regard.

18 First observation: The Legislature, to the extent it
19 draws this map, is perfectly free to consider the issue of
13:18:04 20 incumbency. The law certainly allows for that.

21 Our concern is that Section 2 of the Voting Rights Act be
22 complied with. But it seems from the evidence that was
23 presented to us -- I say this pointed you to you, Mr. Davis --
24 that a map could be drawn conceivably that respects incumbents
13:18:32 25 in whole or in part. How much, how well, how easy is the

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1 question for another time. But we do make that observation.

2 If the Court is called upon to draft the maps, we might
3 not give the same emphasis or priority to that consideration,
4 although it is fairly a consideration among a host of them,
13:19:08 5 including compactness, contiguity, respecting political
6 boundaries, divisions, counties, cities, municipalities,
7 precincts, the doctrine of one person one vote, the
8 consideration surrounding the Voting Rights Act itself. It's
9 something that may properly be considered, is all I'm really
13:19:34 10 saying. And the state Legislature can do that conceivably in
11 drawing a map, so long as it complies with the core holding
12 regarding the requirements of Section 2 of the Voting Rights
13 Act.

14 But I wanted, second, Mr. Ross, to just probe a little bit
13:20:00 15 more, if you are comfortable sort of giving me your sort of
16 initial reaction to what we were suggesting. I sense that you
17 have a concern.

18 Is there something that you can at least preliminarily
19 express to me? Is it a concern that we have considered
13:20:19 20 actually teaming up the State Legislature's cartographer with
21 either Dr. Duchin or Mr. Cooper?

22 MR. ROSS: I think we have --

23 JUDGE MARCUS: You think that's unworkable or a bad
24 idea for some reason? And I only see it because it struck us
13:20:37 25 at least initially that there was a lot of soundness to

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1 considering it doing it -- doing it in that way, given the
2 experience that each of the players brings to the underlying
3 task.

4 So I just wanted to ask you a little bit further, if you
13:20:58 5 are comfortable giving me some preliminary sense, and Judge
6 Manasco, Judge Moorer, your preliminary thoughts on that
7 matter.

8 MR. ROSS: Thank you, Judge Marcus.

9 I think my preliminary concern -- and my colleagues share
13:21:12 10 it -- is that there -- a concern about potential privilege
11 issues, since they are our expert and this is a preliminary
12 injunction hearing, that we may not want them having
13 conversations about the case with other parties. And so that
14 is what comes off the top of my head. There may be ways around
13:21:33 15 it, but that's my initial concern.

16 And my other thought is that, you know, the way that this
17 has sometimes worked in other cases is that the Court will have
18 its own special master, the parties will have the experts that
19 they may use, and the Court could provide a list of criteria
13:21:55 20 that the Court considers important.

21 I listed incumbents just because it was a thing that came
22 off the top of my head. But there are many other factors the
23 Court can say these should be prioritized, these should not be,
24 and then the parties could offer maps that the Court's special
13:22:13 25 master could consider on its own or not.

1 So, again, I don't think I'm saying no, but I think that
2 was the initial concerns.

3 JUDGE MARCUS: I understand. Let me make one
4 observation for you that just sort of comes off the top of my
13:22:29 5 head as I think about what you have said.

6 If we were to basically make as an arm of the Court Duchin
7 and Hinaman, or Cooper and Hinaman, they would be working for
8 us at that point, not you. We would certainly not invade any
9 prior discussion or conversation that you may have had with
13:23:00 10 them.

11 Beyond all of that, we will, regardless of who is selected
12 if -- and I underscore if we are required to step down that
13 road -- we will issue an order laying out the guidelines here.
14 They will be very specific, very direct, and it will tell the
13:23:25 15 special master and the map drawers what it is that we believe
16 their task must accomplish and what considerations they must
17 take into account. But I just wanted to share that with you.

18 Ms. Khanna, thoughts?

19 MS. KHANNA: Yes, Your Honor.

13:23:47 20 I really appreciate the Court's consideration of this
21 issue, because I think these are all great map drawers. I do
22 share Mr. Ross's concern.

