No. __-___

In the Supreme Court of the United States

WES ALLEN,
IN HIS OFFICIAL CAPACITY AS THE ALABAMA SECRETARY OF STATE
Applicant,
v.
EVAN MILLIGAN, et al.
Respondents.

APPENDIX TO EMERGENCY APPLICATION FOR STAY: VOLUME 3 OF 3

Steve Marshall
Attorney General

Edmund G. LaCour Jr.
Counsel of Record

James W. Davis
Misty S. Fairbanks Messick
Brenton M. Smith
Benjamin M. Seiss
Charles A. McKay
OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
501 Washington Avenue
P.O. Box 300152
Montgomery, AL 36130-0152
(334) 242-7300
Edmund.LaCour@AlabamaAG.gov

Jeffrey M. Harris
Taylor A.R. Meehan
C'Zar Bernstein
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
Jeff@ConsovoyMcCarthy.com

Counsel for Applicant

TABLE OF CONTENTS

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

BOBBY SINGLETON, et al., Plaintiffs, vs. WES ALLEN, in his official capacity as Alabama Secretary of State, et al., Defendants.	*	2:21-cv-1291-AMM August 14, 2023 Birmingham, Alabama 9:00 a.m.
EVAN MILLIGAN, et al., Plaintiffs, vs. WES ALLEN, in his official capacity as Alabama Secretary of State, et al., Defendants.	*	2:21-cv-1530-AMM
MARCUS CASTER, et al., Plaintiffs, vs. WES ALLEN, in his official capacity as Alabama Secretary of State, et al., Defendants.	*	2:21-cv-1536-AMM

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ANNA M. MANASCO,
THE HONORABLE TERRY F. MOORER,
THE HONORABLE STANLEY MARCUS

CHRISTINA K. DECKER, RMR, CRR
Federal Official Court Reporter
101 Holmes Avenue, NE
Huntsville, AL 35801
256-506-0[illegible]ChristinaDecker.rmr.crr@aol.com

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
Federal Official Court Reporter
101 Holmes Avenue, NE
Huntsville, AL 35801
256-506-0[illegible]ChristinaDecker.rmr.crr@aol.com

APPEARANCES

FOR THE MILLIGAN PLAINTIFFS:

Deuel Ross
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
700 14th Street N.W. Ste. 600
Washington, DC 20005
(202) 682-1300
Dross@naacpldf.org

Brittany Carter
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
Laden@naacpldf.org
Snaifeh@naacpldf.org

Davin M. Rosborough
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad St.
New York, NY 10004
(212) 549-2500
Drosborough@aclu.org

David Dunn
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, NY 10017
(212) 918-3000
David.dunn@hoganlovells.com

Sidney M. Jackson
Nicki Lawsen
WIGGINS CHILDS PANTAZIS
FISHER & GOLDFARB, LLC
301 19th Street North
Birmingham, AL 35203
Phone: (205) 341-0498
Sjackson@wigginschilds.com
Nlawsen@wigginschilds.com

FOR THE CASTER PLAINTIFFS:
Abha Khanna
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
206-656-0177
Email: AKhanna@elias.law

Joseph N. Posimato
Elias Law Group LLP
10 G Street, NE; Suite 600
Washington, DC 20002
202-968-4518
Email: Jposimato@elias.law

Richard P Rouco
QUINN CONNOR WEAVER DAVIES & ROUCO LLP
Two North Twentieth Street
2 20th Street North
Suite 930
Birmingham, AL 35203
205-870-9989
Fax: 205-803-4143
Email: Rrouco@qcwdr.com

FOR THE DEFENDANT:
Brenton Merrill Smith
OFFICE OF THE ATTORNEY GENERAL OF ALABAMA
P.O. Box 300152
501 Washington Avenue
Montgomery, AL 36130
334-353-4336
Email: Brenton.Smith@AlabamaAG.gov

Edmund Gerard LaCour, Jr.
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
P.O. Box 300152
Montgomery, AL 36104
334-242-7300
Email: Edmund.Lacour@AlabamaAG.gov

James W Davis
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
P O Box 300152
Montgomery, AL 36130-0152
334-242-7300
Fax: 334-353-8400
Email: Jim.davis@alabamaag.gov

J Dorman Walker
BALCH & BINGHAM LLP
P O Box 78
Montgomery, AL 36101
334-834-6500
Fax: 334-269-3115
Email: Dwalker@balch.com

COURTROOM DEPUTY: Frankie N. Sherbert

COURT REPORTER: Christina K. Decker, RMR, CRR

PROCEEDINGS:

JUDGE MARCUS: Good morning to all of you folks, and welcome.

It's a whole lot more pleasurable to see you in person, I can assure you, than on a Zoom screen.

We regret very much, Ms. Khanna, that you have been unable to come, but we wish you a speedy recovery. We're delighted you are with us online.

Can you hear us okay?

MS. KHANNA: I can, Your Honor. Can you hear me?

JUDGE MARCUS: Just fine. Thank you.

With that, I would like to begin by asking the parties if you would be kind enough to state your appearances on the record.

This is in the Milligan and Caster cases. We will proceed with Singleton upon the completion of this case.

With that, if counsel for Milligan would be kind enough to state your appearances.

MR. ROSS: Yes, Your Honor. Deuel Ross for the Milligan plaintiffs.

MR. ROSBOROUGH: Good morning, Your Honor. Davin Rosborough for the Milligan plaintiffs.

JUDGE MARCUS: And for Caster.

MR. POSIMATO: Good morning, Your Honor. It's Joe Posimato on behalf of the Caster plaintiffs.

MR. ROUCO: Good morning, Your Honor. Richard Rouco on behalf of the Caster plaintiffs.

MS. KHANNA: Good morning, Your Honor. Abha Khanna also on behalf of the Caster plaintiffs.

JUDGE MARCUS: Good morning to all of you.

And for the defendants?

MR. LACOUR: Good morning, Your Honor. Edmund LaCour on behalf of the Secretary of State Wes Allen.

MR. DAVIS: Jim Davis on behalf of the Secretary of State Wes Allen.

MR. SMITH: Good morning, Your Honor. Brent Smith on behalf of Secretary of State Wes Allen.

JUDGE MARCUS: And good morning to all of you folks.

I'm sorry. Mr. Walker.

MR. WALKER: Dorman Walker on behalf of the defendant intervenors.

JUDGE MARCUS: Are you able to see us okay from where you are?

MR. WALKER: Yes, sir, I can.

JUDGE MARCUS: Thank you. I think we missed one attorney on the right.

MR. JACKSON: Good morning, Your Honor. Sidney Jackson for the Milligan plaintiffs.

JUDGE MARCUS: Good morning. Any other lawyers of record that want to state their appearances?

MR. DUNN: David Dunn also for the Milligan plaintiffs.

MR. ROSS: Your Honor, we also have Nicki Lawsen and Tanner Lockhead, Amanda Allen, and Brittany Carter also for the Milligan plaintiffs, and our clients are here, as well.

JUDGE MARCUS: Welcome to all of you.

And, Mr. LaCour, Mr. Davis, anyone else you wanted to introduce before we begin?

MR. DAVIS: That's all for us, Judge.

JUDGE MARCUS: Thank you.

We set this case down for a hearing this morning. We wanted to give each side the opportunity to make an opening statement, and we will give each of the parties a half hour. You need not take all of it to make an opening statement.

But before we did that, we had one outstanding motion pending that was the motion in limine filed by the -- by the plaintiffs.

With that, did you want to address that motion at this point, Mr. Ross? Ms. Khanna? Or did you want to go to opening statement first?

MS. KHANNA: We would prefer to go to opening statement first, Your Honor. But I leave it to Mr. Ross if he wanted to argue the motion in limine specifically.

MR. ROSS: Your Honor, we would rather do the opening statements first, and then answer questions about the motion in

limine.

JUDGE MARCUS: Okay. The only reason -- Mr. LaCour, Mr. Davis, Mr. Walker, what's your view? Did you want us to tackle the in limine motion first, or go to opening first?

MR. LACOUR: Your Honor, I think -- you have seen the briefing on the objections and on the motion in limine. There is a tremendous amount of overlap, we think. So we want to start with opening statements and delve into some of those issues about what is or is not relevant and what the Court is or is not doing today. We think that makes sense.

THE COURT: All right. We will proceed with opening statements. And then we will go forward with the motion in limine. And then we will proceed to the presentation, Mr. Ross, you want to make on behalf of the Milligan plaintiffs, and, Ms. Khanna, and your colleagues on behalf of Caster, and whatever the State will be presenting, Mr. LaCour.

So that with, we will turn to Mr. Ross. Did you want to begin?

MR. POSIMATO: Your Honor, both the Caster and Milligan plaintiffs are prepared to start first. We defer to the Court on whether it makes sense for Ms. Khanna to go first since she is on Zoom, or whether you prefer to hear from Mr. Ross first.

JUDGE MARCUS: Why don't we go forward with Mr. Ross?

MR. ROSS: Thank you, Your Honor.

May it please the Court. 18 months ago, this Court ruled that the 2021 plan likely dilutes the votes of black voters in Alabama. The appropriate remedy this Court said is a plan that includes either an additional majority-minority district or an additional district in which black voters have an opportunity to elect candidates of their choice.

The Supreme Court affirmed that decision in full.

At this Court's invitation, the Alabama Legislature has proposed a new remedial map. And so today, there's only one question before this Court: Does the new 2023 plan remedy the prior vote dilution, and does it provide black voters with an additional opportunity to elect the candidates of their choice. The answer is that it does not.

No party disputes this fact.

The viability of the 2023 plan is not considered on a clean slate the way Alabama would have it. Rather, the Court evaluates the 2023 plan in part measured by the historical record that is the record of the violation this Court has already found, and in part measured by prediction, and in part measured by the difference between the old plan and the new plan.

First, looking at the historical record as affirmed by the Supreme Court, plaintiffs have satisfied the first *Gingles* precondition. The first *Gingles* precondition does not look at the compactness of plaintiffs' map. It looks at the

compactness of the minority community. And as the Supreme Court found, black voters and this Court found, as well, geographic -- or black voters are geographically compact, and they are sufficiently numerous to constitute a second majority-minority district.

Plaintiffs also satisfied the second and third *Gingles* preconditions. Alabama does not dispute that black voters are -- that there is serious racially polarized voting in the state, and that black voters have not been able to elect the candidate of their choice in a second congressional district.

Today, as in 2022, black voters enjoy virtually zero success in state-wide elections. Alabama's political campaigns feature racial appeals. Alabama has an extensive and ongoing history of repugnant racial discrimination, and this history of discrimination includes abandoning racist laws when they're enjoined by courts, and then replacing them with facially race-neutral laws that maintain the status quo.

Second, when measured by predictions, there is no dispute that the 2023 plan does not lead to the election of a majority -- second African-American candidate of choice. According to Alabama's own analysis, the black-preferred candidate would have lost all seven elections that the State analyzed between 2018 and 2022. And defendants do not dispute the analysis plaintiffs' expert Dr. Liu that black candidates would have lost all 11 biracial elections that took place over

the last 10 years.

Third, the 2023 plan, like the old plan, also results in vote dilution. Both plans contain only one opportunity district. In the new District 2, black candidates would lose every election, just as in the old District 2, black candidates have lost every election.

Unfortunately, rather than address its failure to correct the violation that this Court found, Alabama rehashes the arguments that both this Court and the Supreme Court have already rejected.

First, these courts rejected Alabama's overdrawn argument there could be no legitimate reason to split Mobile and Baldwin counties, and yet Alabama wants to relitigate its prioritization of Mobile and Baldwin overdrawing an effective opportunity district.

Second, the Supreme Court made clear the Section 2 does not set up a beauty contest between plaintiffs' illustrative plans, and the State's enacted plan. And yet Alabama insists that the Court should compare its allegedly neutral treatment of various communities in the 2023 plan to the treatment of the same alleged communities in the illustrative plan. But the Court rejected the notion that plaintiffs' or Alabama's plans are measured against some idealized allegedly neutral application of Alabama's preferred redistricting criteria.

Third, the Supreme Court made clear that the use of race

in redistricting is permissible to remedy a Section 2 violation. The majority of the court said the very reason plaintiffs educe a map of first step of *Gingles* is precisely because of its racial composition.

The majority also said that Section 2 requires remedies, and those instances like here where intensive racial politics already play an excessive role in denying black voters the opportunity to elect the candidate of their choice. And yet Alabama is again arguing that the use of race in devising a remedy is improper.

At bottom, Alabama is arguing that this Court should ignore the Supreme Court's rulings, ignore this Court's preliminary injunction order, and ignore the undisputed fact that the 2023 plan does not result in a new opportunity district for black voters.

Instead, Alabama wants to focus on the Legislature's intent in enacting the 2023 plan, but as the Supreme Court unanimously found, Section 2 is not about intent. It's about results and effect.

Plaintiffs' only burden then is to show that under the 2023 plan, black voters still lack an opportunity to elect a candidate of their choice in a second district. Plaintiffs have met that burden. And Alabama does not dispute that fact.

For that reason, plaintiffs are not required to go any further to sustain their objections.

Still as this Court knows, Senate Factor 2 -- or, excuse me -- Senate Factor 9 under the *Gingles* analysis asks whether the policy underlying the State's justification for its redistricting plan is tenuous. This Court declined to rule on tenuousness in 2022, and this Court doesn't have to resolve this issue now here. Nonetheless, there is substantial evidence that the Legislature was engaged in gamesmanship rather than a good faith effort to comply with this Court's order.

Before the special session, the chairs of the redistricting committee Senator Livingston and Representative Pringle were well aware of the import of this Court's order. I am going to play some clips from depositions that were taken last week. I am going to begin here with Senator Livingston, the chair of the Senate Redistricting Committee on his understanding of the Court's order:

(Video played:)

"SENATOR LIVINGSTON: I understand that the courts have ordered us to provide two opportunity districts minority -- majority-minority opportunity districts."

MR. ROSS: That's Senator Livingston, the chair of the redistricting committee and a defendant in this case.

And here is Representative Pringle, the chair of the House Redistricting Committee.

(Video played:)

"MR. PRINGLE: At play in your consideration of these new maps during the 2023 redistricting cycle."

JUDGE MARCUS: Let me stop for a moment. Was that video as well as audio?

MR. ROSS: Yes. Yes. Can you not hear the audio, Your Honor?

JUDGE MARCUS: I can hear the audio.

MR. ROSS: Okay. Oh, I believe Representative Pringle is in the corner there, and he is reading our exhibit, which is a copy of the opinion.

JUDGE MARCUS: Thank you.

MR. ROSS: Start from the beginning, please.

(Video played:)

Q "What role, if any, did this passage from the preliminary injunction order play in your consideration of these new maps during the 2023 redistricting cycle?

A That we were charged with drawing a map that would provide an opportunity for the black voters to elect a candidate of their choosing.

Q Did you have an understanding of what was required in order for that opportunity to comply with the opportunity as it's expressed in this paragraph?

A An opportunity for blacks to elect a candidate of their choosing.

Q Okay. So as you were considering plans, did you have an

understanding of what it means for black voters to have an opportunity to elect a representative of their choice?
A I would say -- ask me that again, please.
Q Sure. Tell me what you understand what it means to provide black voters with an opportunity to elect a black candidate of their choice.
A You know, a district which they have the ability to elect or defeat somebody of their choosing. I have no magic number on that.
Q Sure. Does it turn on the ability to elect for you?
A Yes. Ability."

MR. ROSS: Your Honor, Mr. Hinaman, who is also the State's cartographer and drew the 2021 plan, also testified to his understanding of the Court's order and what the redistricting chairs initially asked him to do after the Supreme Court ruling.

If you could play Mr. Hinaman's testimony.

(Video played:)

Q "In light of Mr. Walker and Mr. LaCour, did you discuss the Court's order with anyone else?
A Obviously the two chairs.
Q What did you discuss with them?
A Just essentially what I said earlier, that we needed to address the Court's concerns and work to draw a map that was -- provided an opportunity for African-Americans to elect a

candidate of their choice in two districts.
Q You mentioned that from your perspective an opportunity district is one in which black voters have an opportunity to elect a representative of their choice, correct?
A Yes, sir.
Q And you mentioned that a big indicator of that is shown in a performance analysis or an election analysis, correct?
A Yes, sir."

MR. ROSS: Okay. And so, again, the plaintiff -- excuse me -- the defendants were very well understood what their task was. And yet despite their understanding, Alabama never set out to draw a second opportunity district.

Mr. Hinaman testified that he was never instructed to draw a second majority-black district. And the 2023 plan was enacted without actually providing that opportunity. Instead, the map was drafted largely in secret without incorporating the input from black legislators in the state.

Although it's unclear who exactly drew the 2023 plan, it is clear who had substantial input. Here, again, is Representative Pringle testifying.

(Video played:)

Q "During this stage?
A For me?
Q For you -- is there anyone else besides Mr. Hinaman that served as a map drawer or a consultant during this stage?

A For me?
Q For you or for the committee?
A No. Eddie LaCour worked as a map drawer at some point in time.
Q Okay. And what did he do as a map drawer?
A Drew maps.
Q And in that respect, Mr. LaCour primarily served as a map drawer or an attorney?
A Initially as an attorney.
Q What about after that?
A I lost contact with Mr. LaCour at the very beginning of the special session and never saw or communicated with him again. He was upstairs meeting with the senators in a different room working with them to draw what ultimately became the Livingston plan.
Q Understood."

MR. ROSS: So in passing the 2023 plan, defendants knew that they were flouting this Court's order to devise a plan that contained a second opportunity district.

And Representative Pringle was very clear that he was unhappy about the 2023 plan. He would have preferred that the Legislature enact the plan that was first passed by the House.

And while plaintiffs believe that that plan also would have not satisfied Section 2, the State's performance analysis of the House's plan showed that black-preferred candidates

would at least rarely be able to win elections in a second district.

Here is Representative Pringle explaining his view of the House plan, as compared to the enacted plan in -- that's at issue now.

(Video played:)

Q "What's the significance of the 39.9 percent BVAP in SB-5; just that it passed?

A That's what the Senate came up with, and they were not going to allow us to pass the House plan.

Q And do you know why they chose that number?

A You're going to have to talk to Senator Livingston and Eddie LaCour.

Q Did they mention anything to you?

A No.

Q Let's go ahead and --

A Let me -- no. Let me rephrase that.

Senator Livingston came to me towards the end and said, we're going to take your plan and substitute my bill and pass your plan with my mapping. And I said, no, we're not. If you want to pass a Senate plan, you are going to pass a Senate plan on the Senate bill number, and you are not going to put my name on it. You're not -- it is not going to be a House bill number. It's going to be a Senate bill number if that's what we are going to pass.

Q Why didn't you want your name on it?
A Because I thought my plan was a better plan.
Q In terms of its compliance with the Voting Rights Act?
A Exactly.
Q Representative Pringle, these --"

MR. ROSS: Finally, the findings in new redistricting criteria included in SB-5 are also unprecedented. Neither the cartographer Mr. Hinaman, Representative Pringle, or Senator Livingston had ever seen a redistricting bill that included legislative findings about communities of interest or any findings about redistricting guidelines.

Indeed, a week before the Legislature enacted the 2023 plan, the redistricting committee readopted the exact same guidelines that were used in 2021. And Mr. Hinaman testified that he drew his plans for the Legislature based on those 2021 and 2023 committee guidelines. And Alabama admits that under the 2021 and 2023 committee guidelines, it would have allowed the State to draw a second majority-black district.

But SB-5 includes newly invented findings that limit the number of county splits to six, that change the definition of communities of interest, that identify the Black Belts, the Wiregrass, and the Gulf as specifically prioritized communities. And SB-5 also bars splitting those prioritized communities into more than two districts.

But it appears that SB-5's findings did not come from the

Legislature itself, but from the lawyers in this case. Thus, the apparent purpose of SB-5's findings were simply to facilitate the defendants' relitigation of *Gingles I* at this hearing.

Here again, Your Honor, is Representative Pringle, the chair of the House Redistricting Committee.

(Video played:)

Q "Representative Pringle, these are the suggestive findings; is that right?

A That's what was written in the bill, yes.

Q Okay. And do you know who drafted the statement of legislative intent in findings here?

A No, sir.

Q Did you know that these would be put in the bill?

A No, sir.

Q Did the redistricting committee solicit anyone to draft these findings?

A No, sir.

Q Do you know why they're in here?

A No.

Q As -- remind me. Have you ever seen another district bill contained similar language like this, these findings?

A Not to my knowledge, no."

MR. ROSS: And here again, Your Honor, is Senator Livingston, the chair of the Senate Redistricting Committee.

(Video played:)

Q "Are you generally familiar with the fact that there are what are titled legislative findings that take up about, you know, five or so pages in the bill?

A Yes, sir.

Q Okay. And do you recall in your responses to the interrogatories that when you were asked to identify each individual and/or entity who participated in the drafting of the statement of legislative intent accompanying the congressional districting map, you said on information believed Eddie LaCour. Do you recall that?

A Yes, sir.

Q When -- are these sections of the bill what you were referring to in that answer?

A Yes, sir.

Q Okay."

MR. ROSS: Your Honors, Alabama should not be rewarded for its bad faith.

Ultimately Section 2, though, is a results test. Plaintiffs simply present this evidence to give the Court context about the gamesmanship that was going on by Alabama Legislature and by the defendants in this case.

The 2023 plan has the same results as the 2021 plan. That is what's important. It does not create a new opportunity for black voters to elect their candidates of choice in a second

district, and, therefore, plaintiffs respectfully request that the Court enjoin the 2023 plan and order the special master to begin the process of devising a complete and proper remedy.

Thank you.

JUDGE MARCUS: Thank you much, counsel.

Who will be proceeding for the Caster plaintiffs? Ms. Khanna or --

MS. KHANNA: Your Honor, with the Court's permission, I will give the opening statement for the Caster plaintiffs.

THE COURT: Thank you. Of course. And you may proceed.

MS. KHANNA: Good morning, Your Honors. May it please the Court. Abha Khanna for the Caster plaintiffs. And I would like the thank the Court again for the accommodation to allow me to present via Zoom while I'm in quarantine. I am very disappointed that I could not make it there in person today.

18 months ago, this Court found Alabama liable under Section 2 of the Voting Rights Act for diluting the voting power of its black citizens through a congressional plan that provided black voters just a single district in which they had the opportunity to elect their candidates of choice. The same district that Alabama was forced to draw 30 years ago after a different Voting Rights Act lawsuit.

This Court's conclusion on what the law requires was neither cursory nor groundbreaking. To the contrary, it was

meticulous and methodical, following step by step the well-established legal standard for adjudicating claims under Section 2.

First, the Court found that it was beyond dispute that black voters in Alabama were sufficiently numerous to comprise a majority of eligible voters in an additional district. In so doing, this Court rejected the State's odious suggestion advanced through its expert Mr. Thomas Bryan to narrow the count of black citizens to only a subset of individuals that the State deemed black enough to warrant protection under the Voting Rights Act.

Second, the Court found extreme polarization throughout the state. This, too, was beyond dispute. Black and white voters in Alabama consistently and cohesively vote for opposing candidates. And absent a majority-black district or something close to it, white voters will vote as a bloc to defeat black-preferred candidates in virtually any election. So intense is the racial polarization in Alabama that even the state's own expert agreed with this Court's finding.

Third, this Court analyzed each and every Senate Factor relevant to this case to determine that the totality of circumstances weighed decidedly in favor of finding Section 2 liability. Specifically, it found that the pattern of racial polarization in Alabama is clear, stark, and intense; that black Alabamians enjoy virtually zero success in statewide

elections; and no black candidate for Congress has ever been elected from a majority white district.

Alabama's extensive history of repugnant racial and voting-related discrimination is undeniable and well documented. And that despite defendants' contention that Alabama has come a long way, the last few decades of Alabama's discriminatory voting laws, racial animus among state actors, and racial disparities across nearly every dimension make clear that that history is alive and well in the present, that recent and prominent political campaigns, including by congressional candidates have been characterized by a racial appeals, and that white voters enjoy a disproportionate advantage in congressional representation while black voters experience a disproportionate disadvantage in stark contrast to their respective shares of the population.

Finally, this Court rejected the State's contention that plaintiffs' illustrative plans are unconstitutional racial gerrymanders. It further rejected Alabama's throw everything at the wall to see what sticks legal strategy seeking to undermine the very constitutionality of Section 2 and the ability of individual plaintiffs to bring Section 2 claims to court in the first place.

In short, this Court did exactly what district courts are charged with doing. It applied well-established law to the well-developed factual record. And in so doing, it found that

the question of whether Alabama's congressional plan likely violates Section 2 of the Voting Rights Act is not even close.

Alabama refused to accept this Court's ruling and sought and achieved a stay before the U.S. Supreme Court. As a result, the congressional plan enjoined by this Court as a violation of federal law, remained in place for the 2022 elections. And as expected, black-preferred candidates lost in every district, save District 7, the state's only majority-black district.

On the merits, Alabama turned to the Supreme Court with the same arguments that it advanced before this Court. And once again, lost on each and every one of them. The Supreme Court upheld this Court's findings on plaintiffs' satisfaction of the *Gingles* preconditions and the totality of circumstances.

The Supreme Court saw no reason to disturb this Court's careful factual findings and spot-on legal conclusions. And the Court firmly and decidedly rejected Alabama's attempts to upend the Section 2 legal standard, to paint plaintiffs' illustrative maps as racial gerrymanders, and cut the legs out from Section 2 altogether.

In short, the Supreme Court reaffirmed the well-established legal standard applied by this Court and this Court's detailed findings and conclusions based on that standard.

