No. __-___

In the Supreme Court of the United States

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

APPENDIX TO EMERGENCY APPLICATION FOR STAY: VOLUME 3 OF 3

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

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

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

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Proceedings recorded by OFFICIAL COURT REPORTER, Qualified pursuant to 28 U.S.C. 753(a) & Guide to Judiciary Policies and Procedures Vol. VI, Chapter III, D.2. Transcript produced by computerized stenotype.

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1 PROCEEDINGS:
2 JUDGE MARCUS: Good morning to all of you folks, and
3 welcome.
4 It's a whole lot more pleasurable to see you in person, I
5 can assure you, than on a Zoom screen.
6 We regret very much, Ms. Khanna, that you have been unable
7 to come, but we wish you a speedy recovery. We're delighted
8 you are with us online.
9 Can you hear us okay?
10 MS. KHANNA: I can, Your Honor. Can you hear me?
11 JUDGE MARCUS: Just fine. Thank you.
12 With that, I would like to begin by asking the parties if
13 you would be kind enough to state your appearances on the
14 record.
15 This is in the Milligan and Caster cases. We will proceed
16 with Singleton upon the completion of this case.
17 With that, if counsel for Milligan would be kind enough to
18 state your appearances.
19 MR. ROSS: Yes, Your Honor. Deuel Ross for the
20 Milligan plaintiffs.
21 MR. ROSBOROUGH: Good morning, Your Honor. Davin
22 Rosborough for the Milligan plaintiffs.
23 JUDGE MARCUS: And for Caster.
24 MR. POSIMATO: Good morning, Your Honor. It's Joe
25 Posimato on behalf of the Caster plaintiffs.

1 MR. ROUCO: Good morning, Your Honor. Richard Rouco
2 on behalf of the Caster plaintiffs.
3 MS. KHANNA: Good morning, Your Honor. Abha Khanna
4 also on behalf of the Caster plaintiffs.
5 JUDGE MARCUS: Good morning to all of you.
6 And for the defendants?
7 MR. LACOUR: Good morning, Your Honor. Edmund LaCour
8 on behalf of the Secretary of State Wes Allen.
9 MR. DAVIS: Jim Davis on behalf of the Secretary of
10 State Wes Allen.
11 MR. SMITH: Good morning, Your Honor. Brent Smith on
12 behalf of Secretary of State Wes Allen.
13 JUDGE MARCUS: And good morning to all of you folks.
14 I'm sorry. Mr. Walker.
15 MR. WALKER: Dorman Walker on behalf of the defendant
16 intervenors.
17 JUDGE MARCUS: Are you able to see us okay from where
18 you are?
19 MR. WALKER: Yes, sir, I can.
20 JUDGE MARCUS: Thank you. I think we missed one
21 attorney on the right.
22 MR. JACKSON: Good morning, Your Honor. Sidney
23 Jackson for the Milligan plaintiffs.
24 JUDGE MARCUS: Good morning. Any other lawyers of
25 record that want to state their appearances?

1 MR. DUNN: David Dunn also for the Milligan
2 plaintiffs.
3 MR. ROSS: Your Honor, we also have Nicki Lawsen and
4 Tanner Lockhead, Amanda Allen, and Brittany Carter also for the
5 Milligan plaintiffs, and our clients are here, as well.
6 JUDGE MARCUS: Welcome to all of you.
7 And, Mr. LaCour, Mr. Davis, anyone else you wanted to
8 introduce before we begin?
9 MR. DAVIS: That's all for us, Judge.
10 JUDGE MARCUS: Thank you.
11 We set this case down for a hearing this morning. We
12 wanted to give each side the opportunity to make an opening
13 statement, and we will give each of the parties a half hour.
14 You need not take all of it to make an opening statement.
15 But before we did that, we had one outstanding motion
16 pending that was the motion in limine filed by the -- by the
17 plaintiffs.
18 With that, did you want to address that motion at this
19 point, Mr. Ross? Ms. Khanna? Or did you want to go to opening
20 statement first?
21 MS. KHANNA: We would prefer to go to opening
22 statement first, Your Honor. But I leave it to Mr. Ross if he
23 wanted to argue the motion in limine specifically.
24 MR. ROSS: Your Honor, we would rather do the opening
25 statements first, and then answer questions about the motion in

1 limine.
2 JUDGE MARCUS: Okay. The only reason -- Mr. LaCour,
3 Mr. Davis, Mr. Walker, what's your view? Did you want us to
4 tackle the in limine motion first, or go to opening first?
5 MR. LACOUR: Your Honor, I think -- you have seen the
6 briefing on the objections and on the motion in limine. There
7 is a tremendous amount of overlap, we think. So we want to
8 start with opening statements and delve into some of those
9 issues about what is or is not relevant and what the Court is
10 or is not doing today. We think that makes sense.
11 THE COURT: All right. We will proceed with opening
12 statements. And then we will go forward with the motion in
13 limine. And then we will proceed to the presentation,
14 Mr. Ross, you want to make on behalf of the Milligan
15 plaintiffs, and, Ms. Khanna, and your colleagues on behalf of
16 Caster, and whatever the State will be presenting, Mr. LaCour.
17 So that with, we will turn to Mr. Ross. Did you want to
18 begin?
19 MR. POSIMATO: Your Honor, both the Caster and
20 Milligan plaintiffs are prepared to start first. We defer to
21 the Court on whether it makes sense for Ms. Khanna to go first
22 since she is on Zoom, or whether you prefer to hear from
23 Mr. Ross first.
24 JUDGE MARCUS: Why don't we go forward with Mr. Ross?
25 MR. ROSS: Thank you, Your Honor.

1 May it please the Court. 18 months ago, this Court ruled
2 that the 2021 plan likely dilutes the votes of black voters in
3 Alabama. The appropriate remedy this Court said is a plan that
4 includes either an additional majority-minority district or an
5 additional district in which black voters have an opportunity
6 to elect candidates of their choice.
7 The Supreme Court affirmed that decision in full.
8 At this Court's invitation, the Alabama Legislature has
9 proposed a new remedial map. And so today, there's only one
10 question before this Court: Does the new 2023 plan remedy the
11 prior vote dilution, and does it provide black voters with an
12 additional opportunity to elect the candidates of their choice.
13 The answer is that it does not.
14 No party disputes this fact.
15 The viability of the 2023 plan is not considered on a
16 clean slate the way Alabama would have it. Rather, the Court
17 evaluates the 2023 plan in part measured by the historical
18 record that is the record of the violation this Court has
19 already found, and in part measured by prediction, and in part
20 measured by the difference between the old plan and the new
21 plan.
22 First, looking at the historical record as affirmed by the
23 Supreme Court, plaintiffs have satisfied the first *Gingles*
24 precondition. The first *Gingles* precondition does not look at
25 the compactness of plaintiffs' map. It looks at the

1 compactness of the minority community. And as the Supreme
2 Court found, black voters and this Court found, as well,
3 geographic -- or black voters are geographically compact, and
4 they are sufficiently numerous to constitute a second majority-
5 minority district.
6 Plaintiffs also satisfied the second and third *Gingles*
7 preconditions. Alabama does not dispute that black voters
8 are -- that there is serious racially polarized voting in the
9 state, and that black voters have not been able to elect the
10 candidate of their choice in a second congressional district.
11 Today, as in 2022, black voters enjoy virtually zero
12 success in state-wide elections. Alabama's political campaigns
13 feature racial appeals. Alabama has an extensive and ongoing
14 history of repugnant racial discrimination, and this history of
15 discrimination includes abandoning racist laws when they're
16 enjoined by courts, and then replacing them with facially
17 race-neutral laws that maintain the status quo.
18 Second, when measured by predictions, there is no dispute
19 that the 2023 plan does not lead to the election of a
20 majority -- second African-American candidate of choice.
21 According to Alabama's own analysis, the black-preferred
22 candidate would have lost all seven elections that the State
23 analyzed between 2018 and 2022. And defendants do not dispute
24 the analysis plaintiffs' expert Dr. Liu that black candidates
25 would have lost all 11 biracial elections that took place over

1 the last 10 years.
2 Third, the 2023 plan, like the old plan, also results in
3 vote dilution. Both plans contain only one opportunity
4 district. In the new District 2, black candidates would lose
5 every election, just as in the old District 2, black candidates
6 have lost every election.
7 Unfortunately, rather than address its failure to correct
8 the violation that this Court found, Alabama rehashes the
9 arguments that both this Court and the Supreme Court have
10 already rejected.
11 First, these courts rejected Alabama's overdrawn argument
12 there could be no legitimate reason to split Mobile and Baldwin
13 counties, and yet Alabama wants to relitigate its
14 prioritization of Mobile and Baldwin overdrawing an effective
15 opportunity district.
16 Second, the Supreme Court made clear the Section 2 does
17 not set up a beauty contest between plaintiffs' illustrative
18 plans, and the State's enacted plan. And yet Alabama insists
19 that the Court should compare its allegedly neutral treatment
20 of various communities in the 2023 plan to the treatment of the
21 same alleged communities in the illustrative plan. But the
22 Court rejected the notion that plaintiffs' or Alabama's plans
23 are measured against some idealized allegedly neutral
24 application of Alabama's preferred redistricting criteria.
25 Third, the Supreme Court made clear that the use of race

1 in redistricting is permissible to remedy a Section 2
2 violation. The majority of the court said the very reason
3 plaintiffs educe a map of first step of *Gingles* is precisely
4 because of its racial composition.
5 The majority also said that Section 2 requires remedies,
6 and those instances like here where intensive racial politics
7 already play an excessive role in denying black voters the
8 opportunity to elect the candidate of their choice. And yet
9 Alabama is again arguing that the use of race in devising a
10 remedy is improper.
11 At bottom, Alabama is arguing that this Court should
12 ignore the Supreme Court's rulings, ignore this Court's
13 preliminary injunction order, and ignore the undisputed fact
14 that the 2023 plan does not result in a new opportunity
15 district for black voters.
16 Instead, Alabama wants to focus on the Legislature's
17 intent in enacting the 2023 plan, but as the Supreme Court
18 unanimously found, Section 2 is not about intent. It's about
19 results and effect.
20 Plaintiffs' only burden then is to show that under the
21 2023 plan, black voters still lack an opportunity to elect a
22 candidate of their choice in a second district. Plaintiffs
23 have met that burden. And Alabama does not dispute that fact.
24 For that reason, plaintiffs are not required to go any
25 further to sustain their objections.

1 Still as this Court knows, Senate Factor 2 -- or, excuse
2 me -- Senate Factor 9 under the *Gingles* analysis asks whether
3 the policy underlying the State's justification for its
4 redistricting plan is tenuous. This Court declined to rule on
5 tenuousness in 2022, and this Court doesn't have to resolve
6 this issue now here. Nonetheless, there is substantial
7 evidence that the Legislature was engaged in gamesmanship
8 rather than a good faith effort to comply with this Court's
9 order.
10 Before the special session, the chairs of the
11 redistricting committee Senator Livingston and Representative
12 Pringle were well aware of the import of this Court's order. I
13 am going to play some clips from depositions that were taken
14 last week. I am going to begin here with Senator Livingston,
15 the chair of the Senate Redistricting Committee on his
16 understanding of the Court's order:
17 (Video played:)
18 "SENATOR LIVINGSTON: I understand that the courts have
19 ordered us to provide two opportunity districts minority --
20 majority-minority opportunity districts."
21 MR. ROSS: That's Senator Livingston, the chair of the
22 redistricting committee and a defendant in this case.
23 And here is Representative Pringle, the chair of the House
24 Redistricting Committee.
25 (Video played:)

1 "MR. PRINGLE: At play in your consideration of these
2 new maps during the 2023 redistricting cycle."
3 JUDGE MARCUS: Let me stop for a moment. Was that
4 video as well as audio?
5 MR. ROSS: Yes. Yes. Can you not hear the audio,
6 Your Honor?
7 JUDGE MARCUS: I can hear the audio.
8 MR. ROSS: Okay. Oh, I believe Representative Pringle
9 is in the corner there, and he is reading our exhibit, which is
10 a copy of the opinion.
11 JUDGE MARCUS: Thank you.
12 MR. ROSS: Start from the beginning, please.
13 (Video played:)
14 Q "What role, if any, did this passage from the preliminary
15 injunction order play in your consideration of these new maps
16 during the 2023 redistricting cycle?
17 A That we were charged with drawing a map that would provide
18 an opportunity for the black voters to elect a candidate of
19 their choosing.
20 Q Did you have an understanding of what was required in
21 order for that opportunity to comply with the opportunity as
22 it's expressed in this paragraph?
23 A An opportunity for blacks to elect a candidate of their
24 choosing.
25 Q Okay. So as you were considering plans, did you have an

1 understanding of what it means for black voters to have an
2 opportunity to elect a representative of their choice?
3 A I would say -- ask me that again, please.
4 Q Sure. Tell me what you understand what it means to
5 provide black voters with an opportunity to elect a black
6 candidate of their choice.
7 A You know, a district which they have the ability to elect
8 or defeat somebody of their choosing. I have no magic number
9 on that.
10 Q Sure. Does it turn on the ability to elect for you?
11 A Yes. Ability."
12 MR. ROSS: Your Honor, Mr. Hinaman, who is also the
13 State's cartographer and drew the 2021 plan, also testified to
14 his understanding of the Court's order and what the
15 redistricting chairs initially asked him to do after the
16 Supreme Court ruling.
17 If you could play Mr. Hinaman's testimony.
18 (Video played:)
19 Q "In light of Mr. Walker and Mr. LaCour, did you discuss
20 the Court's order with anyone else?
21 A Obviously the two chairs.
22 Q What did you discuss with them?
23 A Just essentially what I said earlier, that we needed to
24 address the Court's concerns and work to draw a map that was --
25 provided an opportunity for African-Americans to elect a

1 candidate of their choice in two districts.
2 Q You mentioned that from your perspective an opportunity
3 district is one in which black voters have an opportunity to
4 elect a representative of their choice, correct?
5 A Yes, sir.
6 Q And you mentioned that a big indicator of that is shown in
7 a performance analysis or an election analysis, correct?
8 A Yes, sir."
9 MR. ROSS: Okay. And so, again, the plaintiff --
10 excuse me -- the defendants were very well understood what
11 their task was. And yet despite their understanding, Alabama
12 never set out to draw a second opportunity district.
13 Mr. Hinaman testified that he was never instructed to draw
14 a second majority-black district. And the 2023 plan was
15 enacted without actually providing that opportunity. Instead,
16 the map was drafted largely in secret without incorporating the
17 input from black legislators in the state.
18 Although it's unclear who exactly drew the 2023 plan, it
19 is clear who had substantial input. Here, again, is
20 Representative Pringle testifying.
21 (Video played:)
22 Q "During this stage?
23 A For me?
24 Q For you -- is there anyone else besides Mr. Hinaman that
25 served as a map drawer or a consultant during this stage?

1 A For me?
2 Q For you or for the committee?
3 A No. Eddie LaCour worked as a map drawer at some point in
4 time.
5 Q Okay. And what did he do as a map drawer?
6 A Drew maps.
7 Q And in that respect, Mr. LaCour primarily served as a map
8 drawer or an attorney?
9 A Initially as an attorney.
10 Q What about after that?
11 A I lost contact with Mr. LaCour at the very beginning of
12 the special session and never saw or communicated with him
13 again. He was upstairs meeting with the senators in a
14 different room working with them to draw what ultimately became
15 the Livingston plan.
16 Q Understood."
17 MR. ROSS: So in passing the 2023 plan, defendants
18 knew that they were flouting this Court's order to devise a
19 plan that contained a second opportunity district.
20 And Representative Pringle was very clear that he was
21 unhappy about the 2023 plan. He would have preferred that the
22 Legislature enact the plan that was first passed by the House.
23 And while plaintiffs believe that that plan also would
24 have not satisfied Section 2, the State's performance analysis
25 of the House's plan showed that black-preferred candidates

1 would at least rarely be able to win elections in a second
2 district.
3 Here is Representative Pringle explaining his view of the
4 House plan, as compared to the enacted plan in -- that's at
5 issue now.
6 (Video played:)
7 Q "What's the significance of the 39.9 percent BVAP in SB-5;
8 just that it passed?
9 A That's what the Senate came up with, and they were not
10 going to allow us to pass the House plan.
11 Q And do you know why they chose that number?
12 A You're going to have to talk to Senator Livingston and
13 Eddie LaCour.
14 Q Did they mention anything to you?
15 A No.
16 Q Let's go ahead and --
17 A Let me -- no. Let me rephrase that.
18 Senator Livingston came to me towards the end and said,
19 we're going to take your plan and substitute my bill and pass
20 your plan with my mapping. And I said, no, we're not. If you
21 want to pass a Senate plan, you are going to pass a Senate plan
22 on the Senate bill number, and you are not going to put my name
23 on it. You're not -- it is not going to be a House bill
24 number. It's going to be a Senate bill number if that's what
25 we are going to pass.

1 Q Why didn't you want your name on it?
2 A Because I thought my plan was a better plan.
3 Q In terms of its compliance with the Voting Rights Act?
4 A Exactly.
5 Q Representative Pringle, these --"
6 MR. ROSS: Finally, the findings in new redistricting
7 criteria included in SB-5 are also unprecedented. Neither the
8 cartographer Mr. Hinaman, Representative Pringle, or Senator
9 Livingston had ever seen a redistricting bill that included
10 legislative findings about communities of interest or any
11 findings about redistricting guidelines.
12 Indeed, a week before the Legislature enacted the 2023
13 plan, the redistricting committee readopted the exact same
14 guidelines that were used in 2021. And Mr. Hinaman testified
15 that he drew his plans for the Legislature based on those 2021
16 and 2023 committee guidelines. And Alabama admits that under
17 the 2021 and 2023 committee guidelines, it would have allowed
18 the State to draw a second majority-black district.
19 But SB-5 includes newly invented findings that limit the
20 number of county splits to six, that change the definition of
21 communities of interest, that identify the Black Belts, the
22 Wiregrass, and the Gulf as specifically prioritized
23 communities. And SB-5 also bars splitting those prioritized
24 communities into more than two districts.
25 But it appears that SB-5's findings did not come from the

1 Legislature itself, but from the lawyers in this case. Thus,
2 the apparent purpose of SB-5's findings were simply to
3 facilitate the defendants' relitigation of *Gingles I* at this
4 hearing.
5 Here again, Your Honor, is Representative Pringle, the
6 chair of the House Redistricting Committee.
7 (Video played:)
8 Q "Representative Pringle, these are the suggestive
9 findings; is that right?
10 A That's what was written in the bill, yes.
11 Q Okay. And do you know who drafted the statement of
12 legislative intent in findings here?
13 A No, sir.
14 Q Did you know that these would be put in the bill?
15 A No, sir.
16 Q Did the redistricting committee solicit anyone to draft
17 these findings?
18 A No, sir.
19 Q Do you know why they're in here?
20 A No.
21 Q As -- remind me. Have you ever seen another district bill
22 contained similar language like this, these findings?
23 A Not to my knowledge, no."
24 MR. ROSS: And here again, Your Honor, is Senator
25 Livingston, the chair of the Senate Redistricting Committee.

1 (Video played:)
2 Q "Are you generally familiar with the fact that there are
3 what are titled legislative findings that take up about, you
4 know, five or so pages in the bill?
5 A Yes, sir.
6 Q Okay. And do you recall in your responses to the
7 interrogatories that when you were asked to identify each
8 individual and/or entity who participated in the drafting of
9 the statement of legislative intent accompanying the
10 congressional districting map, you said on information believed
11 Eddie LaCour. Do you recall that?
12 A Yes, sir.
13 Q When -- are these sections of the bill what you were
14 referring to in that answer?
15 A Yes, sir.
16 Q Okay."
17 MR. ROSS: Your Honors, Alabama should not be rewarded
18 for its bad faith.
19 Ultimately Section 2, though, is a results test.
20 Plaintiffs simply present this evidence to give the Court
21 context about the gamesmanship that was going on by Alabama
22 Legislature and by the defendants in this case.
23 The 2023 plan has the same results as the 2021 plan. That
24 is what's important. It does not create a new opportunity for
25 black voters to elect their candidates of choice in a second

1 district, and, therefore, plaintiffs respectfully request that
2 the Court enjoin the 2023 plan and order the special master to
3 begin the process of devising a complete and proper remedy.
4 Thank you.
5 JUDGE MARCUS: Thank you much, counsel.
6 Who will be proceeding for the Caster plaintiffs?
7 Ms. Khanna or --
8 MS. KHANNA: Your Honor, with the Court's permission,
9 I will give the opening statement for the Caster plaintiffs.
10 THE COURT: Thank you. Of course. And you may
11 proceed.
12 MS. KHANNA: Good morning, Your Honors. May it please
13 the Court. Abha Khanna for the Caster plaintiffs. And I would
14 like the thank the Court again for the accommodation to allow
15 me to present via Zoom while I'm in quarantine. I am very
16 disappointed that I could not make it there in person today.
17 18 months ago, this Court found Alabama liable under
18 Section 2 of the Voting Rights Act for diluting the voting
19 power of its black citizens through a congressional plan that
20 provided black voters just a single district in which they had
21 the opportunity to elect their candidates of choice. The same
22 district that Alabama was forced to draw 30 years ago after a
23 different Voting Rights Act lawsuit.
24 This Court's conclusion on what the law requires was
25 neither cursory nor groundbreaking. To the contrary, it was

1 meticulous and methodical, following step by step the
2 well-established legal standard for adjudicating claims under
3 Section 2.
4 First, the Court found that it was beyond dispute that
5 black voters in Alabama were sufficiently numerous to comprise
6 a majority of eligible voters in an additional district. In so
7 doing, this Court rejected the State's odious suggestion
8 advanced through its expert Mr. Thomas Bryan to narrow the
9 count of black citizens to only a subset of individuals that
10 the State deemed black enough to warrant protection under the
11 Voting Rights Act.
12 Second, the Court found extreme polarization throughout
13 the state. This, too, was beyond dispute. Black and white
14 voters in Alabama consistently and cohesively vote for opposing
15 candidates. And absent a majority-black district or something
16 close to it, white voters will vote as a bloc to defeat
17 black-preferred candidates in virtually any election. So
18 intense is the racial polarization in Alabama that even the
19 state's own expert agreed with this Court's finding.
20 Third, this Court analyzed each and every Senate Factor
21 relevant to this case to determine that the totality of
22 circumstances weighed decidedly in favor of finding Section 2
23 liability. Specifically, it found that the pattern of racial
24 polarization in Alabama is clear, stark, and intense; that
25 black Alabamians enjoy virtually zero success in statewide