23 And I think it's not that we feel like we would -- that
24 our experts would disclose anything, or that the Court would
13:24:02 25 ask them to disclose anything of our given privilege.

1 I think I just -- again, thinking about it without having
2 really analyzed the issued or not, I have not been presented
3 with this before, I would be a little worried about
4 relinquishing our experts who we rely on for map drawing and
13:24:20 5 evaluation to the Court, if we can't otherwise get them back as
6 the case proceeds or as the remedy process proceeds.

7 I also think that for all intents and purposes, all three
8 of the map-drawing experts that you mentioned will be
9 participating in the remedy process. I have -- I presume
13:24:40 10 Mr. Hinaman will be working with the Legislature to draw any
11 remedy map that they're able to propose. As Mr. Ross said, our
12 experts can propose additional maps, in addition to their
13 illustrative plans to -- if there's any particular court
14 guidelines that are set forth that they need to adhere to.

13:24:57 15 We will -- those three experts I have to assume will be
16 opining on other parties' maps and what they have proposed.

17 So I think the Court will still have the benefit of their
18 map-drawing expertise and analysis of the various factors even
19 if it doesn't necessarily create -- suggest that they are, in
13:25:20 20 fact, becoming an arm of the Court.

21 JUDGE MARCUS: Mr. Davis, what are your thoughts?

22 MR. DAVIS: Nothing further. As I said, Judge, I
23 would like to discuss it with my colleagues.

24 JUDGE MARCUS: So you are not quite ready to throw
13:25:32 25 cold water on the idea we threw out.

1 MR. DAVIS: I am not. I haven't had a chance to
2 discuss it.

3 JUDGE MARCUS: I appreciate that.

4 Mr. Blacksher?

13:25:39 5 MR. BLACKSHER: We're the only parties with no expert
6 demographer at our sides.

7 And I would only say that Randy Hinaman and Bill Cooper
8 know more about Alabama than any other map drawers alive. And
9 not just the boundaries, but the internal workings of the
13:26:08 10 state, the culture and the politics.

11 But -- and that's all I have to say. And I think Bill
12 Cooper is the best map drawer in the U.S., so that's what I
13 think.

14 JUDGE MARCUS: It just occurred to us, counsel, that
13:26:25 15 one way that this could be done with great dispatch would be to
16 team that group up in some, you know, in some combination, or
17 formation.

18 Any other comments, Judge Manasco, or Judge Moorer, on
19 this issue?

13:26:46 20 JUDGE MANASCO: I think -- all that I would add is,
21 having heard the concerns about privilege, you know, I would
22 invite the parties to think creatively about a way to
23 facilitate an opportunity for collaboration between those three
24 individuals that could unfold in a manner that respects the
13:27:10 25 privilege, but does not forego the potentially, you know, the

1 sort of synergistic effect and the potential efficiency of
2 having them collaborate in a way that is not adversarial, where
3 we see a proposal from one, a proposal from another, or a
4 proposal from another, or something in that manner.

13:27:31 5 I mean, to sort of use the shorthand to the extent that we
6 can get the, you know, some combination of them in the same
7 room at the same time to think about these issues that could
8 be -- if -- and I hope we are not required to, but if we are
9 required to step down this path, that that could be an
13:27:53 10 efficient way to begin.

11 So if, you know, the Court's initial idea is imperfect, I
12 would invite the parties to collaborate about a way to sort of
13 achieve a similar result in a manner that would be more
14 consistent with concerns about the privilege.

13:28:12 15 JUDGE MARCUS: Judge Moorer, any questions or comments
16 in connection with any of this?

17 JUDGE MOORER: Mr. Davis, this is more for you.

18 I appreciate the fact that you have got clients that you
19 have got to get with, and you've got your colleagues on the
13:28:34 20 defense team to interact with.

21 But, ultimately, I hope that you carry the message to your
22 side that this process is going to go forward, and it will be
23 done.

24 The Legislature, of course, has not only incumbency to
13:29:00 25 play out, but they have other competing political interests

1 that are valid to play out in a political scene, such as the
2 passage of a reapportionment map.