And so after three federal judges and a majority of

Supreme Court justices rejected the State's Section 2 defense, the ball flipped back in Alabama's court. This Court rightly afforded Alabama a reasonable opportunity to remedy its violation.

And the Court didn't leave state officials in the dark about what that remedy required. It held as a matter of law that under the statutory framework, Supreme Court precedent, and Eleventh Circuit precedent, the appropriate remedy is a congressional redistricting plan that either includes an additional majority black congressional district or an additional district in which black voters otherwise have an opportunity to elect a representative of their choice.

And the Court recognized as a matter of fact the practical reality based on the ample evidence of intensely racially polarized voting that any remedial plan will need to include two districts in which black voters comprise a voting major majority or something quite close to it.

Alabama promised to take advantage of the opportunity afforded by this Court assuring both the Court and plaintiffs that the Legislature would make a good faith attempt to enact a remedial map that addresses this Court's findings. But in defiance of the Court's clear instructions, and in disregard of the state's black citizens, Alabama squandered that opportunity and refused to draw a remedy map at all.

After asking this Court to pause these proceedings for

weeks, to allow the Legislature to act, the state of Alabama once again enacted a congressional plan with just a single district in which black voters have an opportunity to elect their candidates of choice. That is the map before this Court today.

Let me be clear. There is no dispute that the 2023 plan enacted by the state of Alabama once again limits the state's black citizens to a single opportunity district. Alabama has stipulated that its new map includes just one majority black district. It has stipulated that the district with the next highest black population has a BVAP of just 39.9 percent. It has stipulated to the findings of plaintiffs' experts that black-preferred candidates will nearly always be defeated in that district.

In fact, it has stipulated to the Alabama Legislature's own analysis revealing that black-preferred candidates would lose each and every one of the elections the Legislature analyzed in the state's new congressional District 2.

Based on these stipulated facts alone, Your Honors, this Court can and must enjoin the 2023 map for perpetuating the same Section 2 violation as the map struck down by this Court last year.

In enacting the 2023 plan, Alabama acted in defiance of this Court's preliminary injunction order and the U.S. Supreme Court's opinion. And Alabama remains defiant in its continued

and baseless defense of that plan before this Court.

First, Alabama insists that after more than a year and a half of litigation, after it succeeded in staving off plaintiffs' relief for an entire election cycle, and after five weeks granted by this Court to allow the state to engage in a remedial map drawing process, we're now back at square one. According to Alabama, the enactment of a new map wipes the record clean and requires plaintiffs to reprove Section 2 liability from scratch.

But the Supreme Court has already rejected the state's position in *North Carolina vs. Covington*, where it explained that the passage of a remedial plan does not reset a court's liability finding.

Second, Alabama argues that it remedied its prior cracking of the Black Belt by dividing Black Belt counties into two districts instead of four. But Alabama cannot feign innocence on its warped interpretation of the term cracking.

Cracking in the Section 2 context refers to the dispersal of minority voters into districts where they have no opportunity to elect their preferred candidates even though they are sufficiently numerous and geographically compact enough to comprise a majority of voters in a reasonably configured district.

The 2021 plan cracked black voters in the Black Belt among three congressional districts to ensure that black voters in

Alabama would be limited to only one district in which they could elect their preferred candidate.

The 2023 plan reshuffled Black Belt counties to give the illusion of a remedy while once again ensuring that black voters of Alabama are limited to only one congressional district in which they can elect their preferred candidates. Alabama gets no brownie points for uniting black voters and the Black Belt community of interest in a district in which they have no electoral power and in a map that continues to dilute the black vote.

Third, Alabama attempts to introduce evidence about the ways the 2023 plan respects various communities of interest around the state. But in so doing, Alabama completely misses the point. Section 2 is not a claim for better respect for communities of interest. It is a claim regarding minority vote dilution.

The question of communities of interest arises when analyzing the extent to which plaintiffs' illustrative maps are consistent with the state's redistricting principles. This Court has already found, the Supreme Court has already affirmed that plaintiffs' illustrative maps in this case take account of communities of interest along with a host of other traditional criteria.

Neither Alabama's apparent preference for one particular community of interest, nor its attempt to reverse engineered

map drawing process to prioritize and immunize certain communities above all others can override its mandate to comply with Section 2.

Alabama asserts that it can erase its Section 2 liability by simply tidying up its map to better comport with traditional criteria. But, once again, this Court has already said and the Supreme Court has already affirmed that plaintiffs' illustrative plans need not beat out rival districts in an endless beauty contest.

Indeed, under Alabama's approach, plaintiffs and defendants could find themselves in a perpetual game of one-upmanship (sic), fixing this precinct line, increasing this compactness score, all while the other underlying vote dilution remains in place in election after election after election.

But the reason courts look to traditional districting principles when evaluating plaintiffs' maps is not to see which map can achieve the highest score on one or more measures. It is to understand whether plaintiffs' illustrative plans generally comport with the state's tradition of running districted elections. And whereas here, plaintiffs' illustrative districts are consistent with those traditions, they do not need to beat out every competing district to satisfy *Gingles I*.

And, finally, Alabama attempts to rehash its racial predominance argument, once again trotting out Thomas Bryan to

cast aspersions on plaintiffs' plans. That is a fight that Alabama has already fought and lost.

Ultimately, neither the 2023 plan nor Alabama's arguments to this Court reflect a serious -- to remedy a serious violation. Instead, they reflect the state's inability to stomach the idea of affording black voters equal access to the political process and its willful disregard of the legal process.

Alabama's counsel is essentially telling this Court with a straight face that you got it wrong. And not only that you got it wrong, Your Honors, but apparently the Supreme Court got it wrong. And even though Alabama is taking full advantage of the appellate process, it refuses to accept the judiciary's authority to say what the law requires and limit what the state can do under that law.

18 months ago, when appealing to the Supreme Court to stay this Court's injunction, defendants asserted that the Court's liability finding leaves Alabama with no real choice but to draw an additional congressional district in which black voters have an opportunity to elect their candidates of choice.

But now, all these months later, Alabama has chosen instead to thumb its nose at this Court, to thumb its nose at our nation's highest court, and to thumb its nose once again at its own black citizens. In choosing defiance over compliance, Alabama only doubles down on its Section 2 liability adding yet

another marker to its centuries and decades long pattern of electing barriers to racial equality at the ballot box.

Caster plaintiffs respectfully request that the Court put an end to Alabama's gamesmanship by enjoining the 2023 plan and proceeding to a judicial remedy process to ensure that plaintiffs obtain relief in time for the 2024 election.

Thank you, Your Honors.

JUDGE MARCUS: Thank you.

We'll turn to the defendants, Mr. LaCour, Mr. Davis. I am not sure how you're choosing to proceed.

MR. LACOUR: Thank you, Your Honors. Edmond LaCour on behalf --

JUDGE MARCUS: I take it just, so that I'm clear, you will be speaking on behalf of all of the defendants, correct?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Thank you.

MR. LACOUR: First, I would like to begin with the threshold issue of what we are doing here. This Court's preliminary injunction order and binding precedent of the Supreme Court and Eleventh Circuit make clear that the issue before this Court is whether the 2023 plan violates federal law. If plaintiffs cannot make that showing at least on preliminary basis, then the 2023 plan is governing law, and that is great evidence that this plan completely remedies the past likely violation in the 2021 plan.

This is the view the defendants have staked out since we informed the Court just a week after the Supreme Court's decision of the Legislature's intent to enact a new plan. Again, our view is the same one that this Court took in the preliminary injunction; namely, that the new legislative plan if forthcoming would be governing law unless challenged and found to violate federal law.

That is, of course, the Supreme Court's view articulated in *Wise vs. Lipscomb,* which, again, the Court quoted in the P.I. order. The Supreme Court made clear there is a critical difference between a legislatively enacted plan and a mere proposal or a court-drawn plan.

Even after a final judgment on the merits, a, quote, new legislative plan is the governing law unless it too is challenged and found to violate federal law. That comes out of *Wise*, and this comports with the Eleventh Circuit's *Dillard* decision, which made clear that a question in a proceeding like this one is whether there is, quote, a violation of Section 2, closed quote, and which requires, quote, evidence that the new plan violates Section 2. That's from page 250 of the *Dillard* opinion.

The Milligan plaintiffs agreed with us. In their objections from pages 16 to 20 of the ECF pagination, they argued that HB-5 fails to completely remedy the Section 2 violation because the plan itself violates Section 2. They

explain that, quote, in evaluating remedial proposal, the Court applies the same *Gingles* standard applied at the merit stage.

And they contended that, quote, in assessing a remedy, the Court should also examine the redistricting policies the Legislature relied upon to justify its new plan.

They were citing *Dillard*, and they were right to do so because *Dillard* lays all this out. Even after a final judgment on liability, when a new plan is put forward, the Court considers anew whether it violates Section 2. Courts cannot, in the words of *Dillard*, simply take the findings that made the original electoral system infirm and transcribe them to the new electoral system, from page 249 of the *Dillard* opinion.

Dillard continues, the evidence showing a violation in an existing election scheme may not be completely co-extensive with a proposed alternative. Thus, the *Dillard* court recognized that even, quote, at-large procedures that are discriminatory in the context of one scheme are not necessarily discriminatory under another scheme.

So too here. A congressional redistricting plan like the 2021 plan that had one majority-minority district may violate Section 2 in one context while a different plan like the 2023 plan may not violate Section 2 in another context even if it shares one component or one factor similar to the 2021 plan, which as we have heard from the plaintiffs today, they seem to think it's the only relevant factor, the number of

majority-minority districts in the plan.

But, of course, their arguments to this Court and to the Supreme Court were not that the 2021 plan violated Section 2 merely because of the number of majority-minority districts in it. You can read the briefs, and they made clear that Section 2 is not a tool for demanding proportionality. There's much more that has to be done.

And critical to the analysis that the Supreme Court laid out in *Allen* was *Gingles I*, and I think that is what is before the Court today, whether they have come forward with sufficient evidence to show that the 2023 plan likely violates Section 2. That is going to require them to come forward with *Gingles I* evidence.

Now, it might be that the 11 illustrative plans they had from 2021 will be up to the task, but we submit that in light of *Allen vs. Milligan* that that simply cannot be the case for a couple of reasons. As the *Allen* court made clear, this *Gingles I* inquiry is an exacting test, and it requires an intensely local appraisal of the electoral mechanism at issue. And here, that electoral mechanism is the 2023 plan, not the 2021 plan.

And this view of *Gingles I* is exactly what the Milligan plaintiffs had put in their Supreme Court brief. So today you heard from Mr. Ross that all that really matters is the compactness of the minority population in the state. That is not what they told the Supreme Court, and that's not what the

Supreme Court said.

At pages 26 through 27 of the read brief, they said, a *Gingles I* district is reasonably configured if it takes into account traditional districting principles. That was citing to *LULAC* and *Abrams vs. Johnson* to the *Gingles I* decisions from the Supreme Court. And then they listed the following objective factors of compactness, contiguity, respect for communities of interest, and political subdivisions.

So it is not just a matter of where the minority population lives in the state. *Gingles I* and again for decades has always required taking into account traditional districting principles. And for this inquiry to really be objective as the Milligan plaintiffs said it is, the traditional districting principles that the map that they're introducing must account for are the traditional districting principles embodied in the map that they are challenging. Again, that intensely local appraisal. Thus, this Court and the Supreme Court in the challenge to the 2021 map looked at the principles that were given effect in the 2021 map, not just what the Legislature or the redistricting committee said about the map, but what it actually did.

The *Abrams* Court, the Supreme Court considered the *Abrams* case over Georgia's congressional districts. They looked at Georgia's traditional districting principles, not California's traditional districting principles.

In the Eleventh Circuit in the *City of Rome* case that we cite in our briefs, looked at the City of Rome's redistricting principles when they were conducting their *Gingles* inquiry.

So for this challenge to the 2023 plan, the traditional principles that matter are those that are given effect in the 2023 plan.

Now, importantly, those are not the same principles as those given effect in the 2021 plan. As you all recall, that plan was a core retention map. Core retention came before communities of interest like the Black Belt. The core retention came before other principles like compactness. And plaintiffs argued that the 2021 plan violates Section 2, again not just because it didn't have two majority-black districts, but because it, quote, fragmented both the Black Belt, which this Court found to be a community of substantial significance, and the very important community comprising the majority black city of Montgomery while prioritizing keeping the majority white people of French and Spanish colonial heritage in Baldwin and Mobile together. That's from page 39 of the Milligan Supreme Court brief.

They argued that this was, quote, inconsistent treatment of black and white communities. Again, it's the definition of discrimination to have two similar things treating them dissimilarly. And Section 2 is trying to get at discriminatory maps, not just maps that fail to produce proportional

representation.

This wasn't a minor theme for the plaintiffs. As the Milligan plaintiffs said on page 5 of their Supreme Court brief, the very heart of their case was how Alabama had treated the Black Belt in its maps. The Supreme Court ultimately agreed making clear that core retention was not going to be a defense at the *Gingles I* stage that could justify splitting majority communities of interest like the Black Belt in Montgomery.

So with this new guidance, the 2023 plan answers the plaintiffs' challenge. Core retention takes a back seat to communities of interest like the Black Belt, takes a back seat to trying to make the districts more compact. It cures the cracking at issue in the 2021 plan.

Those 18 core counties that make up the core of the Black Belt that all the parties agreed upon are now found in just two congressional districts, a compact eastern Black Belt district, District 2, and a compact western Black Belt district, District 7 while ensuring that no county lines are needlessly split and ensuring that the districts are far more compact than they were in the past map.

Now, importantly here, every one of the plaintiffs' 11 plans splits those 18 core Black Belt counties into more than two districts. So in the past map, they argued that it was critical that the Black Belt be given priority not because they

were trying to hit racial goals, but it was a significant community of interest. They said based on the Legislature's definition of community of interest, the Black Belt fits the bill better than the Gulf. Therefore, you should prioritize keeping the Black Belt together over prioritizing the Gulf, and one way to do that is by splitting the Gulf.

Today, they're in front of you saying it's important to, I guess, split the Black Belt because it's going to help them hit racial goals, which is absolutely inconsistent with what the *Allen* court said. Where forcing proportionality over traditional principles is not just not required by Section 2, but it is unlawful. That's from page 1509 of the majority opinion.

But back to the 2023 map. Mr. Ross said that we had admitted that the guidelines would produce a two majority-minority district map.

We did not admit that, Your Honors. And in any event, what is relevant is not how the state describes its map in guidelines. What is relevant is what the map actually does. If we told you that county splits -- that minimizing county splits was very important, and then we passed a map that split 20 counties, you would look at what the map actually did. You wouldn't look at what they said it was supposed to do.

But, again, the result of the 2023 plan is to answer the plaintiffs' call, to take out those discriminatory components,

those purportedly discriminatory components of the 2021 plan. And they are gone. The Black Belt is no longer fragmented. Montgomery's sitting county have been made whole in a compact eastern Black Belt district.

To address the word cracking, which Ms. Khanna referenced before, not that is something we invented. Again, to quote from my friends the Milligan plaintiffs from their Supreme Court brief at page 29, they said that cracking occurs where, quote, a state has split minority neighborhoods that would have been grouped into a single district if the state had employed the same line drawing standards in minority neighborhoods as it used elsewhere.

That is what they alleged had happened when it came to communities of interest in the 2021 plan that we were fine splitting a majority black community of interest or two of them while we prioritize keeping majority white communities of interest together.

That cracking is gone. There's no serious allegation that anything like that is present in the 2023 plan coming from -- at least coming from the Section 2 plaintiffs here.

And as a result, the 2023 plan does not produce discriminatory effects on the account of race.

That conclusion is confirmed by the plaintiffs' refusal to try to shoulder their burden under *Gingles I*.

Now, what they say is that they've already done it because

they have maps that did as well as the 2021 plan. But, again, that is the wrong inquiry. The relevant traditional principles here are the ones used by a different Legislature to enact a different law that is being challenged at this point.

The inquiry, that objective inquiry that Mr. Ross referred to in his Supreme Court brief has to be tied to the state's map. If it's tied to some abstract standard of what a reasonable map might look like, then it's no standard at all. And because I don't think the Court is well-equipped to say that while the state's map splits only 6 counties, splitting 7, or splitting 8, or splitting 9, or splitting 12 is close enough.

We need standards in this space as the Supreme Court recognized; otherwise, Section 2 is going to be turned into a tool for enforcing proportionality. It's going to be turned into a tool that requires states to adopt districts that violate traditional principles like respecting county lines or respecting communities of interest in service of racial gerrymanders. That would be, in the Supreme Court's words, unlawful.

We think that this approach follows from the Supreme Court's decision. If you look at page 1504 and 1505 at the outset, this is where the Court is discussing why it was that the plaintiffs' illustrative plans satisfied *Gingles I* in their attack on the 2021 plan.

When it came to compactness, we pointed out that some of their districts were not relatively compact, and the Court came back and said, well, on average they have more plans that are compact than yours. When it came to county lines, some of their plans split seven or eight, but they had plans that split only six counties just like the 2021 plan, which the Supreme Court noted in the majority opinion, and Justice Kavanaugh gave special attention to in his concurrence to Footnote 2 saying it was important in this case that they had maps that split only six counties.

Then when it came to communities of interest, of course, we argued that the Gulf was being split in their plans, and the Court said that is not a problem because they do better for the Black Belt. So under either approach, there's going to be a community of interest treated better or worse in each of the plans.

And the Court went on to explain why it is that it is important that the plaintiffs were able to produce a map that meets this sort of standard. At 1507, the Court explained that deviation from a properly constructed map by the plaintiffs could show that it's not legitimate principles that explain the lack of proportionality, but it may be race that is explaining the lack of proportionality.

So if plaintiffs had only come forward with a map that split 12 counties, for example, and that was necessary to get

to their second majority-black district, well, then, the failure, that disparate effect of the redistricting scheme would not be on account of race. It would be on account of county lines, on account of respecting county lines. Just like if they could only come forward with a map that had to sacrifice contiguity or had to sacrifice equal population.

If you draw a congressional district of only 100,000 people in the state when everybody else has to live in a congressional district of 717,000, you can get another majority-black district. But the failure to do that is not a discriminatory effect on the account of race.

Similarly, the failure to split extra counties or split extra communities of interest or draw less compact districts is not discrimination on account of race. Those are discriminatory effects on account of legitimate principles that have been blessed by the Supreme Court in four different *Gingles I* opinions now. And that's why the Supreme Court said that in case after case they have rejected attempts to try to use Section 2 to force proportionality at the expense of these traditional redistricting principles of compactness, communities of interest, and counties.

And, finally, quoting from the Caster plaintiffs, they said, Section 2 never requires the state to adopt districts that violate traditional redistricting principles. We agree with that, not so sure the plaintiffs agree with that.

Turning to the Gulf -- there was a mention that this Court had rejected the idea that there was no legitimate reason to split the Gulf. Well, the legitimate reason -- again, legitimate race-neutral reason that they gave that this Court relied on was that it was important to do so to put the Black Belt together, more together, and one way to do that was to break into the Gulf and split the Gulf.

Today, they've abandoned that argument. Today, their only justification for splitting the Gulf is not to unite the Black Belt because the 2023 plan shows that it's possible to unite the Black Belt even better than every one of the 11 plans the plaintiffs showed you back in 2022.

The Black Belt can be united without breaking up the Gulf, without splitting up the Wiregrass as their plans would do, as well. And so for that reason, the legitimate reason they gave you, the traditional districting principle they cited to you of keeping together this community of interest in the Black Belt has fallen out. And all that's left is race. And, again, 1509 Supreme Court's opinion, it is unlawful to force proportionality at the expense of traditional districting principles.

There was talk about a risk of some sort of cycle of the plaintiffs coming forward with another map and the state coming forward with another map. I think that's a total straw man.

The opinions from the Supreme Court are clear that if

there's time, the Court should give the Legislature an attempt to try to remedy the violation. If there's not time, there's no need to do so. We had one shot. We have taken that shot. There's not going to be another plan between now and October 1st.

But at the same time, what the Supreme Court has also made clear even in cases like *Covington*, *Covington* was not decided against the state of North Carolina merely because they didn't like the new map or didn't completely change the lines sufficiently. That failure to change the lines was proof of another racial gerrymander, and that is important in intentional discrimination claim. If race has been used as a jury mechanism to move people around, you may need to use race to unpack that. We are dealing with an effects claim here though in Section 2. So that same rationale doesn't apply.

And in any event, there are many, many ways to satisfy Section 2, but what we do know from *Allen vs. Milligan* is that one way that you cannot satisfy Section 2 is by forcing proportionality at the expense of traditional districting principles.

That invites racial gerrymandering claims, which is not a hypothetical, as Your Honors know. And you will be hearing a racial gerrymandering claim preliminary injunction motion after this hearing has concluded.

Singleton plaintiffs' lawyer was there in front of the

Legislature threatening racial gerrymandering claims. And so the Legislature was put in a difficult position of trying to navigate these dueling threats of liability of Section 2 on one side and Equal Protection Clause on the other.

And as you could see in the last redistricting cycle when the Legislature was trying to comply with Section 5 in its state legislative maps, they used race too much. They were found liable for racial gerrymandering claims, which the Milligan put in front of the Court as proof that Alabama is still discriminating, and that this Court relied on actually to find through a bootstrapping mechanism. But the additional risk for the State is Section 3, the bail in provision of the Voting Rights Act, which says if you violate the 14th or 15th Amendment, there is risk of getting bailed in.

So the Legislature has to consider all these things in trying to chart a path between these dueling principles, and they had *Allen vs. Milligan* to guide them, which again made clear communities of interest, county lines, compactness, these are legitimate principles for a state to pursue in a map. Section 2 does not require them to be abandoned. And so that is why we have a map that now more fully and fairly applies those principles.

And plaintiffs had told the Supreme Court that Section 2 was not keyed solely to proportionality. Again, they focused on traditional districting principles. But now proportionality

is all that you are hearing about. We are the only parties here that are giving *Allen vs. Milligan* a serious reading. They are the ones who are defying the Supreme Court's opinion and demanding that the state adopt districts that violate traditional districting principles.

They had it right the first time when they told the Supreme Court what I have told you just a moment ago, the 1510 of that opinion. Section 2 never requires the state to adopt districts that violate traditional districting principles. Because the plaintiffs have not met their burden at *Gingles I*, they have not shown that this map fails to remedy the likely violation of the 2021 plan, and it should be the governing law going forward.

Thank you.

JUDGE MARCUS: Thank you, counsel.

We will proceed, then, to addressing the motion in limine the plaintiffs have filed.

Mr. Ross, who is going to argue that?

MR. ROSS: Mr. Rosborough is going to argue the motion in limine.

JUDGE MARCUS: Just let me ask sort of a preliminary question. Are we going to hear from both Milligan and Caster on the motion in limine, or just from Milligan?

MS. KHANNA: No, Your Honor. I think Mr. Rosborough can speak for all plaintiffs on this motion in limine.

Thank you.

JUDGE MARCUS: All right. Thank you.

MR. ROSBOROUGH: Good morning again, Your Honors.

I will just be brief here and answer any questions you have because I agree with Mr. LaCour that the briefing probably says most of what we need to say.

The plaintiffs filed this motion in limine because the only purpose as offered here of the expert reports and the purported community of interest witnesses are to relitigate the *Gingles I* issue that is law of the case already for the purposes of the preliminary injunction remedy.

As to the experts, both reports for Mr. Trende and Mr. Bryan are simply comparisons between the plaintiffs' illustrative plans and the state's plans.

Number one, as this Court has said, we are still in a remedial posture based on the Court's findings on the --

JUDGE MARCUS: I think what I would like you to address for me is: What is the nature of this remedial proceeding? It seems to me that's one of the central questions we have here today.

MR. ROSBOROUGH: Yes, Your Honor.

JUDGE MARCUS: As I hear the defendants' position, it's a whole lot broader than how you see it.

They say, if I have it right, that you are obliged to answer all of the *Gingles* factors and considerations here in

this remedial proceeding.

I hear you to say you have the burden of proof on only one; that is to say whether CD-2 effectively creates a fair and reasonable opportunity district.

Do I have that right, that distinction? Or is that overdrawn?

MR. ROSBOROUGH: I think, Your Honor, it's actually based on what the evidence is here. It's a distinction without a difference. Because I think where the point of distinction is, is the defendants' misunderstanding of the point of *Gingles I*. *Gingles I* focuses on whether -- and I think you have got the --

MR. ROSS: I can read it, Your Honor, if this is helpful. In *LULAC vs. Perry* at 433, the Supreme Court says, *Gingles I* refers to the compactness of the minority population, not the compactness of the contested district. Compactness does show a violation of equal protection, so a racial gerrymandering claim concerns the shape of the boundaries of district.

That differs from the Section 2 compactness inquiry which concerns a minority group's compactness. And so I believe -- just to finish up on the thought and then turn back it to Mr. Rosborough. The issue is are black voters geographically compact. Can you draw a reasonably configured district around them when looking at objective factors, not a beauty contest

between the map we drew and a map that we would potentially draw.

JUDGE MARCUS: Thank you.

Let me ask my question of you this way if I can, Mr. Rosborough: Is there something provisional about this map? This SB-5? Or is it the law?

MR. ROSBOROUGH: Your Honors, I believe that that depends on what the Court does here today. And I am not trying to avoid the Court's question. I think where we are --

JUDGE MARCUS: You understand why I ask?

MR. ROSBOROUGH: I'm sorry?

JUDGE MARCUS: You do understand what I am asking?