1 elections; and no black candidate for Congress has ever been
2 elected from a majority white district.
3 Alabama's extensive history of repugnant racial and
4 voting-related discrimination is undeniable and well
5 documented. And that despite defendants' contention that
6 Alabama has come a long way, the last few decades of Alabama's
7 discriminatory voting laws, racial animus among state actors,
8 and racial disparities across nearly every dimension make clear
9 that that history is alive and well in the present, that recent
10 and prominent political campaigns, including by congressional
11 candidates have been characterized by a racial appeals, and
12 that white voters enjoy a disproportionate advantage in
13 congressional representation while black voters experience a
14 disproportionate disadvantage in stark contrast to their
15 respective shares of the population.
16 Finally, this Court rejected the State's contention that
17 plaintiffs' illustrative plans are unconstitutional racial
18 gerrymanders. It further rejected Alabama's throw everything
19 at the wall to see what sticks legal strategy seeking to
20 undermine the very constitutionality of Section 2 and the
21 ability of individual plaintiffs to bring Section 2 claims to
22 court in the first place.
23 In short, this Court did exactly what district courts are
24 charged with doing. It applied well-established law to the
25 well-developed factual record. And in so doing, it found that

1 the question of whether Alabama's congressional plan likely
2 violates Section 2 of the Voting Rights Act is not even close.
3 Alabama refused to accept this Court's ruling and sought
4 and achieved a stay before the U.S. Supreme Court. As a
5 result, the congressional plan enjoined by this Court as a
6 violation of federal law, remained in place for the 2022
7 elections. And as expected, black-preferred candidates lost in
8 every district, save District 7, the state's only
9 majority-black district.
10 On the merits, Alabama turned to the Supreme Court with
11 the same arguments that it advanced before this Court. And
12 once again, lost on each and every one of them. The Supreme
13 Court upheld this Court's findings on plaintiffs' satisfaction
14 of the *Gingles* preconditions and the totality of circumstances.
15 The Supreme Court saw no reason to disturb this Court's
16 careful factual findings and spot-on legal conclusions. And
17 the Court firmly and decidedly rejected Alabama's attempts to
18 upend the Section 2 legal standard, to paint plaintiffs'
19 illustrative maps as racial gerrymanders, and cut the legs out
20 from Section 2 altogether.
21 In short, the Supreme Court reaffirmed the
22 well-established legal standard applied by this Court and this
23 Court's detailed findings and conclusions based on that
24 standard.
25 And so after three federal judges and a majority of

1 Supreme Court justices rejected the State's Section 2 defense,
2 the ball flipped back in Alabama's court. This Court rightly
3 afforded Alabama a reasonable opportunity to remedy its
4 violation.
5 And the Court didn't leave state officials in the dark
6 about what that remedy required. It held as a matter of law
7 that under the statutory framework, Supreme Court precedent,
8 and Eleventh Circuit precedent, the appropriate remedy is a
9 congressional redistricting plan that either includes an
10 additional majority black congressional district or an
11 additional district in which black voters otherwise have an
12 opportunity to elect a representative of their choice.
13 And the Court recognized as a matter of fact the practical
14 reality based on the ample evidence of intensely racially
15 polarized voting that any remedial plan will need to include
16 two districts in which black voters comprise a voting major
17 majority or something quite close to it.
18 Alabama promised to take advantage of the opportunity
19 afforded by this Court assuring both the Court and plaintiffs
20 that the Legislature would make a good faith attempt to enact a
21 remedial map that addresses this Court's findings. But in
22 defiance of the Court's clear instructions, and in disregard of
23 the state's black citizens, Alabama squandered that opportunity
24 and refused to draw a remedy map at all.
25 After asking this Court to pause these proceedings for

1 weeks, to allow the Legislature to act, the state of Alabama
2 once again enacted a congressional plan with just a single
3 district in which black voters have an opportunity to elect
4 their candidates of choice. That is the map before this Court
5 today.
6 Let me be clear. There is no dispute that the 2023 plan
7 enacted by the state of Alabama once again limits the state's
8 black citizens to a single opportunity district. Alabama has
9 stipulated that its new map includes just one majority black
10 district. It has stipulated that the district with the next
11 highest black population has a BVAP of just 39.9 percent. It
12 has stipulated to the findings of plaintiffs' experts that
13 black-preferred candidates will nearly always be defeated in
14 that district.
15 In fact, it has stipulated to the Alabama Legislature's
16 own analysis revealing that black-preferred candidates would
17 lose each and every one of the elections the Legislature
18 analyzed in the state's new congressional District 2.
19 Based on these stipulated facts alone, Your Honors, this
20 Court can and must enjoin the 2023 map for perpetuating the
21 same Section 2 violation as the map struck down by this Court
22 last year.
23 In enacting the 2023 plan, Alabama acted in defiance of
24 this Court's preliminary injunction order and the U.S. Supreme
25 Court's opinion. And Alabama remains defiant in its continued

1 and baseless defense of that plan before this Court.
2 First, Alabama insists that after more than a year and a
3 half of litigation, after it succeeded in staving off
4 plaintiffs' relief for an entire election cycle, and after
5 five weeks granted by this Court to allow the state to engage
6 in a remedial map drawing process, we're now back at square
7 one. According to Alabama, the enactment of a new map wipes
8 the record clean and requires plaintiffs to reprove Section 2
9 liability from scratch.
10 But the Supreme Court has already rejected the state's
11 position in *North Carolina vs. Covington*, where it explained
12 that the passage of a remedial plan does not reset a court's
13 liability finding.
14 Second, Alabama argues that it remedied its prior cracking
15 of the Black Belt by dividing Black Belt counties into two
16 districts instead of four. But Alabama cannot feign innocence
17 on its warped interpretation of the term cracking.
18 Cracking in the Section 2 context refers to the dispersal
19 of minority voters into districts where they have no
20 opportunity to elect their preferred candidates even though
21 they are sufficiently numerous and geographically compact
22 enough to comprise a majority of voters in a reasonably
23 configured district.
24 The 2021 plan cracked black voters in the Black Belt among
25 three congressional districts to ensure that black voters in

1 Alabama would be limited to only one district in which they
2 could elect their preferred candidate.
3 The 2023 plan reshuffled Black Belt counties to give the
4 illusion of a remedy while once again ensuring that black
5 voters of Alabama are limited to only one congressional
6 district in which they can elect their preferred candidates.
7 Alabama gets no brownie points for uniting black voters and the
8 Black Belt community of interest in a district in which they
9 have no electoral power and in a map that continues to dilute
10 the black vote.
11 Third, Alabama attempts to introduce evidence about the
12 ways the 2023 plan respects various communities of interest
13 around the state. But in so doing, Alabama completely misses
14 the point. Section 2 is not a claim for better respect for
15 communities of interest. It is a claim regarding minority vote
16 dilution.
17 The question of communities of interest arises when
18 analyzing the extent to which plaintiffs' illustrative maps are
19 consistent with the state's redistricting principles. This
20 Court has already found, the Supreme Court has already affirmed
21 that plaintiffs' illustrative maps in this case take account of
22 communities of interest along with a host of other traditional
23 criteria.
24 Neither Alabama's apparent preference for one particular
25 community of interest, nor its attempt to reverse engineered

1 map drawing process to prioritize and immunize certain
2 communities above all others can override its mandate to comply
3 with Section 2.
4 Alabama asserts that it can erase its Section 2 liability
5 by simply tidying up its map to better comport with traditional
6 criteria. But, once again, this Court has already said and the
7 Supreme Court has already affirmed that plaintiffs'
8 illustrative plans need not beat out rival districts in an
9 endless beauty contest.
10 Indeed, under Alabama's approach, plaintiffs and
11 defendants could find themselves in a perpetual game of
12 one-upmanship (sic), fixing this precinct line, increasing this
13 compactness score, all while the other underlying vote dilution
14 remains in place in election after election after election.
15 But the reason courts look to traditional districting
16 principles when evaluating plaintiffs' maps is not to see which
17 map can achieve the highest score on one or more measures. It
18 is to understand whether plaintiffs' illustrative plans
19 generally comport with the state's tradition of running
20 districted elections. And whereas here, plaintiffs'
21 illustrative districts are consistent with those traditions,
22 they do not need to beat out every competing district to
23 satisfy *Gingles I*.
24 And, finally, Alabama attempts to rehash its racial
25 predominance argument, once again trotting out Thomas Bryan to

1 cast aspersions on plaintiffs' plans. That is a fight that
2 Alabama has already fought and lost.
3 Ultimately, neither the 2023 plan nor Alabama's arguments
4 to this Court reflect a serious -- to remedy a serious
5 violation. Instead, they reflect the state's inability to
6 stomach the idea of affording black voters equal access to the
7 political process and its willful disregard of the legal
8 process.
9 Alabama's counsel is essentially telling this Court with a
10 straight face that you got it wrong. And not only that you got
11 it wrong, Your Honors, but apparently the Supreme Court got it
12 wrong. And even though Alabama is taking full advantage of the
13 appellate process, it refuses to accept the judiciary's
14 authority to say what the law requires and limit what the state
15 can do under that law.
16 18 months ago, when appealing to the Supreme Court to stay
17 this Court's injunction, defendants asserted that the Court's
18 liability finding leaves Alabama with no real choice but to
19 draw an additional congressional district in which black voters
20 have an opportunity to elect their candidates of choice.
21 But now, all these months later, Alabama has chosen
22 instead to thumb its nose at this Court, to thumb its nose at
23 our nation's highest court, and to thumb its nose once again at
24 its own black citizens. In choosing defiance over compliance,
25 Alabama only doubles down on its Section 2 liability adding yet

1 another marker to its centuries and decades long pattern of
2 electing barriers to racial equality at the ballot box.
3 Caster plaintiffs respectfully request that the Court put
4 an end to Alabama's gamesmanship by enjoining the 2023 plan and
5 proceeding to a judicial remedy process to ensure that
6 plaintiffs obtain relief in time for the 2024 election.
7 Thank you, Your Honors.
8 JUDGE MARCUS: Thank you.
9 We'll turn to the defendants, Mr. LaCour, Mr. Davis. I am
10 not sure how you're choosing to proceed.
11 MR. LACOUR: Thank you, Your Honors. Edmond LaCour on
12 behalf --
13 JUDGE MARCUS: I take it just, so that I'm clear, you
14 will be speaking on behalf of all of the defendants, correct?
15 MR. LACOUR: Yes, Your Honor.
16 JUDGE MARCUS: Thank you.
17 MR. LACOUR: First, I would like to begin with the
18 threshold issue of what we are doing here. This Court's
19 preliminary injunction order and binding precedent of the
20 Supreme Court and Eleventh Circuit make clear that the issue
21 before this Court is whether the 2023 plan violates federal
22 law. If plaintiffs cannot make that showing at least on
23 preliminary basis, then the 2023 plan is governing law, and
24 that is great evidence that this plan completely remedies the
25 past likely violation in the 2021 plan.

1 This is the view the defendants have staked out since we
2 informed the Court just a week after the Supreme Court's
3 decision of the Legislature's intent to enact a new plan.
4 Again, our view is the same one that this Court took in the
5 preliminary injunction; namely, that the new legislative plan
6 if forthcoming would be governing law unless challenged and
7 found to violate federal law.
8 That is, of course, the Supreme Court's view articulated
9 in *Wise vs. Lipscomb,* which, again, the Court quoted in the
10 P.I. order. The Supreme Court made clear there is a critical
11 difference between a legislatively enacted plan and a mere
12 proposal or a court-drawn plan.
13 Even after a final judgment on the merits, a, quote, new
14 legislative plan is the governing law unless it too is
15 challenged and found to violate federal law. That comes out of
16 *Wise*, and this comports with the Eleventh Circuit's *Dillard*
17 decision, which made clear that a question in a proceeding like
18 this one is whether there is, quote, a violation of Section 2,
19 closed quote, and which requires, quote, evidence that the new
20 plan violates Section 2. That's from page 250 of the *Dillard*
21 opinion.
22 The Milligan plaintiffs agreed with us. In their
23 objections from pages 16 to 20 of the ECF pagination, they
24 argued that HB-5 fails to completely remedy the Section 2
25 violation because the plan itself violates Section 2. They

1 explain that, quote, in evaluating remedial proposal, the Court
2 applies the same *Gingles* standard applied at the merit stage.
3 And they contended that, quote, in assessing a remedy, the
4 Court should also examine the redistricting policies the
5 Legislature relied upon to justify its new plan.
6 They were citing *Dillard*, and they were right to do so
7 because *Dillard* lays all this out. Even after a final judgment
8 on liability, when a new plan is put forward, the Court
9 considers anew whether it violates Section 2. Courts cannot,
10 in the words of *Dillard*, simply take the findings that made the
11 original electoral system infirm and transcribe them to the new
12 electoral system, from page 249 of the *Dillard* opinion.
13 *Dillard* continues, the evidence showing a violation in an
14 existing election scheme may not be completely co-extensive
15 with a proposed alternative. Thus, the *Dillard* court
16 recognized that even, quote, at-large procedures that are
17 discriminatory in the context of one scheme are not necessarily
18 discriminatory under another scheme.
19 So too here. A congressional redistricting plan like the
20 2021 plan that had one majority-minority district may violate
21 Section 2 in one context while a different plan like the 2023
22 plan may not violate Section 2 in another context even if it
23 shares one component or one factor similar to the 2021 plan,
24 which as we have heard from the plaintiffs today, they seem to
25 think it's the only relevant factor, the number of

1 majority-minority districts in the plan.
2 But, of course, their arguments to this Court and to the
3 Supreme Court were not that the 2021 plan violated Section 2
4 merely because of the number of majority-minority districts in
5 it. You can read the briefs, and they made clear that Section
6 2 is not a tool for demanding proportionality. There's much
7 more that has to be done.
8 And critical to the analysis that the Supreme Court laid
9 out in *Allen* was *Gingles I*, and I think that is what is before
10 the Court today, whether they have come forward with sufficient
11 evidence to show that the 2023 plan likely violates Section 2.
12 That is going to require them to come forward with *Gingles I*
13 evidence.
14 Now, it might be that the 11 illustrative plans they had
15 from 2021 will be up to the task, but we submit that in light
16 of *Allen vs. Milligan* that that simply cannot be the case for a
17 couple of reasons. As the *Allen* court made clear, this *Gingles*
18 *I* inquiry is an exacting test, and it requires an intensely
19 local appraisal of the electoral mechanism at issue. And here,
20 that electoral mechanism is the 2023 plan, not the 2021 plan.
21 And this view of *Gingles I* is exactly what the Milligan
22 plaintiffs had put in their Supreme Court brief. So today you
23 heard from Mr. Ross that all that really matters is the
24 compactness of the minority population in the state. That is
25 not what they told the Supreme Court, and that's not what the

1 Supreme Court said.
2 At pages 26 through 27 of the read brief, they said, a
3 *Gingles I* district is reasonably configured if it takes into
4 account traditional districting principles. That was citing to
5 *LULAC* and *Abrams vs. Johnson* to the *Gingles I* decisions from
6 the Supreme Court. And then they listed the following
7 objective factors of compactness, contiguity, respect for
8 communities of interest, and political subdivisions.
9 So it is not just a matter of where the minority
10 population lives in the state. *Gingles I* and again for decades
11 has always required taking into account traditional districting
12 principles. And for this inquiry to really be objective as the
13 Milligan plaintiffs said it is, the traditional districting
14 principles that the map that they're introducing must account
15 for are the traditional districting principles embodied in the
16 map that they are challenging. Again, that intensely local
17 appraisal. Thus, this Court and the Supreme Court in the
18 challenge to the 2021 map looked at the principles that were
19 given effect in the 2021 map, not just what the Legislature or
20 the redistricting committee said about the map, but what it
21 actually did.
22 The *Abrams* Court, the Supreme Court considered the *Abrams*
23 case over Georgia's congressional districts. They looked at
24 Georgia's traditional districting principles, not California's
25 traditional districting principles.

1 In the Eleventh Circuit in the *City of Rome* case that we
2 cite in our briefs, looked at the City of Rome's redistricting
3 principles when they were conducting their *Gingles* inquiry.
4 So for this challenge to the 2023 plan, the traditional
5 principles that matter are those that are given effect in the
6 2023 plan.
7 Now, importantly, those are not the same principles as
8 those given effect in the 2021 plan. As you all recall, that
9 plan was a core retention map. Core retention came before
10 communities of interest like the Black Belt. The core
11 retention came before other principles like compactness. And
12 plaintiffs argued that the 2021 plan violates Section 2, again
13 not just because it didn't have two majority-black districts,
14 but because it, quote, fragmented both the Black Belt, which
15 this Court found to be a community of substantial significance,
16 and the very important community comprising the majority black
17 city of Montgomery while prioritizing keeping the majority
18 white people of French and Spanish colonial heritage in Baldwin
19 and Mobile together. That's from page 39 of the Milligan
20 Supreme Court brief.
21 They argued that this was, quote, inconsistent treatment
22 of black and white communities. Again, it's the definition of
23 discrimination to have two similar things treating them
24 dissimilarly. And Section 2 is trying to get at discriminatory
25 maps, not just maps that fail to produce proportional

1 representation.
2 This wasn't a minor theme for the plaintiffs. As the
3 Milligan plaintiffs said on page 5 of their Supreme Court
4 brief, the very heart of their case was how Alabama had treated
5 the Black Belt in its maps. The Supreme Court ultimately
6 agreed making clear that core retention was not going to be a
7 defense at the *Gingles I* stage that could justify splitting
8 majority communities of interest like the Black Belt in
9 Montgomery.
10 So with this new guidance, the 2023 plan answers the
11 plaintiffs' challenge. Core retention takes a back seat to
12 communities of interest like the Black Belt, takes a back seat
13 to trying to make the districts more compact. It cures the
14 cracking at issue in the 2021 plan.
15 Those 18 core counties that make up the core of the Black
16 Belt that all the parties agreed upon are now found in just two
17 congressional districts, a compact eastern Black Belt district,
18 District 2, and a compact western Black Belt district, District
19 7 while ensuring that no county lines are needlessly split and
20 ensuring that the districts are far more compact than they were
21 in the past map.
22 Now, importantly here, every one of the plaintiffs' 11
23 plans splits those 18 core Black Belt counties into more than
24 two districts. So in the past map, they argued that it was
25 critical that the Black Belt be given priority not because they

1 were trying to hit racial goals, but it was a significant
2 community of interest. They said based on the Legislature's
3 definition of community of interest, the Black Belt fits the
4 bill better than the Gulf. Therefore, you should prioritize
5 keeping the Black Belt together over prioritizing the Gulf, and
6 one way to do that is by splitting the Gulf.
7 Today, they're in front of you saying it's important to, I
8 guess, split the Black Belt because it's going to help them hit
9 racial goals, which is absolutely inconsistent with what the
10 *Allen* court said. Where forcing proportionality over
11 traditional principles is not just not required by Section 2,
12 but it is unlawful. That's from page 1509 of the majority
13 opinion.
14 But back to the 2023 map. Mr. Ross said that we had
15 admitted that the guidelines would produce a two
16 majority-minority district map.
17 We did not admit that, Your Honors. And in any event,
18 what is relevant is not how the state describes its map in
19 guidelines. What is relevant is what the map actually does.
20 If we told you that county splits -- that minimizing county
21 splits was very important, and then we passed a map that split
22 20 counties, you would look at what the map actually did. You
23 wouldn't look at what they said it was supposed to do.
24 But, again, the result of the 2023 plan is to answer the
25 plaintiffs' call, to take out those discriminatory components,

1 those purportedly discriminatory components of the 2021 plan.
2 And they are gone. The Black Belt is no longer fragmented.
3 Montgomery's sitting county have been made whole in a compact
4 eastern Black Belt district.
5 To address the word cracking, which Ms. Khanna referenced
6 before, not that is something we invented. Again, to quote
7 from my friends the Milligan plaintiffs from their Supreme
8 Court brief at page 29, they said that cracking occurs where,
9 quote, a state has split minority neighborhoods that would have
10 been grouped into a single district if the state had employed
11 the same line drawing standards in minority neighborhoods as it
12 used elsewhere.
13 That is what they alleged had happened when it came to
14 communities of interest in the 2021 plan that we were fine
15 splitting a majority black community of interest or two of them
16 while we prioritize keeping majority white communities of
17 interest together.
18 That cracking is gone. There's no serious allegation that
19 anything like that is present in the 2023 plan coming from --
20 at least coming from the Section 2 plaintiffs here.
21 And as a result, the 2023 plan does not produce
22 discriminatory effects on the account of race.
23 That conclusion is confirmed by the plaintiffs' refusal to
24 try to shoulder their burden under *Gingles I*.
25 Now, what they say is that they've already done it because

1 they have maps that did as well as the 2021 plan. But, again,
2 that is the wrong inquiry. The relevant traditional principles
3 here are the ones used by a different Legislature to enact a
4 different law that is being challenged at this point.
5 The inquiry, that objective inquiry that Mr. Ross referred
6 to in his Supreme Court brief has to be tied to the state's
7 map. If it's tied to some abstract standard of what a
8 reasonable map might look like, then it's no standard at all.
9 And because I don't think the Court is well-equipped to say
10 that while the state's map splits only 6 counties, splitting 7,
11 or splitting 8, or splitting 9, or splitting 12 is close
12 enough.
13 We need standards in this space as the Supreme Court
14 recognized; otherwise, Section 2 is going to be turned into a
15 tool for enforcing proportionality. It's going to be turned
16 into a tool that requires states to adopt districts that
17 violate traditional principles like respecting county lines or
18 respecting communities of interest in service of racial
19 gerrymanders. That would be, in the Supreme Court's words,
20 unlawful.
21 We think that this approach follows from the Supreme
22 Court's decision. If you look at page 1504 and 1505 at the
23 outset, this is where the Court is discussing why it was that
24 the plaintiffs' illustrative plans satisfied *Gingles I* in their
25 attack on the 2021 plan.

1 When it came to compactness, we pointed out that some of
2 their districts were not relatively compact, and the Court came
3 back and said, well, on average they have more plans that are
4 compact than yours. When it came to county lines, some of
5 their plans split seven or eight, but they had plans that split
6 only six counties just like the 2021 plan, which the Supreme
7 Court noted in the majority opinion, and Justice Kavanaugh gave
8 special attention to in his concurrence to Footnote 2 saying it
9 was important in this case that they had maps that split only
10 six counties.
11 Then when it came to communities of interest, of course,
12 we argued that the Gulf was being split in their plans, and the
13 Court said that is not a problem because they do better for the
14 Black Belt. So under either approach, there's going to be a
15 community of interest treated better or worse in each of the
16 plans.
17 And the Court went on to explain why it is that it is
18 important that the plaintiffs were able to produce a map that
19 meets this sort of standard. At 1507, the Court explained that
20 deviation from a properly constructed map by the plaintiffs
21 could show that it's not legitimate principles that explain the
22 lack of proportionality, but it may be race that is explaining
23 the lack of proportionality.
24 So if plaintiffs had only come forward with a map that
25 split 12 counties, for example, and that was necessary to get

1 to their second majority-black district, well, then, the
2 failure, that disparate effect of the redistricting scheme
3 would not be on account of race. It would be on account of
4 county lines, on account of respecting county lines. Just like
5 if they could only come forward with a map that had to
6 sacrifice contiguity or had to sacrifice equal population.
7 If you draw a congressional district of only 100,000
8 people in the state when everybody else has to live in a
9 congressional district of 717,000, you can get another
10 majority-black district. But the failure to do that is not a
11 discriminatory effect on the account of race.
12 Similarly, the failure to split extra counties or split
13 extra communities of interest or draw less compact districts is
14 not discrimination on account of race. Those are
15 discriminatory effects on account of legitimate principles that
16 have been blessed by the Supreme Court in four different
17 *Gingles I* opinions now. And that's why the Supreme Court said
18 that in case after case they have rejected attempts to try to
19 use Section 2 to force proportionality at the expense of these
20 traditional redistricting principles of compactness,
21 communities of interest, and counties.
22 And, finally, quoting from the Caster plaintiffs, they
23 said, Section 2 never requires the state to adopt districts
24 that violate traditional redistricting principles. We agree
25 with that, not so sure the plaintiffs agree with that.