3 And I hope that you will convey to your clients that if
4 they don't engage in that process, how much they would be
13:29:29 5 losing that is of value to the entire process. And encourage
6 you to encourage your clients to essentially do what is the
7 Legislature's responsibility.

8 But I would also ask that you convey to them just as
9 strongly that it is going to be done in such a way that the
13:29:55 10 ultimate end goal -- the elections that must occur -- can occur
11 in an orderly fashion.

12 MR. DAVIS: Your Honor, I don't quite know what to
13 say. We take very seriously our role as officers of the Court
14 and as attorneys for --

13:30:11 15 JUDGE MOORER: I know you do. I am trying to give you
16 the imprimatur of the Court that you can pass along to your
17 client --

18 MR. DAVIS: I want to assure --

19 JUDGE MOORER: -- to encourage them. I am sure that
13:30:23 20 you as an officer of the Court are trying to encourage your
21 clients to act quickly. But ultimately it's got to be done,
22 this map process, and it will be done.

23 MR. DAVIS: Well, thank you, Judge. Everything the
24 Court says and everything the Court orders, we carry that to
13:30:46 25 our client and make sure that we do our best to advise them of

1 their legal obligations.

2 JUDGE MOORER: Yes.

3 JUDGE MARCUS: I think the only point here that's
4 being made, Mr. Davis -- and we made this point in the original
13:31:00 5 order that we entered -- if and only if the State Legislature
6 is unable to adopt a remedial map that complies with the
7 requirements of Section 2, it would fall then to the courts to
8 address that.

9 I repeat to you words that I've read and said to myself
13:31:30 10 many times in an opinion entered by Justice White many, many
11 years ago.

12 He said, and I quote him, That legislative bodies should
13 not leave their reapportionment tasks to the federal courts;
14 but when those with legislative responsibilities do not
13:31:51 15 respond, or the imminence of an election makes it impractical
16 for them to do so, it becomes the unwelcome obligation of the
17 federal courts to devise and impose a reapportionment plan
18 pending later legislative action.

19 And it makes the point that this is quintessentially a
13:32:21 20 legislative task. And we recognize that and underscore that.
21 But if we have to do this, there should be no misunderstanding
22 that we will do what our obligation requires us to do. We're
23 saying no more and no less, putting great faith, I should say,
24 in Alabama's Legislature to do this.

13:32:55 25 Any other thoughts or comments about this or status? Any

1 other issues anybody wanted to raise?

2 We have, of course, in front of us pending the application
3 for stay, Mr. LaCour, that you submitted, and we have had a
4 chance to study that at some length, I guess since yesterday,
13:33:20 5 and the response that we received from the Milligan and Caster
6 folks. And we will rule on that shortly, promptly.

7 But if there's anything you wanted to add with respect to
8 that, we're more than happy to give you a chance to do that, as
9 well.

13:33:40 10 MR. LACOUR: Nothing more to add, Your Honor, other
11 than we do, as we asked for in the motion, we do respectfully
12 ask the Court to rule quickly based on what we have heard
13 today. It sounds like we've got an inclination of how the
14 Court's going to rule. And if the Court does deny, we do
13:33:59 15 intend to seek a stay on appeal as quickly as possible.

16 JUDGE MARCUS: Sure. I understand that. Mr. Ross,
17 Ms. Khanna, anything further on that issue?

18 MR. ROSS: Not on the stay, Your Honor. But I did
19 want just to on your earlier point propose something. And
13:34:15 20 again we will have perhaps some time to think about it.

21 But if there were an opportunity for a court-ordered
22 mediation, that may address some of our concerns and allow our
23 experts to talk to the State's map drawers.

24 JUDGE MARCUS: Explain that. Sort of spin that out to
13:34:33 25 me. The reason I raised it is normally when we use mediation,

1 let's say we have a group of mediators on the U.S. Court of
2 Appeals that we use. When we send a case to a mediator,
3 basically, our involvement ends insofar as we dictate nothing
4 to the lawyer, the parties, or the mediator. If he and they
13:35:01 5 are able to work a solution, that's fine. If they aren't, so
6 be it, and it goes on for oral argument.