MR. ROSBOROUGH: Yes, Your Honor. SB-5 is the new law in Alabama.

But where we are today is an unfinished portion of the preliminary injunction proceeding. We have only been given a partial remedy, which was an injunction against the state's prior plan, but this Court also ordered the adoption of a plan that creates opportunities in the second district. And that -- and by prior precedent, the Court properly gave the state the chance to do that in accordance with its own -- its own principles.

This is what we're here about, though, Your Honor. Going forward, whatever happens, if the defendants choose to take -- go to trial with this, you know, that, then, yes, it is a focus

on SB-5, and some of this evidence that they're talking about here that they've put into play here may become relevant again if we go in trial in this case.

But here we are dealing with an unfinished portion of the remedy that this Court ordered. And so this has to be analyzed within that context. Defendants deferred the opportunity to go to trial until sometime after 2024. So this is about -- this is about, you know, a full analysis of whether this remedies the Voting Rights Act violation identified by the Court.

I think the plaintiffs' position is that all of the evidence that we've put forward remains relevant and decisive. The only thing that has changed about between 2021 and 2023 are the lines of certain districts. And so basically it's not that the other factors couldn't theoretically be relevant, but they're just not relevant here. The only -- *Gingles III* is really the only thing that is relevant here. Does -- based on the new lines, does white bloc voting continue to dominate and prevent black voters from electing preferred candidates in a second district.

JUDGE MARCUS: Let me sharpen the question this way: The Supreme Court said in *Gingles* vs. *Thornburg* that the plaintiff must do the following in order to establish by a preponderance of the evidence its burden that Section 2 is violated. First, you have got to come up with the numerosity requirement and create a reasonably configured map that

complies with all of these criteria, doesn't violate the principle of one person one vote, and so on.

Gingles II and *III* really look to racial polarization. And then there are these additional eight or nine factors. What's at dispute in this hearing in this case? *Gingles I* and/or *Gingles II* and/or *Gingles III* and/or the nine Senate Factors as you see it?

MR. ROSBOROUGH: I am going to let Mr. Ross address that.

JUDGE MARCUS: All right. Thank you.

MR. ROSS: The question was whether or not -- what's at issue at the remedial phase?

JUDGE MARCUS: At this hearing as we sit here today, do you have to do anything other than to show that SB-5 fails to create a fair and reasonable opportunity district?

MR. ROSS: Your Honor, because what's at issue here as Mr. Rosborough said a preliminary injunction the remedial proceedings, the defendants don't dispute that the minority community in Alabama remains geographically compact. They don't dispute that what the Supreme Court has said is that you look at objective factors, not the subjective factors that Mr. LaCour wrote into the legislative record.

What you look at is compactness, you look at contiguity, you look at political subdivisions, like cities and towns. That is what the Supreme Court looked at in this opinion. That

is what Justice Kavanaugh and the chief justice wrote about. It is objective criteria and not things like communities of interest.

Communities of interest are important, and obviously we argue that issue to the Supreme Court. But I think it's what's it's really clear about when Mr. LaCour was arguing, was he was talking about the intent of the Legislature, he was talking about disparate treatment of communities of interest. Those all go to the issue of intent. They don't go to the issue of the discriminatory effects.

JUDGE MARCUS: I think there is no dispute about that. What I am driving at with my question -- I may not have asked it clearly enough -- is this: As you see it, is *Gingles I* at issue in this proceeding at this time?

MR. ROSS: No, Your Honor, because nothing can change the fact that African-Americans are -- as a community are reasonably compact, and you can draw a reasonably configured district around them looking at objective criteria.

JUDGE MARCUS: So the only issue really boils down to the proofs on *Gingles II* and *III*, how racially polarized Alabama may be.

MR. ROSS: Primarily, Your Honor, because the state doesn't dispute any of the other factors. In fact, Your Honor, just going to that point, the state doesn't dispute *Gingles II* or *III*, either.

JUDGE MARCUS: No. They say *Gingles I* is at issue. You say, no, it isn't. The only thing at issue is *II* and *III*? Is that really what it boils down to?

MR. ROSS: That's what it boils down to, Your Honor. They have a misunderstanding. They are attempting to argue a racial gerrymandering claim at *Gingles I*. The Supreme Court has said that the inquiry in *Gingles I* is different from a racial gerrymandering inquiry. The inquiry is about the geographic compactness of African-American voters. The only thing that can substantially change where African-American voters are and whether you can draw a reasonably compact district throughout it, would be a new census, and we don't have that evidence here. We have Alabama's new made-up legislative findings that the chairs of the redistricting committee didn't even know existed, that they did not take into consideration when they drew the map.

And one other point I will make is that the Supreme Court has been very clear that there are objective redistricting criteria, and then there are state-created redistricting criteria that can be used and manipulated in a number of ways, and that this Court doesn't have to consider those factors --

JUDGE MARCUS: What falls into the category of objective criteria?

MR. ROSS: What the Supreme Court said in *Shaw vs. Reno* is compactness, contiguity, and -- excuse me -- political

subdivisions. And as the Supreme Court said in *Allen vs. Milligan,* that includes towns, counties, things like that.

And on the -- our maps meet or beat the state on all of those factors. That's what the Supreme Court held. That's what this Court held. We don't need look at Mr. LaCour's redistricting criteria.

JUDGE MARCUS: Are communities of interest an objective factor or criteria embodied in *Gingles I*?

MR. ROSS: They are a factor that's important in *Gingles I,* but it's important that communities of interest are overlapping.

JUDGE MARCUS: No. No. No. I accept all of that. I just want to use your terminology. In your view, is the criterion of communities of interest an objective factor or what you characterized as subjective?

MR. ROSS: I think --

JUDGE MARCUS: And does it make a difference?

MR. ROSS: I think the Supreme Court has talked about it in ways that varies. Sometimes -- they have made clear that it is -- it's part objective. It's part subjective. It's like asking a question about people, what is your community? Our clients who are here today have testified that their community includes Mobile, includes the Black Belt, includes Montgomery, and includes Dothan.

That is the way -- and plaintiffs' maps don't always

include all of those communities because they're not required to. They're required to show a reasonably configured district, and the remedy that my clients seek is one that brings that community together and fixes the vote dilution.

This is a Section 2 case. It is not a racial gerrymandering case. It is not about Alabama drew district lines one way, and they could have drawn them a different way. It is about that and its impact on African-American voters and their ability to actually elect candidates of their choice.

JUDGE MARCUS: I understand your point, and I take your point that drawing communities of interest are difficult. They tend to overlap. They pull and push in different directions. All I'm asking is whether that determination falls into the category of objective criterion that you mentioned or subjective. I wouldn't have asked --

MR. ROSS: Yes, Your Honor. I believe the Supreme Court has talked about it in both ways.

It's talked about, you know, if you are going to draw a district and you are going to consider things like communities of interest, then you look at factors like the economy, the history of the jurisdiction to determine whether or not that's a community of interest.

I don't think that the issue, though, Your Honor, is, you know, communities of interest -- in *Gingles I*, the community of interest that's relevant is the African-American community.

Are you drawing a reasonably compact district around that African-American community? Or are you drawing a district that goes from, you know, from Mobile to Huntsville, like the districts that the Supreme Court was concerned about in *Shaw*. We're not talking about that district.

This Court and the Supreme Court has already said that our districts are reasonably configured. When you look at all of the factors, you look at the objective factors, you look at the communities of interest factor, which has a subjective and an objective quality to it, those factors are met. Our districts are reasonably configured when you look at those things.

Again, it's not about the factors that Mr. LaCour uses in his legislative findings. It's not about, you know, whether we split the Wiregrass, which their plan splits, as well. It's not about whether our plans sufficiently, you know, measure up as compared to their plans in a beauty contest. That's not what *Gingles I* is about, and Alabama is trying to make it into a test that the Supreme Court has explicitly and repeatedly said it is not.

JUDGE MARCUS: You moved in limine to strike from the record as not relevant the tests -- there wasn't testimony. There was a report from Thomas Bryan, and there was a written report from Trende. Do you want to tell me why we should strike that?

MR. ROSS: So, Your Honor, their reports are simply

not relevant. They are trying to relitigate whether our *Gingles I* maps created reasonably configured districts. And they are trying to do it by conducting a beauty contest between the 2023 plan and our plan. But, again, *Gingles I* is not a beauty contest. It is not about how their map compares to our map on the some allegedly race-neutral criteria.

That is what Alabama argued in the Supreme Court. That is what they lost on. They tried to go to the Supreme Court and argue that there are these certain factors that if you look at them just the way Alabama wants to look at them, they win. If you look at them as compared to the community of interest that they prefer, they win.

The Supreme Court said that that is not the test. The Supreme Court said again as it has said for the last 50 years that the issue is the geographic compactness of African-American voters. And as I said the only thing substantively that could change between 2022 and 2023 would be a new census, and we have not had a new census.

We know that African-Americans are geographically compact. We don't need Mr. Trende to talk about how our map compares to their map. We don't need Mr. Bryan to testify about his view of racial gerrymandering which isn't well founded. None of that evidence is relevant to the question of black voters are geographically compact because the Supreme Court and this Court has already answered that question, and it is yes.

JUDGE MARCUS: Anything else you wanted to say, or Mr. Rosborough, on your motion in limine?

MR. ROSBOROUGH: (Shook head.)

JUDGE MARCUS: Thank you.

MR. ROSS: Thank you, Your Honor.

JUDGE MARCUS: Mr. LaCour?

Mr. LaCour, to set the backdrop, what would be helpful at least for me is for you to tell me in your own words how you characterized this remedial proceeding. What is it supposed to do?

MR. LACOUR: Your Honor, we characterize it like -- I believe this Court had characterized what it would look like when you entered the preliminary injunction order, which is a chance for them to show anew that this new law violates federal law.

Had we failed -- had the Legislature failed in the task of enacting a new law and repealing the old law, then we would have moved immediately to a remedial proceeding and the continuation of the preliminary injunction proceeding. But the old law that was preliminarily enjoined is no more. It is not on the books.

And so then the question for this Court if it's going to exercise judicial power is whether this new law also violates federal law or not, which requires a showing.

Now, they have --

JUDGE MARCUS: Let me ask the question this way so it will cut to the chase: Are we in the first inning of the first game of these proceedings today?

MR. LACOUR: Your Honor, the way I would put it, I think is consistent with what we said at the status conference eight days after *Allen* was decided. There is, of course, a lot of evidence that has already come in and --

JUDGE MARCUS: So I take it just on that point, everyone is in agreement that the corpus of evidence presented in round one is admissible in part of this record in round two. I take it you agree with that?

MR. LACOUR: The evidence, yes.

JUDGE MARCUS: Talking about the evidence presented at the seven-day hearing we held in January of 2022.

MR. LACOUR: Yes, Your Honor. There is no reason why you would turn a blind eye to that evidence. And *Dillard* says that some of it may very well be relevant, and we agree that some of it is certainly relevant.

But *Dillard* also says you can't just transcribe the findings from an old law onto a new law merely because they bear some passing resemblance.

JUDGE MARCUS: I understand that. But I'm trying to understand what that means in the context of this case.

MR. LACOUR: I think what --

JUDGE MARCUS: Are we in the first inning of the first

came of this proceeding as you see it? It's a simple question.

MR. LACOUR: Your Honor, I think we are -- I think this is essentially a preliminary injunction motion being filed by two sets of plaintiffs to challenge the 2023 law with a lot of evidence they already have admitted into the record from the earlier proceedings, and then the new evidence that they've come forward with, as well as the new evidence that we have come forward with. And then it basically boils down to how do you read reasonably configured and how do you read *Allen vs. Milligan*.

JUDGE MARCUS: Is that another way of saying, yes, we are in the first inning of the first game?

MR. LACOUR: If -- if that means we're in the first inning --

JUDGE MARCUS: I want you to tell me. I just want to understand what the position of the state of Alabama is. Are we at square one, or are we six pieces down the road?

MR. LACOUR: So I -- and perhaps this will help me answer the question. This is Doc 172 from the Milligan docket. This is the status conference that was held on, I believe, June 16th. And I think what Your Honor summed up near the end of that hearing, Judge Marcus, you said, quote, should there be a new map, and should there be a challenge to the new map, at which time we will afford the parties, of course, every opportunity to present whatever data, evidence, witnesses you

may deem appropriate going to any challenge that may be launched as to a new map that the Legislature will draw.

But then turning to the next page, 53, we consider what would happen if the Legislature failed in that task, and we were just continuing into a purely remedial proceeding --

JUDGE MARCUS: No. I understand -- Mr. LaCour, bear with me.

I understand that we don't just have ruling one, HB-1 likely violated Section 2, nothing intervening, and then we went right to drawing the map. I understand that the state adopted, after you asked us to hold our proceedings for 30 days, which we did, a new map.

Nevertheless, I still ask: Are we at square one for all purposes now with regard to SB-5? That is to say: Do they have to relitigate and prove by a preponderance in your view the first *Gingles* condition, the second *Gingles* condition, the third *Gingles* condition, and each of the Senate Factors? In your view, do they have to prove each of those things to prevail in this hearing at this time?

MR. LACOUR: Yes. I think that's consistent with the power that an Article III judge exercises.

JUDGE MARCUS: Let's just follow along to see if we can at least boil down what's in dispute.

I take it -- the Supreme Court summarized *Gingles I*, *II*, and *III*, and the Senate Factors.

Is there any dispute that they haven't sustained their burden as to *Gingles II* and *III*?

MR. LACOUR: Your Honor, we have not presented any evidence or argument to *Gingles II* or *III*.

JUDGE MARCUS: So that is not -- I just want to use my language, if you would.

MR. LACOUR: Yes.

JUDGE MARCUS: Do you concede that they have met their burden on *Gingles II* and *III*?

MR. LACOUR: If Your Honors think that the evidence that was put forward --

JUDGE MARCUS: I am not asking what we think. I am trying to get you to help me. I want to know what's in dispute before we actually get started with the presentation of evidence.

MR. LACOUR: Yes.

JUDGE MARCUS: Are *Gingles II* and *III* in dispute, or do you accept and concede they have met their burden on *II* and *III*?

MR. LACOUR: Your Honor, for purposes solely of this proceeding, we will concede *II* and *III*.

JUDGE MARCUS: Okay. You have reserved your right for a full permanent injunction hearing. You suggested that you would follow after the election in 2024. So I'm just asking about this proceeding at this time for these purposes.

Have they met their burden on *II* and *III*?

MR. LACOUR: We will have no problem stipulating for these proceedings solely that they have met *II* and *III*. We are not putting that at issue.

JUDGE MARCUS: Okay. Then we have the Senate Factors. There are eight or nine of them, depending on how you read them.

Is there any dispute, based on what we've seen in round one and what's been presented so far in round two on paper, that that's -- none of those factors are in dispute either?

MR. LACOUR: We have not put forward new evidence or arguments as to that Senate Factor.

JUDGE MARCUS: No dispute that they have met their burden on the eight or nine Senate Factors?

MR. LACOUR: For the purposes of this proceeding --

JUDGE MARCUS: Just for the purposes of this hearing, that's all I'm talking about.

MR. LACOUR: Yes.

JUDGE MARCUS: So in your view, the only question is *Gingles I*?

MR. LACOUR: *Gingles I* read in light of the whole protection clause, yes. I think there are serious constitutional avoidance questions that we have raised that would suggest, as well, that our reading of *Allen vs. Milligan* is the only constitutionally permissible reading --

JUDGE MARCUS: Help me with *Gingles I*, which is what the state says is in dispute.

The Supreme Court of the United States wrote the following, and I quote it, in *Allen vs. Milligan*: With respect to the first *Gingles* precondition, the district court correctly found that black voters could constitute a majority in a second district that, quote, was reasonably configured, end quote. The plaintiffs educed 11 illustrative maps that is example districting maps that Alabama could enact, each of which contained two majority-black districts that comported with traditional districting criteria.

Then they went through compactness and all of that. And then they say, we agree with the district court. Therefore, that the plaintiffs' illustrative maps strongly suggest that black voters in Alabama could constitute a majority in a second reasonably configured district. That determination was made by us in round one, affirmed by the Supreme Court after round one.

Is that in dispute? Can you challenge now in these proceedings the determination that black voters could constitute a majority in a second district that was reasonably configured?

MR. LACOUR: Your Honor, it's our position that in the context of the challenge to the 2021 plan, that issue is settled. We are not trying to relitigate liability under the 2021 plan. There's no point in doing that. That law has been

repealed.

We are here before you on the 2023 plan. And it is our reading of *Allen* that reasonably configured is not determined based on whatever a hired expert map drawer comes in and says, like, this is reasonable enough. It has to be tethered -- as Mr. Ross said in his brief, it has to be tethered to objective factors to a standard or rule that a Legislature can look at ex ante, that the Court can look at, as well.

JUDGE MARCUS: The reason I'm asking you -- the question is just to find out what is it we are going to hear from the parties today so we can frame the scope of these proceedings. And I ask it more particularly in the context of the motion in limine, because as I understand their motion in limine, they say, to take one example, Bryan's testimony -- or Bryan really wasn't testimony, it was a report -- should be barred as not being relevant because he cannot in this proceeding challenge the finding we made and the Supreme Court affirmed, which was that the 11 illustrative maps were reasonably configured.

Can he challenge that? Because I read him to be trying to. He says, if I got it right, what's wrong with the 11 illustrative maps is that race predominated, and here's a new study I did, and it yields that conclusion.

Is he free in this proceeding to attack the finding the Court made and the Supreme Court affirmed about 11 illustrative

maps that wouldn't have been reasonably configured if race had predominated?

MR. LACOUR: Your Honor, I think what he is doing is explaining why you would have a race predominate outcome if the 2023 plan is being replaced by one of their 11 illustrative plans or that the plan that they submitted to the Legislature in 2023. I mean, as he shows, the splits in those counties -- and they have three splits in District 2 alone -- each one of them is on racial lines. They get about 30 percent of the population of Houston County to put into District 2. But in the process, they pick up about 60 percent of the black population of Houston County. And that would suggest that the reason why they're violating the principle of not splitting more counties than you need to is for racial reasons and not for some other legitimate reason.

JUDGE MARCUS: Of course, the 11 maps were drawn at an earlier time for a different purpose with HB-1 in mind rather than SB-5.

MR. LACOUR: Correct. The intensely local appraisal was of that electoral mechanism in the Supreme Court's words. And by the same token, the intensely local appraisal today is on the 2023 plan, not on the 2021 plan, so...

JUDGE MARCUS: And help me if I have got it wrong. I'm trying to understand.

Bryan's testimony is relevant, admissible, and material

because it shows that the 11 illustrative maps really were tainted with race predominance, notwithstanding what we said at the first round and what the Supreme Court said. Does that overstate it or misstate it?

MR. LACOUR: Well, there are some things that have changed. And I will point you to footnote 5 of the *Allen* --

JUDGE MARCUS: Help me with the broad brush first, and then we will get into the details.

Broadly speaking, is it your view that Bryan's testimony is relevant and material because it shows those 11 maps are no good, those maps were tainted with an analysis that yielded a race predominate conclusion?

MR. LACOUR: I don't think you get into predominance for us to prevail. Our primarily argument --

JUDGE MARCUS: No. I am just trying to find out why Bryan's testimony is relevant. They say it's irrelevant.

MR. LACOUR: I do think it is --

JUDGE MARCUS: Because they say it's already been decided that there are 11 reasonably configured maps. Bryan says, wait a minute. Those maps are defective because, and then he explains his analysis based on race.

MR. LACOUR: Three things: First, is there's a new map. I don't think it's been proffered as a *Gingles I* map by the plaintiffs, but there's the 2023 VRA remedial map in the event they put it forward.

I think it's important for the Court to consider why it has the shape that it has. And Tom Bryan's report shines light on that, I think very important light on it.

Second, as I noted, our primary argument here is a statutory in *Gingles I*. Reasonably configured means in light of the principles in the challenged plan, not principles in the ether.

But third, under cases like United States -- not -- University of *Texas vs. Camenisch*, the Supreme Court said that preliminary injunction findings are not binding even when going on to a trial in the same case. It necessarily follows then that this if there is a whole new law and there's new evidence, that should come in, as well.

So there are three different reasons why his report could be relevant.

JUDGE MARCUS: What about Trende? Help me with him. They moved to strike Trende, as well.

MR. LACOUR: Yeah. I don't understand the basis for that, other than their view that reasonably configured means, as Mr. Ross was saying, reasonably configured for at least the next ten years.

We strongly dispute that. We don't think that provides much of an objective standard. We didn't don't think that's in any way consistent with *Allen vs. Milligan.*

Because as you can see from Trendy's report, and just from

looking at the maps if they are right about that, then you will be forcing the state to scrap a map that performs better on compactness, on county splits, on Black Belt, on the Gulf, and on the Wiregrass all in favor of another map that all it has going for it is race. That is unlawful under *Allen vs. Milligan*.

JUDGE MOORER: If the State's map, the 2023 map is defective, then even if the plaintiffs' illustrative maps don't cure it, then does it fall to us to then put together a remedy that does comport with the --

MR. LACOUR: Correct, Your Honor, but if they cannot satisfy their burden under *Gingles I*, they cannot show that the 2023 plan is defective.

And to return to this notion of objective factors versus communities of interest that you were hearing about a moment ago, on case after case after case the Court has mentioned communities of interest among those traditional districting principles that must be accounted for in a *Gingles I* plan, but -- and in the Milligan plaintiffs' brief, it's also listed there which what they have told the Supreme Court.

But even if you were just looking to the so-called objective factors that Mr. Ross mentioned a moment ago of compactness and county lines, Mr. Trendy's report shows that every one of those 11 plans, if you toss in the 12th plan, it's true, too, every one of them is going to be less compact or is

going to split more counties or both. So just on those objective factors, those plans are not suitable remedies for the 2023 plan.

Because again, you are going to have two principles coming into conflict: Keeping counties together or race, they are going to conflict, and race is going to be given preference, which is affirmative action in redistricting. It's not mere race consciousness, it is race predominance, and it's unlawful.

JUDGE MOORER: Mr. LaCour, isn't what you are essentially arguing is whatever the state does, we can just say they shot a bullet, and we have now drawn a bull's eye where that bullet hit, and so it's good? It's just some veneer to justify whatever the state wanted to do that was short of the VRA.

MR. LACOUR: No, Your Honor. I think that misreads VRA precedent, which makes clear that the state does have a legitimate interest in promoting these three principles of compactness, counties, and communities of interest.

And so the Court has given a green light to the state to say that this is something you're allowed to do. If the state had instead picked some other interest that was not a traditional interest and pursued that instead, like they did in the 2021 plan in core retention, then that's not going to cut it. But the Supreme Court's at least given us that much guidance when it comes to counties' compactness and communities

of interest.

And if you have a map like the 2023 map that applies those principles fairly, that doesn't have sort of the dissimilar treatment of similar communities of interest like the 2021 plan had, then you have a plan that is equally open. You have a plan that is not producing discriminatory results on account of the race. Even if it's true that requiring one person one vote in contiguity and county wholeness and compactness does not result in proportional representation, that doesn't mean there's a Section 2 violation.

Again, on account of race is still right there in the text, as is the proviso that says nothing in this law guarantees proportional representation. And so the Court explained 1508, 1509, and 1510 of the opinion in case after case, they have looked at traditional principles to turn back these attempts to force proportionality.

JUDGE MOORER: Isn't the idea that people can elect a candidate of choice just as important to achieve as not granting people's proportionate representation just ab initio? In other words, I think the law is clear that VRA doesn't require proportional representation, but isn't it equally clear that an equally compelling objective is to give groups of voters the opportunity to select a candidate of choice?

MR. LACOUR: Not if race is predominating over traditional principles. That is a racial gerrymander like the

racial gerrymandering claim we were promised we would face if we adopted one of the plaintiffs' plans. And that is under the Supreme Court's opinion at 1509 unlawful.

JUDGE MANASCO: Mr. LaCour, what is the state's position as to the motion in limine regarding the impact of our finding in connection with the preliminary injunction that the appropriate remedy would be an additional opportunity district?

MR. LACOUR: Your Honor, I think that that statement in the order -- again, the bottom line of the order was Secretary of State do not use the 2021 plan, and he is not going to use the 2021 plan again.

But I think that statement has to be read particularly in light of *Allen vs. Milligan* in the context of the 2021 plan and the way that it applied its principles, and the Court concluded that it was possible to find another map out there that was on par with the state on compactness, county lines, and communities of interest that created a second majority-minority district.

So if the Legislature went back and said, we still want to draw sprawling districts and we still want to split up communities of interest, then, yes, they would likely have had a different map that resulted from that that would have two majority-black districts. But the state was not bound by the 2021 Legislature's application of principles there. They weren't required to stick with core retention and give the

Black Belt or communities of interest more generally a back seat or give compactness a back seat. And so now we have a new context as *Dillard* said. There is a new context here. It is the 2023 plan. So...

JUDGE MANASCO: So does our statement that the appropriate remedy for the violation that we found or likely violation that we found would be an additional opportunity district have any relevance to what we're doing now?

MR. LACOUR: I don't think so, Your Honor.

JUDGE MANASCO: So the Legislature -- it is the state's position that the Legislature could comply with our previous findings and conclusions -- I understand the face of the order did not order the Legislature to do anything -- but their findings and conclusions in it that the Supreme Court affirmed that the Legislature could enact a new map that was consistent with those findings and conclusions without adding a second opportunity district?

MR. LACOUR: Yes, Your Honor.

JUDGE MANASCO: All right. So is it, with respect -- I'm taking my question back for the motion in limine, in particular.