1 Turning to the Gulf -- there was a mention that this Court
2 had rejected the idea that there was no legitimate reason to
3 split the Gulf. Well, the legitimate reason -- again,
4 legitimate race-neutral reason that they gave that this Court
5 relied on was that it was important to do so to put the Black
6 Belt together, more together, and one way to do that was to
7 break into the Gulf and split the Gulf.
8 Today, they've abandoned that argument. Today, their only
9 justification for splitting the Gulf is not to unite the Black
10 Belt because the 2023 plan shows that it's possible to unite
11 the Black Belt even better than every one of the 11 plans the
12 plaintiffs showed you back in 2022.
13 The Black Belt can be united without breaking up the Gulf,
14 without splitting up the Wiregrass as their plans would do, as
15 well. And so for that reason, the legitimate reason they gave
16 you, the traditional districting principle they cited to you of
17 keeping together this community of interest in the Black Belt
18 has fallen out. And all that's left is race. And, again, 1509
19 Supreme Court's opinion, it is unlawful to force
20 proportionality at the expense of traditional districting
21 principles.
22 There was talk about a risk of some sort of cycle of the
23 plaintiffs coming forward with another map and the state coming
24 forward with another map. I think that's a total straw man.
25 The opinions from the Supreme Court are clear that if

1 there's time, the Court should give the Legislature an attempt
2 to try to remedy the violation. If there's not time, there's
3 no need to do so. We had one shot. We have taken that shot.
4 There's not going to be another plan between now and
5 October 1st.
6 But at the same time, what the Supreme Court has also made
7 clear even in cases like *Covington*, *Covington* was not decided
8 against the state of North Carolina merely because they didn't
9 like the new map or didn't completely change the lines
10 sufficiently. That failure to change the lines was proof of
11 another racial gerrymander, and that is important in
12 intentional discrimination claim. If race has been used as a
13 jury mechanism to move people around, you may need to use race
14 to unpack that. We are dealing with an effects claim here
15 though in Section 2. So that same rationale doesn't apply.
16 And in any event, there are many, many ways to satisfy
17 Section 2, but what we do know from *Allen vs. Milligan* is that
18 one way that you cannot satisfy Section 2 is by forcing
19 proportionality at the expense of traditional districting
20 principles.
21 That invites racial gerrymandering claims, which is not a
22 hypothetical, as Your Honors know. And you will be hearing a
23 racial gerrymandering claim preliminary injunction motion after
24 this hearing has concluded.
25 Singleton plaintiffs' lawyer was there in front of the

1 Legislature threatening racial gerrymandering claims. And so
2 the Legislature was put in a difficult position of trying to
3 navigate these dueling threats of liability of Section 2 on one
4 side and Equal Protection Clause on the other.
5 And as you could see in the last redistricting cycle when
6 the Legislature was trying to comply with Section 5 in its
7 state legislative maps, they used race too much. They were
8 found liable for racial gerrymandering claims, which the
9 Milligan put in front of the Court as proof that Alabama is
10 still discriminating, and that this Court relied on actually to
11 find through a bootstrapping mechanism. But the additional
12 risk for the State is Section 3, the bail in provision of the
13 Voting Rights Act, which says if you violate the 14th or 15th
14 Amendment, there is risk of getting bailed in.
15 So the Legislature has to consider all these things in
16 trying to chart a path between these dueling principles, and
17 they had *Allen vs. Milligan* to guide them, which again made
18 clear communities of interest, county lines, compactness, these
19 are legitimate principles for a state to pursue in a map.
20 Section 2 does not require them to be abandoned. And so that
21 is why we have a map that now more fully and fairly applies
22 those principles.
23 And plaintiffs had told the Supreme Court that Section 2
24 was not keyed solely to proportionality. Again, they focused
25 on traditional districting principles. But now proportionality

1 is all that you are hearing about. We are the only parties
2 here that are giving *Allen vs. Milligan* a serious reading.
3 They are the ones who are defying the Supreme Court's opinion
4 and demanding that the state adopt districts that violate
5 traditional districting principles.
6 They had it right the first time when they told the
7 Supreme Court what I have told you just a moment ago, the 1510
8 of that opinion. Section 2 never requires the state to adopt
9 districts that violate traditional districting principles.
10 Because the plaintiffs have not met their burden at *Gingles I*,
11 they have not shown that this map fails to remedy the likely
12 violation of the 2021 plan, and it should be the governing law
13 going forward.
14 Thank you.
15 JUDGE MARCUS: Thank you, counsel.
16 We will proceed, then, to addressing the motion in limine
17 the plaintiffs have filed.
18 Mr. Ross, who is going to argue that?
19 MR. ROSS: Mr. Rosborough is going to argue the motion
20 in limine.
21 JUDGE MARCUS: Just let me ask sort of a preliminary
22 question. Are we going to hear from both Milligan and Caster
23 on the motion in limine, or just from Milligan?
24 MS. KHANNA: No, Your Honor. I think Mr. Rosborough
25 can speak for all plaintiffs on this motion in limine.

1 Thank you.
2 JUDGE MARCUS: All right. Thank you.
3 MR. ROSBOROUGH: Good morning again, Your Honors.
4 I will just be brief here and answer any questions you
5 have because I agree with Mr. LaCour that the briefing probably
6 says most of what we need to say.
7 The plaintiffs filed this motion in limine because the
8 only purpose as offered here of the expert reports and the
9 purported community of interest witnesses are to relitigate the
10 *Gingles I* issue that is law of the case already for the
11 purposes of the preliminary injunction remedy.
12 As to the experts, both reports for Mr. Trende and
13 Mr. Bryan are simply comparisons between the plaintiffs'
14 illustrative plans and the state's plans.
15 Number one, as this Court has said, we are still in a
16 remedial posture based on the Court's findings on the --
17 JUDGE MARCUS: I think what I would like you to
18 address for me is: What is the nature of this remedial
19 proceeding? It seems to me that's one of the central questions
20 we have here today.
21 MR. ROSBOROUGH: Yes, Your Honor.
22 JUDGE MARCUS: As I hear the defendants' position,
23 it's a whole lot broader than how you see it.
24 They say, if I have it right, that you are obliged to
25 answer all of the *Gingles* factors and considerations here in

1 this remedial proceeding.
2 I hear you to say you have the burden of proof on only
3 one; that is to say whether CD-2 effectively creates a fair and
4 reasonable opportunity district.
5 Do I have that right, that distinction? Or is that
6 overdrawn?
7 MR. ROSBOROUGH: I think, Your Honor, it's actually
8 based on what the evidence is here. It's a distinction without
9 a difference. Because I think where the point of distinction
10 is, is the defendants' misunderstanding of the point of *Gingles*
11 *I*. *Gingles I* focuses on whether -- and I think you have got
12 the --
13 MR. ROSS: I can read it, Your Honor, if this is
14 helpful. In *LULAC vs. Perry* at 433, the Supreme Court says,
15 *Gingles I* refers to the compactness of the minority population,
16 not the compactness of the contested district. Compactness
17 does show a violation of equal protection, so a racial
18 gerrymandering claim concerns the shape of the boundaries of
19 district.
20 That differs from the Section 2 compactness inquiry which
21 concerns a minority group's compactness. And so I believe --
22 just to finish up on the thought and then turn back it to
23 Mr. Rosborough. The issue is are black voters geographically
24 compact. Can you draw a reasonably configured district around
25 them when looking at objective factors, not a beauty contest

1 between the map we drew and a map that we would potentially
2 draw.
3 JUDGE MARCUS: Thank you.
4 Let me ask my question of you this way if I can,
5 Mr. Rosborough: Is there something provisional about this map?
6 This SB-5? Or is it the law?
7 MR. ROSBOROUGH: Your Honors, I believe that that
8 depends on what the Court does here today. And I am not trying
9 to avoid the Court's question. I think where we are --
10 JUDGE MARCUS: You understand why I ask?
11 MR. ROSBOROUGH: I'm sorry?
12 JUDGE MARCUS: You do understand what I am asking?
13 MR. ROSBOROUGH: Yes, Your Honor. SB-5 is the new law
14 in Alabama.
15 But where we are today is an unfinished portion of the
16 preliminary injunction proceeding. We have only been given a
17 partial remedy, which was an injunction against the state's
18 prior plan, but this Court also ordered the adoption of a plan
19 that creates opportunities in the second district. And that --
20 and by prior precedent, the Court properly gave the state the
21 chance to do that in accordance with its own -- its own
22 principles.
23 This is what we're here about, though, Your Honor. Going
24 forward, whatever happens, if the defendants choose to take --
25 go to trial with this, you know, that, then, yes, it is a focus

1 on SB-5, and some of this evidence that they're talking about
2 here that they've put into play here may become relevant again
3 if we go in trial in this case.
4 But here we are dealing with an unfinished portion of the
5 remedy that this Court ordered. And so this has to be analyzed
6 within that context. Defendants deferred the opportunity to go
7 to trial until sometime after 2024. So this is about -- this
8 is about, you know, a full analysis of whether this remedies
9 the Voting Rights Act violation identified by the Court.
10 I think the plaintiffs' position is that all of the
11 evidence that we've put forward remains relevant and decisive.
12 The only thing that has changed about between 2021 and 2023 are
13 the lines of certain districts. And so basically it's not that
14 the other factors couldn't theoretically be relevant, but
15 they're just not relevant here. The only -- *Gingles III* is
16 really the only thing that is relevant here. Does -- based on
17 the new lines, does white bloc voting continue to dominate and
18 prevent black voters from electing preferred candidates in a
19 second district.
20 JUDGE MARCUS: Let me sharpen the question this way:
21 The Supreme Court said in *Gingles* vs. *Thornburg* that the
22 plaintiff must do the following in order to establish by a
23 preponderance of the evidence its burden that Section 2 is
24 violated. First, you have got to come up with the numerosity
25 requirement and create a reasonably configured map that

1 complies with all of these criteria, doesn't violate the
2 principle of one person one vote, and so on.
3 *Gingles II* and *III* really look to racial polarization.
4 And then there are these additional eight or nine factors.
5 What's at dispute in this hearing in this case? *Gingles I*
6 and/or *Gingles II* and/or *Gingles III* and/or the nine Senate
7 Factors as you see it?
8 MR. ROSBOROUGH: I am going to let Mr. Ross address
9 that.
10 JUDGE MARCUS: All right. Thank you.
11 MR. ROSS: The question was whether or not -- what's
12 at issue at the remedial phase?
13 JUDGE MARCUS: At this hearing as we sit here today,
14 do you have to do anything other than to show that SB-5 fails
15 to create a fair and reasonable opportunity district?
16 MR. ROSS: Your Honor, because what's at issue here as
17 Mr. Rosborough said a preliminary injunction the remedial
18 proceedings, the defendants don't dispute that the minority
19 community in Alabama remains geographically compact. They
20 don't dispute that what the Supreme Court has said is that you
21 look at objective factors, not the subjective factors that
22 Mr. LaCour wrote into the legislative record.
23 What you look at is compactness, you look at contiguity,
24 you look at political subdivisions, like cities and towns.
25 That is what the Supreme Court looked at in this opinion. That

1 is what Justice Kavanaugh and the chief justice wrote about.
2 It is objective criteria and not things like communities of
3 interest.
4 Communities of interest are important, and obviously we
5 argue that issue to the Supreme Court. But I think it's what's
6 it's really clear about when Mr. LaCour was arguing, was he was
7 talking about the intent of the Legislature, he was talking
8 about disparate treatment of communities of interest. Those
9 all go to the issue of intent. They don't go to the issue of
10 the discriminatory effects.
11 JUDGE MARCUS: I think there is no dispute about that.
12 What I am driving at with my question -- I may not have asked
13 it clearly enough -- is this: As you see it, is *Gingles I* at
14 issue in this proceeding at this time?
15 MR. ROSS: No, Your Honor, because nothing can change
16 the fact that African-Americans are -- as a community are
17 reasonably compact, and you can draw a reasonably configured
18 district around them looking at objective criteria.
19 JUDGE MARCUS: So the only issue really boils down to
20 the proofs on *Gingles II* and *III*, how racially polarized
21 Alabama may be.
22 MR. ROSS: Primarily, Your Honor, because the state
23 doesn't dispute any of the other factors. In fact, Your Honor,
24 just going to that point, the state doesn't dispute *Gingles II*
25 or *III*, either.

1 JUDGE MARCUS: No. They say *Gingles I* is at issue.
2 You say, no, it isn't. The only thing at issue is *II* and *III*?
3 Is that really what it boils down to?
4 MR. ROSS: That's what it boils down to, Your Honor.
5 They have a misunderstanding. They are attempting to argue a
6 racial gerrymandering claim at *Gingles I*. The Supreme Court
7 has said that the inquiry in *Gingles I* is different from a
8 racial gerrymandering inquiry. The inquiry is about the
9 geographic compactness of African-American voters. The only
10 thing that can substantially change where African-American
11 voters are and whether you can draw a reasonably compact
12 district throughout it, would be a new census, and we don't
13 have that evidence here. We have Alabama's new made-up
14 legislative findings that the chairs of the redistricting
15 committee didn't even know existed, that they did not take into
16 consideration when they drew the map.
17 And one other point I will make is that the Supreme Court
18 has been very clear that there are objective redistricting
19 criteria, and then there are state-created redistricting
20 criteria that can be used and manipulated in a number of ways,
21 and that this Court doesn't have to consider those factors --
22 JUDGE MARCUS: What falls into the category of
23 objective criteria?
24 MR. ROSS: What the Supreme Court said in *Shaw vs.*
25 *Reno* is compactness, contiguity, and -- excuse me -- political

1 subdivisions. And as the Supreme Court said in *Allen vs.*
2 *Milligan,* that includes towns, counties, things like that.
3 And on the -- our maps meet or beat the state on all of
4 those factors. That's what the Supreme Court held. That's
5 what this Court held. We don't need look at Mr. LaCour's
6 redistricting criteria.
7 JUDGE MARCUS: Are communities of interest an
8 objective factor or criteria embodied in *Gingles I*?
9 MR. ROSS: They are a factor that's important in
10 *Gingles I,* but it's important that communities of interest are
11 overlapping.
12 JUDGE MARCUS: No. No. No. I accept all of that. I
13 just want to use your terminology. In your view, is the
14 criterion of communities of interest an objective factor or
15 what you characterized as subjective?
16 MR. ROSS: I think --
17 JUDGE MARCUS: And does it make a difference?
18 MR. ROSS: I think the Supreme Court has talked about
19 it in ways that varies. Sometimes -- they have made clear that
20 it is -- it's part objective. It's part subjective. It's like
21 asking a question about people, what is your community? Our
22 clients who are here today have testified that their community
23 includes Mobile, includes the Black Belt, includes Montgomery,
24 and includes Dothan.
25 That is the way -- and plaintiffs' maps don't always

1 include all of those communities because they're not required
2 to. They're required to show a reasonably configured district,
3 and the remedy that my clients seek is one that brings that
4 community together and fixes the vote dilution.
5 This is a Section 2 case. It is not a racial
6 gerrymandering case. It is not about Alabama drew district
7 lines one way, and they could have drawn them a different way.
8 It is about that and its impact on African-American voters and
9 their ability to actually elect candidates of their choice.
10 JUDGE MARCUS: I understand your point, and I take
11 your point that drawing communities of interest are difficult.
12 They tend to overlap. They pull and push in different
13 directions. All I'm asking is whether that determination falls
14 into the category of objective criterion that you mentioned or
15 subjective. I wouldn't have asked --
16 MR. ROSS: Yes, Your Honor. I believe the Supreme
17 Court has talked about it in both ways.
18 It's talked about, you know, if you are going to draw a
19 district and you are going to consider things like communities
20 of interest, then you look at factors like the economy, the
21 history of the jurisdiction to determine whether or not that's
22 a community of interest.
23 I don't think that the issue, though, Your Honor, is, you
24 know, communities of interest -- in *Gingles I*, the community of
25 interest that's relevant is the African-American community.

1 Are you drawing a reasonably compact district around that
2 African-American community? Or are you drawing a district that
3 goes from, you know, from Mobile to Huntsville, like the
4 districts that the Supreme Court was concerned about in *Shaw*.
5 We're not talking about that district.
6 This Court and the Supreme Court has already said that our
7 districts are reasonably configured. When you look at all of
8 the factors, you look at the objective factors, you look at the
9 communities of interest factor, which has a subjective and an
10 objective quality to it, those factors are met. Our districts
11 are reasonably configured when you look at those things.
12 Again, it's not about the factors that Mr. LaCour uses in
13 his legislative findings. It's not about, you know, whether we
14 split the Wiregrass, which their plan splits, as well. It's
15 not about whether our plans sufficiently, you know, measure up
16 as compared to their plans in a beauty contest. That's not
17 what *Gingles I* is about, and Alabama is trying to make it into
18 a test that the Supreme Court has explicitly and repeatedly
19 said it is not.
20 JUDGE MARCUS: You moved in limine to strike from the
21 record as not relevant the tests -- there wasn't testimony.
22 There was a report from Thomas Bryan, and there was a written
23 report from Trende. Do you want to tell me why we should
24 strike that?
25 MR. ROSS: So, Your Honor, their reports are simply

1 not relevant. They are trying to relitigate whether our
2 *Gingles I* maps created reasonably configured districts. And
3 they are trying to do it by conducting a beauty contest between
4 the 2023 plan and our plan. But, again, *Gingles I* is not a
5 beauty contest. It is not about how their map compares to our
6 map on the some allegedly race-neutral criteria.
7 That is what Alabama argued in the Supreme Court. That is
8 what they lost on. They tried to go to the Supreme Court and
9 argue that there are these certain factors that if you look at
10 them just the way Alabama wants to look at them, they win. If
11 you look at them as compared to the community of interest that
12 they prefer, they win.
13 The Supreme Court said that that is not the test. The
14 Supreme Court said again as it has said for the last 50 years
15 that the issue is the geographic compactness of
16 African-American voters. And as I said the only thing
17 substantively that could change between 2022 and 2023 would be
18 a new census, and we have not had a new census.
19 We know that African-Americans are geographically compact.
20 We don't need Mr. Trende to talk about how our map compares to
21 their map. We don't need Mr. Bryan to testify about his view
22 of racial gerrymandering which isn't well founded. None of
23 that evidence is relevant to the question of black voters are
24 geographically compact because the Supreme Court and this Court
25 has already answered that question, and it is yes.

1 JUDGE MARCUS: Anything else you wanted to say, or
2 Mr. Rosborough, on your motion in limine?
3 MR. ROSBOROUGH: (Shook head.)
4 JUDGE MARCUS: Thank you.
5 MR. ROSS: Thank you, Your Honor.
6 JUDGE MARCUS: Mr. LaCour?
7 Mr. LaCour, to set the backdrop, what would be helpful at
8 least for me is for you to tell me in your own words how you
9 characterized this remedial proceeding. What is it supposed to
10 do?
11 MR. LACOUR: Your Honor, we characterize it like -- I
12 believe this Court had characterized what it would look like
13 when you entered the preliminary injunction order, which is a
14 chance for them to show anew that this new law violates federal
15 law.
16 Had we failed -- had the Legislature failed in the task of
17 enacting a new law and repealing the old law, then we would
18 have moved immediately to a remedial proceeding and the
19 continuation of the preliminary injunction proceeding. But the
20 old law that was preliminarily enjoined is no more. It is not
21 on the books.
22 And so then the question for this Court if it's going to
23 exercise judicial power is whether this new law also violates
24 federal law or not, which requires a showing.
25 Now, they have --

1 JUDGE MARCUS: Let me ask the question this way so it
2 will cut to the chase: Are we in the first inning of the first
3 game of these proceedings today?
4 MR. LACOUR: Your Honor, the way I would put it, I
5 think is consistent with what we said at the status conference
6 eight days after *Allen* was decided. There is, of course, a lot
7 of evidence that has already come in and --
8 JUDGE MARCUS: So I take it just on that point,
9 everyone is in agreement that the corpus of evidence presented
10 in round one is admissible in part of this record in round two.
11 I take it you agree with that?
12 MR. LACOUR: The evidence, yes.
13 JUDGE MARCUS: Talking about the evidence presented at
14 the seven-day hearing we held in January of 2022.
15 MR. LACOUR: Yes, Your Honor. There is no reason why
16 you would turn a blind eye to that evidence. And *Dillard* says
17 that some of it may very well be relevant, and we agree that
18 some of it is certainly relevant.
19 But *Dillard* also says you can't just transcribe the
20 findings from an old law onto a new law merely because they
21 bear some passing resemblance.
22 JUDGE MARCUS: I understand that. But I'm trying to
23 understand what that means in the context of this case.
24 MR. LACOUR: I think what --
25 JUDGE MARCUS: Are we in the first inning of the first

1 came of this proceeding as you see it? It's a simple question.
2 MR. LACOUR: Your Honor, I think we are -- I think
3 this is essentially a preliminary injunction motion being filed
4 by two sets of plaintiffs to challenge the 2023 law with a lot
5 of evidence they already have admitted into the record from the
6 earlier proceedings, and then the new evidence that they've
7 come forward with, as well as the new evidence that we have
8 come forward with. And then it basically boils down to how do
9 you read reasonably configured and how do you read *Allen vs.*
10 *Milligan*.
11 JUDGE MARCUS: Is that another way of saying, yes, we
12 are in the first inning of the first game?
13 MR. LACOUR: If -- if that means we're in the first
14 inning --
15 JUDGE MARCUS: I want you to tell me. I just want to
16 understand what the position of the state of Alabama is. Are
17 we at square one, or are we six pieces down the road?
18 MR. LACOUR: So I -- and perhaps this will help me
19 answer the question. This is Doc 172 from the Milligan docket.
20 This is the status conference that was held on, I believe,
21 June 16th. And I think what Your Honor summed up near the end
22 of that hearing, Judge Marcus, you said, quote, should there be
23 a new map, and should there be a challenge to the new map, at
24 which time we will afford the parties, of course, every
25 opportunity to present whatever data, evidence, witnesses you

1 may deem appropriate going to any challenge that may be
2 launched as to a new map that the Legislature will draw.
3 But then turning to the next page, 53, we consider what
4 would happen if the Legislature failed in that task, and we
5 were just continuing into a purely remedial proceeding --
6 JUDGE MARCUS: No. I understand -- Mr. LaCour, bear
7 with me.
8 I understand that we don't just have ruling one, HB-1
9 likely violated Section 2, nothing intervening, and then we
10 went right to drawing the map. I understand that the state
11 adopted, after you asked us to hold our proceedings for
12 30 days, which we did, a new map.
13 Nevertheless, I still ask: Are we at square one for all
14 purposes now with regard to SB-5? That is to say: Do they
15 have to relitigate and prove by a preponderance in your view
16 the first *Gingles* condition, the second *Gingles* condition, the
17 third *Gingles* condition, and each of the Senate Factors? In
18 your view, do they have to prove each of those things to
19 prevail in this hearing at this time?
20 MR. LACOUR: Yes. I think that's consistent with the
21 power that an Article III judge exercises.
22 JUDGE MARCUS: Let's just follow along to see if we
23 can at least boil down what's in dispute.
24 I take it -- the Supreme Court summarized *Gingles I*, *II*,
25 and *III*, and the Senate Factors.