7 And on a district court, much the same way. If a district
8 court sends a case out for mediation, generally it will leave
9 it to the parties to see what they can do.

13:35:19 10 The problem that strikes me initially with mediation is
11 that I don't think that it helps us, in terms of the issues of
12 timing that we, you know, that we otherwise face.

13 What I would like to do at this point, if you can bear
14 with us, is just to take a short break for a few minutes to
13:35:56 15 give me a chance to counsel with my colleagues, and you can
16 give some further thought to some of the things we've
17 discussed, as well.

18 It is by my clock 1:36 Central Standard Time. I thought
19 we would bring you back here at 2:00 o'clock Central Standard
13:36:18 20 Time, which would be 3:00 Eastern Standard Time.

21 Is that okay with you folks? Can you stick around with us
22 for another 20 minutes or half hour?

23 MR. DAVIS: Yes, Your Honor.

24 MR. BLACKSHER: Yes, Your Honor.

13:36:29 25 MS. KHANNA: Yes, Your Honor. If I may just piggyback

1 off of something Mr. Ross said as everybody goes back to
2 consider various options.

3 It's possible just in response to Judge Manasco's idea of
4 thinking creatively here, how we can get these experts in a
13:36:46 5 room, in the event that the Legislature is not able to act in
6 the two weeks allotted, it is possible for the Court to proceed
7 to appoint a special master well before that so that the
8 structure is in place, but then at that point we can basically
9 have a settlement conference among the parties. Not
13:37:05 10 necessarily waiving whatever arguments people have on appeal on
11 the liability point, but a settlement remedial conference where
12 the lawyers and the map drawers are able to be in a room
13 without relinquishing our experts, but being able to utilize
14 our experts, and seeing if there is a joint proposal that
13:37:24 15 they're able to come up with for the Court's consideration and
16 perhaps special master's consideration.

17 If there's not, we end up where we were otherwise, which
18 is people presenting various competing maps. But that might be
19 an option.

13:37:37 20 JUDGE MARCUS: What she's suggesting, Mr. Ross,
21 Mr. Davis, Mr. Blacksher, Mr. Walker, is put them in a room
22 with a special master; that is to say, either Cooper and
23 Hinaman, or Duchin and Hinaman, or all three of them. We would
24 have to think about that -- with a special master and see what
13:38:00 25 comes of that deliberation and that discussion.

1 Do I have the thrust of that right, Ms. Khanna?

2 MS. KHANNA: Yes. Except I guess I guess I'm offering
3 like a settlement conference. The attorneys would also be
4 there -- the special master may or may not be in the room, but
13:38:17 5 it would really be a discussion among the parties. And I would
6 say the three parties here to sit down and see if there is a
7 joint resolution we can all agree on -- "we" being the lawyers
8 and the map drawers -- that we can provide for the Court's
9 approval, just like any settlement conference, where the
13:38:36 10 lawyers would meet up and see if their clients could come to
11 some agreement.

12 JUDGE MARCUS: Mr. Davis, what do you think about
13 that?

14 MR. DAVIS: I'm not sure I understand Ms. Khanna's
13:38:46 15 proposal. If she's discussing that we could actually try to
16 resolve this claim, I don't think that's realistic, given our
17 views of the governing law.

18 But I will think about it as to whether that structure
19 might facilitate a remedial map in a way that would allow us to
13:39:06 20 reserve all of our defenses.

21 JUDGE MARCUS: I understand.

22 Let's -- Mr. Ross, anything else you wanted to say with
23 regard to Ms. Khanna's observation?

24 MR. ROSS: No, Your Honor. Just that she's described
13:39:17 25 sort of what we were thinking, as well. Thank you.

1 JUDGE MARCUS: Let's do this, folks. I have 1:39. We
2 will reconvene here at about 2:00 o'clock. And it will give
3 you a chance to do some more thinking about it.

4 I understand, Mr. Davis, you have got to go back and speak
13:39:35 5 to your clients and your principals, and I know Mr. Walker has
6 to do that, as well, as do Mr. Ross, Ms. Khanna, and
7 Mr. Blacksher.