Is it the state's position, with respect to the motion in limine, that we should not hear any evidence about whether there is or is not now a second opportunity district?

MR. LACOUR: We have not moved in limine to try to

exclude their evidence about whether there is or is not. So I don't think that issue is before the Court. I think they have the right, as Judge Marcus noted at the hearing, to put forth any evidence that they want that could go to the challenge to the map, evidence as to whether or not District 2 is going to, in their words, perform could be relevant to *Gingles II* and *Gingles III*. So we have not tried to keep that out.

JUDGE MANASCO: But, so to put a finer point on it, you are not trying to keep it out, but you are saying we should assign it no weight?

MR. LACOUR: I think you can assign it weight to say that they've satisfied *Gingles II* and *III*, but it's not going to do them much good under a proper reading of *Gingles I*.

JUDGE MANASCO: Thank you.

JUDGE MARCUS: Let me just follow up on my colleague's question. And help me with this.

I think I hear you to be saying -- and I do want you to correct me if I misunderstand -- that you can draw a map that maintains three communities of interest and splits six counties or less, but that very likely fails to create a fair and reasonable opportunity district and still prevail because they would not have met their burden of proof?

MR. LACOUR: Yes, Your Honor. Section 2 is not tied to proportional representation. It is tied to --

JUDGE MARCUS: I am not asking about -- I think

everyone agrees that you can't create a map for proportional representative purposes. The statute says that unambiguously. The case law has said it unambiguously, and we recognize it unambiguously.

I'm just asking: Could they prevail here if all they failed -- all they succeed in showing is that CD-2 does not likely create a fair and reasonable opportunity district.

MR. LACOUR: That's correct, Your Honor. All three preconditions must be met to make sure that Section 2 is not turned into a tool for forcing proportionality.

JUDGE MARCUS: Okay. It's a condition precedent. It doesn't matter about opportunity at all.

MR. LACOUR: Correct. If all their maps --

JUDGE MARCUS: If they flunk out on A, B, and C, it doesn't matter they prevail on D because you have already conceded *Gingles II* and *III* here?

MR. LACOUR: Correct.

JUDGE MARCUS: Help me understand that just a little bit further.

When I looked at the guidelines adopted by the Alabama Legislature in '21, which were considered as part of the backdrop that the reapportionment committees were going to consider in round two, it had a hierarchy of the order of priorities, including the Constitution, one person one vote, the Voting Rights Act, and so on and so forth, compactness,

contiguity.

Do communities of interest basically dominate the analysis? Can that, if you will, trump everything else?

MR. LACOUR: Your Honor, a couple of things to clear up, and then I will get to your question.

First, the guidelines were adopted by the reapportionment committee, not the entire Legislature.

JUDGE MARCUS: Yes.

MR. LACOUR: It didn't have all the members voting on that. And then so -- and then it's our position that *Gingles I*, that's what's relevant is not again how someone has described the map, but what the map actually does.

If it was enough for us to say this is what our guidelines require and then -- and your map doesn't follow your guidelines as we understand them, then the plaintiffs would have lost in 2021.

But they were able to actually look at what the map did. And so when the map said maintain communities of interest but split up the Black Belt, that was powerful evidence they had that they could satisfy *Gingles I*.

But, again, what was really relevant in 2021 was how the principles were embedded or embodied in the '21 plan. The same thing is true for 2023, is you have to look at the map itself, and one does. If it says don't split any more than six counties but splits nine, then it doesn't matter what they said

before. It matters what they did.

And what they did here was prioritize the Black Belt while still maintaining the Gulf and the Wiregrass to the extent the Wiregrass could be maintained without sacrificing the Black Belt, and then create far more compact districts across the state, as well.

JUDGE MARCUS: Any other questions?

JUDGE MANASCO: Not on the motion in limine.

JUDGE MARCUS: Thank you, counsel. I'm sorry. I didn't mean to cut you off.

MR. LACOUR: So I wanted to make sure --

JUDGE MARCUS: I'm talking about just the motion in limine that they have made.

MR. LACOUR: Yes. I suppose this might be relevant to the motion in limine. Just a couple of points the plaintiffs had made while up here.

One, for about the beauty contest, that beauty contest language both in this Court's opinion and the Supreme Court's opinion was in the context of the communities of interest discussion where you had two maps each of which gave priority to one community of interest and sacrificed one community of interest. So they were both on par when it came to communities of interest. And that's the beauty contest.

But if -- so it's not enough to say we like splitting these six counties better than the six counties you would

split. If they can match the state, then we are not going to have the beauty contest. But if they come forward with a map that splits eight or nine counties, or seven for that matter, they don't get into the beauty contest. That sort of language doesn't even apply.

Otherwise, you are going to be in a situation where the state is going to be trading out a map that better respects traditional principles in service of a racial gerrymander.

Finally, Mr. Ross said that race itself was a community of interest, I believe, or that black people are the relevant community. *LULAC* does not endorse that proposal. *LULAC* speaks of nonracial communities of interest.

If communities of interest were defined purely by race, then there would never be a successful racial gerrymandering claim, because every Legislature could say, oh, we're just trying to put the black community together, or we were just trying to put the white community together, and that's a traditional districting principle that we find important. And, of course, that's absurd proposition. The Court has spoken.

In cases like *LULAC* of nonracial communities of interest, that was the understanding this Court relied on when plaintiffs had said that their maps went across the state to put the Black Belt together.

If you look at footnote 5 of the Supreme Court's plurality opinion, the Court quoting Bill Cooper said that the

understanding of the Black Belt was not as a demographic community, but as a historical community with historical boundaries that go across the center of the state and that are predominantly rural and that include Montgomery.

Of course, neither Mobile nor Dothan are in the center of the state. Dothan is not a rural place. It is a not a huge city, but for the Wiregrass, it's pretty big. And Mobile, of course, is not rural, either.

So they can't be allowed to transform the concept of nonracial communities of interest into race being the sole determinant for a community of interest.

If there are no further questions...

JUDGE MARCUS: Thank you very much.

Mr. Ross, any reply?

MR. ROSS: Yes, Your Honor. And I believe Ms. Khanna also wants the opportunity to reply.

JUDGE MARCUS: Let me sort of ask you this question, and, Ms. Khanna, before you begin.

Mr. LaCour says if you can't get over the requirements of *Gingles I*, particularly these redistricting criteria of which he propounds three communities of interest, compactness, and county splits, you cannot meet your burden under Section 2, even if you otherwise can show that SB-5 does not create a reasonable opportunity. Did you want to reply to that?

MR. ROSS: I did, Your Honor. I first wanted to reply

to Mr. LaCour misquoting me. What I was saying is that *Gingles I*, as the Supreme Court has said, is about the reasonable compactness of the minority community. I wasn't saying that race as of itself was a consideration for the only consideration for communities of interest.

I was saying that as the Supreme Court said, as the Supreme Court says in Milligan, says in *LULAC*, and mentions again in a footnote in 7 of *LULAC* -- or, excuse me -- of the Milligan opinion. The whole point of the *Gingles* is whether or not you can draw a majority-minority district and you can draw one that's reasonably configured.

So it is not that I was saying race is the only issue at communities of interest. My point is that the *Gingles I* inquiry is about the geographic compactness of the African-American community in this case.

To answer your question more directly, Your Honor, the -- what Mr. LaCour is trying to do is exactly trying to turn this into the beauty contest that the Supreme Court and this Court said it is not.

If you look at page 1504 and 1505 of the Supreme Court's opinion, the Supreme Court never mentions Alabama's redistricting criteria as what they're measuring our plan against their plan. The only time the Supreme Court, to my knowledge, quotes the state's redistricting criteria is when it's quoting what a community of interest is as defined by

Alabama.

So what the Court actually looks to when it's talking about traditional redistricting criteria is compactness. It looks to whether or not our maps had tentacles, appendages, bizarre shapes. It looks at whether our maps were equal populations, were again contiguous, or whether they respected existing political subdivisions; that is, counties, cities, and towns. And what the Court found is that it did.

It did talk about sort of how our map compared to the state's map. But the point was that some of our illustrative plans only split six counties. Some -- which is the minimum that Mr. LaCour's rules, you know, would require, and that the one person one vote itself requires.

We also split -- showed that the -- our maps were contiguous. We don't grab populations over here and bring them over there. All of those issues have been resolved.

Alabama concedes *Gingles II* and *III*, Senate Factors 1 through 9. The only issue that they're trying to relitigate is this racial gerrymandering claim that is not at issue in the *Gingles I* consideration.

JUDGE MARCUS: Well, I think they say they're doing more than that. They say they drew three communities of interest that they say properly reflect their judgment about how these districts should be drawn.

Didn't you put in evidence on that issue yourself?

MR. ROSS: We did put in evidence that showed that the African-American community was reasonably compact, consistent with *Gingles I*, and some of that evidence included the fact that there were communities of interest that were overlapping between the Black Belt -- obviously, Montgomery is in the Black Belt -- between Mobile and Baldwin County that we weren't trying to connect disparate communities of interest.

And so our evidence at trial last year was that there is a community of interest that exists between Mobile and the Black Belt that that community of interest is being respected. Alabama's map from our perspective does not respect that community of interest.

Mr. LaCour continues to bring up the issue of our remedial map. I do want to make one point about that, which is relevant to our motion in limine.

JUDGE MARCUS: Before you did --

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: -- the point I was trying to get at is --

MR. ROSS: Yes.

JUDGE MARCUS: -- when you filed your objections to SB-5, you saw fit to put into the record or attempt to put into the record an expert report from Dr. Bagley. And among other things, Dr. Bagley, who you had presented on round one, said in an expert report, I don't really agree with the way those

communities of interest have been defined or drawn in SB-5. I quarrel with the Wiregrass. I think maybe they're not exactly right on the Gulf Coast, et cetera.

So having put that in, isn't it fair game for them to address why these are reasonable communities of interest?

MR. ROSS: Your Honor, as I said at the opening, we don't intend to put -- we don't think that that evidence is necessary or relevant to these remedial proceedings. The only reason why we presented that evidence is because we saw Mr. LaCour's legislative findings in SB-5.

And so to the extent that Court did want to consider those issues, we wanted to be prepared to address them. But to be very clear, we do not think that Dr. Bagley's report is relevant unless the Court wants to go down the path that Mr. LaCour going.

This is not a beauty contest between our communities of interest and their communities of interest. It is about whether or not the minority community is reasonably compact and can be placed in a reasonably configured district.

The Supreme Court has answered that question. This Court has answered that question. We don't need to go down that path again.

JUDGE MARCUS: Thank you very much.

MR. ROSS: Thank you, Your Honor.

JUDGE MARCUS: We are going to take a ten-minute

break. We want to give everyone a chance, and our court reporter.

One comment I wanted to make though, for you.

MR. ROSS: Your Honor, if I may make one more point.

JUDGE MARCUS: Absolutely. You may indeed.

MR. ROSS: And one other -- Ms. Khanna would like the opportunity to address the Court.

JUDGE MARCUS: Correct. Thank you.

MR. ROSS: And so, Your Honor, Mr. LaCour keeps saying that if race predominates in a plan, any plan, that it cannot survive under the Constitution. That's an incorrect reading of the law.

We don't think and the Supreme Court didn't think that race predominated in any of our illustrative districts. But as Mr. LaCour knows, because Alabama litigated a racial gerrymandering case in 2017, if race predominated and the reason why was to comply with the Voting Rights Act, that does not violate the Constitution.

The Supreme Court reaffirmed that both in *Milligan* at 1516 to 1517, where the Court said that you can use race to remedy a violation of Section 2. It said it in *Shaw* 2 at 909 to 910. And it said it in the Harvard case that Mr. LaCour wants to reference, which is at 221 -- excuse me -- 2162. Thank you, Your Honor.

JUDGE MARCUS: Thank you.

Ms. Khanna?

MS. KHANNA: Thank you, Your Honor. I just wanted to make a few points regarding the presentations that have been discussed. But if the Court would like to take a break first, I don't want to keep the court reporter or anybody past the point of --

JUDGE MARCUS: I think it would be wiser if we did that. So we will take a ten-minute break, and then we will come back and proceed, Ms. Khanna.

MS. KHANNA: Thank you, Your Honor.

(Recess.)

JUDGE MARCUS: When we broke, we were about to hear from Ms. Khanna.

You may proceed.

MS. KHANNA: Thank you, Your Honor. And I will keep my notes brief. I just wanted to respond to a few points that were discussed with Mr. LaCour on the various issues.

The *Gingles I* standard, which Mr. LaCour says is the only thing in dispute today, the *Gingles I* standard is an evidentiary standard. It is for plaintiffs to come to court to prove by preponderance of the evidence the demographic reality of the state of Alabama. We have to show that the black population in Alabama is large enough, it's numerous enough, and it's condensed and compact enough to create an additional majority-black district.

Neither the size of the black population nor its location throughout the state is a moving target. That has already been established.

What plaintiffs' illustrative plans have shown is just that. It's demonstrated the demographics based on census data, location, and a whole bunch of traditional districting criteria. Neither the size of the black population has changed, neither the location throughout the state has changed. And nor have plaintiffs' illustrative maps changed. Those same illustrative maps that this Court and the Supreme Court said proved what we had to prove, which was the size and location of the black population in Alabama.

Nothing about the 2023 map, nothing about the evidence that the defendants can now present to this Court can go back in time and inject race improperly into maps that were drawn by plaintiffs' experts two years ago.

Now, the inquiry into what -- what is *Gingles I* actually getting at, if we take -- if you were to start from scratch even, understanding that the record that we've already established is still before the Court, this Court need only look at the record that -- the evidence that is already in the record to see that nothing has undermined plaintiffs' *Gingles I* showing, nothing has abandoned this Court's *Gingles I* finding or the Supreme Court's *Gingles I* affirmance.

Gingles -- the plaintiffs' illustrative maps this Court

found and the Supreme Court found comported with traditional districting criteria. Nothing about the tradition of Alabama's redistricting criteria has changed. If anything, it is Alabama that has broken with its own tradition in enacting this 2023 plan in creating these brand new findings out of nowhere, unbeknownst to the actual committee chairs who were in charge of the process.

That has nothing to do with whether or not our maps that we brought to court were comporting with the state's tradition.

This Court -- the United States Supreme Court in *LULAC* said that there is no precise threshold for determining geographic compactness. There is no precise rule. It can't say every time you fall below this line or that line, it is or is not compact. Yet Mr. LaCour has come to this Court and basically said that's not true. It turns out six counties is the precise rule, or the Mobile/Baldwin community is the precise rule, or just counting communities is the precise rule.

If that had been the precise rule, the Supreme Court might have told us that. That is not the rule.

The reason that courts look at the enacted map, previous enacted maps, other redistricting maps is to figure out what does Alabama's tradition generally follow. And certainly, plaintiffs' illustrative maps follow Alabama's tradition of reasonably compact district -- really compact district.

I just want to take one moment and address the *Dillard*

case that Mr. LaCour has placed a lot of emphasis on. The *Dillard* case was a case in which the plaintiffs challenged an at-large voting mechanism as a violation of Section 2. They won on liability.

On remedy, the defendant came forward, defendant jurisdiction came forward, and with a new election plan, a brand new election plan that did include districted positions but also included an at-large elected chair, the Court in *Dillard*, the Eleventh Circuit in *Dillard* said that the district court was correct to incorporate the entire liability record into its findings upon the remedy. That had to be informed by the case which had already happened.

But what the district court could not do is assume that once you have an at-large election, all at-large elections are per se unlawful. The Supreme Court has been clear that there's no such rule. So you have to look at the actual election system.

And what did the *Dillard* court look at in looking at the new election system on remedy? They looked at how does it actually operate? How does it actually perform for minority voters. Right? And they said that turns out that the jurisdictions decision to create an at-large post that essentially has this -- a lot of weight and a lot of leadership is still a violation, because the way it operates is in conjunction with the entire liability evidence before -- in the

previous round shows that it is not a remedy. Let alone a complete remedy.

That is exactly where we are today. Right? The way that this purported remedy by the state of Alabama operates is exactly the same as the previous plan operates. The way it performs for minorities is exactly the same way as the way it performs the 2021 plan performed for minorities.

And like the Eleventh Circuit said in *Dillard*, if this incomplete remedy, this fake remedy is no remedy at all, we are in the exact same position where the 2023 plan is no remedy at all. It is a violation just as much as the 2021 plan, and this Court has all of the evidence before it in order to find that violation.

That's all for now, Your Honor, unless you have any other questions.

JUDGE MARCUS: No. Thank you.

Any questions?

JUDGE MANASCO: None.

JUDGE MOORER: No.

JUDGE MARCUS: Thanks very much.

Seeing nothing further on the motion in limine, this Court will reserve its ruling and carry the issue with the case.

We will go on to the presentation of evidence by the Milligan plaintiffs.

Mr. Ross, you may proceed.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: You may put on what you will, and we will take up any objections, Mr. LaCour, that he has witness by witness, or exhibit by exhibit.

MR. ROSS: Yes, Your Honor. I'm sorry. Just give me one moment. I misplaced --

JUDGE MARCUS: Sure.

MR. ROSS: So, Your Honor, given that we don't intend to put on live evidence, as we stipulated with the defendants, we were intending to move into the record a number of exhibits. And we have not come to any agreement with the defendants, so I don't know if they will have any objections.

So first, Your Honor, plaintiffs would like to move -- excuse me. Oh.

JUDGE MARCUS: No, no. Please fire away.

MR. ROSS: Plaintiffs would like to move into evidence M1, which it the population summary of the Livingston Congressional Plan 3.

JUDGE MARCUS: Any objection?

MR. WALKER: No objection, Your Honor.

JUDGE MARCUS: Seeing none, M1 is received.

MR. ROSS: Plaintiffs would like to move -- actually, let me take a step back.

At the outset, we want to move into evidence all of the 2022 testimony and exhibits in Milligan and Caster related to

the Section 2 claim.

JUDGE MARCUS: Any objection?

MR. WALKER: No objection.

JUDGE MARCUS: Seeing none, received.

MR. ROSS: Thank you, Your Honor.

Next, we would move into evidence M2, which is Dr. Liu's remedial expert record.

JUDGE MARCUS: Any objection?

MR. WALKER: No objection, Your Honor. I might be able to simplify this by telling you the four that we do object to.

JUDGE MARCUS: That would be great. That would be great. As I see it, there are 49 and a demonstrative exhibit. Which ones do you object to of the 49?

MR. WALKER: There are four newspaper articles that are hearsay. Those are M38, M32, M31, and recently added M47.

MR. ROSS: Can you give me the numbers?

MR. WALKER: Okay. Sorry. M31, M32, M38, and M47. I can give you the ECF numbers if you want those.

JUDGE MARCUS: I may be confused. But on the list I have, I'm working, Mr. Walker, off of the Milligan plaintiff's amended exhibit list. If I have the right document, 47 is a transcript of the video of the August 9th deposition of Pringle.

MR. WALKER: Excuse me, Your Honor. That is the

deposition of Pringle. And within that Exhibit O and Exhibit Z, which are the two newspaper articles, Exhibit Z is also M32.

JUDGE MARCUS: So M32, is that O or is that Z? M32 is embodied in and was shown to the witness? Is that what happened?

MR. WALKER: It was shown to the witness -- yes, Your Honor.

JUDGE MARCUS: Did you want to respond?

MR. ROSS: Your Honor, that exact point, that it was shown to a witness during a deposition, and so the relevance of it or its admissibility all goes to whatever the witness said about it, not, you know, we're not trying to enter it for --

JUDGE MARCUS: You are not offering it for the truth of its content?

MR. ROSS: There are some of these news articles.

JUDGE MARCUS: We're talking about O and Z in particular. O is which one? M47 is the transcript of Pringle. Mr. Walker says in the course of deposing Pringle, you used or showed him two newspaper articles. One was O, one was Z. One of them, in fact, is your M32, perhaps the other one is M31. I'm not sure. Perhaps you can help us.

MR. WALKER: M32 was the article Alabama Legislature --

MR. ROSS: She can't hear you, the Court Reporter.

MR. WALKER: I'm sorry.

JUDGE MARCUS: That's all right. You take your time.

MR. WALKER: M32 is the article Alabama Legislature Passes Controversial Congressional Map.

And Exhibit O to the Pringle deposition, Mr. Ross, was the article that quoted Congressman Sewell. I can't think of the name of it. I don't have it right here. Alabama Ignores U.S. Constitution, I believe, was part of the title.

MR. ROSS: If I may respond.

JUDGE MANASCO: That was M13.

MR. ROSS: That's right.

Your Honor, if I may respond. If Mr. Walker is done.

So, Your Honor, I think we are trying to enter these into evidence for two reasons. First, is that some of the witnesses testified to these articles. They verified statements that were made in them. The other is that some of the statements were made by the defendants in this case. And so they are statements of party opponents.

JUDGE MARCUS: So that I'm clear, the objections are to M31, M32, M38, and O embodied in 47?

MR. WALKER: Which apparently, Your Honor, is M13. Am I correct?

JUDGE MARCUS: Which is M13.

Anything further on the issue?

MR. WALKER: Your Honor, I believe Mr. Ross wants those to come in under statement of opponent's party. And that

requires that the party manifested that it had adopted or believed the article to be true or the statement to be true, which was not the case.

MR. ROSS: Your Honor, as I said -- if the witness in the course of the deposition denied that they made a statement, then we're not -- obviously the defendants can rely on that in whatever proposed findings of fact that they have. But to the extent that, you know -- unfortunately, Your Honor, I am not looking at the deposition transcript right now, and I can't tell you exactly what they did or did not adopt, but I do think it's fair to allow this into evidence and let us deal with it in our proposed findings of fact.

JUDGE MARCUS: Just help me with one thing.

Of the four exhibits -- M13, 31, 32, and 38 -- how many were actually used to question the witnesses in their depositions?

MR. ROSS: My understanding, Your Honor, all of these exhibits were used to question a witness in a deposition -- the ones that -- the four that he's referenced.

MR. WALKER: Mr. Ross -- excuse me -- Your Honor, they were used to question either Senator Livingston or Representative Pringle. Mr. Ross is correct.

JUDGE MARCUS: So all of them were used for cross confrontation or on direct?

MR. WALKER: That's correct, Your Honor.

JUDGE MARCUS: We will receive it for the limited purpose that it's offered not for the truth of its content. You may proceed.

Having said that, I take it, Mr. Walker, we can go through these one by one and just clear up the record? You have no objection to the other exhibits?

MR. WALKER: No objection to the other exhibits, Your Honor. Thank you.

JUDGE MARCUS: All right, Mr. Ross. Why don't we just clean up the record?

MR. ROSS: Are you going to go through them?

JUDGE MARCUS: Yeah, I think so.

We resolved M2, which was the report of Dr. Liu.

There's no objection to M3, the Alabama Performance Analysis. Received.

M4, received. That's the text of SB-5.

M-5, an article from Jeff Poor and the Yellow Hammer News, received.

M6, a press release issued by the Permanent Legislative Committee on Reapportionment, June 21st, received.

M7, VRA plaintiffs --

MR. ROSS: Your Honor, we are not intending to offer M7 or M8 into evidence.

JUDGE MARCUS: Okay. M9 is a declaration from Representative Jones, July 27, '23. No objection. Received.

M10 you're offering?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: That's an article by Mike Cason in the AL.com July 22nd. Received.

M11, another article in Politico. You're offering that again so I'm clear?

MR. ROSS: Sorry, Your Honor. Just trying to confer at a distance with my colleagues.

JUDGE MARCUS: Sure. Take your time. That purports to be an article from Zach Montellaro, quote, Alabama's Redistricting Brawl Rehashes Bitter Fight.

MR. ROSS: Yes, Your Honor. We are entering into that evidence.

JUDGE MARCUS: All right. Without objection, we will receive that.

12, Associated Press Daily News July 24th. Are you offering that?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection.

M13, we received for a limited purpose over Mr. Walker's objection.

M14, are you offering that?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection, received.

M15, the remedial expert report of Dr. Bagley.

MR. ROSS: Your Honor, I think that that is subject to your motion in limine. As I said, if the Court grants their motion in limine, we are not intending to enter M15 into evidence.

JUDGE MARCUS: Got it.

MR. ROSS: And at the same --

JUDGE MARCUS: I'm sorry. Sure.

MR. ROSS: Never mind, Your Honor. We have already entered Representative Jones. I think we have the same concern.

JUDGE MARCUS: M16, Dr. Hood's performance analysis. I take it you're offering that?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Received without objection.

M17, Defendant Senator Livingston's responses to the plaintiffs' third set of interrogatories?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection, received.

M18, Alabama Legislature's SB-5 population summary. You're offering that?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Received without objection.

M19, the expert report of Dr. Palmer?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection, it's received.

M20, Defendant Pringle's response to the plaintiffs' third set of interrogatories. You're offering that?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection, received.

M21, community of interest map plan.

MR. ROSS: Yes, Your Honor. Again, for the limited purpose of rebutting the defendants' testimony.

JUDGE MARCUS: Right. There was no objection to that one.

MR. ROSS: Yes.

JUDGE MARCUS: M22 and 23, those were Livingston 1 map and Livingston 2 map. You're offering both?

MR. ROSS: The same reservation for M22 and M23, which is that we're not intending to affirmatively put that forward except to the extent it's relevant to rebut some of the things the defendants are raising.

JUDGE MARCUS: So received for that purpose.

M25, the '21 Reapportionment Committee Redistricting Guidelines. May 5, '21.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection, we're receiving that.

M26, the Russell split plan map.