1 Is there any dispute that they haven't sustained their
2 burden as to *Gingles II* and *III*?
3 MR. LACOUR: Your Honor, we have not presented any
4 evidence or argument to *Gingles II* or *III*.
5 JUDGE MARCUS: So that is not -- I just want to use my
6 language, if you would.
7 MR. LACOUR: Yes.
8 JUDGE MARCUS: Do you concede that they have met their
9 burden on *Gingles II* and *III*?
10 MR. LACOUR: If Your Honors think that the evidence
11 that was put forward --
12 JUDGE MARCUS: I am not asking what we think. I am
13 trying to get you to help me. I want to know what's in dispute
14 before we actually get started with the presentation of
15 evidence.
16 MR. LACOUR: Yes.
17 JUDGE MARCUS: Are *Gingles II* and *III* in dispute, or
18 do you accept and concede they have met their burden on *II* and
19 *III*?
20 MR. LACOUR: Your Honor, for purposes solely of this
21 proceeding, we will concede *II* and *III*.
22 JUDGE MARCUS: Okay. You have reserved your right for
23 a full permanent injunction hearing. You suggested that you
24 would follow after the election in 2024. So I'm just asking
25 about this proceeding at this time for these purposes.

1 Have they met their burden on *II* and *III*?
2 MR. LACOUR: We will have no problem stipulating for
3 these proceedings solely that they have met *II* and *III*. We are
4 not putting that at issue.
5 JUDGE MARCUS: Okay. Then we have the Senate Factors.
6 There are eight or nine of them, depending on how you read
7 them.
8 Is there any dispute, based on what we've seen in round
9 one and what's been presented so far in round two on paper,
10 that that's -- none of those factors are in dispute either?
11 MR. LACOUR: We have not put forward new evidence or
12 arguments as to that Senate Factor.
13 JUDGE MARCUS: No dispute that they have met their
14 burden on the eight or nine Senate Factors?
15 MR. LACOUR: For the purposes of this proceeding --
16 JUDGE MARCUS: Just for the purposes of this hearing,
17 that's all I'm talking about.
18 MR. LACOUR: Yes.
19 JUDGE MARCUS: So in your view, the only question is
20 *Gingles I*?
21 MR. LACOUR: *Gingles I* read in light of the whole
22 protection clause, yes. I think there are serious
23 constitutional avoidance questions that we have raised that
24 would suggest, as well, that our reading of *Allen vs. Milligan*
25 is the only constitutionally permissible reading --

1 JUDGE MARCUS: Help me with *Gingles I*, which is what
2 the state says is in dispute.
3 The Supreme Court of the United States wrote the
4 following, and I quote it, in *Allen vs. Milligan*: With respect
5 to the first *Gingles* precondition, the district court correctly
6 found that black voters could constitute a majority in a second
7 district that, quote, was reasonably configured, end quote.
8 The plaintiffs educed 11 illustrative maps that is example
9 districting maps that Alabama could enact, each of which
10 contained two majority-black districts that comported with
11 traditional districting criteria.
12 Then they went through compactness and all of that. And
13 then they say, we agree with the district court. Therefore,
14 that the plaintiffs' illustrative maps strongly suggest that
15 black voters in Alabama could constitute a majority in a second
16 reasonably configured district. That determination was made by
17 us in round one, affirmed by the Supreme Court after round one.
18 Is that in dispute? Can you challenge now in these
19 proceedings the determination that black voters could
20 constitute a majority in a second district that was reasonably
21 configured?
22 MR. LACOUR: Your Honor, it's our position that in the
23 context of the challenge to the 2021 plan, that issue is
24 settled. We are not trying to relitigate liability under the
25 2021 plan. There's no point in doing that. That law has been

1 repealed.
2 We are here before you on the 2023 plan. And it is our
3 reading of *Allen* that reasonably configured is not determined
4 based on whatever a hired expert map drawer comes in and says,
5 like, this is reasonable enough. It has to be tethered -- as
6 Mr. Ross said in his brief, it has to be tethered to objective
7 factors to a standard or rule that a Legislature can look at ex
8 ante, that the Court can look at, as well.
9 JUDGE MARCUS: The reason I'm asking you -- the
10 question is just to find out what is it we are going to hear
11 from the parties today so we can frame the scope of these
12 proceedings. And I ask it more particularly in the context of
13 the motion in limine, because as I understand their motion in
14 limine, they say, to take one example, Bryan's testimony -- or
15 Bryan really wasn't testimony, it was a report -- should be
16 barred as not being relevant because he cannot in this
17 proceeding challenge the finding we made and the Supreme Court
18 affirmed, which was that the 11 illustrative maps were
19 reasonably configured.
20 Can he challenge that? Because I read him to be trying
21 to. He says, if I got it right, what's wrong with the 11
22 illustrative maps is that race predominated, and here's a new
23 study I did, and it yields that conclusion.
24 Is he free in this proceeding to attack the finding the
25 Court made and the Supreme Court affirmed about 11 illustrative

1 maps that wouldn't have been reasonably configured if race had
2 predominated?
3 MR. LACOUR: Your Honor, I think what he is doing is
4 explaining why you would have a race predominate outcome if the
5 2023 plan is being replaced by one of their 11 illustrative
6 plans or that the plan that they submitted to the Legislature
7 in 2023. I mean, as he shows, the splits in those counties --
8 and they have three splits in District 2 alone -- each one of
9 them is on racial lines. They get about 30 percent of the
10 population of Houston County to put into District 2. But in
11 the process, they pick up about 60 percent of the black
12 population of Houston County. And that would suggest that the
13 reason why they're violating the principle of not splitting
14 more counties than you need to is for racial reasons and not
15 for some other legitimate reason.
16 JUDGE MARCUS: Of course, the 11 maps were drawn at an
17 earlier time for a different purpose with HB-1 in mind rather
18 than SB-5.
19 MR. LACOUR: Correct. The intensely local appraisal
20 was of that electoral mechanism in the Supreme Court's words.
21 And by the same token, the intensely local appraisal today is
22 on the 2023 plan, not on the 2021 plan, so...
23 JUDGE MARCUS: And help me if I have got it wrong.
24 I'm trying to understand.
25 Bryan's testimony is relevant, admissible, and material

1 because it shows that the 11 illustrative maps really were
2 tainted with race predominance, notwithstanding what we said at
3 the first round and what the Supreme Court said. Does that
4 overstate it or misstate it?
5 MR. LACOUR: Well, there are some things that have
6 changed. And I will point you to footnote 5 of the *Allen* --
7 JUDGE MARCUS: Help me with the broad brush first, and
8 then we will get into the details.
9 Broadly speaking, is it your view that Bryan's testimony
10 is relevant and material because it shows those 11 maps are no
11 good, those maps were tainted with an analysis that yielded a
12 race predominate conclusion?
13 MR. LACOUR: I don't think you get into predominance
14 for us to prevail. Our primarily argument --
15 JUDGE MARCUS: No. I am just trying to find out why
16 Bryan's testimony is relevant. They say it's irrelevant.
17 MR. LACOUR: I do think it is --
18 JUDGE MARCUS: Because they say it's already been
19 decided that there are 11 reasonably configured maps. Bryan
20 says, wait a minute. Those maps are defective because, and
21 then he explains his analysis based on race.
22 MR. LACOUR: Three things: First, is there's a new
23 map. I don't think it's been proffered as a *Gingles I* map by
24 the plaintiffs, but there's the 2023 VRA remedial map in the
25 event they put it forward.

1 I think it's important for the Court to consider why it
2 has the shape that it has. And Tom Bryan's report shines light
3 on that, I think very important light on it.
4 Second, as I noted, our primary argument here is a
5 statutory in *Gingles I*. Reasonably configured means in light
6 of the principles in the challenged plan, not principles in the
7 ether.
8 But third, under cases like United States -- not --
9 University of *Texas vs. Camenisch*, the Supreme Court said that
10 preliminary injunction findings are not binding even when going
11 on to a trial in the same case. It necessarily follows then
12 that this if there is a whole new law and there's new evidence,
13 that should come in, as well.
14 So there are three different reasons why his report could
15 be relevant.
16 JUDGE MARCUS: What about Trende? Help me with him.
17 They moved to strike Trende, as well.
18 MR. LACOUR: Yeah. I don't understand the basis for
19 that, other than their view that reasonably configured means,
20 as Mr. Ross was saying, reasonably configured for at least the
21 next ten years.
22 We strongly dispute that. We don't think that provides
23 much of an objective standard. We didn't don't think that's in
24 any way consistent with *Allen vs. Milligan.*
25 Because as you can see from Trendy's report, and just from

1 looking at the maps if they are right about that, then you will
2 be forcing the state to scrap a map that performs better on
3 compactness, on county splits, on Black Belt, on the Gulf, and
4 on the Wiregrass all in favor of another map that all it has
5 going for it is race. That is unlawful under *Allen vs.*
6 *Milligan*.
7 JUDGE MOORER: If the State's map, the 2023 map is
8 defective, then even if the plaintiffs' illustrative maps don't
9 cure it, then does it fall to us to then put together a remedy
10 that does comport with the --
11 MR. LACOUR: Correct, Your Honor, but if they cannot
12 satisfy their burden under *Gingles I*, they cannot show that the
13 2023 plan is defective.
14 And to return to this notion of objective factors versus
15 communities of interest that you were hearing about a moment
16 ago, on case after case after case the Court has mentioned
17 communities of interest among those traditional districting
18 principles that must be accounted for in a *Gingles I* plan,
19 but -- and in the Milligan plaintiffs' brief, it's also listed
20 there which what they have told the Supreme Court.
21 But even if you were just looking to the so-called
22 objective factors that Mr. Ross mentioned a moment ago of
23 compactness and county lines, Mr. Trendy's report shows that
24 every one of those 11 plans, if you toss in the 12th plan, it's
25 true, too, every one of them is going to be less compact or is

1 going to split more counties or both. So just on those
2 objective factors, those plans are not suitable remedies for
3 the 2023 plan.
4 Because again, you are going to have two principles coming
5 into conflict: Keeping counties together or race, they are
6 going to conflict, and race is going to be given preference,
7 which is affirmative action in redistricting. It's not mere
8 race consciousness, it is race predominance, and it's unlawful.
9 JUDGE MOORER: Mr. LaCour, isn't what you are
10 essentially arguing is whatever the state does, we can just say
11 they shot a bullet, and we have now drawn a bull's eye where
12 that bullet hit, and so it's good? It's just some veneer to
13 justify whatever the state wanted to do that was short of the
14 VRA.
15 MR. LACOUR: No, Your Honor. I think that misreads
16 VRA precedent, which makes clear that the state does have a
17 legitimate interest in promoting these three principles of
18 compactness, counties, and communities of interest.
19 And so the Court has given a green light to the state to
20 say that this is something you're allowed to do. If the state
21 had instead picked some other interest that was not a
22 traditional interest and pursued that instead, like they did in
23 the 2021 plan in core retention, then that's not going to cut
24 it. But the Supreme Court's at least given us that much
25 guidance when it comes to counties' compactness and communities

1 of interest.
2 And if you have a map like the 2023 map that applies those
3 principles fairly, that doesn't have sort of the dissimilar
4 treatment of similar communities of interest like the 2021 plan
5 had, then you have a plan that is equally open. You have a
6 plan that is not producing discriminatory results on account of
7 the race. Even if it's true that requiring one person one vote
8 in contiguity and county wholeness and compactness does not
9 result in proportional representation, that doesn't mean
10 there's a Section 2 violation.
11 Again, on account of race is still right there in the
12 text, as is the proviso that says nothing in this law
13 guarantees proportional representation. And so the Court
14 explained 1508, 1509, and 1510 of the opinion in case after
15 case, they have looked at traditional principles to turn back
16 these attempts to force proportionality.
17 JUDGE MOORER: Isn't the idea that people can elect a
18 candidate of choice just as important to achieve as not
19 granting people's proportionate representation just ab initio?
20 In other words, I think the law is clear that VRA doesn't
21 require proportional representation, but isn't it equally clear
22 that an equally compelling objective is to give groups of
23 voters the opportunity to select a candidate of choice?
24 MR. LACOUR: Not if race is predominating over
25 traditional principles. That is a racial gerrymander like the

1 racial gerrymandering claim we were promised we would face if
2 we adopted one of the plaintiffs' plans. And that is under the
3 Supreme Court's opinion at 1509 unlawful.
4 JUDGE MANASCO: Mr. LaCour, what is the state's
5 position as to the motion in limine regarding the impact of our
6 finding in connection with the preliminary injunction that the
7 appropriate remedy would be an additional opportunity district?
8 MR. LACOUR: Your Honor, I think that that statement
9 in the order -- again, the bottom line of the order was
10 Secretary of State do not use the 2021 plan, and he is not
11 going to use the 2021 plan again.
12 But I think that statement has to be read particularly in
13 light of *Allen vs. Milligan* in the context of the 2021 plan and
14 the way that it applied its principles, and the Court concluded
15 that it was possible to find another map out there that was on
16 par with the state on compactness, county lines, and
17 communities of interest that created a second majority-minority
18 district.
19 So if the Legislature went back and said, we still want to
20 draw sprawling districts and we still want to split up
21 communities of interest, then, yes, they would likely have had
22 a different map that resulted from that that would have two
23 majority-black districts. But the state was not bound by the
24 2021 Legislature's application of principles there. They
25 weren't required to stick with core retention and give the

1 Black Belt or communities of interest more generally a back
2 seat or give compactness a back seat. And so now we have a new
3 context as *Dillard* said. There is a new context here. It is
4 the 2023 plan. So...
5 JUDGE MANASCO: So does our statement that the
6 appropriate remedy for the violation that we found or likely
7 violation that we found would be an additional opportunity
8 district have any relevance to what we're doing now?
9 MR. LACOUR: I don't think so, Your Honor.
10 JUDGE MANASCO: So the Legislature -- it is the
11 state's position that the Legislature could comply with our
12 previous findings and conclusions -- I understand the face of
13 the order did not order the Legislature to do anything -- but
14 their findings and conclusions in it that the Supreme Court
15 affirmed that the Legislature could enact a new map that was
16 consistent with those findings and conclusions without adding a
17 second opportunity district?
18 MR. LACOUR: Yes, Your Honor.
19 JUDGE MANASCO: All right. So is it, with respect --
20 I'm taking my question back for the motion in limine, in
21 particular.
22 Is it the state's position, with respect to the motion in
23 limine, that we should not hear any evidence about whether
24 there is or is not now a second opportunity district?
25 MR. LACOUR: We have not moved in limine to try to

1 exclude their evidence about whether there is or is not. So I
2 don't think that issue is before the Court. I think they have
3 the right, as Judge Marcus noted at the hearing, to put forth
4 any evidence that they want that could go to the challenge to
5 the map, evidence as to whether or not District 2 is going to,
6 in their words, perform could be relevant to *Gingles II* and
7 *Gingles III*. So we have not tried to keep that out.
8 JUDGE MANASCO: But, so to put a finer point on it,
9 you are not trying to keep it out, but you are saying we should
10 assign it no weight?
11 MR. LACOUR: I think you can assign it weight to say
12 that they've satisfied *Gingles II* and *III*, but it's not going
13 to do them much good under a proper reading of *Gingles I*.
14 JUDGE MANASCO: Thank you.
15 JUDGE MARCUS: Let me just follow up on my colleague's
16 question. And help me with this.
17 I think I hear you to be saying -- and I do want you to
18 correct me if I misunderstand -- that you can draw a map that
19 maintains three communities of interest and splits six counties
20 or less, but that very likely fails to create a fair and
21 reasonable opportunity district and still prevail because they
22 would not have met their burden of proof?
23 MR. LACOUR: Yes, Your Honor. Section 2 is not tied
24 to proportional representation. It is tied to --
25 JUDGE MARCUS: I am not asking about -- I think

1 everyone agrees that you can't create a map for proportional
2 representative purposes. The statute says that unambiguously.
3 The case law has said it unambiguously, and we recognize it
4 unambiguously.
5 I'm just asking: Could they prevail here if all they
6 failed -- all they succeed in showing is that CD-2 does not
7 likely create a fair and reasonable opportunity district.
8 MR. LACOUR: That's correct, Your Honor. All three
9 preconditions must be met to make sure that Section 2 is not
10 turned into a tool for forcing proportionality.
11 JUDGE MARCUS: Okay. It's a condition precedent. It
12 doesn't matter about opportunity at all.
13 MR. LACOUR: Correct. If all their maps --
14 JUDGE MARCUS: If they flunk out on A, B, and C, it
15 doesn't matter they prevail on D because you have already
16 conceded *Gingles II* and *III* here?
17 MR. LACOUR: Correct.
18 JUDGE MARCUS: Help me understand that just a little
19 bit further.
20 When I looked at the guidelines adopted by the Alabama
21 Legislature in '21, which were considered as part of the
22 backdrop that the reapportionment committees were going to
23 consider in round two, it had a hierarchy of the order of
24 priorities, including the Constitution, one person one vote,
25 the Voting Rights Act, and so on and so forth, compactness,

1 contiguity.
2 Do communities of interest basically dominate the
3 analysis? Can that, if you will, trump everything else?
4 MR. LACOUR: Your Honor, a couple of things to clear
5 up, and then I will get to your question.
6 First, the guidelines were adopted by the reapportionment
7 committee, not the entire Legislature.
8 JUDGE MARCUS: Yes.
9 MR. LACOUR: It didn't have all the members voting on
10 that. And then so -- and then it's our position that *Gingles*
11 *I*, that's what's relevant is not again how someone has
12 described the map, but what the map actually does.
13 If it was enough for us to say this is what our guidelines
14 require and then -- and your map doesn't follow your guidelines
15 as we understand them, then the plaintiffs would have lost in
16 2021.
17 But they were able to actually look at what the map did.
18 And so when the map said maintain communities of interest but
19 split up the Black Belt, that was powerful evidence they had
20 that they could satisfy *Gingles I*.
21 But, again, what was really relevant in 2021 was how the
22 principles were embedded or embodied in the '21 plan. The same
23 thing is true for 2023, is you have to look at the map itself,
24 and one does. If it says don't split any more than six
25 counties but splits nine, then it doesn't matter what they said

1 before. It matters what they did.
2 And what they did here was prioritize the Black Belt while
3 still maintaining the Gulf and the Wiregrass to the extent the
4 Wiregrass could be maintained without sacrificing the Black
5 Belt, and then create far more compact districts across the
6 state, as well.
7 JUDGE MARCUS: Any other questions?
8 JUDGE MANASCO: Not on the motion in limine.
9 JUDGE MARCUS: Thank you, counsel. I'm sorry. I
10 didn't mean to cut you off.
11 MR. LACOUR: So I wanted to make sure --
12 JUDGE MARCUS: I'm talking about just the motion in
13 limine that they have made.
14 MR. LACOUR: Yes. I suppose this might be relevant to
15 the motion in limine. Just a couple of points the plaintiffs
16 had made while up here.
17 One, for about the beauty contest, that beauty contest
18 language both in this Court's opinion and the Supreme Court's
19 opinion was in the context of the communities of interest
20 discussion where you had two maps each of which gave priority
21 to one community of interest and sacrificed one community of
22 interest. So they were both on par when it came to communities
23 of interest. And that's the beauty contest.
24 But if -- so it's not enough to say we like splitting
25 these six counties better than the six counties you would

1 split. If they can match the state, then we are not going to
2 have the beauty contest. But if they come forward with a map
3 that splits eight or nine counties, or seven for that matter,
4 they don't get into the beauty contest. That sort of language
5 doesn't even apply.
6 Otherwise, you are going to be in a situation where the
7 state is going to be trading out a map that better respects
8 traditional principles in service of a racial gerrymander.
9 Finally, Mr. Ross said that race itself was a community of
10 interest, I believe, or that black people are the relevant
11 community. *LULAC* does not endorse that proposal. *LULAC* speaks
12 of nonracial communities of interest.
13 If communities of interest were defined purely by race,
14 then there would never be a successful racial gerrymandering
15 claim, because every Legislature could say, oh, we're just
16 trying to put the black community together, or we were just
17 trying to put the white community together, and that's a
18 traditional districting principle that we find important. And,
19 of course, that's absurd proposition. The Court has spoken.
20 In cases like *LULAC* of nonracial communities of interest,
21 that was the understanding this Court relied on when plaintiffs
22 had said that their maps went across the state to put the Black
23 Belt together.
24 If you look at footnote 5 of the Supreme Court's plurality
25 opinion, the Court quoting Bill Cooper said that the

1 understanding of the Black Belt was not as a demographic
2 community, but as a historical community with historical
3 boundaries that go across the center of the state and that are
4 predominantly rural and that include Montgomery.
5 Of course, neither Mobile nor Dothan are in the center of
6 the state. Dothan is not a rural place. It is a not a huge
7 city, but for the Wiregrass, it's pretty big. And Mobile, of
8 course, is not rural, either.
9 So they can't be allowed to transform the concept of
10 nonracial communities of interest into race being the sole
11 determinant for a community of interest.
12 If there are no further questions...
13 JUDGE MARCUS: Thank you very much.
14 Mr. Ross, any reply?
15 MR. ROSS: Yes, Your Honor. And I believe Ms. Khanna
16 also wants the opportunity to reply.
17 JUDGE MARCUS: Let me sort of ask you this question,
18 and, Ms. Khanna, before you begin.
19 Mr. LaCour says if you can't get over the requirements of
20 *Gingles I*, particularly these redistricting criteria of which
21 he propounds three communities of interest, compactness, and
22 county splits, you cannot meet your burden under Section 2,
23 even if you otherwise can show that SB-5 does not create a
24 reasonable opportunity. Did you want to reply to that?
25 MR. ROSS: I did, Your Honor. I first wanted to reply

1 to Mr. LaCour misquoting me. What I was saying is that *Gingles*
2 *I*, as the Supreme Court has said, is about the reasonable
3 compactness of the minority community. I wasn't saying that
4 race as of itself was a consideration for the only
5 consideration for communities of interest.
6 I was saying that as the Supreme Court said, as the
7 Supreme Court says in Milligan, says in *LULAC*, and mentions
8 again in a footnote in 7 of *LULAC* -- or, excuse me -- of the
9 Milligan opinion. The whole point of the *Gingles* is whether or
10 not you can draw a majority-minority district and you can draw
11 one that's reasonably configured.
12 So it is not that I was saying race is the only issue at
13 communities of interest. My point is that the *Gingles I*
14 inquiry is about the geographic compactness of the
15 African-American community in this case.
16 To answer your question more directly, Your Honor, the --
17 what Mr. LaCour is trying to do is exactly trying to turn this
18 into the beauty contest that the Supreme Court and this Court
19 said it is not.
20 If you look at page 1504 and 1505 of the Supreme Court's
21 opinion, the Supreme Court never mentions Alabama's
22 redistricting criteria as what they're measuring our plan
23 against their plan. The only time the Supreme Court, to my
24 knowledge, quotes the state's redistricting criteria is when
25 it's quoting what a community of interest is as defined by

1 Alabama.
2 So what the Court actually looks to when it's talking
3 about traditional redistricting criteria is compactness. It
4 looks to whether or not our maps had tentacles, appendages,
5 bizarre shapes. It looks at whether our maps were equal
6 populations, were again contiguous, or whether they respected
7 existing political subdivisions; that is, counties, cities, and
8 towns. And what the Court found is that it did.
9 It did talk about sort of how our map compared to the
10 state's map. But the point was that some of our illustrative
11 plans only split six counties. Some -- which is the minimum
12 that Mr. LaCour's rules, you know, would require, and that the
13 one person one vote itself requires.
14 We also split -- showed that the -- our maps were
15 contiguous. We don't grab populations over here and bring them
16 over there. All of those issues have been resolved.
17 Alabama concedes *Gingles II* and *III,* Senate Factors 1
18 through 9. The only issue that they're trying to relitigate is
19 this racial gerrymandering claim that is not at issue in the
20 *Gingles I* consideration.
21 JUDGE MARCUS: Well, I think they say they're doing
22 more than that. They say they drew three communities of
23 interest that they say properly reflect their judgment about
24 how these districts should be drawn.
25 Didn't you put in evidence on that issue yourself?