8 We will take a break for about 20 minutes and then we will
9 come back.

13:39:49 10 Thank you all.

11 (Recess.)

12 JUDGE MARCUS: Before we go forward any further, were
13 there any additional comments or thoughts that anyone wanted to
14 share with us?

14:08:11 15 Mr. Davis?

16 MR. DAVIS: Not from us, Judge. Thank you.

17 JUDGE MARCUS: Mr. Ross?

18 MR. ROSS: Your Honor, only thought is that since the
19 Court -- when the Court rules on the stay, we would just ask as
14:08:26 20 soon as possible -- and I know the Court is obviously working
21 on it -- that there be a written opinion, given that the
22 defendants are intending to seek a stay in this.

23 Thank you, Your Honor.

24 JUDGE MARCUS: We will give you a written order on the
14:08:43 25 stay probably no later than tomorrow.

1 Ms. Khanna?

2 MS. KHANNA: Nothing further right now.

3 JUDGE MARCUS: Mr. Blacksher?

4 MR. BLACKSHER: Nothing further, Your Honor. Thank
14:08:58 5 you.

6 JUDGE MARCUS: Mr. Davis, we have a question for you,
7 my colleagues and I.

8 Ms. Khanna had raised the question or concern about
9 privilege with regard to either Duchin or Cooper. If the Court
14:09:23 10 decided to use Hinaman as our cartographer -- "our" being this
11 three-judge court -- would you have an objection to that?

12 MR. DAVIS: Judge, again, that's something I would
13 have to think about.

14 JUDGE MARCUS: I understand.

14:09:46 15 MR. DAVIS: Yeah. And that's something I would have
16 to discuss not just with my co-counsel, but with our
17 principals, as well.

18 JUDGE MARCUS: I understand fully. But I would like
19 you to think about it, and Ms. Khanna, and Mr. Ross, and
14:10:06 20 Mr. Blacksher, we'd like you also to think about the
21 possibility of the following scenario.

22 We retain the services of Mr. Hinaman; by that, I mean
23 this three-judge court. Of course, we're ahead of ourselves
24 with all of this, because all of this assumes that the State's
14:10:34 25 legislative body is unable to perform this sovereign task of

1 drawing a map, and we have given you our view on the importance
2 of that.

3 But assuming arguendo that it falls to us to do this, the
4 scenario I'm throwing out to you is that we make Hinaman an arm
14:11:00 5 of the Court. We are not interested in his past discussions
6 with you, Mr. Davis, or any of your predecessors. But we hire
7 him as the Court's cartographer.

8 And subject to the supervision of a special master that we
9 will pick, and pursuant to an express order that we will enter
14:11:23 10 laying out exactly what the mission will be, what the
11 considerations are that have to be taken into account, and with
12 the additional requirement that he must consult with Duchin and
13 Cooper, or Cooper and Duchin, to the extent plaintiffs' counsel
14 agree to allow that, and otherwise properly respect any
14:11:57 15 privilege that may otherwise obtain. They may choose not to
16 make Cooper and Duchin available at all.

17 But I am throwing out the scenario that we direct
18 Mr. Hinaman, if we retain his services, to consult with him
19 specifically in connection with this task pursuant to the
14:12:22 20 orders we will enter and have entered, and pursuant to the
21 supervision and involvement of a special master.

22 I want you to think about that. Does that work for you?
23 Does that work for you, Ms. Khanna? Does that work for you,
24 Mr. Ross? And enable you to ensure that you can protect any
14:12:46 25 issue of privilege and it avoids the Court co-opting Duchin and

1 Cooper and making them an arm of the Court so they're not
2 otherwise available to you.

3 I am thinking aloud. Maybe this is doable. Maybe it
4 isn't. And maybe we will just pick a cartographer of our own
14:13:11 5 choice and say thank you all very much, and move on from there.

6 But this strikes us as worth consideration. And it may be
7 that there are ample ways to protect any privilege, Mr. Davis,
8 that you may be concerned about, and any privilege, Mr. Ross,
9 Ms. Khanna, and Mr. Blacksher, that you may be concerned about.