MR. ROSS: The same reservations for M26, M27, and M28 that we are entering it only to rebut any evidence the

defendants may put in.

JUDGE MARCUS: We will receive it for that limited purpose.

M29 is characterized as an e-mail. It doesn't say from whom or to whom.

MR. ROSS: My understanding, Your Honor, is that it's an e-mail that was produced by the defendants. There are Bates numbers there which are RCO49603 to 04, and it was used in a deposition. We are seeking to admit that into evidence.

JUDGE MARCUS: Without objection, received.

I take it you withdrew M30?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: M31, 32, 38, we've already ruled on. They were admitted for limited purposes.

MR. ROSS: M33, as well, Your Honor?

JUDGE MARCUS: There was no -- I saw no objection -- did I misapprehend that, Mr. Walker? Did you have an objection to M33? That's characterized, quote, talking point.

MR. WALKER: No. No. There was no objection to that, Your Honor.

JUDGE MARCUS: Received.

M34 is omitted.

M35, Proposed Amendment of Reapportionment Committee Guidelines.

MR. ROSS: Yes. Entering that into evidence, Your

Honor.

JUDGE MARCUS: Without objection, received.

M36, the July 12th Reapportionment Committee Agenda, you are offering that.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection, received.

37, you've withdrawn.

38, we've already ruled on.

M39?

MR. ROSS: 39 the same reservation, Your Honor, simply addressing the defendants' arguments.

JUDGE MARCUS: Received for that limited purpose.

M40, talking points. I'm not sure whose.

MR. ROSS: M40, M41, M42 were used in depositions. They are documents produced by the legislative defendants.

JUDGE MARCUS: And you are offering each of them?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Without objection, M40, 41, and 42 are received.

M43, the transcript of the August 9th deposition of Randy Hinaman.

MR. ROSS: I believe there might be a typo there, Your Honor. It should both be the transcript and the video of that deposition.

JUDGE MARCUS: Gotcha.

Seeing no objection, M43 is received.

M44 is the transcript and video August 11th deposition of Brad Kimbro.

MR. ROSS: Yes, Your Honor. And just to be clear, I think for M43 to M49, the same reservations that, you know, we think we can rest on our evidence. But to the extent it's relevant to rebut, anything the Court lets in on the motion in limine.

JUDGE MARCUS: We will receive them with that understanding and stipulation.

Having said that, feel free to present before this Court what you will.

MR. ROSS: We rest on the evidence that we've submitted both now and in 2022.

JUDGE MARCUS: Okay.

MR. ROSS: Thank you, Your Honor.

JUDGE MARCUS: And I take it, Ms. Khanna, that you're resting on the record, as well at this point?

MS. KHANNA: Yes, Your Honor. I just want to confirm that the Caster plaintiffs' remedial Exhibit 1, which I believe is at ECF 212 in the Caster docket our expert report of Dr. Palmer is admitted into the evidence.

MR. ROSS: That was admitted. It was one of our --

JUDGE MARCUS: It was. But I will receive it under the title of your case. Your Exhibit 1 the 2023 expert report

of Maxwell Palmer in support of Caster plaintiffs' objections. That is received.

MS. KHANNA: Yes, Your Honor.

JUDGE MARCUS: We have already received it, but we will receive it under your number, as well as the expert report from your expert is received.

MS. KHANNA: Thank you, Your Honor. I have no further argument unless the Court has any questions.

JUDGE MARCUS: No. I do have one clarification I wanted to make sure that I was right about. And we had discussed this earlier, and this is the way we proceeded in the first case -- the first time we heard it in round one.

And that is to say: Evidence admitted in support of or opposition of one was in support of, in opposition of all. Do I have that right?

MS. KHANNA: Yes, Your Honor.

JUDGE MARCUS: Mr. Ross?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Mr. LaCour?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Okay. The plaintiffs have rested their presentation, Mr. LaCour. We're happy to proceed with the state's case.

MR. LACOUR: Yes, Your Honor.

We, too, are just going to rest on paper evidence that has

been submitted to the Court either attached to our response to the Milligan and Caster filings or subsequently filed thereafter.

So we would move first to admit Exhibit A.

JUDGE MARCUS: Can I -- let's see what objections there are.

Which -- Mr. Ross, Ms. Khanna, can you tell me of these exhibits offered by the state you do object to we can maybe short circuit the time and admit everything else?

MR. ROSS: Your Honor, could we have a moment just to confer?

JUDGE MARCUS: You sure can.

MR. ROSS: I apologize.

Your Honor, I think it would be most prudent to just go by them one by one and lodge our objections.

JUDGE MARCUS: Sure. All right, Mr. LaCour, let's go forward.

MR. LACOUR: This is a transcript of the hearing before the Legislature's permanent legislative hearing on the reapportionment on June 27th, 2023. It's certified by a court reporter. We would move to admit this.

JUDGE MARCUS: Any objection?

MR. ROSS: We object, Your Honor. It's entirely hearsay. There's no one to come testify about it. No one was testifying under oath. It's similar to the evidence that this

Court previously rejected. They were hearing transcripts for the 1992 redistricting that this Court found were not admissible.

JUDGE MARCUS: Mr. LaCour?

MR. LACOUR: Yes, Your Honor. We think this is still admissible to show what evidence was in front of the Legislature as it was considering how to draw the 2023 plan. So and, again, this is also certified by a court reporter on top of all that.

JUDGE MARCUS: We will reserve on the issue.

MR. LACOUR: Okay. Thank you, Your Honor.

MR. ROSS: May I make one more point?

JUDGE MARCUS: Of course.

MR. ROSS: I would also object on relevance since this is solely about Section 2 not about the intent of the Legislature.

JUDGE MARCUS: Did you want to comment on that? He says it's inadmissible both because it's not relevant and because it's hearsay.

MR. LACOUR: Your Honor, we think it absolutely is relevant. We are not introducing this to argue that like whether or not it goes to the intent of Legislature. I think it does go to this notion that the goal for the Wiregrass were made up by the Legislature in 2023, which runs contrary to even Joseph Bagley's declaration.

JUDGE MARCUS: So you are offering it for the truth of its contents?

MR. LACOUR: Both for that, but also for evidence that the Legislature had it before it that it's certainly competent for the Legislature to consider this evidence even if people were not sworn and cross-examined. These sorts of things happen in Congress all the time.

JUDGE MARCUS: We will reserve on it.

It's the same issue on B, transcript dated July 30th?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Is there anything further you wanted to say about that one, Mr. LaCour?

MR. LACOUR: No, Your Honor. Other than that at the time we filed our response, we had only had a partial copy of the transcript.

JUDGE MARCUS: And now we have the full thing, right?

MR. ROSS: The full thing. Yes, Your Honor. We filed that on the docket.

JUDGE MARCUS: We will reserve on that. B2?

MR. LACOUR: Yes. B2 is the full transcript from that hearing, which has been filed with the Court now. So...

JUDGE MARCUS: Mr. Ross?

MR. ROSS: Same objection, Your Honor.

JUDGE MARCUS: We will reserve on B2. The objection again to the entire transcript is both relevance and hearsay.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: C?

MR. LACOUR: Yes. So this is a document -- we would move to admit this. This is a document that was before -- well, there is a version of this document I think we have explained in a separate filing at C2 that was before the Legislature that had I think either a couple of pages towards the end of it that were not included in the filing that we had given, because we had ended up pulling that document off of the Internet. But in either instance, it was both in front of the Legislature, the C2 document and Exhibit C here -- everything we quoted from --

JUDGE MARCUS: So this goes to the community of interest in the Gulf Coast?

MR. LACOUR: It does go to the community of interest point. I also note that this is a government document that this Court can take judicial notice of.

JUDGE MARCUS: Any objection?

MR. ROSS: Your Honor, it may be a government document, but there's no one to come here and testify to where it came from, who produced it. There's no one to come and testify that the Legislature actually considered it or looked at it or that it was in the legislative record. It's simply Mr. LaCour's representations.

JUDGE MARCUS: Mr. LaCour?

MR. LACOUR: You can pull this document yourself off of a government website. That's good enough for judicial notice.

JUDGE MARCUS: His objection, if I understand it here, is a foundational objection.

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Rather than an objection going to relevance or hearsay. Do I have that right, Mr. Ross?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: He just says you haven't laid the right foundation.

Let me ask you a question, Mr. Ross, just to cut to the chase. Mr. Ross, I have a question for you.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Is there any doubt that this is what purports to be?

MR. ROSS: I don't know, Your Honor. They haven't laid a foundation. I don't know what document this is or where it came from.

JUDGE MARCUS: Anything on foundation you want to present?

MR. LACOUR: Your Honor, if you look at B2, which is the transcript, you will see towards the end of that transcript Mr. Walker moving to admit these documents into the legislative record.

MR. ROSS: Your Honor, if they want to swear in Mr. Walker, we are happy to cross-examine him.

JUDGE MARCUS: Let me just ask this question, Mr. LaCour: I take it Exhibit C was before the committee?

MR. LACOUR: Yes. C2.

JUDGE MARCUS: C.

MR. LACOUR: Which is nearly identical.

JUDGE MARCUS: I may be working off the wrong list. Is there a C2, as well?

MR. LACOUR: It comes near the end. So if you go to page 5 of our amended exhibit list.

JUDGE MARCUS: Okay. I've got it. So you're offering C and C2 on the same grounds?

MR. LACOUR: Yes, Your Honor. We find just offering C2 though. But they're both government documents you can pull off a government website to take judicial notice of. Whether you are --

JUDGE MARCUS: So then why not just offer C2 and make the record clean?

MR. LACOUR: We would be fine with that, Your Honor.

JUDGE MARCUS: All right. He's offering only C2, Mr. Ross. So we're clear. And you have objected on C2 on the same grounds of foundation?

MR. ROSS: Yes. Just to understand, Your Honor, C2 is a complete copy -- yes, same grounds.

JUDGE MARCUS: Okay. We will reserve on C2.

MR. LACOUR: Moving to D. This was also submitted to the legislative redistricting committee.

As you can see in B2 with the certified transcript, Mr. Walker admitted this into the record on July 13th, 2023, for the Legislature to consider, also note that Mr. Bagley quotes from Adline C. Clarke, who is quoted in this document talking about Mobile and Baldwin Counties being one political subdivision, which is a pretty good definition of community of interest.

JUDGE MARCUS: Just so I'm clear, D is an article by John Sharp in AL.com titled, Redistricting Alabama how south Alabama could be split up due to Baldwin's growth?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: All right. I take it your objection is the same?

MR. ROSS: Double hearsay, Your Honor. I don't know -- and lack of foundation, the same objection. I don't know -- you know, no one is here to testify about this article, its relevance to the Legislature, anything that was said in it.

JUDGE MARCUS: So it's --

MS. KHANNA: Your Honor, if I can add to Mr. Deuel's objection on relevance grounds, as well, to this and the previous exhibit, these are -- consistent with our position, our legal position in motion in limine, I think all of these

documents attempting to shore up their understanding of communities of interest are not relevant to today's proceedings.

JUDGE MARCUS: I understand. We'll reserve on that for the same reason we reserved on the underlying motion in limine.

E?

MR. ROSS: Same objection running throughout, Your Honor.

JUDGE MARCUS: E through R? Mr. Ross, we can short circuit this. You are objecting to everything, E, F, G, H, I, J, K, L, M, N, O, P, Q, R?

MR. ROSS: I think, Your Honor, so if we can go perhaps E.

JUDGE MARCUS: Maybe we better take it --

MR. ROSS: E through I -- I think we would have the same objection. Looks like these have some sort of reports.

JUDGE MARCUS: Let's make a record on these things. Let's talk about E. What is E, and tell me the relevance it would have.

MR. LACOUR: Yes, Your Honor. Alabama Port Authority 2021 Economic Impact Study Report. This a government document of which this Court can take judicial notice. It explains the tremendous economic impact in terms of money generated, jobs created from the port.

I believe this is -- it's either this document or F, not to jump ahead, that also explains that of the 21,000 give or take direct jobs created by the port somewhere in the upper 30 percent, somewhere around 39 percent of people who hold those jobs are from Mobile City, about another 39 percent of them are from Mobile County, exclusive of Mobile City. Another 13 percent to about 2,700 people live in Baldwin County. So --

MR. ROSS: Your Honor, if I may --

JUDGE MARCUS: Allow him to finish, please.

MR. ROSS: Sorry.

MR. LACOUR: Yes. So we do think that goes to community of interest point. And again, this is something that was in front of the Legislature, as well.

So whether you are considering that like you would reading the Senate report from 1982 amendments to the Voting Rights Act, or you're considering it just for the truth of what's asserted inside because you can pull it off of a government website and has that ability, either way it tends to support the idea that there are unique important ties between Mobile and Baldwin Counties.

THE COURT: So if I understand it right, you're introducing or seeking to introduce E and F in support of the manner in which SB-5 drafted communities of interest?

MR. LACOUR: Your Honor, we do think it -- I would -- both for that purpose and simply for the argument that

plaintiffs' maps failed *Gingles I* because they do not maintain a community of interest in the Gulf.

JUDGE MARCUS: And your objection is relevance, hearsay, foundation, or all three?

MR. ROSS: All three, Your Honor. And I think one point on the government record, Your Honor, as you know, you can take judicial notice of the fact there was a government record, but you can't necessarily take judicial notice of the import or the reliability of everything that's in the report.

And so unless Mr. LaCour is going to bring a witness again to testify about this report, who looked at it, what it's about, obviously an expert could come as they did in some of our testimony and talk about similar reports, but they haven't brought an expert. They haven't brought anyone.

JUDGE MARCUS: Anything further on this point, Mr. LaCour?

MR. LACOUR: I'll just note the only thing that Mr. Bagley says about the port about these studies when he is talking about is there used to be the slave trade at the port. So I don't think there's any dispute that the port is a critical -- a critical part of the Gulf and a critical part of helping establish that community of interest there.

JUDGE MARCUS: We'll reserve on E and F.

MR. LACOUR: G is the BRATS schedule for Baylinc Mobile Fairhope. I don't exactly remember what the acronym

stands for there, but it involves Baldwin County. This is a government document and showing that there is public transportation that goes from Baldwin County to Mobile and back every day.

JUDGE MARCUS: Is that the bridge that you're talking about there?

MR. LACOUR: This is beyond that. There's actually government -- government run public transportation to move people between the two counties within the one community.

JUDGE MARCUS: Objection?

MR. ROSS: Same objections, Your Honor. Relevance.

JUDGE MARCUS: Anything --

MR. ROSS: Hearsay, foundation.

MR. LACOUR: If I could, I am going to grab my copy of the exhibits to make sure I'm describing them --

JUDGE MARCUS: Sure. Take your time.

MR. LACOUR: Exhibit H is --

JUDGE MARCUS: Again, so we're clear, I'm going to reserve on G, as well.

H.

MR. LACOUR: Yes. H, Baylinc connects Mobile Baldwin County transit systems dated November 5th, 2007. This is from the government website cityofmobile.org explaining that there is this connection of bus routes being run by local governments to make sure that people can cross from one county to the other

because there are close ties between these counties. This was introduced to the Legislature on July 13th, 2023.

JUDGE MARCUS: Objection?

MR. ROSS: Relevance, hearsay, foundation. We can't take Mr. LaCour's testimony about what was produced to the Legislature.

JUDGE MARCUS: We will reserve.

I.

MR. LACOUR: Yes, Your Honor. This is South Alabama Regional Planning Commission website information from the South Alabama Regional Planning Commission, which is creation of state government that binds together Mobile, Baldwin Counties, as well as Escambia County and all the -- the 29 municipalities within those three counties to work together to promote common interests among those local governments. And the document describes what the regional planning commission is that's existed since 1968, and when it was created by --

JUDGE MARCUS: What's the date on this?

MR. LACOUR: Your Honor, this was -- appears it was printed on July 10th, 2023.

JUDGE MARCUS: Any objection, and if so, basis?

MR. ROSS: Same objections, Your Honor, relevance, hearsay, foundation.

And I'm not sure if the regional planning commission -- excuse me -- website -- that's actually -- same objections,

Your Honor.

JUDGE MARCUS: Gotcha. We will reserve --

MR. ROSS: It's government document, but maybe Mr. LaCour --

JUDGE MARCUS: We will reserve on I.

J and L, we have already had argument on, and we will reserve on both of those. Those were the expert report of Mr. Bryan dated August 3rd, '23. L was the expert report of Trende dated August 4, '23. Anything further you wanted to say about Bryan? Let's stop on that one. Mr. LaCour?

MR. LACOUR: There we think this evidence is relevant, and so we have submitted it to the Court.

JUDGE MARCUS: Let me ask you a question that I have. Since we don't have Bryan present testifying under oath, for any of these experts to be admissible, Hornbook laws says you have to show A, by background, training, and experience that they're competent and qualified to opine; B, that the opinion being offered is methodologically sound and reliable; and C, that the expert opinions' report would assist the trier of fact.

Since we don't have him live, I want to just give you an opportunity perhaps, if you want, to flesh any of that out.

MR. LACOUR: Sure, Your Honor.

JUDGE MARCUS: A, qualification by background, training, and experience to opine about racial predominance,

which I take it is the thrust of his report.

B, the foundation, the methodological way he came to this opinion.

And C, how it would assist the trier.

MR. LACOUR: Yes, Your Honor. First, on qualifications, multiple pages explaining his qualifications when it comes to redistricting. There's been no assertion that his numbers are somehow off in any way.

He's explaining that there are -- these stark disparities where you see splits of counties in congressional plans including very remedial plan. You see very different demographics on either side of that line.

So when it comes to District 2, for example, in the remedial plan split -- three counties are split on the District 2 side of that line. For every one of those splits, you see a much higher percentage of Black Voting Age Population there than you do on the other side of that line.

That is the exact evidence that Mr. Williamson, an expert for the plaintiffs and their racial gerrymandering claim back in 2021 presented to suggest that there was evidence of gerrymandering or racial predominance in the 2021 plan.

JUDGE MARCUS: Let me ask a preliminary question, if I can, on qualifications.

Has Bryan ever testified and been received as a credible witness on racial predominance? I couldn't tell from the

materials you submitted.

MR. LACOUR: Your Honor, I think in terms of an expert and racial predominance.

JUDGE MARCUS: Yes. I mean on -- zeroing in on that issue.

MR. LACOUR: He has offered similar testimony in other -- in other cases. I believe the Louisiana case he had done similar analysis there.

I would need to see -- I don't have in front of me right now how things were ruled on.

JUDGE MARCUS: Help me on the foundation. Did he employ in your view -- and I went back to re-read Ryan Williamson's testimony in round one.

Did he employ the same methodology Williamson did as you see it?

MR. LACOUR: My recollection is a very similar analysis. I think Williamson may have done some additional -- may have done some additional analysis, or I think he looked at -- there were other -- there were other things he did that Mr. Bryan did not do.

But my recollection is there were these analyses of split political geographies. And we have here analysis of these splits in these counties, which I know that plaintiffs used very similar analysis -- plaintiffs' lawyers rather used very similar analysis in attacking the congressional map in South

Carolina. They submitted a brief to the Supreme Court just last week the ACLU and the NAACP accusing South Carolina of bleaching one of their districts.

MR. ROSS: Your Honor, objection. I'm not sure why we're talking about a totally different case and totally different --

JUDGE MARCUS: Your may proceed with your argument.

MR. LACOUR: They accused, on page 1 of the brief, South Carolina of bleaching a district because the County of Charleston was split, and 60 percent of the black population of Charleston County was moved into another district.

That's the almost the exact same number we have where --

JUDGE MARCUS: No, no. What I am getting at is -- I was asking a very simple question.

Did he employ the exact methodology employed by Ryan Williamson? Your answer is yes.

MR. LACOUR: I would need to look back more closely to say if it's exactly the same. But I think Your Honors are competent to look at these numbers and adjudge whether they should be given much weight or not.

It's simply more data about what is being done in the maps that would tend to show -- tend to make it more likely than not that there may be racial predominance concerns in these plans.

JUDGE MARCUS: I understand. Mr. Ross? I understand your objection and Ms. Khanna's objection initially is it is

not relevant. The issue has been already determined in round one, and it's not open for debate. We have heard that. We will ultimately rule on that.

But, two, assuming arguendo that we get over the relevance objection, I read somewhere along the way that one of you had foundational objections, and I will give you the opportunity to put that on the record, as well.

MR. ROSS: Yes, Your Honor. We had objections about the reliability of Mr. Bryan's evidence. It is -- you know, it's -- Mr. LaCour is standing up here and attempting to testify about the connection between his report and findings of racial predominance. Nowhere in Mr. Bryan's report does he actually make that connection. He simply says, black people are on one side of the line, white people are on another side of the line. And from there, you know, implies that there's racial predominance.

But as this Court knows, as the Supreme Court has said many times, you know, racial predominance is not that you may have been aware of race. It's not that, you know -- none of those factors are sort of dispositive. It's simply irrelevant in the first instance, and Mr. LaCour cannot make the connections that Mr. Bryan does not actually make in his report. It's unreliable and not useful.

JUDGE MARCUS: Just one moment, Mr. LaCour. I just want you to hear all of the objections so you can respond to

all of them at once.

MR. ROSS: Your Honor, if I may make this other point. This Court has already found that there were serious concerns with Mr. Bryan's testimony.

The *Robinson vs. Ardoin*, the -- I may be mispronouncing that -- the Louisiana case that Mr. Bryan also testified in, the Court had serious concerns about the liability of his opinion and also found -- gave his opinion little weight, and he didn't testify, let alone but he's not even appearing to give any testimony here about --

JUDGE MARCUS: Ms. Khanna, any additional arguments you wanted to make on the admissibility of Bryan's report?

MS. KHANNA: Just to make sure I heard Mr. Ross correctly. Was he just reading from the Louisiana opinion?

MR. ROSS: Yes. I can read the full sentence, Your Honor. It's on page --

MS. KHANNA: No, no. That's all right. I was going to do the same thing. I just wanted to make sure that's in the record.

MR. ROSS: Yes, Your Honor. It's on page 824 of the Louisiana opinion. The Louisiana opinion is at 605 F.Supp.3d, 759.

JUDGE MARCUS: Other arguments?

MS. KHANNA: I have nothing to add. No thank you, Your Honor. Nothing to add.

JUDGE MARCUS: You may respond if you wanted to since you are the proponent of the exhibit.

MR. LACOUR: Yes, Your Honor. Mr. Bryan's opinion was the definitive proof of predominance. It is merely some evidence of predominance. The reasons why are obvious.

If every time the split is producing racially disparate effect, again and again and again like in the remedial plan from the plaintiffs, then that is some evidence that race was afoot. It's -- I think this Court is savvy enough to understand that multiple courts have looked at analysis like that before and connected the dots.

JUDGE MARCUS: Gotcha. Anything further, Mr. Ross?

MR. ROSS: One more objection, Your Honor.

Mr. LaCour keeps referencing the remedial plans that plaintiffs -- that my client put in front of the Legislature. That plan is not in front of this Court. We have never offered it as an illustrative plan. We have never offered it as a remedy to Section 2 case to this Court. And so it's simply another reason why any testimony about the remedial plan isn't relevant at all and isn't admissible.

And one other thing, Your Honor. Although Mr. Bryan goes and examines plaintiffs' plan, he does not examine the state's own plan for racial predominance. He doesn't compare, as Mr. LaCour thinks is relevant in racial predominance analysis, how their plan splits black and white communities along racial

lines.

JUDGE MARCUS: Mr. LaCour?

MR. LACOUR: Your Honor, that's not true. If you look at pages 32 and 31, he does include the county split information for the state's 2023 plan.

JUDGE MARCUS: Can you help me just with the last point Mr. Ross made? He says, if I hear him right, that going beyond the illustrative maps, we have already talked about them, this VRA reapportionment map was not being offered by the plaintiffs in any event, so what possible relevance could it be to have Bryan comment about that? He says you're shooting blanks in the night if you are shooting at a map not offered.

MR. LACOUR: I'm happy they have confirmed they are not offering that plan. It's the only one that doesn't split the Black Belt into at least three, if not four districts. So I am glad we cleared that up.

JUDGE MARCUS: Is it relevant? Why would Bryan's testimony be relevant to a map that they have not submitted to this Court?

MR. LACOUR: Well, I think his testimony as to the seven other maps that he does analyze is still relevant.

JUDGE MARCUS: No, I am not talking about Cooper's maps. I'm not talking about Duchin's maps. I'm talking about -- let's call it the VRA map.

MR. LACOUR: Here's why I think it might be relevant

is if -- imagine if the Legislature had before it only two plans, the VRA remedial plan and the 2023 plan, and they had to choose how to best comply with the demands of federal law, Section 2, and the Equal Protection Clause, and they looked and said, well, this one only splits six counties, the 2023 plan only splits six counties, that one splits seven. The 2023 plan keeps together these communities of interest, that one doesn't, and the 2023 is more compact both on average, and its least compact district is more compact than the plaintiffs' plan, if they chose the plaintiffs' plan anyway, it would be an obvious racial gerrymander, and there would be additional evidence that it would be a racial gerrymander from the fact of how those counties split, so that additional unnecessary county split came about.

And I think that should inform the Court when we're dealing with these charges of defiance here. We had a difficult task complying with dueling commands of Section 2 and the racial gerrymandering jurisprudence of the Supreme Court. I think the evidence goes to that, as well.

JUDGE MARCUS: I got it. The next item. We will reserve on that.

That would be J, the report of Bryan.

K was the Alabama Act Number 2023-563. I take it that is SB-5.

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Any objection?

MR. ROSS: No objection, Your Honor.

JUDGE MARCUS: K is received.