1 MR. ROSS: We did put in evidence that showed that the
2 African-American community was reasonably compact, consistent
3 with *Gingles I*, and some of that evidence included the fact
4 that there were communities of interest that were overlapping
5 between the Black Belt -- obviously, Montgomery is in the Black
6 Belt -- between Mobile and Baldwin County that we weren't
7 trying to connect disparate communities of interest.
8 And so our evidence at trial last year was that there is a
9 community of interest that exists between Mobile and the Black
10 Belt that that community of interest is being respected.
11 Alabama's map from our perspective does not respect that
12 community of interest.
13 Mr. LaCour continues to bring up the issue of our remedial
14 map. I do want to make one point about that, which is relevant
15 to our motion in limine.
16 JUDGE MARCUS: Before you did --
17 MR. ROSS: Yes, Your Honor.
18 JUDGE MARCUS: -- the point I was trying to get at
19 is --
20 MR. ROSS: Yes.
21 JUDGE MARCUS: -- when you filed your objections to
22 SB-5, you saw fit to put into the record or attempt to put into
23 the record an expert report from Dr. Bagley. And among other
24 things, Dr. Bagley, who you had presented on round one, said in
25 an expert report, I don't really agree with the way those

1 communities of interest have been defined or drawn in SB-5. I
2 quarrel with the Wiregrass. I think maybe they're not exactly
3 right on the Gulf Coast, et cetera.
4 So having put that in, isn't it fair game for them to
5 address why these are reasonable communities of interest?
6 MR. ROSS: Your Honor, as I said at the opening, we
7 don't intend to put -- we don't think that that evidence is
8 necessary or relevant to these remedial proceedings. The only
9 reason why we presented that evidence is because we saw
10 Mr. LaCour's legislative findings in SB-5.
11 And so to the extent that Court did want to consider those
12 issues, we wanted to be prepared to address them. But to be
13 very clear, we do not think that Dr. Bagley's report is
14 relevant unless the Court wants to go down the path that
15 Mr. LaCour going.
16 This is not a beauty contest between our communities of
17 interest and their communities of interest. It is about
18 whether or not the minority community is reasonably compact and
19 can be placed in a reasonably configured district.
20 The Supreme Court has answered that question. This Court
21 has answered that question. We don't need to go down that path
22 again.
23 JUDGE MARCUS: Thank you very much.
24 MR. ROSS: Thank you, Your Honor.
25 JUDGE MARCUS: We are going to take a ten-minute

1 break. We want to give everyone a chance, and our court
2 reporter.
3 One comment I wanted to make though, for you.
4 MR. ROSS: Your Honor, if I may make one more point.
5 JUDGE MARCUS: Absolutely. You may indeed.
6 MR. ROSS: And one other -- Ms. Khanna would like the
7 opportunity to address the Court.
8 JUDGE MARCUS: Correct. Thank you.
9 MR. ROSS: And so, Your Honor, Mr. LaCour keeps saying
10 that if race predominates in a plan, any plan, that it cannot
11 survive under the Constitution. That's an incorrect reading of
12 the law.
13 We don't think and the Supreme Court didn't think that
14 race predominated in any of our illustrative districts. But as
15 Mr. LaCour knows, because Alabama litigated a racial
16 gerrymandering case in 2017, if race predominated and the
17 reason why was to comply with the Voting Rights Act, that does
18 not violate the Constitution.
19 The Supreme Court reaffirmed that both in *Milligan* at 1516
20 to 1517, where the Court said that you can use race to remedy a
21 violation of Section 2. It said it in *Shaw* 2 at 909 to 910.
22 And it said it in the Harvard case that Mr. LaCour wants to
23 reference, which is at 221 -- excuse me -- 2162. Thank you,
24 Your Honor.
25 JUDGE MARCUS: Thank you.

1 Ms. Khanna?
2 MS. KHANNA: Thank you, Your Honor. I just wanted to
3 make a few points regarding the presentations that have been
4 discussed. But if the Court would like to take a break first,
5 I don't want to keep the court reporter or anybody past the
6 point of --
7 JUDGE MARCUS: I think it would be wiser if we did
8 that. So we will take a ten-minute break, and then we will
9 come back and proceed, Ms. Khanna.
10 MS. KHANNA: Thank you, Your Honor.
11 (Recess.)
12 JUDGE MARCUS: When we broke, we were about to hear
13 from Ms. Khanna.
14 You may proceed.
15 MS. KHANNA: Thank you, Your Honor. And I will keep
16 my notes brief. I just wanted to respond to a few points that
17 were discussed with Mr. LaCour on the various issues.
18 The *Gingles I* standard, which Mr. LaCour says is the only
19 thing in dispute today, the *Gingles I* standard is an
20 evidentiary standard. It is for plaintiffs to come to court to
21 prove by preponderance of the evidence the demographic reality
22 of the state of Alabama. We have to show that the black
23 population in Alabama is large enough, it's numerous enough,
24 and it's condensed and compact enough to create an additional
25 majority-black district.

1 Neither the size of the black population nor its location
2 throughout the state is a moving target. That has already been
3 established.
4 What plaintiffs' illustrative plans have shown is just
5 that. It's demonstrated the demographics based on census data,
6 location, and a whole bunch of traditional districting
7 criteria. Neither the size of the black population has
8 changed, neither the location throughout the state has changed.
9 And nor have plaintiffs' illustrative maps changed. Those same
10 illustrative maps that this Court and the Supreme Court said
11 proved what we had to prove, which was the size and location of
12 the black population in Alabama.
13 Nothing about the 2023 map, nothing about the evidence
14 that the defendants can now present to this Court can go back
15 in time and inject race improperly into maps that were drawn by
16 plaintiffs' experts two years ago.
17 Now, the inquiry into what -- what is *Gingles I* actually
18 getting at, if we take -- if you were to start from scratch
19 even, understanding that the record that we've already
20 established is still before the Court, this Court need only
21 look at the record that -- the evidence that is already in the
22 record to see that nothing has undermined plaintiffs' *Gingles I*
23 showing, nothing has abandoned this Court's *Gingles I* finding
24 or the Supreme Court's *Gingles I* affirmance.
25 *Gingles* -- the plaintiffs' illustrative maps this Court

1 found and the Supreme Court found comported with traditional
2 districting criteria. Nothing about the tradition of Alabama's
3 redistricting criteria has changed. If anything, it is Alabama
4 that has broken with its own tradition in enacting this 2023
5 plan in creating these brand new findings out of nowhere,
6 unbeknownst to the actual committee chairs who were in charge
7 of the process.
8 That has nothing to do with whether or not our maps that
9 we brought to court were comporting with the state's tradition.
10 This Court -- the United States Supreme Court in *LULAC*
11 said that there is no precise threshold for determining
12 geographic compactness. There is no precise rule. It can't
13 say every time you fall below this line or that line, it is or
14 is not compact. Yet Mr. LaCour has come to this Court and
15 basically said that's not true. It turns out six counties is
16 the precise rule, or the Mobile/Baldwin community is the
17 precise rule, or just counting communities is the precise rule.
18 If that had been the precise rule, the Supreme Court might
19 have told us that. That is not the rule.
20 The reason that courts look at the enacted map, previous
21 enacted maps, other redistricting maps is to figure out what
22 does Alabama's tradition generally follow. And certainly,
23 plaintiffs' illustrative maps follow Alabama's tradition of
24 reasonably compact district -- really compact district.
25 I just want to take one moment and address the *Dillard*

1 case that Mr. LaCour has placed a lot of emphasis on. The
2 *Dillard* case was a case in which the plaintiffs challenged an
3 at-large voting mechanism as a violation of Section 2. They
4 won on liability.
5 On remedy, the defendant came forward, defendant
6 jurisdiction came forward, and with a new election plan, a
7 brand new election plan that did include districted positions
8 but also included an at-large elected chair, the Court in
9 *Dillard*, the Eleventh Circuit in *Dillard* said that the district
10 court was correct to incorporate the entire liability record
11 into its findings upon the remedy. That had to be informed by
12 the case which had already happened.
13 But what the district court could not do is assume that
14 once you have an at-large election, all at-large elections are
15 per se unlawful. The Supreme Court has been clear that there's
16 no such rule. So you have to look at the actual election
17 system.
18 And what did the *Dillard* court look at in looking at the
19 new election system on remedy? They looked at how does it
20 actually operate? How does it actually perform for minority
21 voters. Right? And they said that turns out that the
22 jurisdictions decision to create an at-large post that
23 essentially has this -- a lot of weight and a lot of leadership
24 is still a violation, because the way it operates is in
25 conjunction with the entire liability evidence before -- in the

1 previous round shows that it is not a remedy. Let alone a
2 complete remedy.
3 That is exactly where we are today. Right? The way that
4 this purported remedy by the state of Alabama operates is
5 exactly the same as the previous plan operates. The way it
6 performs for minorities is exactly the same way as the way it
7 performs the 2021 plan performed for minorities.
8 And like the Eleventh Circuit said in *Dillard*, if this
9 incomplete remedy, this fake remedy is no remedy at all, we are
10 in the exact same position where the 2023 plan is no remedy at
11 all. It is a violation just as much as the 2021 plan, and this
12 Court has all of the evidence before it in order to find that
13 violation.
14 That's all for now, Your Honor, unless you have any other
15 questions.
16 JUDGE MARCUS: No. Thank you.
17 Any questions?
18 JUDGE MANASCO: None.
19 JUDGE MOORER: No.
20 JUDGE MARCUS: Thanks very much.
21 Seeing nothing further on the motion in limine, this Court
22 will reserve its ruling and carry the issue with the case.
23 We will go on to the presentation of evidence by the
24 Milligan plaintiffs.
25 Mr. Ross, you may proceed.

1 MR. ROSS: Yes, Your Honor.
2 JUDGE MARCUS: You may put on what you will, and we
3 will take up any objections, Mr. LaCour, that he has witness by
4 witness, or exhibit by exhibit.
5 MR. ROSS: Yes, Your Honor. I'm sorry. Just give me
6 one moment. I misplaced --
7 JUDGE MARCUS: Sure.
8 MR. ROSS: So, Your Honor, given that we don't intend
9 to put on live evidence, as we stipulated with the defendants,
10 we were intending to move into the record a number of exhibits.
11 And we have not come to any agreement with the defendants, so I
12 don't know if they will have any objections.
13 So first, Your Honor, plaintiffs would like to move --
14 excuse me. Oh.
15 JUDGE MARCUS: No, no. Please fire away.
16 MR. ROSS: Plaintiffs would like to move into evidence
17 M1, which it the population summary of the Livingston
18 Congressional Plan 3.
19 JUDGE MARCUS: Any objection?
20 MR. WALKER: No objection, Your Honor.
21 JUDGE MARCUS: Seeing none, M1 is received.
22 MR. ROSS: Plaintiffs would like to move -- actually,
23 let me take a step back.
24 At the outset, we want to move into evidence all of the
25 2022 testimony and exhibits in Milligan and Caster related to

1 the Section 2 claim.
2 JUDGE MARCUS: Any objection?
3 MR. WALKER: No objection.
4 JUDGE MARCUS: Seeing none, received.
5 MR. ROSS: Thank you, Your Honor.
6 Next, we would move into evidence M2, which is Dr. Liu's
7 remedial expert record.
8 JUDGE MARCUS: Any objection?
9 MR. WALKER: No objection, Your Honor. I might be
10 able to simplify this by telling you the four that we do object
11 to.
12 JUDGE MARCUS: That would be great. That would be
13 great. As I see it, there are 49 and a demonstrative exhibit.
14 Which ones do you object to of the 49?
15 MR. WALKER: There are four newspaper articles that
16 are hearsay. Those are M38, M32, M31, and recently added M47.
17 MR. ROSS: Can you give me the numbers?
18 MR. WALKER: Okay. Sorry. M31, M32, M38, and M47. I
19 can give you the ECF numbers if you want those.
20 JUDGE MARCUS: I may be confused. But on the list I
21 have, I'm working, Mr. Walker, off of the Milligan plaintiff's
22 amended exhibit list. If I have the right document, 47 is a
23 transcript of the video of the August 9th deposition of
24 Pringle.
25 MR. WALKER: Excuse me, Your Honor. That is the

1 deposition of Pringle. And within that Exhibit O and Exhibit
2 Z, which are the two newspaper articles, Exhibit Z is also M32.
3 JUDGE MARCUS: So M32, is that O or is that Z? M32 is
4 embodied in and was shown to the witness? Is that what
5 happened?
6 MR. WALKER: It was shown to the witness -- yes, Your
7 Honor.
8 JUDGE MARCUS: Did you want to respond?
9 MR. ROSS: Your Honor, that exact point, that it was
10 shown to a witness during a deposition, and so the relevance of
11 it or its admissibility all goes to whatever the witness said
12 about it, not, you know, we're not trying to enter it for --
13 JUDGE MARCUS: You are not offering it for the truth
14 of its content?
15 MR. ROSS: There are some of these news articles.
16 JUDGE MARCUS: We're talking about O and Z in
17 particular. O is which one? M47 is the transcript of Pringle.
18 Mr. Walker says in the course of deposing Pringle, you
19 used or showed him two newspaper articles. One was O, one was
20 Z. One of them, in fact, is your M32, perhaps the other one is
21 M31. I'm not sure. Perhaps you can help us.
22 MR. WALKER: M32 was the article Alabama
23 Legislature --
24 MR. ROSS: She can't hear you, the Court Reporter.
25 MR. WALKER: I'm sorry.

1 JUDGE MARCUS: That's all right. You take your time.
2 MR. WALKER: M32 is the article Alabama Legislature
3 Passes Controversial Congressional Map.
4 And Exhibit O to the Pringle deposition, Mr. Ross, was the
5 article that quoted Congressman Sewell. I can't think of the
6 name of it. I don't have it right here. Alabama Ignores U.S.
7 Constitution, I believe, was part of the title.
8 MR. ROSS: If I may respond.
9 JUDGE MANASCO: That was M13.
10 MR. ROSS: That's right.
11 Your Honor, if I may respond. If Mr. Walker is done.
12 So, Your Honor, I think we are trying to enter these into
13 evidence for two reasons. First, is that some of the witnesses
14 testified to these articles. They verified statements that
15 were made in them. The other is that some of the statements
16 were made by the defendants in this case. And so they are
17 statements of party opponents.
18 JUDGE MARCUS: So that I'm clear, the objections are
19 to M31, M32, M38, and O embodied in 47?
20 MR. WALKER: Which apparently, Your Honor, is M13. Am
21 I correct?
22 JUDGE MARCUS: Which is M13.
23 Anything further on the issue?
24 MR. WALKER: Your Honor, I believe Mr. Ross wants
25 those to come in under statement of opponent's party. And that

1 requires that the party manifested that it had adopted or
2 believed the article to be true or the statement to be true,
3 which was not the case.
4 MR. ROSS: Your Honor, as I said -- if the witness in
5 the course of the deposition denied that they made a statement,
6 then we're not -- obviously the defendants can rely on that in
7 whatever proposed findings of fact that they have. But to the
8 extent that, you know -- unfortunately, Your Honor, I am not
9 looking at the deposition transcript right now, and I can't
10 tell you exactly what they did or did not adopt, but I do think
11 it's fair to allow this into evidence and let us deal with it
12 in our proposed findings of fact.
13 JUDGE MARCUS: Just help me with one thing.
14 Of the four exhibits -- M13, 31, 32, and 38 -- how many
15 were actually used to question the witnesses in their
16 depositions?
17 MR. ROSS: My understanding, Your Honor, all of these
18 exhibits were used to question a witness in a deposition -- the
19 ones that -- the four that he's referenced.
20 MR. WALKER: Mr. Ross -- excuse me -- Your Honor, they
21 were used to question either Senator Livingston or
22 Representative Pringle. Mr. Ross is correct.
23 JUDGE MARCUS: So all of them were used for cross
24 confrontation or on direct?
25 MR. WALKER: That's correct, Your Honor.

1 JUDGE MARCUS: We will receive it for the limited
2 purpose that it's offered not for the truth of its content.
3 You may proceed.
4 Having said that, I take it, Mr. Walker, we can go through
5 these one by one and just clear up the record? You have no
6 objection to the other exhibits?
7 MR. WALKER: No objection to the other exhibits, Your
8 Honor. Thank you.
9 JUDGE MARCUS: All right, Mr. Ross. Why don't we just
10 clean up the record?
11 MR. ROSS: Are you going to go through them?
12 JUDGE MARCUS: Yeah, I think so.
13 We resolved M2, which was the report of Dr. Liu.
14 There's no objection to M3, the Alabama Performance
15 Analysis. Received.
16 M4, received. That's the text of SB-5.
17 M-5, an article from Jeff Poor and the Yellow Hammer News,
18 received.
19 M6, a press release issued by the Permanent Legislative
20 Committee on Reapportionment, June 21st, received.
21 M7, VRA plaintiffs --
22 MR. ROSS: Your Honor, we are not intending to offer
23 M7 or M8 into evidence.
24 JUDGE MARCUS: Okay. M9 is a declaration from
25 Representative Jones, July 27, '23. No objection. Received.

1 M10 you're offering?
2 MR. ROSS: Yes, Your Honor.
3 JUDGE MARCUS: That's an article by Mike Cason in the
4 AL.com July 22nd. Received.
5 M11, another article in Politico. You're offering that
6 again so I'm clear?
7 MR. ROSS: Sorry, Your Honor. Just trying to confer
8 at a distance with my colleagues.
9 JUDGE MARCUS: Sure. Take your time. That purports
10 to be an article from Zach Montellaro, quote, Alabama's
11 Redistricting Brawl Rehashes Bitter Fight.
12 MR. ROSS: Yes, Your Honor. We are entering into that
13 evidence.
14 JUDGE MARCUS: All right. Without objection, we will
15 receive that.
16 12, Associated Press Daily News July 24th. Are you
17 offering that?
18 MR. ROSS: Yes, Your Honor.
19 JUDGE MARCUS: Without objection.
20 M13, we received for a limited purpose over Mr. Walker's
21 objection.
22 M14, are you offering that?
23 MR. ROSS: Yes, Your Honor.
24 JUDGE MARCUS: Without objection, received.
25 M15, the remedial expert report of Dr. Bagley.

1 MR. ROSS: Your Honor, I think that that is subject to
2 your motion in limine. As I said, if the Court grants their
3 motion in limine, we are not intending to enter M15 into
4 evidence.
5 JUDGE MARCUS: Got it.
6 MR. ROSS: And at the same --
7 JUDGE MARCUS: I'm sorry. Sure.
8 MR. ROSS: Never mind, Your Honor. We have already
9 entered Representative Jones. I think we have the same
10 concern.
11 JUDGE MARCUS: M16, Dr. Hood's performance analysis.
12 I take it you're offering that?
13 MR. ROSS: Yes, Your Honor.
14 JUDGE MARCUS: Received without objection.
15 M17, Defendant Senator Livingston's responses to the
16 plaintiffs' third set of interrogatories?
17 MR. ROSS: Yes, Your Honor.
18 JUDGE MARCUS: Without objection, received.
19 M18, Alabama Legislature's SB-5 population summary.
20 You're offering that?
21 MR. ROSS: Yes, Your Honor.
22 JUDGE MARCUS: Received without objection.
23 M19, the expert report of Dr. Palmer?
24 MR. ROSS: Yes, Your Honor.
25 JUDGE MARCUS: Without objection, it's received.