14:13:37 10 Does any of this make any sense to you? And I -- by me
11 asking the question, I don't mean that I need or expect an
12 answer this minute. If you have any other thoughts, we're
13 happy to hear them.

14 But what we are going to do is we're going to direct
14:13:56 15 counsel for all of the parties -- for the Secretary of State,
16 for the intervening defendants, for the Caster people, for the
17 Milligan people, and for the Singleton people -- to sit down
18 between now and Friday, discuss amongst yourselves whether
19 there is a way to accomplish what it is we're suggesting.

14:14:25 20 What's more, to come back by Friday 10:00 a.m. with a report
21 telling us the following: First, any recommendations you may
22 have for us to consider of a special master. We will pick a
23 special master, and we will pick a special master pursuant not
24 only to our authority under Rule 53 of the federal rules, but
14:14:53 25 also pursuant to the inherent power of the Court, but we want

1 your guidance, your input, your help in that process.

2 So tell us whom you would suggest we consider for the task
3 of being the special master; and, two, tell us what you think
4 about the idea of Hinaman drawing the map with the requirement
14:15:27 5 that he must sit down with Cooper and Duchin -- we only frame
6 it that way, Ms. Khanna, to answer the concern, which is a fair
7 one that you raise, but to make sure that they have real input
8 into this process under the supervision of a special master,
9 and with you working out any problem about making sure that you
14:15:58 10 keep inviolable the privilege of any conversations you may have
11 had with any or all of them.

12 So we would ask you to let us know in a written report
13 hopefully a joint report Friday 10:00 a.m. both on special
14 master, cartographer, and the specific suggestion that has come
14:16:26 15 out of our dialogue today.

16 And, finally, we will ask you to come on back 3:00 p.m.
17 Central Standard Time on Friday, and we can take up the
18 discussion at that point.

19 In addition, as I said, we will put out an order
14:16:49 20 addressing the motion for a stay very shortly. And we will,
21 Mr. Davis, also be putting out an order hopefully that makes it
22 crystal clear that the order we entered referred to and only
23 referred to the map that was drawn, with regard to the seven
24 districts in the congressional elections -- nothing more,
14:17:16 25 nothing less. It has nothing to do with the issue the state

1 seeks, which is before another three-judge court, and which has
2 been stayed with the concurrence of all of the counsel.

3 Any questions about anything I have said, Mr. Davis?

4 MR. DAVIS: No, Judge. Thank you. We understand what
14:17:41 5 Your Honor's given us to consider.

6 JUDGE MARCUS: Ms. Khanna?

7 MS. KHANNA: No, Your Honor.

8 JUDGE MARCUS: Mr. Ross?

9 MR. ROSS: No, Your Honor. Thank you.

14:17:52 10 JUDGE MARCUS: All right. And Mr. Blacksher?

11 MR. BLACKSHER: I'm here. Yes, sir. Thank you.

12 JUDGE MARCUS: Thank you all very much for your
13 participation and your help.

14 Was there something more you want to raise, Mr. LaCour or
14:18:09 15 Mr. Davis?

16 MR. LACOUR: Would the Court be willing to consider
17 issuing an oral -- an oral order on our stay motion at this
18 time, and then follow up with a written opinion --

19 JUDGE MARCUS: No.

14:18:20 20 MR. LACOUR: -- when the Court has time do that?

21 JUDGE MARCUS: No. We're still ruminating. And we
22 want the opportunity to fully consider and put it out in a
23 written report. But you will not have to wait long. We will
24 do everything we can to give you an answer promptly.

14:18:38 25 MR. LACOUR: All right. Thank you.

1 JUDGE MARCUS: With that, I thank you for your
2 request. I appreciate it.

3 We thank all of you. And we will see you back here 3:00
4 p.m. Central Standard Time on Friday. This Court is adjourned.

14:18:52 5 (Whereupon, the above proceedings were concluded at
6 2:18 p.m.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Christina K Decker

0-^-2022

Christina K. Decker, RMR, CRR
Federal Official Court Reporter
ACCR#: 255

Date