L is the other expert report that you have offered in this case. Is there an objection to L other than relevance, Mr. Ross?

MR. ROSS: No, Your Honor.

JUDGE MARCUS: All right. Is there anything you wanted to say further on that issue, or have we pretty much exhausted relevance on Trende?

MR. LACOUR: I think we have gone over it pretty well.

JUDGE MARCUS: Okay. So we will reserve on that.

MR. LACOUR: Next is M. This is the declaration of Lee Lawson that was submitted with our response to the plaintiffs' objections.

He works for a major -- it's the Baldwin County Economic Development Alliance. He's been working with them for 14 years in that role. He helps to foster business development in Baldwin County, which requires him to work closely with Baldwin and Mobile County government officials and other economic leaders in the area. So both as -- it's based on living in the area and based on his work in the area.

JUDGE MARCUS: Right. So just sharpening the focus, it goes to the community of interest?

MR. LACOUR: Yes.

JUDGE MARCUS: Okay. I take it the same objection for Lee Lawson, Mr. Ross?

MR. ROSS: Yes, Your Honor. The relevance objection from our motion in limine.

JUDGE MARCUS: We will reserve on that.

We will talk about M now, Kyle Hamrick, ALDOT says new bridge in Bayway are financially viable.

MR. LACOUR: Yes, Your Honor. This was before the Legislature for them to consider. And so I think it falls into the category of some of the other documents we have discussed before, although this is not a government document.

JUDGE MARCUS: This is again going to the community of interest?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Any objection other than relevance?

MR. ROSS: Hearsay and foundation, Your Honor.

JUDGE MARCUS: Did you want to respond to that?

MR. LACOUR: Your Honor, if you look at the B-2, the transcript of the hearing, certified transcript of the hearing, explains this was being admitted into the record for the Legislature to consider.

So, again, if you were reading the Senate report, you would have evidence there that was before the Senate when they were passing Section 2. Similarly, you have evidence here that was for the Legislature when they were --

JUDGE MARCUS: Just so I understand it, so Hamrick's statement is relevant because it was presented to the Alabama Legislature in 2023.

MR. LACOUR: Yes, sir.

JUDGE MARCUS: Okay.

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Anything further on that, Mr. Ross, other than your objections relevance, foundation, and hearsay?

MR. ROSS: No more, Your Honor.

JUDGE MARCUS: All right. O. We will reserve on N. O, USA, a brief history, University of South Alabama.

MR. LACOUR: Yes, Your Honor. This is from the University of South Alabama's website. This goes to communities of interest, explains some history of the school and that it has campuses both in Mobile and Baldwin Counties.

JUDGE MARCUS: Objection?

MR. LACOUR: This was also in front of the Legislature.

JUDGE MARCUS: Right. Just so we're clear, this was presented to the Legislature here in round two in July of '23?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Thank you. Objection?

MR. ROSS: Relevance, hearsay, and foundation, Your Honor. The same objections.

JUDGE MARCUS: We will reserve on O.

P, About Us.

MR. ROSS: Your Honor, I just would note that that is also -- this is not a government document. It's a school's web page, so...

MR. LACOUR: It is a school that's an arm of the state. So I think it could be considered.

JUDGE MARCUS: Just tell me what it goes to, why it's relevant, and why it isn't otherwise inadmissible. It's hearsay, or for the lack of the foundation, the proponent of the statement is not here in court to testify.

MR. LACOUR: Talking about P now, Your Honor?

JUDGE MARCUS: Yes.

MR. LACOUR: So this was before the Legislature, goes to communities of interest, explaining that there are types of media in the Gulf, including this newspaper Lagniappe that services both Mobile and Baldwin Counties.

JUDGE MARCUS: Who presented it to the Legislature?

MR. LACOUR: Dorman Walker admitted it.

JUDGE MARCUS: Mr. Walker offered this exhibit?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: And the Legislature received it in their work or their reapportionment committee, I take it?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: I gotcha. We will reserve on P.

Q.

MR. LACOUR: Yes, Your Honor. Declaration of Mike Schmitz. This goes to communities of interest, focused mainly on the Wiregrass, who is the former mayor of Dothan and provided the sworn declaration.

JUDGE MARCUS: Same for Kimbro, right?

MR. ROSS: Yes, Your Honor. Same for Kimbro -- Schmitz and Kimbro, both Exhibits Q and R.

JUDGE MARCUS: Help me, though, Mr. Ross. Were these folks deposed?

MR. ROSS: They were deposed, but we're still objecting on relevance grounds, Your Honor.

Excuse me. So we are objecting to the declarations Q and R and S on relevance grounds per our motion in limine.

JUDGE MARCUS: What about the depositions?

MR. ROSS: The depositions we've -- if this evidence comes in, then the depositions would come in.

JUDGE MARCUS: Okay. So your view is it's all inadmissible on relevance grounds, but if it comes in, then it should all come in.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: Okay. Anything further on Q and R, Mr. LaCour?

MR. LACOUR: No, Your Honor. I think everything that was said about Q and R would also be true as to S, the declaration of Jeffrey Williams.

JUDGE MARCUS: That's S, right?

MR. ROSS: Your Honor, if I may say one more thing, just goes to Mr. LaCour's testimony or -- excuse me -- statements -- some of these declarants were people who actually did come and testify at the hearing. Those people who wanted to give sworn declarations give sworn declarations. Those who were unable or unwilling to do so did not.

And so I think it just goes to the fact that these transcripts could have come in, in other ways and yet...

JUDGE MARCUS: I understand. Who is Williams?

MR. LACOUR: Jeff Williams is the senior executive at a bank in Dothan. He's also a member of the Dothan Area Chamber of Commerce. He has evidence about the Wiregrass's community of interest.

JUDGE MARCUS: I take it your objection is the same? Relevance and hearsay? Mr. Ross, I'm talking about --

MR. ROSS: I'm sorry, Your Honor.

JUDGE MARCUS: Yeah. I'm talk about he's offered S, the declaration of Mr. Williams.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: He offers it on the communities of interest and, in particular, the Wiregrass.

MR. ROSS: Yes, Your Honor. The same relevance objection.

JUDGE MARCUS: Okay. We will reserve on that.

MR. LACOUR: Just to be clear, Your Honor. I think you had said hearsay, as well. I don't think hearsay would apply, and I don't think Mr. Ross was raising a hearsay.

JUDGE MARCUS: I did not hear any hearsay objection to Defendants' Exhibit S. Singular objection, just relevance.

MR. ROSS: That's correct.

JUDGE MARCUS: T.

MR. LACOUR: These are the objections and responses to the Singleton first set of requests for admission.

JUDGE MARCUS: Any objection?

MR. ROSS: Your Honor, it's a different case. We're not -- there's no relevance.

JUDGE MARCUS: We can consider that when we get to Singleton, or does this have any bearing on this remedial proceeding, Mr. LaCour? Mr. Davis? We're talking about Exhibit T, which is the Defendant Secretary of State Wes Allen's objections and responses to Singleton's plaintiffs' first set of request for admissions.

Does it have any bearing on this case, or is that something we are going to take up separately?

MR. DAVIS: Your Honor, if it wouldn't inconvenience the Court, could we review that maybe during a break?

JUDGE MARCUS: Absolutely.

MR. DAVIS: That would remind me if it was just a mistake that was included on both lists, or whether there was a

separate purpose.

JUDGE MARCUS: Consider it done. We will take it up later. So we will reserve and give you a chance, Mr. LaCour, to address T.

U.

MR. LACOUR: Yes, Your Honor. This was a copy of Bradley Byrne's testimony offered in the Chestnut case that was presented into the legislative record in 2023 at the July 13th, 2023 hearing.

JUDGE MARCUS: It's already record, is it not?

MR. LACOUR: Yes, Your Honor. I think we are admitting it here to show that this was also something that was admitted or in front of the Legislature and the redistricting committee in July of 2023.

JUDGE MARCUS: Any objection?

MR. ROSS: Just I think same objection, Your Honor. Relevance, hearsay, and foundation.

If they want to bring Mr. Byrne to come and testify, again, they could have. I understand that the Caster plaintiffs did get an opportunity to cross-examine him. We've never had an opportunity to cross-examine him. And we have never waived our right -- or excuse me -- we did -- I'm sorry, Your Honor. We never had a chance to cross-examine him in that particular case on whatever issues he testified about there.

So I think to be clear, we know that it's already in the

case because the Caster plaintiffs introduced it earlier. We would not allow it to be introduced for the purposes of showing what the Legislature saw or didn't see or what they considered or didn't consider.

JUDGE MARCUS: Well, if it's in, it's in, counsel.

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: We are not in the metaphysical debate here. Either it went in or didn't.

MR. ROSS: I understand. It's in the record.

JUDGE MARCUS: So it's in the record. We will receive U.

MR. ROSS: Yes.

MR. LACOUR: I think the same would be true about Exhibit N, which is...

JUDGE MARCUS: I'm sorry. I thought we were up to V.

MR. LACOUR: I'm sorry. I may have skipped ahead. V, yes. This was testimony that Representative Byrne provided, preliminary injunction proceedings in this case. This was also provided to the redistricting committee on July 13th, 2023.

JUDGE MARCUS: And it's already been presented to this Court, has it not?

MR. LACOUR: Yes.

JUDGE MARCUS: Mr. Ross? Anything new on V? It's already in. The reason I'm making the point --

MR. ROSS: I understand, Your Honor.

JUDGE MARCUS: -- is just to be clear.

I have said this three times. I understand the record presented -- the record evidence presented on round one at the preliminary injunction hearing is part of these proceedings, too.

So I'm hard pressed to see an objection to V.

MR. ROSS: No, Your Honor. I think the distinction that I'm drawing which perhaps the Court -- I understand --

JUDGE MARCUS: You're going -- I think what you're really are arguing about the strength of the exhibit, its probative value rather than its admissibility.

MR. ROSS: I think that is absolutely correct, Your Honor. The evidence can come in. It's already in the record, its value, and what it says about the Legislature.

JUDGE MARCUS: Right. Mr. Davis?

MR. DAVIS: If it may help, Your Honor, it wasn't entirely clear to us if we intended to rely on something that was already in the record from the earlier proceedings.

JUDGE MARCUS: I understand.

MR. DAVIS: Whether the Court wished for us to refile. Out of an abundance of caution, we did so.

JUDGE MARCUS: V is received.

W.

MR. LACOUR: W is the testimony of Josiah Bonner in the Caster -- not the Caster -- in the Chestnut case, which I

believe is also -- was admitted as part of the record during the 2021-2022 proceedings. This is also -- this was also admitted to the legislative record at the July 28th -- July 13th, 2023, hearing.

JUDGE MARCUS: Refresh me. What does it go to, Bonner's testimony?

MR. LACOUR: The communities of interest in the Gulf. He's a former Congressman for District 1 and has served in other roles as a public official.

JUDGE MARCUS: Gotcha.

Mr. Ross, same?

MR. ROSS: Same concern, Your Honor, but no objection.

JUDGE MARCUS: We will receive W in evidence.

X, expert report of Dr. Imai.

MR. LACOUR: Yes, Your Honor, this is in the record already. As Mr. Davis referenced, we just wanted to be sure that we were putting forward everything.

JUDGE MARCUS: Gotcha. So it's clear. X is received.

MR. ROSS: Sorry, Your Honor. I want to be clear when we moved evidence into the record, we were moving only our Section 2 evidence, and we weren't intending to enter any evidence from Dr. Williamson or Dr. Imai.

JUDGE MARCUS: Okay. So is there an objection to X?

MR. ROSS: There's an objection to X and Y, Your Honor, for that reason. Relevance, Your Honor. It's simply

not relevant. That was examining the 2021 plan and whether it was a racial gerrymander or not.

JUDGE MARCUS: So it's relevant only to the issue, the Singleton issues of intent and equal protection?

MR. ROSS: Perhaps, Your Honor. But it was only looking at the 2021 plan, not even the 2023 plan.

JUDGE MARCUS: Mr. LaCour, any comment?

MR. LACOUR: Just interesting how this analysis only works one way and not the other.

But I do think Imai's analysis is probative. He showed that if you took -- he -- so you remember he ran three different sets of 10,000 maps race neutrally. The last set, which is in the rebuttal report, Exhibit Y, did a few things. He locked in one majority-minority district between 50 and 51 percent. He kept county splits to a minimum. He prioritized compactness. He avoided pairing incumbents. And then contrary to what the plaintiffs told the Supreme Court and what the Supreme Court actually ended up putting in their opinion, which was in error, he did prioritize two communities of interest -- the Gulf and the Black Belt. And when he ran those 10,000 maps that prioritized the Black Belt and the Gulf, the second highest BVAP district that he had came in on average around 36 percent and did not even get up to 40 percent, which we think is pretty good evidence that if you are actually prioritizing these neutral principles, the highest you are

going to get is probably right around 40 percent, which suggests that the Legislature's use of these principles was not tenuous in any way. This was indeed precisely what you would get.

JUDGE MARCUS: I have the thrust of the argument. Anything further, Mr. Ross, on this?

MR. ROSS: Your Honor, the Supreme Court, as you know, considered his arguments and rejected them.

JUDGE MARCUS: We will receive X and Y into evidence. Z.

MR. LACOUR: Yes, Your Honor. This was an exhibit that came into the record during the preliminary injunction proceedings. It's simply sort of helpful compendium of all the congressional redistricting maps the state has had from its inception until 2021.

JUDGE MARCUS: Comment, Mr. Ross?

MR. ROSS: If I may, one moment.

JUDGE MARCUS: Sure. Looks to me like it's a brief and motion in which --

MR. LACOUR: So this was the exhibit to the motion. It is not the motion itself.

JUDGE MARCUS: 7 is the exhibit to the motion itself.

MR. LACOUR: Yes. 57-7 is the exhibit we're admitting. We are not admitting the Singleton plaintiffs' renewed motion. We are simply admitting this exhibit, which

is, again, a copy of all the maps going back to 1822, at least, up until 2021.

JUDGE MARCUS: I understand.

Mr. Ross?

MR. ROSS: Your Honor, unless it's already in the record, we would object on relevance grounds. It's not clear to us if this is relevant. The Supreme Court rejected the argument that core retention is a principle that this Court --

JUDGE MARCUS: Was that ever received? I know it was appended to a motion, but I don't recall if that was received. The record will answer that question when we look at it.

Do you know?

MR. LACOUR: I do not know off the top of my head, but we can get that answer for you.

JUDGE MARCUS: We will reserve on Z.

C-2 we have already ruled on.

F-2?

MR. LACOUR: This is a slightly different version of the port authority. I believe it included a couple of extra pages at the end. This is the copy that was provided to the legislative districting committee.

JUDGE MARCUS: Right. And we have already reserved on that one, correct?

MR. LACOUR: Yes.

JUDGE MARCUS: So we will reserve on that, too.

Does that conclude your presentation?

MR. LACOUR: Your Honor, if we can have a moment to confer.

JUDGE MARCUS: You sure can.

MR. LACOUR: And get back to you.

JUDGE MARCUS: Mr. Ross, did you want to say anything about F-2?

MR. ROSS: No, Your Honor. I was just standing in case the Court --

JUDGE MARCUS: I understand.

MR. DAVIS: Your Honor, while Mr. LaCour is returning to the podium, as I see it, we have at least two issues that we need to think about and resolve and clarify for the Court after a break, which is whether we're submitting the Singleton request for admission responses for purposes of this case, and whether the exhibit, the historic maps, 57-7 was, in fact, received by this Court --

JUDGE MARCUS: Correct.

MR. DAVIS: -- in the earlier proceedings.

JUDGE MARCUS: Yes. And you can clear that up for us when we take a lunch break.

Mr. LaCour, any other evidence you wanted to put in on behalf of the defendants?

MR. LACOUR: I would just note that I was informed that we now have the full certified transcript of the

July 13th, 2023, hearing. That also includes the exhibits that were attached thereto, which I think should be enough to resolve the notion that we don't know whether the documents were really included.

JUDGE MARCUS: This was presented to the Legislature?

MR. LACOUR: Yes. July 13th.

JUDGE MARCUS: Do you want to put a number on that, and then we can reserve on that?

MR. LACOUR: Yes. We can call that B-3.

JUDGE MARCUS: B as in boy 3?

MR. LACOUR: B as in boy. B-2 was the full transcript but did not yet have the exhibits attached. And B-3.

JUDGE MARCUS: So B-3 is the entire transcript of the July 13th, 2023, legislative committee on reapportionment's hearing on that day.

MR. LACOUR: Yes, with exhibits that were introduced into the record.

JUDGE MARCUS: Okay. And I take it you have a variety of objections: Relevance, hearsay, in some instances, and foundation?

MR. ROSS: Same objections, yes, Your Honor. It can't be that Mr. LaCour testifies about these things.

JUDGE MARCUS: All right. We will consider that and take that under -- we will reserve on that issue.

Let me ask you one final question, Mr. LaCour, and I will

ask your colleagues in just a moment or two.

With the two issues Mr. Davis is going to come back with, you rest your case, correct?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: You do not wish to call anybody live. Do I have that right?

MR. LACOUR: That's correct.

JUDGE MARCUS: Okay. The defendants have rested save for the two issues we will join issue on after we take a lunch break.

Let me turn to the plaintiffs by way of rebuttal. And ask you, Mr. Ross and Ms. Khanna, whether you have any rebuttal evidence or whether you will rest on the record as it now exists.

MR. ROSS: We rest on the record and our objections, Your Honor.

JUDGE MARCUS: Ms. Khanna?

MS. KHANNA: Same here, Your Honor.

JUDGE MARCUS: Just so I'm clear on this, Mr. Ross, Ms. Khanna, you don't wish to call any witnesses live either?

MR. ROSS: No, Your Honor.

MS. KHANNA: No, Your Honor.

JUDGE MARCUS: Okay. With that, we will break for lunch. When we come back, Mr. Davis, just enlighten us about those two exhibits, and we will go into closing argument.

We will give the plaintiffs one hour in the aggregate for closing argument. Mr. Ross, Ms. Khanna, you can break it up any way you see fit. We will give the state one hour for closing argument, as well.

If there's nothing further, we will be in recess until 1:45.

Thank you.

(Lunch recess.)

JUDGE MARCUS: Good afternoon.

Before we proceed with closing, I think there were two loose ends, Mr. Davis, you were going to help us with.

MR. DAVIS: There were, Judge. Exhibit T, which is our responses to request for admissions, we did not mean to move for admission in that document in the Milligan and Caster cases. We did one exhibit list for all three. So we are not moving to admit the responses to RFAs Exhibit T in this case.

JUDGE MARCUS: So you are not offering T?

MR. DAVIS: Correct.

JUDGE MARCUS: Okay. We can strike that out.

MR. DAVIS: Z, which is the historical maps, that is something we wish to be considered for both cases, but our records show that that was admitted when we were here -- when we were together for the preliminary injunction proceedings.

We show that as being admitted on the first day of those proceedings on -- that document, that collection of maps was

filed as Singleton Exhibit 22, which was admitted on page 17 of Volume 1 of the preliminary injunction record.

JUDGE MARCUS: Gotcha.

Anything further on that, then, Mr. Ross? Do you want to withdraw your objection to that one?

MR. ROSS: Yes, Your Honor.

JUDGE MARCUS: So that's clear. We have received Z into evidence, and the other exhibit has been withdrawn.

MR. DAVIS: That's correct.

JUDGE MARCUS: Thank you.

With that, we will proceed to closing argument here. We are just going to have -- we are not going as we might normally have plaintiff argument, response, reply. We are just going to go -- given where we are and the timing issues, two closing arguments. You are going to break up your argument, I take it?

MR. ROSS: Yes, Your Honor. Ms. Khanna is going to do the closing. I may have a few statements or I may not.

JUDGE MARCUS: Perfect. Any way you folks want to handle it is fine.

Then, Mr. LaCour, I take it you are going to make the closing argument?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: We gave in the aggregate each side one hour.

MR. LACOUR: Thank you. We anticipate we will need

much shorter than that.

JUDGE MARCUS: Ms. Khanna, thank you, and you may proceed.

MS. KHANNA: I, too, will be much shorter than an hour. I promise.

During the break, I was looking -- I -- can everybody hear me before I dive in?

JUDGE MARCUS: We hear you fine.

MS. KHANNA: During the break, I was looking through the briefing in preparation for today's hearing, and as the Court knows, we saw a lot of hundreds of pages of motions for clarification, responses to motions for clarification, replies to motions for clarification all trying to answer the question of what are we even fighting about today.

And I really appreciate this Court's efforts during the course of this hearing to drill down on that question. And I think we've gotten some real clarity on that.

So I think I just want to start out by making very clear to the Court what we're not fighting about, what is not in dispute.

Gingles II, are black voters politically cohesive in Alabama in development areas? Yes. That is not in dispute.

Gingles III, does the white majority vote as a bloc usually to defeat black-preferred candidates? Yes. That is not in dispute. It is not in dispute generally in Alabama. It

is not in dispute in the areas in the regions in question. And it is not in dispute in the 2023 plan. Most specifically, in the 2023 plans, Congressional District 2, there is no dispute that the white majority will usually, if not uniformly, vote as a bloc to defeat black-preferred candidates.

So Senate Factors. The Senate Factors are not in dispute. Let's just spell out for a second what that means. Senate Factor 1, the history of official voting-related discrimination in Alabama. That is not in dispute. This Court has already found, the evidence has already showed that that history is repugnant, it is well documented, and it is persistent.

Senate Factor 2, the extent to which voting in the elections of Alabama are racially polarized. Again, that's not in dispute. This Court has already found that racial polarization in Alabama is intense, and it is stark.

Senate Factor 3, the extent to which the state has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group. That is not in dispute. The Court has already made findings in favor of liability under Section 2 for Senate Factor 3.

Senate Factor 5, the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health which hinder their ability to participate effectively in the political process. That is not in dispute. This Court has already made findings that black

voters, black citizens in Alabama have marked disparities across every metric on socioeconomic scale and the fact that continues to hinder their access to the political process.

Senate Factor 6, the use of overt or subtle racial appeals in political campaigns. That's not in dispute. The Court has already made findings that Alabama candidates, including congressional candidates have used racial appeals to appeal to voters.

Senate Factor 7, the extent to which members of the minority group have been elected to public office in the jurisdiction, this Court has already made findings that the extent to which black candidates can achieve success at the statewide level is zero. That is not in dispute.

Now, Senate Factors 8 and 9, this Court did not make findings of fact on those issues during the preliminary injunction phase. And there is, perhaps, some more evidence in the record, depending on how the Court rules on the motion in limine. There has today been presented evidence on both of those issues. And I don't think it actually requires an extensive analysis to see how they kind of fall out today.

Senate Factor 8 is about the extent to which the state has been responsive to the needs of the minority group. I think we can look at responsiveness just by looking at the state of Alabama's response to this Court's ruling, looking at Alabama's response to the Section 2 lawsuit brought by black voters, won

by black voters, and their responsiveness was to give no response at all, and certainly no meaningful response on the rights at issue. Their response was that they will continue to do what they are going -- what they had always done, what has already been struck down, not because they are prioritizing the needs or even recognizing the rights of black voters, but because they are prioritizing their own policy preferences and their own communities.

And then Senate Factor 9 goes to the tenuousness of the justifications for the enacted plan. And as Mr. Ross presented during his opening statement, the new evidence in the record on the 2023 plan shows that the purposes of that plan is tenuous at best, or the state solicitor general as turned map maker to inject into the record, to inject into Alabama's history of redistricting some new found principles and new found ways of beefing up redistricting maps for the sake of a legal argument to continue to advance in court.

The Court definitely -- again, at its disposal is evidence to make additional findings on Senate Factors 8 or 9, although it certainly does not have to in order to resolve the issues here today.

So all that leaves for, again, what are we fighting about? What is in dispute is *Gingles I,* and even then, it's not all of *Gingles I*. There is no dispute on the numerosity part of *Gingles I*. No dispute that black voters in Alabama are

sufficiently numerous to form a majority and additional district.

I just marched through step by step the legal standard to show every element that is not in dispute and that has had -- that has evidence in the record and in many cases findings on the record.

I want to pause for a moment right here, because I heard Mr. LaCour say during his opening statement that all the plaintiffs have come to you -- all that is before this Court is the question of proportionality. And the only way to arrive at that conclusion is to disregard every single element of the test that we just walked through. Every single element of this test that this Court analyzed, meticulously studied, and went through the evidence the last time, all of that evidence remains in the record.

If -- it is perhaps just the state of Alabama who likes the beat the drum of proportionality. But the plaintiffs in this case have been clear that this is a totality, and that this is a comprehensive analysis, and that the evidence itself is comprehensive.

So let's turn to what appears to be in dispute, and that is the portion of *Gingles I* regarding compactness, specifically the compactness of the minority group.

As Mr. Ross noted during his earlier argument in *LULAC vs. Perry*, the Supreme Court made clear that the first *Gingles*

condition refers to the compactness of the minority population and not the compactness of the contested district.

So today, Alabama is basically saying one of two things to the Court: Either the black population in Alabama is less compact today than it was 18 months ago when this Court made its original findings, or even 2 months ago when the U.S. Supreme Court affirmed those findings; or this Court's finding of geographical compactness and the Supreme Court's affirmance of that finding was in error. And according to the state of Alabama, the 2023 plan is just evidence of that error.

As a procedural matter, Alabama is foreclosed from making that argument. This Court has made clear on multiple occasions that it is not relitigating the findings from the preliminary injunction order.