1 M20, Defendant Pringle's response to the plaintiffs' third
2 set of interrogatories. You're offering that?
3 MR. ROSS: Yes, Your Honor.
4 JUDGE MARCUS: Without objection, received.
5 M21, community of interest map plan.
6 MR. ROSS: Yes, Your Honor. Again, for the limited
7 purpose of rebutting the defendants' testimony.
8 JUDGE MARCUS: Right. There was no objection to that
9 one.
10 MR. ROSS: Yes.
11 JUDGE MARCUS: M22 and 23, those were Livingston 1 map
12 and Livingston 2 map. You're offering both?
13 MR. ROSS: The same reservation for M22 and M23, which
14 is that we're not intending to affirmatively put that forward
15 except to the extent it's relevant to rebut some of the things
16 the defendants are raising.
17 JUDGE MARCUS: So received for that purpose.
18 M25, the '21 Reapportionment Committee Redistricting
19 Guidelines. May 5, '21.
20 MR. ROSS: Yes, Your Honor.
21 JUDGE MARCUS: Without objection, we're receiving
22 that.
23 M26, the Russell split plan map.
24 MR. ROSS: The same reservations for M26, M27, and M28
25 that we are entering it only to rebut any evidence the

1 defendants may put in.
2 JUDGE MARCUS: We will receive it for that limited
3 purpose.
4 M29 is characterized as an e-mail. It doesn't say from
5 whom or to whom.
6 MR. ROSS: My understanding, Your Honor, is that it's
7 an e-mail that was produced by the defendants. There are Bates
8 numbers there which are RCO49603 to 04, and it was used in a
9 deposition. We are seeking to admit that into evidence.
10 JUDGE MARCUS: Without objection, received.
11 I take it you withdrew M30?
12 MR. ROSS: Yes, Your Honor.
13 JUDGE MARCUS: M31, 32, 38, we've already ruled on.
14 They were admitted for limited purposes.
15 MR. ROSS: M33, as well, Your Honor?
16 JUDGE MARCUS: There was no -- I saw no objection --
17 did I misapprehend that, Mr. Walker? Did you have an objection
18 to M33? That's characterized, quote, talking point.
19 MR. WALKER: No. No. There was no objection to that,
20 Your Honor.
21 JUDGE MARCUS: Received.
22 M34 is omitted.
23 M35, Proposed Amendment of Reapportionment Committee
24 Guidelines.
25 MR. ROSS: Yes. Entering that into evidence, Your

1 Honor.
2 JUDGE MARCUS: Without objection, received.
3 M36, the July 12th Reapportionment Committee Agenda, you
4 are offering that.
5 MR. ROSS: Yes, Your Honor.
6 JUDGE MARCUS: Without objection, received.
7 37, you've withdrawn.
8 38, we've already ruled on.
9 M39?
10 MR. ROSS: 39 the same reservation, Your Honor, simply
11 addressing the defendants' arguments.
12 JUDGE MARCUS: Received for that limited purpose.
13 M40, talking points. I'm not sure whose.
14 MR. ROSS: M40, M41, M42 were used in depositions.
15 They are documents produced by the legislative defendants.
16 JUDGE MARCUS: And you are offering each of them?
17 MR. ROSS: Yes, Your Honor.
18 JUDGE MARCUS: Without objection, M40, 41, and 42 are
19 received.
20 M43, the transcript of the August 9th deposition of Randy
21 Hinaman.
22 MR. ROSS: I believe there might be a typo there, Your
23 Honor. It should both be the transcript and the video of that
24 deposition.
25 JUDGE MARCUS: Gotcha.

1 Seeing no objection, M43 is received.
2 M44 is the transcript and video August 11th deposition of
3 Brad Kimbro.
4 MR. ROSS: Yes, Your Honor. And just to be clear, I
5 think for M43 to M49, the same reservations that, you know, we
6 think we can rest on our evidence. But to the extent it's
7 relevant to rebut, anything the Court lets in on the motion in
8 limine.
9 JUDGE MARCUS: We will receive them with that
10 understanding and stipulation.
11 Having said that, feel free to present before this Court
12 what you will.
13 MR. ROSS: We rest on the evidence that we've
14 submitted both now and in 2022.
15 JUDGE MARCUS: Okay.
16 MR. ROSS: Thank you, Your Honor.
17 JUDGE MARCUS: And I take it, Ms. Khanna, that you're
18 resting on the record, as well at this point?
19 MS. KHANNA: Yes, Your Honor. I just want to confirm
20 that the Caster plaintiffs' remedial Exhibit 1, which I believe
21 is at ECF 212 in the Caster docket our expert report of
22 Dr. Palmer is admitted into the evidence.
23 MR. ROSS: That was admitted. It was one of our --
24 JUDGE MARCUS: It was. But I will receive it under
25 the title of your case. Your Exhibit 1 the 2023 expert report

1 of Maxwell Palmer in support of Caster plaintiffs' objections.
2 That is received.
3 MS. KHANNA: Yes, Your Honor.
4 JUDGE MARCUS: We have already received it, but we
5 will receive it under your number, as well as the expert report
6 from your expert is received.
7 MS. KHANNA: Thank you, Your Honor. I have no further
8 argument unless the Court has any questions.
9 JUDGE MARCUS: No. I do have one clarification I
10 wanted to make sure that I was right about. And we had
11 discussed this earlier, and this is the way we proceeded in the
12 first case -- the first time we heard it in round one.
13 And that is to say: Evidence admitted in support of or
14 opposition of one was in support of, in opposition of all. Do
15 I have that right?
16 MS. KHANNA: Yes, Your Honor.
17 JUDGE MARCUS: Mr. Ross?
18 MR. ROSS: Yes, Your Honor.
19 JUDGE MARCUS: Mr. LaCour?
20 MR. LACOUR: Yes, Your Honor.
21 JUDGE MARCUS: Okay. The plaintiffs have rested their
22 presentation, Mr. LaCour. We're happy to proceed with the
23 state's case.
24 MR. LACOUR: Yes, Your Honor.
25 We, too, are just going to rest on paper evidence that has

1 been submitted to the Court either attached to our response to
2 the Milligan and Caster filings or subsequently filed
3 thereafter.
4 So we would move first to admit Exhibit A.
5 JUDGE MARCUS: Can I -- let's see what objections
6 there are.
7 Which -- Mr. Ross, Ms. Khanna, can you tell me of these
8 exhibits offered by the state you do object to we can maybe
9 short circuit the time and admit everything else?
10 MR. ROSS: Your Honor, could we have a moment just to
11 confer?
12 JUDGE MARCUS: You sure can.
13 MR. ROSS: I apologize.
14 Your Honor, I think it would be most prudent to just go by
15 them one by one and lodge our objections.
16 JUDGE MARCUS: Sure. All right, Mr. LaCour, let's go
17 forward.
18 MR. LACOUR: This is a transcript of the hearing
19 before the Legislature's permanent legislative hearing on the
20 reapportionment on June 27th, 2023. It's certified by a court
21 reporter. We would move to admit this.
22 JUDGE MARCUS: Any objection?
23 MR. ROSS: We object, Your Honor. It's entirely
24 hearsay. There's no one to come testify about it. No one was
25 testifying under oath. It's similar to the evidence that this

1 Court previously rejected. They were hearing transcripts for
2 the 1992 redistricting that this Court found were not
3 admissible.
4 JUDGE MARCUS: Mr. LaCour?
5 MR. LACOUR: Yes, Your Honor. We think this is still
6 admissible to show what evidence was in front of the
7 Legislature as it was considering how to draw the 2023 plan.
8 So and, again, this is also certified by a court reporter on
9 top of all that.
10 JUDGE MARCUS: We will reserve on the issue.
11 MR. LACOUR: Okay. Thank you, Your Honor.
12 MR. ROSS: May I make one more point?
13 JUDGE MARCUS: Of course.
14 MR. ROSS: I would also object on relevance since this
15 is solely about Section 2 not about the intent of the
16 Legislature.
17 JUDGE MARCUS: Did you want to comment on that? He
18 says it's inadmissible both because it's not relevant and
19 because it's hearsay.
20 MR. LACOUR: Your Honor, we think it absolutely is
21 relevant. We are not introducing this to argue that like
22 whether or not it goes to the intent of Legislature. I think
23 it does go to this notion that the goal for the Wiregrass were
24 made up by the Legislature in 2023, which runs contrary to even
25 Joseph Bagley's declaration.

1 JUDGE MARCUS: So you are offering it for the truth of
2 its contents?
3 MR. LACOUR: Both for that, but also for evidence that
4 the Legislature had it before it that it's certainly competent
5 for the Legislature to consider this evidence even if people
6 were not sworn and cross-examined. These sorts of things
7 happen in Congress all the time.
8 JUDGE MARCUS: We will reserve on it.
9 It's the same issue on B, transcript dated July 30th?
10 MR. LACOUR: Yes, Your Honor.
11 JUDGE MARCUS: Is there anything further you wanted to
12 say about that one, Mr. LaCour?
13 MR. LACOUR: No, Your Honor. Other than that at the
14 time we filed our response, we had only had a partial copy of
15 the transcript.
16 JUDGE MARCUS: And now we have the full thing, right?
17 MR. ROSS: The full thing. Yes, Your Honor. We filed
18 that on the docket.
19 JUDGE MARCUS: We will reserve on that. B2?
20 MR. LACOUR: Yes. B2 is the full transcript from that
21 hearing, which has been filed with the Court now. So...
22 JUDGE MARCUS: Mr. Ross?
23 MR. ROSS: Same objection, Your Honor.
24 JUDGE MARCUS: We will reserve on B2. The objection
25 again to the entire transcript is both relevance and hearsay.

1 MR. ROSS: Yes, Your Honor.
2 JUDGE MARCUS: C?
3 MR. LACOUR: Yes. So this is a document -- we would
4 move to admit this. This is a document that was before --
5 well, there is a version of this document I think we have
6 explained in a separate filing at C2 that was before the
7 Legislature that had I think either a couple of pages towards
8 the end of it that were not included in the filing that we had
9 given, because we had ended up pulling that document off of the
10 Internet. But in either instance, it was both in front of the
11 Legislature, the C2 document and Exhibit C here -- everything
12 we quoted from --
13 JUDGE MARCUS: So this goes to the community of
14 interest in the Gulf Coast?
15 MR. LACOUR: It does go to the community of interest
16 point. I also note that this is a government document that
17 this Court can take judicial notice of.
18 JUDGE MARCUS: Any objection?
19 MR. ROSS: Your Honor, it may be a government
20 document, but there's no one to come here and testify to where
21 it came from, who produced it. There's no one to come and
22 testify that the Legislature actually considered it or looked
23 at it or that it was in the legislative record. It's simply
24 Mr. LaCour's representations.
25 JUDGE MARCUS: Mr. LaCour?

1 MR. LACOUR: You can pull this document yourself off
2 of a government website. That's good enough for judicial
3 notice.
4 JUDGE MARCUS: His objection, if I understand it here,
5 is a foundational objection.
6 MR. LACOUR: Yes, Your Honor.
7 JUDGE MARCUS: Rather than an objection going to
8 relevance or hearsay. Do I have that right, Mr. Ross?
9 MR. ROSS: Yes, Your Honor.
10 JUDGE MARCUS: He just says you haven't laid the right
11 foundation.
12 Let me ask you a question, Mr. Ross, just to cut to the
13 chase. Mr. Ross, I have a question for you.
14 MR. ROSS: Yes, Your Honor.
15 JUDGE MARCUS: Is there any doubt that this is what
16 purports to be?
17 MR. ROSS: I don't know, Your Honor. They haven't
18 laid a foundation. I don't know what document this is or where
19 it came from.
20 JUDGE MARCUS: Anything on foundation you want to
21 present?
22 MR. LACOUR: Your Honor, if you look at B2, which is
23 the transcript, you will see towards the end of that transcript
24 Mr. Walker moving to admit these documents into the legislative
25 record.

1 MR. ROSS: Your Honor, if they want to swear in
2 Mr. Walker, we are happy to cross-examine him.
3 JUDGE MARCUS: Let me just ask this question,
4 Mr. LaCour: I take it Exhibit C was before the committee?
5 MR. LACOUR: Yes. C2.
6 JUDGE MARCUS: C.
7 MR. LACOUR: Which is nearly identical.
8 JUDGE MARCUS: I may be working off the wrong list.
9 Is there a C2, as well?
10 MR. LACOUR: It comes near the end. So if you go to
11 page 5 of our amended exhibit list.
12 JUDGE MARCUS: Okay. I've got it. So you're offering
13 C and C2 on the same grounds?
14 MR. LACOUR: Yes, Your Honor. We find just offering
15 C2 though. But they're both government documents you can pull
16 off a government website to take judicial notice of. Whether
17 you are --
18 JUDGE MARCUS: So then why not just offer C2 and make
19 the record clean?
20 MR. LACOUR: We would be fine with that, Your Honor.
21 JUDGE MARCUS: All right. He's offering only C2,
22 Mr. Ross. So we're clear. And you have objected on C2 on the
23 same grounds of foundation?
24 MR. ROSS: Yes. Just to understand, Your Honor, C2 is
25 a complete copy -- yes, same grounds.

1 JUDGE MARCUS: Okay. We will reserve on C2.
2 MR. LACOUR: Moving to D. This was also submitted to
3 the legislative redistricting committee.
4 As you can see in B2 with the certified transcript,
5 Mr. Walker admitted this into the record on July 13th, 2023,
6 for the Legislature to consider, also note that Mr. Bagley
7 quotes from Adline C. Clarke, who is quoted in this document
8 talking about Mobile and Baldwin Counties being one political
9 subdivision, which is a pretty good definition of community of
10 interest.
11 JUDGE MARCUS: Just so I'm clear, D is an article by
12 John Sharp in AL.com titled, Redistricting Alabama how south
13 Alabama could be split up due to Baldwin's growth?
14 MR. LACOUR: Yes, Your Honor.
15 JUDGE MARCUS: All right. I take it your objection is
16 the same?
17 MR. ROSS: Double hearsay, Your Honor. I don't
18 know -- and lack of foundation, the same objection. I don't
19 know -- you know, no one is here to testify about this article,
20 its relevance to the Legislature, anything that was said in it.
21 JUDGE MARCUS: So it's --
22 MS. KHANNA: Your Honor, if I can add to Mr. Deuel's
23 objection on relevance grounds, as well, to this and the
24 previous exhibit, these are -- consistent with our position,
25 our legal position in motion in limine, I think all of these

1 documents attempting to shore up their understanding of
2 communities of interest are not relevant to today's
3 proceedings.
4 JUDGE MARCUS: I understand. We'll reserve on that
5 for the same reason we reserved on the underlying motion in
6 limine.
7 E?
8 MR. ROSS: Same objection running throughout, Your
9 Honor.
10 JUDGE MARCUS: E through R? Mr. Ross, we can short
11 circuit this. You are objecting to everything, E, F, G, H, I,
12 J, K, L, M, N, O, P, Q, R?
13 MR. ROSS: I think, Your Honor, so if we can go
14 perhaps E.
15 JUDGE MARCUS: Maybe we better take it --
16 MR. ROSS: E through I -- I think we would have the
17 same objection. Looks like these have some sort of reports.
18 JUDGE MARCUS: Let's make a record on these things.
19 Let's talk about E. What is E, and tell me the relevance it
20 would have.
21 MR. LACOUR: Yes, Your Honor. Alabama Port Authority
22 2021 Economic Impact Study Report. This a government document
23 of which this Court can take judicial notice. It explains the
24 tremendous economic impact in terms of money generated, jobs
25 created from the port.

1 I believe this is -- it's either this document or F, not
2 to jump ahead, that also explains that of the 21,000 give or
3 take direct jobs created by the port somewhere in the upper
4 30 percent, somewhere around 39 percent of people who hold
5 those jobs are from Mobile City, about another 39 percent of
6 them are from Mobile County, exclusive of Mobile City. Another
7 13 percent to about 2,700 people live in Baldwin County. So --
8 MR. ROSS: Your Honor, if I may --
9 JUDGE MARCUS: Allow him to finish, please.
10 MR. ROSS: Sorry.
11 MR. LACOUR: Yes. So we do think that goes to
12 community of interest point. And again, this is something that
13 was in front of the Legislature, as well.
14 So whether you are considering that like you would reading
15 the Senate report from 1982 amendments to the Voting Rights
16 Act, or you're considering it just for the truth of what's
17 asserted inside because you can pull it off of a government
18 website and has that ability, either way it tends to support
19 the idea that there are unique important ties between Mobile
20 and Baldwin Counties.
21 THE COURT: So if I understand it right, you're
22 introducing or seeking to introduce E and F in support of the
23 manner in which SB-5 drafted communities of interest?
24 MR. LACOUR: Your Honor, we do think it -- I would --
25 both for that purpose and simply for the argument that

1 plaintiffs' maps failed *Gingles I* because they do not maintain
2 a community of interest in the Gulf.
3 JUDGE MARCUS: And your objection is relevance,
4 hearsay, foundation, or all three?
5 MR. ROSS: All three, Your Honor. And I think one
6 point on the government record, Your Honor, as you know, you
7 can take judicial notice of the fact there was a government
8 record, but you can't necessarily take judicial notice of the
9 import or the reliability of everything that's in the report.
10 And so unless Mr. LaCour is going to bring a witness again
11 to testify about this report, who looked at it, what it's
12 about, obviously an expert could come as they did in some of
13 our testimony and talk about similar reports, but they haven't
14 brought an expert. They haven't brought anyone.
15 JUDGE MARCUS: Anything further on this point,
16 Mr. LaCour?
17 MR. LACOUR: I'll just note the only thing that
18 Mr. Bagley says about the port about these studies when he is
19 talking about is there used to be the slave trade at the port.
20 So I don't think there's any dispute that the port is a
21 critical -- a critical part of the Gulf and a critical part of
22 helping establish that community of interest there.
23 JUDGE MARCUS: We'll reserve on E and F.
24 MR. LACOUR: G is the BRATS schedule for Baylinc
25 Mobile Fairhope. I don't exactly remember what the acronym

1 stands for there, but it involves Baldwin County. This is a
2 government document and showing that there is public
3 transportation that goes from Baldwin County to Mobile and back
4 every day.
5 JUDGE MARCUS: Is that the bridge that you're talking
6 about there?
7 MR. LACOUR: This is beyond that. There's actually
8 government -- government run public transportation to move
9 people between the two counties within the one community.
10 JUDGE MARCUS: Objection?
11 MR. ROSS: Same objections, Your Honor. Relevance.
12 JUDGE MARCUS: Anything --
13 MR. ROSS: Hearsay, foundation.
14 MR. LACOUR: If I could, I am going to grab my copy of
15 the exhibits to make sure I'm describing them --
16 JUDGE MARCUS: Sure. Take your time.
17 MR. LACOUR: Exhibit H is --
18 JUDGE MARCUS: Again, so we're clear, I'm going to
19 reserve on G, as well.
20 H.
21 MR. LACOUR: Yes. H, Baylinc connects Mobile Baldwin
22 County transit systems dated November 5th, 2007. This is from
23 the government website cityofmobile.org explaining that there
24 is this connection of bus routes being run by local governments
25 to make sure that people can cross from one county to the other

1 because there are close ties between these counties. This was
2 introduced to the Legislature on July 13th, 2023.
3 JUDGE MARCUS: Objection?
4 MR. ROSS: Relevance, hearsay, foundation. We can't
5 take Mr. LaCour's testimony about what was produced to the
6 Legislature.
7 JUDGE MARCUS: We will reserve.
8 I.
9 MR. LACOUR: Yes, Your Honor. This is South Alabama
10 Regional Planning Commission website information from the South
11 Alabama Regional Planning Commission, which is creation of
12 state government that binds together Mobile, Baldwin Counties,
13 as well as Escambia County and all the -- the 29 municipalities
14 within those three counties to work together to promote common
15 interests among those local governments. And the document
16 describes what the regional planning commission is that's
17 existed since 1968, and when it was created by --
18 JUDGE MARCUS: What's the date on this?
19 MR. LACOUR: Your Honor, this was -- appears it was
20 printed on July 10th, 2023.
21 JUDGE MARCUS: Any objection, and if so, basis?
22 MR. ROSS: Same objections, Your Honor, relevance,
23 hearsay, foundation.
24 And I'm not sure if the regional planning commission --
25 excuse me -- website -- that's actually -- same objections,

1 Your Honor.
2 JUDGE MARCUS: Gotcha. We will reserve --
3 MR. ROSS: It's government document, but maybe
4 Mr. LaCour --
5 JUDGE MARCUS: We will reserve on I.
6 J and L, we have already had argument on, and we will
7 reserve on both of those. Those were the expert report of
8 Mr. Bryan dated August 3rd, '23. L was the expert report of
9 Trende dated August 4, '23. Anything further you wanted to say
10 about Bryan? Let's stop on that one. Mr. LaCour?
11 MR. LACOUR: There we think this evidence is relevant,
12 and so we have submitted it to the Court.
13 JUDGE MARCUS: Let me ask you a question that I have.
14 Since we don't have Bryan present testifying under oath, for
15 any of these experts to be admissible, Hornbook laws says you
16 have to show A, by background, training, and experience that
17 they're competent and qualified to opine; B, that the opinion
18 being offered is methodologically sound and reliable; and C,
19 that the expert opinions' report would assist the trier of
20 fact.
21 Since we don't have him live, I want to just give you an
22 opportunity perhaps, if you want, to flesh any of that out.
23 MR. LACOUR: Sure, Your Honor.
24 JUDGE MARCUS: A, qualification by background,
25 training, and experience to opine about racial predominance,

1 which I take it is the thrust of his report.
2 B, the foundation, the methodological way he came to this
3 opinion.
4 And C, how it would assist the trier.
5 MR. LACOUR: Yes, Your Honor. First, on
6 qualifications, multiple pages explaining his qualifications
7 when it comes to redistricting. There's been no assertion that
8 his numbers are somehow off in any way.
9 He's explaining that there are -- these stark disparities
10 where you see splits of counties in congressional plans
11 including very remedial plan. You see very different
12 demographics on either side of that line.
13 So when it comes to District 2, for example, in the
14 remedial plan split -- three counties are split on the District
15 2 side of that line. For every one of those splits, you see a
16 much higher percentage of Black Voting Age Population there
17 than you do on the other side of that line.
18 That is the exact evidence that Mr. Williamson, an expert
19 for the plaintiffs and their racial gerrymandering claim back
20 in 2021 presented to suggest that there was evidence of
21 gerrymandering or racial predominance in the 2021 plan.
22 JUDGE MARCUS: Let me ask a preliminary question, if I
23 can, on qualifications.
24 Has Bryan ever testified and been received as a credible
25 witness on racial predominance? I couldn't tell from the

1 materials you submitted.
2 MR. LACOUR: Your Honor, I think in terms of an expert
3 and racial predominance.
4 JUDGE MARCUS: Yes. I mean on -- zeroing in on that
5 issue.
6 MR. LACOUR: He has offered similar testimony in
7 other -- in other cases. I believe the Louisiana case he had
8 done similar analysis there.
9 I would need to see -- I don't have in front of me right
10 now how things were ruled on.
11 JUDGE MARCUS: Help me on the foundation. Did he
12 employ in your view -- and I went back to re-read Ryan
13 Williamson's testimony in round one.
14 Did he employ the same methodology Williamson did as you
15 see it?
16 MR. LACOUR: My recollection is a very similar
17 analysis. I think Williamson may have done some additional --
18 may have done some additional analysis, or I think he looked
19 at -- there were other -- there were other things he did that
20 Mr. Bryan did not do.
21 But my recollection is there were these analyses of split
22 political geographies. And we have here analysis of these
23 splits in these counties, which I know that plaintiffs used
24 very similar analysis -- plaintiffs' lawyers rather used very
25 similar analysis in attacking the congressional map in South

1 Carolina. They submitted a brief to the Supreme Court just
2 last week the ACLU and the NAACP accusing South Carolina of
3 bleaching one of their districts.
4 MR. ROSS: Your Honor, objection. I'm not sure why
5 we're talking about a totally different case and totally
6 different --
7 JUDGE MARCUS: Your may proceed with your argument.
8 MR. LACOUR: They accused, on page 1 of the brief,
9 South Carolina of bleaching a district because the County of
10 Charleston was split, and 60 percent of the black population of
11 Charleston County was moved into another district.
12 That's the almost the exact same number we have where --
13 JUDGE MARCUS: No, no. What I am getting at is -- I
14 was asking a very simple question.
15 Did he employ the exact methodology employed by Ryan
16 Williamson? Your answer is yes.
17 MR. LACOUR: I would need to look back more closely to
18 say if it's exactly the same. But I think Your Honors are
19 competent to look at these numbers and adjudge whether they
20 should be given much weight or not.
21 It's simply more data about what is being done in the maps
22 that would tend to show -- tend to make it more likely than not
23 that there may be racial predominance concerns in these plans.
24 JUDGE MARCUS: I understand. Mr. Ross? I understand
25 your objection and Ms. Khanna's objection initially is it is

1 not relevant. The issue has been already determined in round
2 one, and it's not open for debate. We have heard that. We
3 will ultimately rule on that.
4 But, two, assuming arguendo that we get over the relevance
5 objection, I read somewhere along the way that one of you had
6 foundational objections, and I will give you the opportunity to
7 put that on the record, as well.
8 MR. ROSS: Yes, Your Honor. We had objections about
9 the reliability of Mr. Bryan's evidence. It is -- you know,
10 it's -- Mr. LaCour is standing up here and attempting to
11 testify about the connection between his report and findings of
12 racial predominance. Nowhere in Mr. Bryan's report does he
13 actually make that connection. He simply says, black people
14 are on one side of the line, white people are on another side
15 of the line. And from there, you know, implies that there's
16 racial predominance.
17 But as this Court knows, as the Supreme Court has said
18 many times, you know, racial predominance is not that you may
19 have been aware of race. It's not that, you know -- none of
20 those factors are sort of dispositive. It's simply irrelevant
21 in the first instance, and Mr. LaCour cannot make the
22 connections that Mr. Bryan does not actually make in his
23 report. It's unreliable and not useful.
24 JUDGE MARCUS: Just one moment, Mr. LaCour. I just
25 want you to hear all of the objections so you can respond to

1 all of them at once.
2 MR. ROSS: Your Honor, if I may make this other point.
3 This Court has already found that there were serious concerns
4 with Mr. Bryan's testimony.
5 The *Robinson vs. Ardoin*, the -- I may be mispronouncing
6 that -- the Louisiana case that Mr. Bryan also testified in,
7 the Court had serious concerns about the liability of his
8 opinion and also found -- gave his opinion little weight, and
9 he didn't testify, let alone but he's not even appearing to
10 give any testimony here about --
11 JUDGE MARCUS: Ms. Khanna, any additional arguments
12 you wanted to make on the admissibility of Bryan's report?
13 MS. KHANNA: Just to make sure I heard Mr. Ross
14 correctly. Was he just reading from the Louisiana opinion?
15 MR. ROSS: Yes. I can read the full sentence, Your
16 Honor. It's on page --
17 MS. KHANNA: No, no. That's all right. I was going
18 to do the same thing. I just wanted to make sure that's in the
19 record.
20 MR. ROSS: Yes, Your Honor. It's on page 824 of the
21 Louisiana opinion. The Louisiana opinion is at 605 F.Supp.3d,
22 759.
23 JUDGE MARCUS: Other arguments?
24 MS. KHANNA: I have nothing to add. No thank you,
25 Your Honor. Nothing to add.

1 JUDGE MARCUS: You may respond if you wanted to since
2 you are the proponent of the exhibit.
3 MR. LACOUR: Yes, Your Honor. Mr. Bryan's opinion was
4 the definitive proof of predominance. It is merely some
5 evidence of predominance. The reasons why are obvious.
6 If every time the split is producing racially disparate
7 effect, again and again and again like in the remedial plan
8 from the plaintiffs, then that is some evidence that race was
9 afoot. It's -- I think this Court is savvy enough to
10 understand that multiple courts have looked at analysis like
11 that before and connected the dots.
12 JUDGE MARCUS: Gotcha. Anything further, Mr. Ross?
13 MR. ROSS: One more objection, Your Honor.
14 Mr. LaCour keeps referencing the remedial plans that
15 plaintiffs -- that my client put in front of the Legislature.
16 That plan is not in front of this Court. We have never offered
17 it as an illustrative plan. We have never offered it as a
18 remedy to Section 2 case to this Court. And so it's simply
19 another reason why any testimony about the remedial plan isn't
20 relevant at all and isn't admissible.
21 And one other thing, Your Honor. Although Mr. Bryan goes
22 and examines plaintiffs' plan, he does not examine the state's
23 own plan for racial predominance. He doesn't compare, as
24 Mr. LaCour thinks is relevant in racial predominance analysis,
25 how their plan splits black and white communities along racial

1 lines.
2 JUDGE MARCUS: Mr. LaCour?
3 MR. LACOUR: Your Honor, that's not true. If you look
4 at pages 32 and 31, he does include the county split
5 information for the state's 2023 plan.
6 JUDGE MARCUS: Can you help me just with the last
7 point Mr. Ross made? He says, if I hear him right, that going
8 beyond the illustrative maps, we have already talked about
9 them, this VRA reapportionment map was not being offered by the
10 plaintiffs in any event, so what possible relevance could it be
11 to have Bryan comment about that? He says you're shooting
12 blanks in the night if you are shooting at a map not offered.
13 MR. LACOUR: I'm happy they have confirmed they are
14 not offering that plan. It's the only one that doesn't split
15 the Black Belt into at least three, if not four districts. So
16 I am glad we cleared that up.
17 JUDGE MARCUS: Is it relevant? Why would Bryan's
18 testimony be relevant to a map that they have not submitted to
19 this Court?
20 MR. LACOUR: Well, I think his testimony as to the
21 seven other maps that he does analyze is still relevant.
22 JUDGE MARCUS: No, I am not talking about Cooper's
23 maps. I'm not talking about Duchin's maps. I'm talking
24 about -- let's call it the VRA map.
25 MR. LACOUR: Here's why I think it might be relevant

1 is if -- imagine if the Legislature had before it only two
2 plans, the VRA remedial plan and the 2023 plan, and they had to
3 choose how to best comply with the demands of federal law,
4 Section 2, and the Equal Protection Clause, and they looked and
5 said, well, this one only splits six counties, the 2023 plan
6 only splits six counties, that one splits seven. The 2023 plan
7 keeps together these communities of interest, that one doesn't,
8 and the 2023 is more compact both on average, and its least
9 compact district is more compact than the plaintiffs' plan, if
10 they chose the plaintiffs' plan anyway, it would be an obvious
11 racial gerrymander, and there would be additional evidence that
12 it would be a racial gerrymander from the fact of how those
13 counties split, so that additional unnecessary county split
14 came about.
15 And I think that should inform the Court when we're
16 dealing with these charges of defiance here. We had a
17 difficult task complying with dueling commands of Section 2 and
18 the racial gerrymandering jurisprudence of the Supreme Court.
19 I think the evidence goes to that, as well.
20 JUDGE MARCUS: I got it. The next item. We will
21 reserve on that.
22 That would be J, the report of Bryan.
23 K was the Alabama Act Number 2023-563. I take it that is
24 SB-5.
25 MR. LACOUR: Yes, Your Honor.

1 JUDGE MARCUS: Any objection?
2 MR. ROSS: No objection, Your Honor.
3 JUDGE MARCUS: K is received.
4 L is the other expert report that you have offered in this
5 case. Is there an objection to L other than relevance,
6 Mr. Ross?
7 MR. ROSS: No, Your Honor.
8 JUDGE MARCUS: All right. Is there anything you
9 wanted to say further on that issue, or have we pretty much
10 exhausted relevance on Trende?
11 MR. LACOUR: I think we have gone over it pretty well.
12 JUDGE MARCUS: Okay. So we will reserve on that.
13 MR. LACOUR: Next is M. This is the declaration of
14 Lee Lawson that was submitted with our response to the
15 plaintiffs' objections.
16 He works for a major -- it's the Baldwin County Economic
17 Development Alliance. He's been working with them for 14 years
18 in that role. He helps to foster business development in
19 Baldwin County, which requires him to work closely with Baldwin
20 and Mobile County government officials and other economic
21 leaders in the area. So both as -- it's based on living in the
22 area and based on his work in the area.
23 JUDGE MARCUS: Right. So just sharpening the focus,
24 it goes to the community of interest?
25 MR. LACOUR: Yes.

1 JUDGE MARCUS: Okay. I take it the same objection for
2 Lee Lawson, Mr. Ross?
3 MR. ROSS: Yes, Your Honor. The relevance objection
4 from our motion in limine.
5 JUDGE MARCUS: We will reserve on that.
6 We will talk about M now, Kyle Hamrick, ALDOT says new
7 bridge in Bayway are financially viable.
8 MR. LACOUR: Yes, Your Honor. This was before the
9 Legislature for them to consider. And so I think it falls into
10 the category of some of the other documents we have discussed
11 before, although this is not a government document.
12 JUDGE MARCUS: This is again going to the community of
13 interest?
14 MR. LACOUR: Yes, Your Honor.
15 JUDGE MARCUS: Any objection other than relevance?
16 MR. ROSS: Hearsay and foundation, Your Honor.
17 JUDGE MARCUS: Did you want to respond to that?
18 MR. LACOUR: Your Honor, if you look at the B-2, the
19 transcript of the hearing, certified transcript of the hearing,
20 explains this was being admitted into the record for the
21 Legislature to consider.
22 So, again, if you were reading the Senate report, you
23 would have evidence there that was before the Senate when they
24 were passing Section 2. Similarly, you have evidence here that
25 was for the Legislature when they were --

1 JUDGE MARCUS: Just so I understand it, so Hamrick's
2 statement is relevant because it was presented to the Alabama
3 Legislature in 2023.
4 MR. LACOUR: Yes, sir.
5 JUDGE MARCUS: Okay.
6 MR. LACOUR: Yes, Your Honor.
7 JUDGE MARCUS: Anything further on that, Mr. Ross,
8 other than your objections relevance, foundation, and hearsay?
9 MR. ROSS: No more, Your Honor.
10 JUDGE MARCUS: All right. O. We will reserve on N.
11 O, USA, a brief history, University of South Alabama.
12 MR. LACOUR: Yes, Your Honor. This is from the
13 University of South Alabama's website. This goes to
14 communities of interest, explains some history of the school
15 and that it has campuses both in Mobile and Baldwin Counties.
16 JUDGE MARCUS: Objection?
17 MR. LACOUR: This was also in front of the
18 Legislature.
19 JUDGE MARCUS: Right. Just so we're clear, this was
20 presented to the Legislature here in round two in July of '23?
21 MR. LACOUR: Yes, Your Honor.
22 JUDGE MARCUS: Thank you. Objection?
23 MR. ROSS: Relevance, hearsay, and foundation, Your
24 Honor. The same objections.
25 JUDGE MARCUS: We will reserve on O.

1 P, About Us.
2 MR. ROSS: Your Honor, I just would note that that is
3 also -- this is not a government document. It's a school's web
4 page, so...
5 MR. LACOUR: It is a school that's an arm of the
6 state. So I think it could be considered.
7 JUDGE MARCUS: Just tell me what it goes to, why it's
8 relevant, and why it isn't otherwise inadmissible. It's
9 hearsay, or for the lack of the foundation, the proponent of
10 the statement is not here in court to testify.
11 MR. LACOUR: Talking about P now, Your Honor?
12 JUDGE MARCUS: Yes.
13 MR. LACOUR: So this was before the Legislature, goes
14 to communities of interest, explaining that there are types of
15 media in the Gulf, including this newspaper Lagniappe that
16 services both Mobile and Baldwin Counties.
17 JUDGE MARCUS: Who presented it to the Legislature?
18 MR. LACOUR: Dorman Walker admitted it.
19 JUDGE MARCUS: Mr. Walker offered this exhibit?
20 MR. LACOUR: Yes, Your Honor.
21 JUDGE MARCUS: And the Legislature received it in
22 their work or their reapportionment committee, I take it?
23 MR. LACOUR: Yes, Your Honor.
24 JUDGE MARCUS: I gotcha. We will reserve on P.
25 Q.

1 MR. LACOUR: Yes, Your Honor. Declaration of Mike
2 Schmitz. This goes to communities of interest, focused mainly
3 on the Wiregrass, who is the former mayor of Dothan and
4 provided the sworn declaration.
5 JUDGE MARCUS: Same for Kimbro, right?
6 MR. ROSS: Yes, Your Honor. Same for Kimbro --
7 Schmitz and Kimbro, both Exhibits Q and R.
8 JUDGE MARCUS: Help me, though, Mr. Ross. Were these
9 folks deposed?
10 MR. ROSS: They were deposed, but we're still
11 objecting on relevance grounds, Your Honor.
12 Excuse me. So we are objecting to the declarations Q and
13 R and S on relevance grounds per our motion in limine.
14 JUDGE MARCUS: What about the depositions?
15 MR. ROSS: The depositions we've -- if this evidence
16 comes in, then the depositions would come in.
17 JUDGE MARCUS: Okay. So your view is it's all
18 inadmissible on relevance grounds, but if it comes in, then it
19 should all come in.
20 MR. ROSS: Yes, Your Honor.
21 JUDGE MARCUS: Okay. Anything further on Q and R,
22 Mr. LaCour?
23 MR. LACOUR: No, Your Honor. I think everything that
24 was said about Q and R would also be true as to S, the
25 declaration of Jeffrey Williams.

1 JUDGE MARCUS: That's S, right?
2 MR. ROSS: Your Honor, if I may say one more thing,
3 just goes to Mr. LaCour's testimony or -- excuse me --
4 statements -- some of these declarants were people who actually
5 did come and testify at the hearing. Those people who wanted
6 to give sworn declarations give sworn declarations. Those who
7 were unable or unwilling to do so did not.
8 And so I think it just goes to the fact that these
9 transcripts could have come in, in other ways and yet...
10 JUDGE MARCUS: I understand. Who is Williams?
11 MR. LACOUR: Jeff Williams is the senior executive at
12 a bank in Dothan. He's also a member of the Dothan Area
13 Chamber of Commerce. He has evidence about the Wiregrass's
14 community of interest.
15 JUDGE MARCUS: I take it your objection is the same?
16 Relevance and hearsay? Mr. Ross, I'm talking about --
17 MR. ROSS: I'm sorry, Your Honor.
18 JUDGE MARCUS: Yeah. I'm talk about he's offered S,
19 the declaration of Mr. Williams.
20 MR. ROSS: Yes, Your Honor.
21 JUDGE MARCUS: He offers it on the communities of
22 interest and, in particular, the Wiregrass.
23 MR. ROSS: Yes, Your Honor. The same relevance
24 objection.
25 JUDGE MARCUS: Okay. We will reserve on that.

1 MR. LACOUR: Just to be clear, Your Honor. I think
2 you had said hearsay, as well. I don't think hearsay would
3 apply, and I don't think Mr. Ross was raising a hearsay.
4 JUDGE MARCUS: I did not hear any hearsay objection to
5 Defendants' Exhibit S. Singular objection, just relevance.
6 MR. ROSS: That's correct.
7 JUDGE MARCUS: T.
8 MR. LACOUR: These are the objections and responses to
9 the Singleton first set of requests for admission.
10 JUDGE MARCUS: Any objection?
11 MR. ROSS: Your Honor, it's a different case. We're
12 not -- there's no relevance.
13 JUDGE MARCUS: We can consider that when we get to
14 Singleton, or does this have any bearing on this remedial
15 proceeding, Mr. LaCour? Mr. Davis? We're talking about
16 Exhibit T, which is the Defendant Secretary of State Wes
17 Allen's objections and responses to Singleton's plaintiffs'
18 first set of request for admissions.
19 Does it have any bearing on this case, or is that
20 something we are going to take up separately?
21 MR. DAVIS: Your Honor, if it wouldn't inconvenience
22 the Court, could we review that maybe during a break?
23 JUDGE MARCUS: Absolutely.
24 MR. DAVIS: That would remind me if it was just a
25 mistake that was included on both lists, or whether there was a

1 separate purpose.
2 JUDGE MARCUS: Consider it done. We will take it up
3 later. So we will reserve and give you a chance, Mr. LaCour,
4 to address T.
5 U.
6 MR. LACOUR: Yes, Your Honor. This was a copy of
7 Bradley Byrne's testimony offered in the Chestnut case that was
8 presented into the legislative record in 2023 at the July 13th,
9 2023 hearing.
10 JUDGE MARCUS: It's already record, is it not?
11 MR. LACOUR: Yes, Your Honor. I think we are
12 admitting it here to show that this was also something that was
13 admitted or in front of the Legislature and the redistricting
14 committee in July of 2023.
15 JUDGE MARCUS: Any objection?
16 MR. ROSS: Just I think same objection, Your Honor.
17 Relevance, hearsay, and foundation.
18 If they want to bring Mr. Byrne to come and testify,
19 again, they could have. I understand that the Caster
20 plaintiffs did get an opportunity to cross-examine him. We've
21 never had an opportunity to cross-examine him. And we have
22 never waived our right -- or excuse me -- we did -- I'm sorry,
23 Your Honor. We never had a chance to cross-examine him in that
24 particular case on whatever issues he testified about there.
25 So I think to be clear, we know that it's already in the

1 case because the Caster plaintiffs introduced it earlier. We
2 would not allow it to be introduced for the purposes of showing
3 what the Legislature saw or didn't see or what they considered
4 or didn't consider.
5 JUDGE MARCUS: Well, if it's in, it's in, counsel.
6 MR. ROSS: Yes, Your Honor.
7 JUDGE MARCUS: We are not in the metaphysical debate
8 here. Either it went in or didn't.
9 MR. ROSS: I understand. It's in the record.
10 JUDGE MARCUS: So it's in the record. We will receive
11 U.
12 MR. ROSS: Yes.
13 MR. LACOUR: I think the same would be true about
14 Exhibit N, which is...
15 JUDGE MARCUS: I'm sorry. I thought we were up to V.
16 MR. LACOUR: I'm sorry. I may have skipped ahead. V,
17 yes. This was testimony that Representative Byrne provided,
18 preliminary injunction proceedings in this case. This was also
19 provided to the redistricting committee on July 13th, 2023.
20 JUDGE MARCUS: And it's already been presented to this
21 Court, has it not?
22 MR. LACOUR: Yes.
23 JUDGE MARCUS: Mr. Ross? Anything new on V? It's
24 already in. The reason I'm making the point --
25 MR. ROSS: I understand, Your Honor.

1 JUDGE MARCUS: -- is just to be clear.
2 I have said this three times. I understand the record
3 presented -- the record evidence presented on round one at the
4 preliminary injunction hearing is part of these proceedings,
5 too.
6 So I'm hard pressed to see an objection to V.
7 MR. ROSS: No, Your Honor. I think the distinction
8 that I'm drawing which perhaps the Court -- I understand --
9 JUDGE MARCUS: You're going -- I think what you're
10 really are arguing about the strength of the exhibit, its
11 probative value rather than its admissibility.
12 MR. ROSS: I think that is absolutely correct, Your
13 Honor. The evidence can come in. It's already in the record,
14 its value, and what it says about the Legislature.
15 JUDGE MARCUS: Right. Mr. Davis?
16 MR. DAVIS: If it may help, Your Honor, it wasn't
17 entirely clear to us if we intended to rely on something that
18 was already in the record from the earlier proceedings.
19 JUDGE MARCUS: I understand.
20 MR. DAVIS: Whether the Court wished for us to refile.
21 Out of an abundance of caution, we did so.
22 JUDGE MARCUS: V is received.
23 W.
24 MR. LACOUR: W is the testimony of Josiah Bonner in
25 the Caster -- not the Caster -- in the Chestnut case, which I

1 believe is also -- was admitted as part of the record during
2 the 2021-2022 proceedings. This is also -- this was also
3 admitted to the legislative record at the July 28th --
4 July 13th, 2023, hearing.
5 JUDGE MARCUS: Refresh me. What does it go to,
6 Bonner's testimony?
7 MR. LACOUR: The communities of interest in the Gulf.
8 He's a former Congressman for District 1 and has served in
9 other roles as a public official.
10 JUDGE MARCUS: Gotcha.
11 Mr. Ross, same?
12 MR. ROSS: Same concern, Your Honor, but no objection.
13 JUDGE MARCUS: We will receive W in evidence.
14 X, expert report of Dr. Imai.
15 MR. LACOUR: Yes, Your Honor, this is in the record
16 already. As Mr. Davis referenced, we just wanted to be sure
17 that we were putting forward everything.
18 JUDGE MARCUS: Gotcha. So it's clear. X is received.
19 MR. ROSS: Sorry, Your Honor. I want to be clear when
20 we moved evidence into the record, we were moving only our
21 Section 2 evidence, and we weren't intending to enter any
22 evidence from Dr. Williamson or Dr. Imai.
23 JUDGE MARCUS: Okay. So is there an objection to X?
24 MR. ROSS: There's an objection to X and Y, Your
25 Honor, for that reason. Relevance, Your Honor. It's simply

1 not relevant. That was examining the 2021 plan and whether it
2 was a racial gerrymander or not.
3 JUDGE MARCUS: So it's relevant only to the issue, the
4 Singleton issues of intent and equal protection?
5 MR. ROSS: Perhaps, Your Honor. But it was only
6 looking at the 2021 plan, not even the 2023 plan.
7 JUDGE MARCUS: Mr. LaCour, any comment?
8 MR. LACOUR: Just interesting how this analysis only
9 works one way and not the other.
10 But I do think Imai's analysis is probative. He showed
11 that if you took -- he -- so you remember he ran three
12 different sets of 10,000 maps race neutrally. The last set,
13 which is in the rebuttal report, Exhibit Y, did a few things.
14 He locked in one majority-minority district between 50 and
15 51 percent. He kept county splits to a minimum. He
16 prioritized compactness. He avoided pairing incumbents. And
17 then contrary to what the plaintiffs told the Supreme Court and
18 what the Supreme Court actually ended up putting in their
19 opinion, which was in error, he did prioritize two communities
20 of interest -- the Gulf and the Black Belt. And when he ran
21 those 10,000 maps that prioritized the Black Belt and the Gulf,
22 the second highest BVAP district that he had came in on average
23 around 36 percent and did not even get up to 40 percent, which
24 we think is pretty good evidence that if you are actually
25 prioritizing these neutral principles, the highest you are

1 going to get is probably right around 40 percent, which
2 suggests that the Legislature's use of these principles was not
3 tenuous in any way. This was indeed precisely what you would
4 get.
5 JUDGE MARCUS: I have the thrust of the argument.
6 Anything further, Mr. Ross, on this?
7 MR. ROSS: Your Honor, the Supreme Court, as you know,
8 considered his arguments and rejected them.
9 JUDGE MARCUS: We will receive X and Y into evidence.
10 Z.
11 MR. LACOUR: Yes, Your Honor. This was an exhibit
12 that came into the record during the preliminary injunction
13 proceedings. It's simply sort of helpful compendium of all the
14 congressional redistricting maps the state has had from its
15 inception until 2021.
16 JUDGE MARCUS: Comment, Mr. Ross?
17 MR. ROSS: If I may, one moment.
18 JUDGE MARCUS: Sure. Looks to me like it's a brief
19 and motion in which --
20 MR. LACOUR: So this was the exhibit to the motion.
21 It is not the motion itself.
22 JUDGE MARCUS: 7 is the exhibit to the motion itself.
23 MR. LACOUR: Yes. 57-7 is the exhibit we're
24 admitting. We are not admitting the Singleton plaintiffs'
25 renewed motion. We are simply admitting this exhibit, which

1 is, again, a copy of all the maps going back to 1822, at least,
2 up until 2021.
3 JUDGE MARCUS: I understand.
4 Mr. Ross?
5 MR. ROSS: Your Honor, unless it's already in the
6 record, we would object on relevance grounds. It's not clear
7 to us if this is relevant. The Supreme Court rejected the
8 argument that core retention is a principle that this Court --
9 JUDGE MARCUS: Was that ever received? I know it was
10 appended to a motion, but I don't recall if that was received.
11 The record will answer that question when we look at it.
12 Do you know?
13 MR. LACOUR: I do not know off the top of my head, but
14 we can get that answer for you.
15 JUDGE MARCUS: We will reserve on Z.
16 C-2 we have already ruled on.
17 F-2?
18 MR. LACOUR: This is a slightly different version of
19 the port authority. I believe it included a couple of extra
20 pages at the end. This is the copy that was provided to the
21 legislative districting committee.
22 JUDGE MARCUS: Right. And we have already reserved on
23 that one, correct?
24 MR. LACOUR: Yes.
25 JUDGE MARCUS: So we will reserve on that, too.