And as a substantive matter, the 2023 plan says absolutely nothing about plaintiffs' illustrative plans. It cannot undue the fact that those plans are reasonably configured and that this Court has found those plans to be reasonably configured. And it cannot go back in time to render a reasonable plan unreasonable.

To the extent that Mr. LaCour is focusing on the intent and the predominance of race and plaintiffs' illustrative maps, the Court doesn't need to reopen that can of worms here. There's no way that the intent of the map drawer, the considerations of the map drawer, the communities considered by

that map drawer could have changed between time one and time two. Those maps have remained the same.

The question before this Court during our last gathering on the preliminary injunction hearing was whether based on the Section 2 legal standard and the totality of circumstances Alabama's 2021 congressional plan, which has just a single district that affords black voters an opportunity to elect, provides black citizens an equal opportunity to participate in the political process. This Court answered that question no.

The question today before the Court is whether based on that same standard, Alabama's 2023 plan, again, with just one district that affords black voters an opportunity to elect, provides black citizens in Alabama an equal opportunity to participate in the political process. And, again, based on the same evidence, based on the undisputed facts, it does not.

Ultimately, Your Honor -- Your Honors, nothing has changed. The law hasn't changed. The Supreme Court said as much. It's not for lack of trying on behalf of Alabama. The legal standard has not changed since this Court ruled 18 months ago. It has not changed over the last 40 years.

The record hasn't changed. The record from the preliminary injunction proceedings remains the record today.

The opportunities for black voters have not changed. In under the 2021 plan, black voters had a single opportunity district, and today, black voters have a single opportunity

district. Just like they had a single opportunity district in 2012, in 2002, and in 1992, at that time for the first time.

Nothing has changed, Your Honor. And ultimately, it is time for the black voters of Alabama to see some thing to change. It is time for some kind of change so that black voters in Alabama are finally afforded an opportunity to elect their preferred candidate in an additional district to provide that equal access to the political process.

Unless there's any questions, Your Honor, I will conclude there.

JUDGE MARCUS: No. Thank you.

Mr. Ross?

MR. ROSS: Nothing to add, Your Honor.

JUDGE MARCUS: Thank you.

Mr. LaCour.

MR. LACOUR: Thank you, Your Honors.

The plaintiff said that the heart of their case was the cracking of the Black Belt. The state responded that cracking is no more. It's now the plaintiffs who are demanding that you order the cracking of the Black Belt because every one of their illustrative plans puts the Black Belt into at least three if not four districts to hit racial goals. That reading of Section 2 is unlawful because it's unconstitutional.

Now, to return to something that Ross said before the lunch break. The *Allen* court did not say that strict scrutiny

was satisfied in considering the 2021 plan. The Court has only ever assumed that Section 2 compliance could justify racial predominance.

And I believe in light of the *Safe Harbor* decision that came out two weeks after the *Allen* decision that it makes clear that there are only two circumstances where the Court has ever held that strict scrutiny is satisfied. That is in the context of safety, like prison riots, which is not at issue here, and context of remediating past identified to jury discrimination, also not at issue here when we're dealing with a disparate impact or an effects test.

The Court simply reaffirmed at the end that its concerns that Section 2 may impermissibly elevate race in the allocation of applicable power within the states remains. They simply held that the record did not bear out the concerns in this specific challenge to the 2021 plan on the record before the Court at that time.

So the question, then, is why weren't those concerns borne out on that record? And the answer is that the Court was not requiring the state to adopt a plan that would violate the 2021 plans' principles.

As in any disparate impact litigation, the plaintiffs need to come forward with some sort of alternative that advances legitimate interests whether you are dealing with the employment context or the fair housing context, or you're

dealing with the map drawing context. They have to come forward with an alternative that advances legitimate purposes as well as the challenged policy while still reducing the disparate effect.

That's essentially what *Gingles I* is doing. And because they were able to meet that test in the 2021 plan, we were essentially in a situation where you had equal maps. You had ones that all advanced legitimate purposes of the 2021 plan equally. And when you are in that context, you are dealing with race consciousness rather than race predominance.

But we're not in that context anymore with the 2023 plan.

Now you have a plan in front of you that is substantially different despite what Ms. Khanna said.

JUDGE MARCUS: Help me with this. We are sort of at this a few times. Were you not required to draw a new map that provided a fair and reasoned opportunity district?

MR. LACOUR: Your Honor, I think we were required to draw a new map that complies with the Section 2 of the Voting Rights Act and the Core Protection Clause of the United States Constitution.

JUDGE MARCUS: I understand that. And I think that's truly true stated at this a very high order of an abstraction. But what I would like to get to is combining the abstraction with where we are here, were you not required to draw a new map that provided a fair and reasonable opportunity?

MR. LACOUR: Your Honor, we were required to draw a map that was equally open and that did not have discriminatory effects on account of race. And so Section 2 demands, that's what we have to comply with particularly in light of *Allen vs. Milligan*.

JUDGE MARCUS: So help me. On round one, we found likely proof of liability, and then we said with regard to remedy that you had to afford a second district that provided an opportunity. Is that not a requirement? Was that just a statement of no moment? Does that have any bearing on where we are?

MR. LACOUR: Your Honor, the 2021 plan has been repealed. The 2023 plan has been enacted. And if it does not violate Section 2, then it is lawful and has remedied the violation, regardless of the -- whether it hits proportional representation or not.

JUDGE MARCUS: I am not asking about proportional representation. I'm asking about whether or not it provides a reasonable opportunity. In round one, we said you had to do that, or at least the failure of doing that was a likely violation.

Is it your view that you do not have to answer that question because of these other traditional districting criteria?

MR. LACOUR: I think this is as reasonable of an

opportunity as you can get without violating traditional districting principles in service of a racial gerrymander. And for that reason, we do think it complies with Section 2 of the Voting Rights Act.

JUDGE MARCUS: Thank you.

JUDGE MANASCO: Let me follow up to that --

JUDGE MARCUS: Go ahead.

JUDGE MANASCO: -- just a little bit.

So in our previous order, we considered the tension between Section 2 compliance and racial gerrymandering. And we indicated following our liability finding what an appropriate remedy would be, that it would be a map that includes an additional opportunity district.

I asked a question about that earlier with respect to the motion in limine, but now I'm asking a question with respect to the substance, not necessarily with respect to the evidence you think we ought to consider or ought not to.

What role did our statement about the additional opportunity district play in what was necessary to comply with our order?

MR. LACOUR: I think your statement made clear that if we were going to move forward with the exact same priority given to communities of interest, compactness, and county lines as we gave in 2021, that we would likely need to have two majority-black districts or something quite close to it. But I

don't think we were bound to stick to that same prioritization of those same legitimate principles, which the Supreme Court blessed in *Allen* and has blessed repeatedly as things that a state is allowed to do when it's doing the hard work of trying to draw congressional districting lines.

JUDGE MANASCO: All right. So where are we now? I take it that the state's position is that this is, although it's a remedial proceeding, sort of functionally very much like a preliminary injunction hearing, where if we were to grant the relief that the plaintiffs request, we would be entering an injunction against SB-5 instead of SB-1.

So indulge a hypothetical for a moment. If we were to say again there is a violation and what has to happen is an additional opportunity district, what would be the impact in this context of the statement about an additional opportunity district?

MR. LACOUR: Your Honor, I think our position would be that that would be a violation of *Allen vs. Milligan* Supreme Court's order because they have not satisfied *Gingles I*. And so you would be requiring us to adopt a map that violates traditional principles which the Supreme Court declared to be unlawful.

JUDGE MANASCO: Well, at what point does the federal court in your view have the ability to comment on whether the appropriate remedy includes an additional opportunity district?

On liability? On remedy? Both? Or never?

MR. LACOUR: I don't think there's any prohibition on the Court commenting on what it thinks an appropriate remedy would be, but I do think that that statement had to have been in the context of the 2021 plan and through traditional principles that were given effect in that plan, because again, this is again intensely local appraisal of -- it was an intensely local appraisal of that plan.

JUDGE MANASCO: You can appreciate the concern, though, that if all that's necessary to occur to avoid the additional opportunity district is to redefine the principles, that there never comes a moment where on the state's logic, which we're still in the hypothetical world -- there never comes a moment where the Court can say with force that there has to be an additional opportunity district, because all that's required is for the state to redefine the context every time.

MR. LACOUR: Your Honor, I would dispute that proposition. We couldn't rely on core retention. *Allen* made that clear. So if we said the new context is core retention, it is our number one priority, that would do us no good in a future challenge. But what we did rely on are those three principles that the Court has said are things that states can do and have always done.

JUDGE MANASCO: But for example, SB-5 pays attention

to the Wiregrass. We weren't talking about the Wiregrass in January of 2022.

Is there a point at which the context becomes somewhat fixed? We have a census every ten years. So the numerical features that -- the numerical demographics that we're dealing with are fixed at that point in time.

But is there some point -- does the state acknowledge any point during the ten-year cycle where the ability to redefine the principles cuts off and the Court's ability to order an additional opportunity district attaches?

MR. LACOUR: Your Honor, I think it sounds a lot like a preclearance regime, which I don't think Section 2 --

JUDGE MANASCO: No. In this world, we've made a liability finding. It's not -- I mean, it's not preclearance. There's been a liability finding as to HB-1.

I take it you are urging us to make a liability finding before we do anything, if we do, do anything with respect to HB-5.

My question is: If we have to make the liability finding every time and you say that until we make the liability finding we can never comment on the appropriate remedy because the context can be redefined, when in the cycle does the loop cut off?

MR. LACOUR: Your Honor, there are obviously timing issues that we discussed earlier today. If you find that there

is a problem with this map that it likely violates Section 2, as well, then our time has run out, and we will have a court drawn map for the 2024 election barring appellate review.

But so I think that would address that concern. But -- and this is how federal courts work when it comes to any law that is challenged and is enjoined. If the new law that is enacted that repeals the law whether it's dealing with the First Amendment concern or dealing with -- with any other area of the law that is touched with potential federal interest, it's incumbent on the plaintiff to show that the new law is also violative of federal law.

And if the new law looks identical or very, very close to the old law, that's an easy showing to make, the problem for the plaintiffs here is this is not the same map. This is --

JUDGE MANASCO: Let me ask it I guess a little more finely. With respect to HB-1 when we made the liability finding, is it the state's position that at that time this Court had no authority to comment on what the appropriate remedy would be because at that time the Legislature was free to redefine traditional districting principles?

MR. LACOUR: Of course, the Court could comment on it. And I think had the Legislature failed in its attempt to draw a new map, then we would have moved to a pure remedial proceeding, as Judge Marcus recognized on page 155 of Doc 172 in the Milligan case. But the Legislature did succeed in

passing a new map that comports with Section 2.

JUDGE MANASCO: I guess that brings me back to my original question. The Legislature has drawn a new map. So what was the import according to the state of the original comment about the additional opportunity district?

MR. LACOUR: I think let the Legislature know that if they were going forward with the exact same principles as they went forward with in 2021, which was refine splitting communities of interest, refine drawing really non-compact districts that might be harder to represent, then you are going to have to apply that in a way that ensures that there's not a dispersate effect on the minority population, which is going to require two majority black districts or something close to it. But I don't think we were locked in forever sticking with non-compact districts or sticking with an approach that violates or breaks up communities of interest.

Now, we couldn't say it's really important to keep together these communities of interest while splitting the Black Belt. I think that much was made clear by this Court and the Supreme Court. That's why we have a plan now that does better on the Black Belt than every single one of the plaintiffs' 11 plans. So now they are here asking you to split the Black Belt in order to hit racial goals. And the Supreme Court made clear that is unlawful, and it is unconstitutional.

JUDGE MANASCO: Let me ask you one more question about

the legislative findings with respect to SB-5.

Should Representative Pringle's testimony about his understanding and knowledge of the findings play any role in the amount of weight that we assign them?

MR. LACOUR: Your Honor, I don't think so for at least two reasons. One is he is one of 140 members of the Legislature. The Governor also had these in front of her when she signed the law.

Second is there's a presumption of regularity that attaches to any legislative enactment whether that's a congressional enactment or Legislature's enactment.

And then third, the findings essentially are describing the map. You can look at the map yourself, though, and you can see what the priorities are in that map when it comes to compactness, when it comes to county lines, and when it comes to parts of the state that were kept together.

So what really matters is how the principles were embodied in the plan and...

JUDGE MANASCO: So is there any impact to the state's defense of the map, SB-5, if we set the findings aside?

MR. LACOUR: Your Honor, we think we would still prevail. But at the same time, you do have an act of the Legislature that does define communities of interest in a way that is consonant with other evidence that's in the record.

Even Joseph Bagley in his report notes that multiple

historians have defined the Wiregrass to include the nine counties that the Legislature included in those legislative findings.

So I do think it's somewhat troubling for a federal court to say that they know Alabama's communities of interest better than Alabama's representatives know them.

But we don't need the findings to win. And we have got evidence to back up what was done in the 2023 map. So either way, plaintiffs' maps -- plaintiffs' maps would require us to violate traditional principles.

And keep in mind as well, even on those objective factors of compactness and county splits, the 2023 plan is more compact or splits fewer counties or both than every one of the 11 illustrative plans. So if you are just looking at those two factors alone, you are going to be forcing the state to adopt either a less compact plan, a plan that does not respect county lines as well as the 2023 plan, or a plan that fails on both of those metrics all again in service of forcing proportionality. And again, that is unlawful.

JUDGE MOORER: So, Mr. LaCour, what I hear you saying is the state of Alabama deliberately chose to disregard our instructions to draw two majority-black districts or one where minority candidates could be chosen.

MR. LACOUR: Your Honor, it's our position that the Legislature --

JUDGE MOORER: I am not asking you your position. Did they or did they not? Did they disregard it? Did they deliberately disregard it or not?

MR. LACOUR: Your Honor, District 2 I submit is as close as you are going to get to a second majority-black district without violating *Allen* -- the Supreme Court's decision in *Allen*, which is the supreme law of the land when it comes to interpreting Section 2. So I think this is as close as you could get without violating the Constitution, without violating *Allen vs. Milligan*. So I do think --

JUDGE MOORER: In the view of the state?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Let me ask the question one more time. Can you draw a map that maintains three communities of interest, splits six or fewer counties, but that most likely if not almost certainly fails to create an opportunity district and still comply with Section 2?

MR. LACOUR: Yes. Absolutely.

JUDGE MARCUS: Thank you.

MR. LACOUR: If there are no further questions.

JUDGE MARCUS: No. No. You have got time left which you may or may not use.

MR. LACOUR: I will just say that keep in mind again this Court found that the Black Belt was a substantial community of interest of great significance. Plaintiffs are

here now asking you to split the Black Belt among three or mother districts in service of racial proportionality. But the plaintiffs got it right the first time in their brief to the Supreme Court. Section 2 never requires that result. And for that reason, plaintiffs' challenge fails.

JUDGE MARCUS: Thank you very much.

I take it no one else has anything else to present to us in these proceedings. Mr. Ross?

MR. ROSS: I had a few words to respond, but I am happy to defer to Your Honor.

JUDGE MARCUS: Thank you. Did you have anything else to present by way --

MR. ROSS: No. Just argument, Your Honor.

JUDGE MARCUS: Ms. Khanna?

MS. KHANNA: No, Your Honor. I had a question, but no further evidence or anything.

JUDGE MARCUS: And, Mr. LaCour?

MR. LACOUR: That is all from us, Your Honor.

JUDGE MARCUS: All right. Your question, Ms. Khanna?

MS. KHANNA: This is at the risk of seeking out another clarification. I heard from Mr. LaCour just now he said, and I will quote from the transcript, Your Honor, there are obviously timing issues that we discussed earlier today. If you find that there is a problem with this map, that it likely violates Section 2, as well, then our time has run out,

and we will have a court drawn map for the 2024 election barring appellate review.

And I just wanted to seek some clarification if the state is able to provide about does that -- does that mean that we will not find ourselves in the same loop we found ourselves last time where the state might seek to stay any ruling in plaintiffs' favor to ensure that there's not a remedy in time for 2024, or are we all agreed among the things that are not in dispute is that there will be something in time for 2024 if this Court finds it is warranted?

JUDGE MARCUS: Did you want to respond, Mr. LaCour?

MR. LACOUR: Yes. We are not waiving the right to seek a stay on appeal or to seek appellate review. Our position is simply that if there's an order because that October 1st deadline that has been put forward by the Secretary of State, that --

JUDGE MARCUS: Of course, the Secretary of State, if my recollection is correct, put it in two slightly different iterations. At one point, he said early October. And at another point, he said the first. So I don't -- but I think the thrust of it is essentially the same.

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: That would be correct, would it not?

MR. LACOUR: Yes, Your Honor.

JUDGE MARCUS: Okay.

MR. LACOUR: So we are not waiving the right to seek any sort of appellate review if need be, including stay application. We're simply making the point however that if this order -- if there is a preliminary injunction and it does go into effect, and it is not stayed, because of the time constraints with that October deadline as it currently stands, as a practical matter, I cannot see the Legislature coming back into session enacting another 2023 plan. So they have taken their shot under the current timing -- in light of the current timing restraints. That's the only point I was making.

JUDGE MARCUS: Thanks very much.

Thank you all for your efforts. We will adjourn in a moment.

We wanted to set a deadline for filing post findings of fact and conclusions of law. And we will direct the parties to submit proposed findings of fact and conclusions of law no later than 8:00 a.m. this Saturday, which is the 19th of August.

Let me ask my colleagues whether they had anything else they wanted to address.

Judge Manasco?

JUDGE MANASCO: Nothing from me.

JUDGE MARCUS: Judge Moorer?

JUDGE MOORER: No, sir.

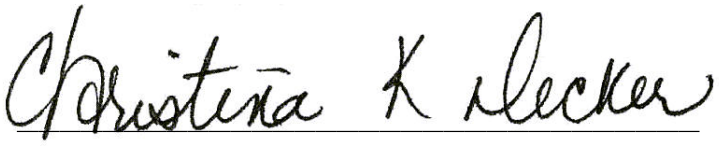
JUDGE MARCUS: This Court is adjourned.

Thank you all for your efforts.

(Whereupon, the above proceedings were concluded at 2:36 p.m.)

CERTIFICATE

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



08-14-2023

Christina K. Decker, RMR, CRR — Date

Federal Official Court Reporter

ACCR#: 255

FILED
2023 Sep-11 PM 12:46
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BOBBY SINGLETON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:21-cv-1291-AMM**
	)	
WES ALLEN, *in his official capacity as Alabama Secretary of State, et al.*,	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

EVAN MILLIGAN, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:21-cv-1530-AMM**
	)	
WES ALLEN, *in his official capacity as Alabama Secretary of State, et al.*,	)	**THREE-JUDGE COURT**
	)	
Defendants.	)	

Before MARCUS, Circuit Judge, MANASCO and MOORER, District Judges.

PER CURIAM:

ORDER DENYING SECRETARY ALLEN'S EMERGENCY MOTION FOR STAY PENDING APPEAL

These congressional redistricting cases are before this Court on a stay motion filed by Alabama Secretary of State Wes Allen ("the Secretary"). *Milligan* Doc. 276.

I. PROCEDURAL POSTURE

These cases returned to this Court on June 8, 2023, after the Supreme Court affirmed a preliminary injunction we entered on January 24, 2022, that enjoined the Secretary from using Alabama's congressional districting plan ("the 2021 Plan"). *See Allen v. Milligan*, 143 S. Ct. 1487, 1498, 1502 (2023).

We immediately set a status conference. *Milligan* Doc. 165. Before the conference, the Secretary and the two legislative defendants (the co-chairs of the Alabama Legislature's Committee on Reapportionment, or "the Legislators") advised us that "the . . . Legislature intend[ed] to enact a new congressional redistricting plan that will repeal and replace the 2021 Plan" and requested that we delay remedial proceedings until July 21, 2023. *Milligan* Doc. 166 at 2. We delayed those proceedings until July 21, 2023, to accommodate the Legislature's efforts; entered a briefing schedule for any objections if the Legislature enacted a new map; and alerted the parties that if a remedial hearing became necessary, it would commence on the date they suggested: August 14, 2023. *Milligan* Doc. 168 at 4–6.

A special session of the Legislature commenced on July 17, 2023. *See Milligan* Doc. 173-1. On July 20, 2023, the Alabama House of Representatives passed a congressional districting plan titled the "Community of Interest Plan." *Milligan* Doc. 251 ¶¶ 16, 22. That same day, the Alabama Senate passed a different plan, titled the "Opportunity Plan." *Id.* ¶¶ 19, 22. The next day, a six-person

bicameral Conference Committee passed the 2023 Plan, which was a modified version of the Opportunity Plan. *Id.* ¶ 23. Later that day, the Legislature enacted the 2023 Plan and Governor Ivey signed it into law. *Milligan* Doc. 186; *Milligan* Doc. 251 ¶ 26; Ala. Code § 17-14-70. The 2023 Plan, like the 2021 Plan enjoined by this Court, has only one district that is majority-Black or Black-opportunity. *Compare Milligan* Doc. 186-1 at 2, *with Milligan* Doc. 107 at 2–3.

On July 26, 2023, the parties jointly proposed a scheduling order for remedial proceedings. *Milligan* Doc. 193. We adopted it. *Milligan* Doc. 194. Each set of Plaintiffs timely objected to the 2023 Plan. *Singleton* Doc. 147; *Milligan* Doc. 200; *Caster* Doc. 179. We held another conference on July 31, 2023 and set a remedial hearing in *Milligan* and *Caster* for August 14, 2023. *See Milligan* Doc. 194 at 3.

Before the remedial hearing, the parties filed motions, briefs, expert materials, depositions, other evidence, and fact stipulations. *See Milligan* Doc. 272 at 64–102. We held the remedial hearing on August 14 and received most exhibits into evidence. *See id.* at 195–97 (evidentiary rulings).

Based on the substantial record before us, on September 5, 2023, we enjoined the 2023 Plan on the ground that it failed to remedy the vote dilution we found (and the Supreme Court affirmed) in the 2021 Plan, and in the alternative on the ground that even if we were to conduct our analysis under *Thornburg v. Gingles*, 478 U.S. 30 (1986), from the ground up, the 2023 Plan still likely violates Section Two

because it dilutes the votes of Black Alabamians. *Milligan* Doc. 272. By separate order, we instructed the Special Master, cartographer, and Special Master's counsel we previously appointed to commence work on a remedial map. *Milligan* Doc. 273. We set a deadline of September 25, 2023, for a Report and Recommendation from the Special Master and his team to recommend three remedial maps. *See id.* at 7.

Later in the day on September 5, 2023, the Secretary — but not the Legislators — appealed our ruling and filed this "emergency" stay motion. *Milligan* Doc. 274; *Milligan* Doc. 275; *Milligan* Doc. 276.

In the motion, the Secretary advised us that regardless of whether we had yet ruled, he would seek a stay in the Supreme Court on September 7, 2023. *Milligan* Doc 276 at 1. We directed the Plaintiffs to respond not later than 10:00 am CDT on September 8, 2023, and they did. *Milligan* Docs. 285, 287; *Caster* Doc. 235. Later on September 8, 2023, the Secretary filed a reply. *Milligan* Doc. 288.

II. STANDARD OF REVIEW

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks and citations omitted). The Secretary bears the burden of establishing that "circumstances justify an exercise of th[e court's] discretion." *Id.* at 433–34. A stay pending appeal is "extraordinary relief" and it requires the moving

party to satisfy a "heavy burden." *Winston–Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers).

Under controlling precedent, we consider four factors to determine whether we should exercise our discretion to stay these cases pending the Secretary's appeal: (1) whether the Secretary "has made a strong showing that he is likely to succeed on the merits; (2) whether the [Secretary] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 425–26 (citation omitted).

III. ANALYSIS

We have said before that "this is a straightforward Section Two case, not a legal unicorn." *Milligan* Doc. 120 at 3. This case remains straightforward. We are aware, however, of no other case — and the Secretary does not direct us to one — in which a state legislature, faced with a federal court order declaring that its electoral plan unlawfully dilutes minority votes and requiring a plan that provides an additional opportunity district, responded with a plan that the state concedes does not provide that district. Likewise, it is exceptionally unusual for a litigant who has presented his arguments to the Supreme Court once already — and lost — to assert that he is now "overwhelmingly likely" to prevail on those same arguments in that Court in this case. Like our first injunction, our second injunction rests on an

exhaustive application of settled law to a robust evidentiary record that includes extensive fact stipulations.

As an initial matter, there is no emergency. When these cases returned to us from the Supreme Court, we immediately set a status conference. At the Secretary's request, we then delayed remedial proceedings for approximately five weeks to accommodate the Legislature's efforts to enact a remedial map. And we entered the scheduling order that the parties, including the Secretary, jointly proposed. After the remedial hearing, we conducted not only the remedial analysis requested by the Plaintiffs, but also the full *Gingles* analysis requested by the Secretary. We ruled expeditiously, weeks in advance of the early October deadline that the Secretary twice told us he needed to make. We have eleven illustrative maps in hand already, and the Special Master and his team are hard at work to recommend a lawful map for us to order the Secretary to use on the timetable that he set. In our view, these proceedings are running on precisely the schedule agreed upon by all parties.

In any event, we find that every factor we must consider strongly counsels against entering a stay pending appeal. We discuss each factor in turn.

A. The Secretary failed to show a strong likelihood that he will prevail on the merits of his appeal.

We find that the Secretary failed to show a strong likelihood that he will succeed on the merits of his appeal. The Secretary has not even attempted to make the strong showing that the law requires. The Secretary's assertion that he is

"overwhelmingly" likely to prevail on appeal is as bare as it is bold: it comprises only three sentences crafted at the highest level of abstraction with virtually no citations. *See Milligan* Doc. 276 at 4. The Secretary simply says that his arguments were set forth in his earlier brief. *Id.* But that brief came before we entered our injunction on September 5, so it does not engage, let alone rebut, any of our findings of fact or conclusions of law. Quite simply, the brief does not help us understand why the Secretary believes he will prevail on a clear-error review of our findings.

In one of the three sentences, the Secretary asserted that he "has fundamental disagreements with" our conclusions, but he did not identify any fact or rule of law that he says we misapprehended, misapplied, or otherwise misjudged. *Id.* We consumed more than 200 pages trying to consider every argument the Secretary made about the 2023 Plan, and the Secretary has not pointed us to a single specific error or omission. If it were enough for a stay applicant merely to assert a "fundamental disagreement" with an injunction, stay motions would be routinely (perhaps invariably) granted. That is not the rule. The Secretary's assertions are too general, too conclusory, and too bare to carry his heavy burden to establish a strong likelihood that he will prevail on appeal.

In any event, we find that the Secretary is likely to lose on appeal. The Secretary has lost three times already, and one of those losses occurred on appeal. *See Milligan* Docs. 107, 272; *Allen*, 143 S. Ct. at 1498, 1502. We have twice

enjoined a plan that includes only one majority-Black or Black-opportunity district on the ground that it likely dilutes the votes of Black Alabamians in violation of Section Two of the Voting Rights Act. Our second injunction, like the first, rests on undisputed facts, extensive evidence, and settled law. *See Milligan* Doc. 107 at 139–225; *Milligan* Doc. 272 at 134–96. Most notably, the Secretary stipulated to the critical facts about intensely racially polarized voting in Alabama. *See Milligan* Doc. 272 at 89–92; 178; Aug. 14 Tr. 64–65.

The legal basis for our analysis is not novel. We applied the same standard that federal courts have routinely applied for forty years, since Section Two was amended in 1982. *See generally Allen*, 143 S. Ct. at 1499–1501 (explaining Voting Rights Act jurisprudence, 1982 statutory amendments, and *Gingles*). As the Supreme Court explained in this case, "*Gingles* effectuates the delicate legislative bargain that § 2 embodies. And statutory *stare decisis* counsels strongly in favor of not 'undo[ing] . . . the compromise that was reached between the House and Senate when § 2 was amended in 1982.'" *Allen*, 143 S. Ct. at 1515 n.10 (quoting *Brnovich* v. *Democratic Nat'l Comm.*, 141 S.Ct. 2321, 2341 (2021)).

And the evidentiary basis for our analysis is not slender. The injunction the Secretary asks us to stay rests on not one, but **four** evidentiary records: the records developed in *Milligan* and *Caster* before our first injunction, and the records developed in both cases before our second injunction. We have reviewed thousands

of pages of briefing, hundreds of exhibits, numerous expert reports (including rebuttal and supplemental reports), and extensive fact stipulations, and we have the benefit of nine total days of hearings and able argument by dozens of lawyers.

After conducting the legal analysis that controlling precedent requires, we did not regard the dispositive question underlying either injunction as a close call. *See Milligan* Doc. 107 at 195–96; *Milligan* Doc. 272 at 8, 46, 52–53, 134–39.

Because of the exceptional public importance of the Plaintiffs' claim that the Alabama Legislature diluted the franchise for Black Alabamians, we have again carefully revisited each finding of fact and conclusion of law with fresh eyes. We see no basis to depart from our original analysis, nor to delay relief. We reconsider each of the Secretary's main arguments: (1) that the 2023 Plan remedied the likely Section Two violation we found in the 2021 Plan because it better respects certain traditional districting criteria — namely, compactness, communities of interest, and county splits, and (2) that the Plaintiffs have failed to establish that the 2023 Plan likely violates Section Two because race predominated in the drawing of their illustrative maps.

We again reject the Secretary's argument that the 2023 Plan remedied the vote dilution we found because it outperforms the 2021 Plan and the Plaintiffs' eleven illustrative maps with respect to compactness, communities of interest in the Black Belt, Gulf Coast, and Wiregrass, and county splits. This is for three separate and

independent reasons. *First*, as we explained in the injunction the Secretary asks us to stay, how the 2023 Plan performs on select traditional districting criteria was not relevant to the question we were required to answer in the remedial stage of this litigation: does the 2023 Plan "completely correct[]—rather than perpetuate[]—the defects that rendered the [2021 Plan] . . . unlawful." *Covington v. North Carolina*, 283 F. Supp. 3d 410, 431 (M.D.N.C.), *aff'd in relevant part, rev'd in part*, 138 S. Ct. 2548 (2018). Because the original Section Two violation that we found was the dilution of Black votes, the question was whether the 2023 Plan cures that dilution by creating an additional district in which Black voters have a fair and reasonable opportunity to elect a candidate of their choice. *Milligan* Doc. 272 at 113–17.

The Secretary conceded the answer: the 2023 Plan does not include an additional opportunity district. *See Milligan* Doc. 251 ¶¶ 5–9; Aug. 14 Tr. 163–64. The stipulated evidence fully supports his concession. District 2 has the second-highest Black voting-age population in the 2023 Plan. Based on (1) the undisputed expert opinions offered by the *Milligan* and *Caster* Plaintiffs, and (2) the Legislature's own performance analysis, the parties stipulated that in District 2 in the 2023 Plan, white-preferred candidates have "almost always defeated Black-preferred candidates." *Milligan* Doc. 251 ¶ 5; *see also Milligan* Docs. 200-2, 200-3; *Caster* Doc. 179-2. In the face of intense racial polarization, the 2023 Plan provides no greater opportunity for Black Alabamians to elect a candidate of their choice than

the 2021 Plan provided. Nothing about the Secretary's evidence on traditional districting criteria changes this fatal flaw in the 2023 Plan.

Second, as we explained when we enjoined the 2023 Plan, even assuming that the Secretary's evidence about traditional districting criteria were relevant to the question before us — *i.e.*, that we were required at the remedial stage to relitigate *Gingles* I from the ground up to determine whether the Plaintiffs have established that it is possible based on the size and shape of the Black population in Alabama to create a reasonably configured second majority-Black district — the Plaintiffs are not required to produce a plan that "meets or beats" the 2023 Plan on any particular traditional districting criteria to satisfy *Gingles* I.

As we explained and the Supreme Court affirmed, we do "not have to conduct a beauty contest between plaintiffs' maps and the State's." *Allen*, 143 S. Ct. at 1505 (internal quotation marks omitted) (alterations accepted); *see also Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion) ("A § 2 district that is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries" is not required "to defeat rival compact districts designed by [the State] in endless 'beauty contests.'"). The Secretary cannot avoid Section Two liability merely by devising a plan that excels at the traditional criteria the Legislature deems most pertinent.

Put differently, the State cannot avoid the mandate of Section Two by

improving its map on metrics other than compliance with Section Two. Otherwise, it could forever escape correcting a Section Two violation by making each remedial map slightly more compact, or slightly better for some communities of interest, than the predecessor map.

Indeed, in the injunction the Secretary asks us to stay, we explained at length why we rejected as irreconcilable with the text of Section Two his position that communities of interest can operate as a trump card to override the requirement to comply with Section Two. *Milligan* Doc. 272 at 169–73. Section Two directs our attention to the "totality of circumstances," and it does not mention, let alone elevate or emphasize, communities of interest as a particular circumstance. *See* 52 U.S.C. § 10301(b). Consistent with this direction, nothing in our ruling or the Supreme Court's affirmance suggests that a remedial plan would cure racially discriminatory vote dilution if only the evidence were better on the Gulf Coast and the Black Belt were not split quite so much.

Under controlling precedent, the Plaintiffs' burden under *Gingles* I is to establish that the Black population in Alabama is "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district." *Cooper v. Harris*, 581 U.S. 285, 301 (2017) (internal quotation marks omitted). We have twice found and the Supreme Court has once affirmed that it is. The Secretary has offered no evidence that either the size or the geographic

concentration of the Black population in Alabama has meaningfully changed — or changed at all — between when we made our finding in 2021 and now.

Third, as we explained in our preliminary injunction, even if we were to apply the Secretary's "meet or beat" requirement and conduct a beauty contest, at least some of the Plaintiffs' illustrative maps perform as well as the 2023 Plan on the traditional districting criteria the Secretary prefers. As for communities of interest — which are at the heart of the State's assertion that the 2023 Plan moved the needle on *Gingles* I — we explained that although the evidence about the Gulf Coast is more substantial now than it was before, it is still considerably weaker than the record on the Black Belt, which rests on extensive stipulated facts and includes extensive expert testimony, and which spanned a substantial range of demographic, cultural, historical, and political issues. *See Milligan* Doc. 272 at 156–61. We found that the new evidence about the Gulf Coast does not establish that the Gulf Coast is the community of interest of primary importance, nor that the Gulf Coast is more important than the Black Belt, nor that there can be no legitimate reason to separate Mobile and Baldwin Counties. We pointed out in both of our preliminary injunction orders that the Legislature has repeatedly split Mobile and Baldwin Counties in creating maps for the State Board of Education districts in Alabama, and the Legislature did so at the same time it drew the 2021 Plan. *Milligan* Doc. 272 at 38, 50, 96, 164; *Milligan* Doc. 107 at 171 (citing *Caster* Doc. 48 ¶¶ 32–41).

Put simply, we found that the new evidence about the Gulf Coast does not establish that separating the Gulf Coast to avoid diluting Black votes in the Black Belt violates, sacrifices, or otherwise transgresses traditional districting principles. *Milligan* Doc. 272 at 156–167. At most, the Secretary's new evidence on the Gulf Coast may show that the Black Belt and the Gulf Coast are geographically overlapping communities of interest that are not airtight and tend to pull in different directions. At best then, the Secretary has established that there are two relevant communities of interest and the Plaintiffs' illustrative maps and the 2023 Plan each preserve a different community, suggesting a wash on this metric: "[t]here would be a split community of interest in both." *Allen*, 143 S. Ct. at 1505. Thus, positing that there are two communities of interest does not undermine our determination that the Plaintiffs' eleven illustrative maps are reasonably configured and altogether consonant with traditional districting criteria.

Further, we found that the Secretary's limited evidence offered about the community of interest in the Wiregrass does not move the needle. *Milligan* Doc. 272 at 167–68. The basis for a community of interest in the Wiregrass is rural geography, a university (Troy), and a military installation (Fort Novosel). These few commonalities do not remotely approach the hundreds of years of shared and very similar demographic, cultural, historical, and political experiences of Alabamians living in the Black Belt. And they are considerably weaker than the common coastal

influence and historical traditions for Alabamians living in the Gulf Coast. Moreover, there is substantial overlap between the Black Belt and the Wiregrass. Three of the nine Wiregrass Counties (Barbour, Crenshaw, and Pike) are also in the Black Belt. Accordingly, any districting plan must make tradeoffs with these communities to meet equal population and contiguity requirements.

As for county splits, we found that the Secretary failed to establish that the 2023 Plan respects county lines better than all the Plaintiffs' illustrative plans. *Id.* at 173–77. Based on the report of the Defendants' own expert, six of the illustrative maps split the same number of counties as the 2023 Plan and satisfy the six-split ceiling the Legislature imposed: Cooper Plans 1, 3, 4, 5, and 7, and Duchin Plan D. *Id.* at 173–75. One of these plans, Cooper 7, performs better than the 2023 Plan by splitting only five counties.

And we found that the Secretary had also failed to establish that the 2023 Plan performed better with regard to geographic compactness. As an initial matter, we noted that the Secretary had not introduced any evidence undermining Dr. Duchin and Mr. Cooper's testimony that the compactness scores of the districts in their illustrative plans are reasonable. *Id.* at 150. Because that testimony was not relative — it opined about the Duchin plans and Cooper plans standing alone, not compared to any other plan — we noted that the enactment of a new plan did not affect it. *Id.* Nor did Mr. Trende's opinion, which, like Mr. Thomas Bryan's opinion before,

"offer[ed] no opinion on what is reasonable or what is not reasonable in terms of compactness." *Id.* at 151. Further, when we examined the relative compactness of the districts in the Duchin plans and the Cooper plans compared to that of the districts in the 2023 Plan, the result remained the same. *Id.* Mr. Trende acknowledged that Duchin Plan B outperformed the 2023 Plan on key compactness metrics, including average Polsby-Popper and cut edges, and did not opine that any of the Duchin plans or Cooper plans that received lower statistical scores received scores that were unreasonably lower or unreasonable. *Id.* at 151–52.

For all these reasons, we again found that the Plaintiffs had established that an additional Black-opportunity district can be reasonably configured without violating traditional districting principles relating to communities of interest, county splits, and compactness. Our finding does not run afoul of the Supreme Court's caution that Section Two never requires the adoption of districts that violate traditional districting principles; it simply finds that the Plaintiffs' plans do not violate traditional districting principles.

We next turn to the Secretary's argument that race predominated in the drawing of the Plaintiffs' eleven illustrative maps. We and the Supreme Court already concluded that it did not. *See Milligan* Doc. 272 at 144–46. Our earlier preliminary injunction would not have been affirmed if there were an open question whether race played an improper role in the preparation of all of the Plaintiffs'

illustrative plans. The State already has presented this argument to the Supreme Court and lost.

In these remedial proceedings, the only new support the Secretary offered for this argument is an unsworn expert report from Mr. Bryan. In our first preliminary injunction, we "assign[ed] very little weight to Mr. Bryan's testimony" and detailed at great length the reasons why we found it unreliable. *Milligan* Doc. 107 at 152–56. We found his written proffer unreliable in the remedial phase and we refused to admit it. *Milligan* Doc. 272 at 141–46. We explained, among other things, that Mr. Bryan does not connect his *ipse dixit* opinion about race predominance to the "geographic splits" methodology that he used, or even explain why an evaluation of race predominance should be based on "geographic splits analysis." *See Milligan* Doc. 220-10 at 22–26. Instead, Mr. Bryan simply presents the results of his geographic splits analysis and then states in one sentence a cursory conclusion about race predominance. *Id.* We also found his report unhelpful because it opines about a plan that the Plaintiffs suggested to the Legislature but have not offered in this litigation, and we have no need for that opinion. *Milligan* Doc. 272 at 145–46.

We also rejected the Secretary's new argument that the *Milligan* and *Caster* Plaintiffs' interpretation of Section Two would require affirmative action in redistricting. *Milligan* Doc. 272 at 185–88. As an initial matter, it is premature, speculative, and entirely unfounded for him to assail any plan we might order as a

remedy as "violat[ing] the 2023 Plan's traditional redistricting principles in favor of race" because we have not yet adopted a remedial plan. *Milligan* Doc. 220 at 59. The Special Master has only just begun his work, we directly instructed him that any proposed plan he submits must "[c]omply with the U.S. Constitution and the Voting Rights Act," and we will carefully review any plan he recommends to ensure that this requirement is met. *Milligan* Doc. 273 at 7.

Beyond that, we also rejected the faulty premise that by accepting the Plaintiffs' illustrative plans for *Gingles* purposes, we improperly held that the Plaintiffs are entitled to "proportional . . . racial representation in Congress." *Milligan* Doc. 107 at 195 (internal quotation marks omitted); *accord Milligan* Doc. 272 at 128–29; 186–87. This faulty premise is the reason why affirmative action cases, like the *Harvard* case the State relies on, 143 S. Ct. 2141, are fundamentally different from this case. Section Two expressly disclaims any "right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). And "properly applied, the *Gingles* framework itself imposes meaningful constraints on proportionality, as [Supreme Court] decisions have frequently demonstrated." *Allen*, 143 S. Ct. at 1508; *see also id.* at 1518 (Kavanaugh, J., concurring).

Unlike the affirmative action programs the Supreme Court struck down in *Harvard*, 143 S. Ct. 2141, which were expressly aimed at achieving balanced racial

outcomes in the makeup of the university student bodies, the Voting Rights Act guarantees only "equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). The Voting Rights Act does not provide a leg up for Black voters — it merely prevents them from being kept down with regard to what is arguably the most "fundamental political right," in that it is "preservative of all rights" — the right to vote. *Democratic Exec. Comm. Of Fla. v. Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019). For all these reasons, we again find that the Secretary is unlikely to prevail on his argument about race predominance.

B. The issuance of a stay will substantially injure the other parties in these proceedings — for the second time in this census cycle.

We further find that the issuance of a stay would substantially injure the other parties in these proceedings. In the injunction the Secretary asks us to stay, we found that the Plaintiffs will suffer irreparable harm if they must vote in the 2024 election based on a likely unlawful redistricting plan. *Milligan* Doc. 272 at 188–90. In his stay motion, the Secretary does not mention, let alone rebut, this finding. The Secretary does not even acknowledge the injury Plaintiffs will suffer from a stay.

"Courts routinely deem restrictions on fundamental voting rights irreparable injury. And discriminatory voting procedures in particular are the kind of serious violation of the Constitution and the Voting Rights Act for which courts have granted immediate relief." *League of Women Voters of N.C. v. North Carolina*, 769

F.3d 224, 247 (4th Cir. 2014) (internal quotation marks omitted) (citing *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012); *Alt. Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997); and *Williams v. Salerno*, 792 F.2d 323 (2d Cir. 1986)) (quoting *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986)).

"Voting is the beating heart of democracy." *Lee*, 915 F.3d at 1315. "And once the election occurs, there can be no do-over and no redress" for voters whose rights were violated. *League of Women Voters of N.C.*, 769 F.3d at 247.

The Plaintiffs already suffered irreparable injury once in this ten-year census cycle, when they voted under the unlawful 2021 Plan in 2022. The Secretary has made no argument that if the Plaintiffs were again required to cast votes in 2024 under an unlawful districting plan, that injury would not be irreparable. Accordingly, we find that the Plaintiffs will suffer irreparable harm absent injunctive relief.

Absent relief now, the Plaintiffs will suffer this irreparable injury until at least 2026, which is more than halfway through this census cycle. The Secretary offers no reason, let alone a compelling one, why Alabamians should have to wait that long to vote under a lawful congressional districting map. *See Milligan* Doc. 276. Having prevailed at every turn so far, the Plaintiffs are entitled to relief. Having lost at every turn so far, the Secretary cannot support a demand that Alabamians again cast their votes under an unlawful map while he tries for the fourth time to prevail.

C. The absence of a stay will not irreparably harm the Secretary.

We also find that the absence of a stay will not harm, let alone irreparably harm, the Secretary or the State of Alabama. The Secretary asserts that "[a]bsent a stay, the State will be compelled to cede its sovereign redistricting power to the Court so that Alabamians can be segregated into different districts based on race." *Id.* at 4. Every piece of this argument is wrong: we have not compelled the State to "cede" its authority; we have not ordered the State to "segregate" Alabamians; and we have not "segregated" Alabamians. *See id.*

As the Supreme Court has long explained, the State's redistricting power is subject to federal law. *Reynolds v. Sims*, 377 U.S. 533, 554–60 (1964). As the Supreme Court explained in this case, a longstanding federal statute, the Voting Rights Act, requires that the State not dilute the votes of Black Alabamians. *Allen*, 143 S. Ct. at 1502–03. And as we have explained, we have a "duty to cure" districts drawn in violation of federal law through an "orderly process in advance of elections," when the state legislature either won't or can't do so. *Milligan* Doc. 272 at 7 (quoting *Covington*, 138 S. Ct. at 2553).

Almost two years into this litigation, we are confident that neither our injunctions nor the Supreme Court's affirmance amount to an undue intrusion on the State's sovereignty. Nor do we suggest that federal judges know Alabama better than Alabama's elected leaders. It is, however, the ordinary business of an independent

judiciary to carefully apply controlling precedents and duly follow the law as enacted by Congress to ensure that the Secretary administers congressional elections according to a districting plan that does not dilute the votes of Black Alabamians. We reject the Secretary's suggestion that compliance with federal law is an onerous burden that comes at too great a cost to the State.[1]

Moreover, we emphatically reject the Secretary's claim that our order requires the State to "segregate[ ] [Alabamians] into different districts based on race." *Milligan* Doc. 276 at 4. We have rejected that argument twice already, and the Supreme Court has rejected it as well. *Milligan* Doc. 107 at 204–06; *Milligan* Doc. 272 at 185–88; *Allen*, 143 S. Ct. at 1504–06. Federal law has long acknowledged that state legislatures can in theory face "competing hazards of liability" when balancing the requirements of the Voting Rights Act with the requirements of the

[1] The Secretary cites one case in his opening brief, *Abbott v. Perez*, to argue that the harm suffered by a state counsels in favor of a stay. *See* 138 S. Ct. 2305, 2324 (2018). But in that case, the Supreme Court held that Texas' inability to enforce its districting plan would irreparably harm the state **to the extent** the plan was not unlawful. *See id.* ("**Unless that statute is unconstitutional**, th[e district court's injunction] would seriously and irreparably harm the State, and only an interlocutory appeal can protect that State interest." (emphasis added)). The Secretary invokes *Karcher v. Daggett* in his reply brief, *see Milligan* Doc. 288 at 2, but that case similarly held only that the prospect of using a court-ordered map would likely cause the state irreparable harm after Justice Brennan found there was a fair prospect that the Court would conclude that the state's districting plan had not violated the one-person, one-vote rule. *See* 455 U.S. 1303, 1306 (1982) (Brennan, J., in chambers). Here, we have determined that the 2023 Plan likely violates Section Two. The Secretary does not cite a single case in which a court has held that the harm suffered by a state in having to use a court-ordered map counsels in favor of a stay notwithstanding the fact that the state's plan violates (or likely violates) the law.

Constitution, *Abbott*, 138 S. Ct. at 2315 (quoting *Bush*, 517 U.S. at 977 (plurality opinion)), but we and the Supreme Court have explained at great length why those concerns are not borne out on this record in this case, *see Allen*, 143 S. Ct. at 1517.

The Voting Rights Act is a well-established antidiscrimination law. Nothing about our injunction applying it countenances, let alone demands, segregation, racial gerrymandering, or anything else improper. As we have found and the Supreme Court has affirmed, there are at least eleven maps illustrating how the required remedy lawfully can be provided. The Special Master is hard at work to recommend three lawful remedial maps to us. And we have not yet ordered the Secretary to use any specific map, so any suggestion that we are "segregat[ing]" voters based on race is unfounded and premature.

We observe that the Legislators have not appealed our injunction nor asked us for a stay. This detail is not material to our separate and independent rejection of the Secretary's arguments about Alabama's sovereignty, but we cannot help but notice that the Legislators apparently do not share the Secretary's concern about this "emergency." As a practical matter, the Legislators' silence undermines the Secretary's position. It is the Legislature's task to draw districts; the Secretary simply administers elections. As the Legislators explained when they moved to intervene as Defendants in *Singleton* and *Caster*, the Secretary does not represent their interest because "[h]e has no authority to conduct redistricting, and

consequently has no experience in redistricting. His relevant duties are to administer elections." *Singleton* Doc. 25 at 5; *Caster* Doc. 60 at 5. According to the Legislators, "[t]he Legislature, via its Reapportionment Committee, not the Secretary of State, is the real party in interest in this case." *Id.* We do not stake our decision to deny a stay on this observation — we simply explain why we do not assume that the Legislators have any emergent concern that this Court has improperly invaded their domain.

On reply, the Secretary argues that absent a stay, "the State will be precluded from enforcing a statute enacted by representatives of its people," and the "importance of the statutory and constitutional arguments presented by the State" supports a stay. *Milligan* Doc. 288 at 2. These reasons are meritless. We understand that the 2023 Plan is a statute. We concluded that it does not remedy the vote dilution we found and, in any event, likely violates Section Two. Under those circumstances, the Plan's status as a statute is not a reason to stay our injunction. Likewise, we understand the importance of the statutory and constitutional issues in this case. We and the Supreme Court rejected the State's arguments on those issues. Under that circumstance, the importance of the issues is no reason to stay our order.

D. A stay is not in Alabama's public interest.

Finally, we find that the public interest weighs decisively against a stay. We observe that the words "public interest" do not appear in the Secretary's stay motion, other than in his recitation of the applicable legal standard. *Milligan* Doc. 276 at 3.

The Secretary asserts that when the "government is the party opposing the . . . injunction, its interest and harm merge with the public interest." *Swain v. Junior*, 958 F.3d 1081, 1091 (11th Cir. 2020) (citing *Nken*, 556 U.S. at 435). We find that a stay would greatly disserve the public interest. Alabama's interest is in the conduct of lawful congressional elections. We have enjoined the use of the 2023 Plan on the same grounds we enjoined the use of the 2021 Plan, and our first injunction was affirmed in all respects. *See Allen*, 143 S. Ct. at 1487, 1498, 1502. The Plaintiffs — like all Alabamians — already have endured one congressional election in this census cycle that the Secretary administered under an unlawful map. We see no reason to allow that to happen again.

* * *

We repeat that we are deeply troubled that the State enacted a map that the Secretary readily admits does not provide the remedy we said federal law requires. And we are disturbed by the evidence that the State delayed remedial proceedings but did not even nurture the ambition to provide that required remedy. Under these circumstances, we cannot understand why it would be a reasonable exercise of our discretion to order a stay pending the Secretary's second appeal. The law requires the creation of an additional district that affords Black Alabamians, like everyone else, a fair and reasonable opportunity to elect candidates of their choice. Without further delay.

DONE and **ORDERED** this 11th day of September, 2023.

STANLEY MARCUS
UNITED STATES CIRCUIT JUDGE

ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

TERRY F. MOORER
UNITED STATES DISTRICT JUDGE