1 Does that conclude your presentation?
2 MR. LACOUR: Your Honor, if we can have a moment to
3 confer.
4 JUDGE MARCUS: You sure can.
5 MR. LACOUR: And get back to you.
6 JUDGE MARCUS: Mr. Ross, did you want to say anything
7 about F-2?
8 MR. ROSS: No, Your Honor. I was just standing in
9 case the Court --
10 JUDGE MARCUS: I understand.
11 MR. DAVIS: Your Honor, while Mr. LaCour is returning
12 to the podium, as I see it, we have at least two issues that we
13 need to think about and resolve and clarify for the Court after
14 a break, which is whether we're submitting the Singleton
15 request for admission responses for purposes of this case, and
16 whether the exhibit, the historic maps, 57-7 was, in fact,
17 received by this Court --
18 JUDGE MARCUS: Correct.
19 MR. DAVIS: -- in the earlier proceedings.
20 JUDGE MARCUS: Yes. And you can clear that up for us
21 when we take a lunch break.
22 Mr. LaCour, any other evidence you wanted to put in on
23 behalf of the defendants?
24 MR. LACOUR: I would just note that I was informed
25 that we now have the full certified transcript of the

1 July 13th, 2023, hearing. That also includes the exhibits that
2 were attached thereto, which I think should be enough to
3 resolve the notion that we don't know whether the documents
4 were really included.
5 JUDGE MARCUS: This was presented to the Legislature?
6 MR. LACOUR: Yes. July 13th.
7 JUDGE MARCUS: Do you want to put a number on that,
8 and then we can reserve on that?
9 MR. LACOUR: Yes. We can call that B-3.
10 JUDGE MARCUS: B as in boy 3?
11 MR. LACOUR: B as in boy. B-2 was the full transcript
12 but did not yet have the exhibits attached. And B-3.
13 JUDGE MARCUS: So B-3 is the entire transcript of the
14 July 13th, 2023, legislative committee on reapportionment's
15 hearing on that day.
16 MR. LACOUR: Yes, with exhibits that were introduced
17 into the record.
18 JUDGE MARCUS: Okay. And I take it you have a variety
19 of objections: Relevance, hearsay, in some instances, and
20 foundation?
21 MR. ROSS: Same objections, yes, Your Honor. It can't
22 be that Mr. LaCour testifies about these things.
23 JUDGE MARCUS: All right. We will consider that and
24 take that under -- we will reserve on that issue.
25 Let me ask you one final question, Mr. LaCour, and I will

1 ask your colleagues in just a moment or two.
2 With the two issues Mr. Davis is going to come back with,
3 you rest your case, correct?
4 MR. LACOUR: Yes, Your Honor.
5 JUDGE MARCUS: You do not wish to call anybody live.
6 Do I have that right?
7 MR. LACOUR: That's correct.
8 JUDGE MARCUS: Okay. The defendants have rested save
9 for the two issues we will join issue on after we take a lunch
10 break.
11 Let me turn to the plaintiffs by way of rebuttal. And ask
12 you, Mr. Ross and Ms. Khanna, whether you have any rebuttal
13 evidence or whether you will rest on the record as it now
14 exists.
15 MR. ROSS: We rest on the record and our objections,
16 Your Honor.
17 JUDGE MARCUS: Ms. Khanna?
18 MS. KHANNA: Same here, Your Honor.
19 JUDGE MARCUS: Just so I'm clear on this, Mr. Ross,
20 Ms. Khanna, you don't wish to call any witnesses live either?
21 MR. ROSS: No, Your Honor.
22 MS. KHANNA: No, Your Honor.
23 JUDGE MARCUS: Okay. With that, we will break for
24 lunch. When we come back, Mr. Davis, just enlighten us about
25 those two exhibits, and we will go into closing argument.

1 We will give the plaintiffs one hour in the aggregate for
2 closing argument. Mr. Ross, Ms. Khanna, you can break it up
3 any way you see fit. We will give the state one hour for
4 closing argument, as well.
5 If there's nothing further, we will be in recess until
6 1:45.
7 Thank you.
8 (Lunch recess.)
9 JUDGE MARCUS: Good afternoon.
10 Before we proceed with closing, I think there were two
11 loose ends, Mr. Davis, you were going to help us with.
12 MR. DAVIS: There were, Judge. Exhibit T, which is
13 our responses to request for admissions, we did not mean to
14 move for admission in that document in the Milligan and Caster
15 cases. We did one exhibit list for all three. So we are not
16 moving to admit the responses to RFAs Exhibit T in this case.
17 JUDGE MARCUS: So you are not offering T?
18 MR. DAVIS: Correct.
19 JUDGE MARCUS: Okay. We can strike that out.
20 MR. DAVIS: Z, which is the historical maps, that is
21 something we wish to be considered for both cases, but our
22 records show that that was admitted when we were here -- when
23 we were together for the preliminary injunction proceedings.
24 We show that as being admitted on the first day of those
25 proceedings on -- that document, that collection of maps was

1 filed as Singleton Exhibit 22, which was admitted on page 17 of
2 Volume 1 of the preliminary injunction record.
3 JUDGE MARCUS: Gotcha.
4 Anything further on that, then, Mr. Ross? Do you want to
5 withdraw your objection to that one?
6 MR. ROSS: Yes, Your Honor.
7 JUDGE MARCUS: So that's clear. We have received Z
8 into evidence, and the other exhibit has been withdrawn.
9 MR. DAVIS: That's correct.
10 JUDGE MARCUS: Thank you.
11 With that, we will proceed to closing argument here. We
12 are just going to have -- we are not going as we might normally
13 have plaintiff argument, response, reply. We are just going to
14 go -- given where we are and the timing issues, two closing
15 arguments. You are going to break up your argument, I take it?
16 MR. ROSS: Yes, Your Honor. Ms. Khanna is going to do
17 the closing. I may have a few statements or I may not.
18 JUDGE MARCUS: Perfect. Any way you folks want to
19 handle it is fine.
20 Then, Mr. LaCour, I take it you are going to make the
21 closing argument?
22 MR. LACOUR: Yes, Your Honor.
23 JUDGE MARCUS: We gave in the aggregate each side
24 one hour.
25 MR. LACOUR: Thank you. We anticipate we will need

1 much shorter than that.
2 JUDGE MARCUS: Ms. Khanna, thank you, and you may
3 proceed.
4 MS. KHANNA: I, too, will be much shorter than an
5 hour. I promise.
6 During the break, I was looking -- I -- can everybody hear
7 me before I dive in?
8 JUDGE MARCUS: We hear you fine.
9 MS. KHANNA: During the break, I was looking through
10 the briefing in preparation for today's hearing, and as the
11 Court knows, we saw a lot of hundreds of pages of motions for
12 clarification, responses to motions for clarification, replies
13 to motions for clarification all trying to answer the question
14 of what are we even fighting about today.
15 And I really appreciate this Court's efforts during the
16 course of this hearing to drill down on that question. And I
17 think we've gotten some real clarity on that.
18 So I think I just want to start out by making very clear
19 to the Court what we're not fighting about, what is not in
20 dispute.
21 *Gingles II*, are black voters politically cohesive in
22 Alabama in development areas? Yes. That is not in dispute.
23 *Gingles III*, does the white majority vote as a bloc
24 usually to defeat black-preferred candidates? Yes. That is
25 not in dispute. It is not in dispute generally in Alabama. It

1 is not in dispute in the areas in the regions in question. And
2 it is not in dispute in the 2023 plan. Most specifically, in
3 the 2023 plans, Congressional District 2, there is no dispute
4 that the white majority will usually, if not uniformly, vote as
5 a bloc to defeat black-preferred candidates.
6 So Senate Factors. The Senate Factors are not in dispute.
7 Let's just spell out for a second what that means. Senate
8 Factor 1, the history of official voting-related discrimination
9 in Alabama. That is not in dispute. This Court has already
10 found, the evidence has already showed that that history is
11 repugnant, it is well documented, and it is persistent.
12 Senate Factor 2, the extent to which voting in the
13 elections of Alabama are racially polarized. Again, that's not
14 in dispute. This Court has already found that racial
15 polarization in Alabama is intense, and it is stark.
16 Senate Factor 3, the extent to which the state has used
17 voting practices or procedures that tend to enhance the
18 opportunity for discrimination against the minority group.
19 That is not in dispute. The Court has already made findings in
20 favor of liability under Section 2 for Senate Factor 3.
21 Senate Factor 5, the extent to which minority group
22 members bear the effects of discrimination in areas such as
23 education, employment, and health which hinder their ability to
24 participate effectively in the political process. That is not
25 in dispute. This Court has already made findings that black

1 voters, black citizens in Alabama have marked disparities
2 across every metric on socioeconomic scale and the fact that
3 continues to hinder their access to the political process.
4 Senate Factor 6, the use of overt or subtle racial appeals
5 in political campaigns. That's not in dispute. The Court has
6 already made findings that Alabama candidates, including
7 congressional candidates have used racial appeals to appeal to
8 voters.
9 Senate Factor 7, the extent to which members of the
10 minority group have been elected to public office in the
11 jurisdiction, this Court has already made findings that the
12 extent to which black candidates can achieve success at the
13 statewide level is zero. That is not in dispute.
14 Now, Senate Factors 8 and 9, this Court did not make
15 findings of fact on those issues during the preliminary
16 injunction phase. And there is, perhaps, some more evidence in
17 the record, depending on how the Court rules on the motion in
18 limine. There has today been presented evidence on both of
19 those issues. And I don't think it actually requires an
20 extensive analysis to see how they kind of fall out today.
21 Senate Factor 8 is about the extent to which the state has
22 been responsive to the needs of the minority group. I think we
23 can look at responsiveness just by looking at the state of
24 Alabama's response to this Court's ruling, looking at Alabama's
25 response to the Section 2 lawsuit brought by black voters, won

1 by black voters, and their responsiveness was to give no
2 response at all, and certainly no meaningful response on the
3 rights at issue. Their response was that they will continue to
4 do what they are going -- what they had always done, what has
5 already been struck down, not because they are prioritizing the
6 needs or even recognizing the rights of black voters, but
7 because they are prioritizing their own policy preferences and
8 their own communities.
9 And then Senate Factor 9 goes to the tenuousness of the
10 justifications for the enacted plan. And as Mr. Ross presented
11 during his opening statement, the new evidence in the record on
12 the 2023 plan shows that the purposes of that plan is tenuous
13 at best, or the state solicitor general as turned map maker to
14 inject into the record, to inject into Alabama's history of
15 redistricting some new found principles and new found ways of
16 beefing up redistricting maps for the sake of a legal argument
17 to continue to advance in court.
18 The Court definitely -- again, at its disposal is evidence
19 to make additional findings on Senate Factors 8 or 9, although
20 it certainly does not have to in order to resolve the issues
21 here today.
22 So all that leaves for, again, what are we fighting about?
23 What is in dispute is *Gingles I,* and even then, it's not all of
24 *Gingles I*. There is no dispute on the numerosity part of
25 *Gingles I*. No dispute that black voters in Alabama are

1 sufficiently numerous to form a majority and additional
2 district.
3 I just marched through step by step the legal standard to
4 show every element that is not in dispute and that has had --
5 that has evidence in the record and in many cases findings on
6 the record.
7 I want to pause for a moment right here, because I heard
8 Mr. LaCour say during his opening statement that all the
9 plaintiffs have come to you -- all that is before this Court is
10 the question of proportionality. And the only way to arrive at
11 that conclusion is to disregard every single element of the
12 test that we just walked through. Every single element of this
13 test that this Court analyzed, meticulously studied, and went
14 through the evidence the last time, all of that evidence
15 remains in the record.
16 If -- it is perhaps just the state of Alabama who likes
17 the beat the drum of proportionality. But the plaintiffs in
18 this case have been clear that this is a totality, and that
19 this is a comprehensive analysis, and that the evidence itself
20 is comprehensive.
21 So let's turn to what appears to be in dispute, and that
22 is the portion of *Gingles I* regarding compactness, specifically
23 the compactness of the minority group.
24 As Mr. Ross noted during his earlier argument in *LULAC vs.*
25 *Perry*, the Supreme Court made clear that the first *Gingles*

1 condition refers to the compactness of the minority population
2 and not the compactness of the contested district.
3 So today, Alabama is basically saying one of two things to
4 the Court: Either the black population in Alabama is less
5 compact today than it was 18 months ago when this Court made
6 its original findings, or even 2 months ago when the U.S.
7 Supreme Court affirmed those findings; or this Court's finding
8 of geographical compactness and the Supreme Court's affirmance
9 of that finding was in error. And according to the state of
10 Alabama, the 2023 plan is just evidence of that error.
11 As a procedural matter, Alabama is foreclosed from making
12 that argument. This Court has made clear on multiple occasions
13 that it is not relitigating the findings from the preliminary
14 injunction order.
15 And as a substantive matter, the 2023 plan says absolutely
16 nothing about plaintiffs' illustrative plans. It cannot undue
17 the fact that those plans are reasonably configured and that
18 this Court has found those plans to be reasonably configured.
19 And it cannot go back in time to render a reasonable plan
20 unreasonable.
21 To the extent that Mr. LaCour is focusing on the intent
22 and the predominance of race and plaintiffs' illustrative maps,
23 the Court doesn't need to reopen that can of worms here.
24 There's no way that the intent of the map drawer, the
25 considerations of the map drawer, the communities considered by

1 that map drawer could have changed between time one and time
2 two. Those maps have remained the same.
3 The question before this Court during our last gathering
4 on the preliminary injunction hearing was whether based on the
5 Section 2 legal standard and the totality of circumstances
6 Alabama's 2021 congressional plan, which has just a single
7 district that affords black voters an opportunity to elect,
8 provides black citizens an equal opportunity to participate in
9 the political process. This Court answered that question no.
10 The question today before the Court is whether based on
11 that same standard, Alabama's 2023 plan, again, with just
12 one district that affords black voters an opportunity to elect,
13 provides black citizens in Alabama an equal opportunity to
14 participate in the political process. And, again, based on the
15 same evidence, based on the undisputed facts, it does not.
16 Ultimately, Your Honor -- Your Honors, nothing has
17 changed. The law hasn't changed. The Supreme Court said as
18 much. It's not for lack of trying on behalf of Alabama. The
19 legal standard has not changed since this Court ruled 18 months
20 ago. It has not changed over the last 40 years.
21 The record hasn't changed. The record from the
22 preliminary injunction proceedings remains the record today.
23 The opportunities for black voters have not changed. In
24 under the 2021 plan, black voters had a single opportunity
25 district, and today, black voters have a single opportunity

1 district. Just like they had a single opportunity district in
2 2012, in 2002, and in 1992, at that time for the first time.
3 Nothing has changed, Your Honor. And ultimately, it is
4 time for the black voters of Alabama to see some thing to
5 change. It is time for some kind of change so that black
6 voters in Alabama are finally afforded an opportunity to elect
7 their preferred candidate in an additional district to provide
8 that equal access to the political process.
9 Unless there's any questions, Your Honor, I will conclude
10 there.
11 JUDGE MARCUS: No. Thank you.
12 Mr. Ross?
13 MR. ROSS: Nothing to add, Your Honor.
14 JUDGE MARCUS: Thank you.
15 Mr. LaCour.
16 MR. LACOUR: Thank you, Your Honors.
17 The plaintiff said that the heart of their case was the
18 cracking of the Black Belt. The state responded that cracking
19 is no more. It's now the plaintiffs who are demanding that you
20 order the cracking of the Black Belt because every one of their
21 illustrative plans puts the Black Belt into at least three if
22 not four districts to hit racial goals. That reading of
23 Section 2 is unlawful because it's unconstitutional.
24 Now, to return to something that Ross said before the
25 lunch break. The *Allen* court did not say that strict scrutiny

1 was satisfied in considering the 2021 plan. The Court has only
2 ever assumed that Section 2 compliance could justify racial
3 predominance.
4 And I believe in light of the *Safe Harbor* decision that
5 came out two weeks after the *Allen* decision that it makes clear
6 that there are only two circumstances where the Court has ever
7 held that strict scrutiny is satisfied. That is in the context
8 of safety, like prison riots, which is not at issue here, and
9 context of remediating past identified to jury discrimination,
10 also not at issue here when we're dealing with a disparate
11 impact or an effects test.
12 The Court simply reaffirmed at the end that its concerns
13 that Section 2 may impermissibly elevate race in the allocation
14 of applicable power within the states remains. They simply
15 held that the record did not bear out the concerns in this
16 specific challenge to the 2021 plan on the record before the
17 Court at that time.
18 So the question, then, is why weren't those concerns borne
19 out on that record? And the answer is that the Court was not
20 requiring the state to adopt a plan that would violate the 2021
21 plans' principles.
22 As in any disparate impact litigation, the plaintiffs need
23 to come forward with some sort of alternative that advances
24 legitimate interests whether you are dealing with the
25 employment context or the fair housing context, or you're

1 dealing with the map drawing context. They have to come
2 forward with an alternative that advances legitimate purposes
3 as well as the challenged policy while still reducing the
4 disparate effect.
5 That's essentially what *Gingles I* is doing. And because
6 they were able to meet that test in the 2021 plan, we were
7 essentially in a situation where you had equal maps. You had
8 ones that all advanced legitimate purposes of the 2021 plan
9 equally. And when you are in that context, you are dealing
10 with race consciousness rather than race predominance.
11 But we're not in that context anymore with the 2023 plan.
12 Now you have a plan in front of you that is substantially
13 different despite what Ms. Khanna said.
14 JUDGE MARCUS: Help me with this. We are sort of at
15 this a few times. Were you not required to draw a new map that
16 provided a fair and reasoned opportunity district?
17 MR. LACOUR: Your Honor, I think we were required to
18 draw a new map that complies with the Section 2 of the Voting
19 Rights Act and the Core Protection Clause of the United States
20 Constitution.
21 JUDGE MARCUS: I understand that. And I think that's
22 truly true stated at this a very high order of an abstraction.
23 But what I would like to get to is combining the abstraction
24 with where we are here, were you not required to draw a new map
25 that provided a fair and reasonable opportunity?

1 MR. LACOUR: Your Honor, we were required to draw a
2 map that was equally open and that did not have discriminatory
3 effects on account of race. And so Section 2 demands, that's
4 what we have to comply with particularly in light of *Allen vs.*
5 *Milligan*.
6 JUDGE MARCUS: So help me. On round one, we found
7 likely proof of liability, and then we said with regard to
8 remedy that you had to afford a second district that provided
9 an opportunity. Is that not a requirement? Was that just a
10 statement of no moment? Does that have any bearing on where we
11 are?
12 MR. LACOUR: Your Honor, the 2021 plan has been
13 repealed. The 2023 plan has been enacted. And if it does not
14 violate Section 2, then it is lawful and has remedied the
15 violation, regardless of the -- whether it hits proportional
16 representation or not.
17 JUDGE MARCUS: I am not asking about proportional
18 representation. I'm asking about whether or not it provides a
19 reasonable opportunity. In round one, we said you had to do
20 that, or at least the failure of doing that was a likely
21 violation.
22 Is it your view that you do not have to answer that
23 question because of these other traditional districting
24 criteria?
25 MR. LACOUR: I think this is as reasonable of an

1 opportunity as you can get without violating traditional
2 districting principles in service of a racial gerrymander. And
3 for that reason, we do think it complies with Section 2 of the
4 Voting Rights Act.
5 JUDGE MARCUS: Thank you.
6 JUDGE MANASCO: Let me follow up to that --
7 JUDGE MARCUS: Go ahead.
8 JUDGE MANASCO: -- just a little bit.
9 So in our previous order, we considered the tension
10 between Section 2 compliance and racial gerrymandering. And we
11 indicated following our liability finding what an appropriate
12 remedy would be, that it would be a map that includes an
13 additional opportunity district.
14 I asked a question about that earlier with respect to the
15 motion in limine, but now I'm asking a question with respect to
16 the substance, not necessarily with respect to the evidence you
17 think we ought to consider or ought not to.
18 What role did our statement about the additional
19 opportunity district play in what was necessary to comply with
20 our order?
21 MR. LACOUR: I think your statement made clear that if
22 we were going to move forward with the exact same priority
23 given to communities of interest, compactness, and county lines
24 as we gave in 2021, that we would likely need to have two
25 majority-black districts or something quite close to it. But I

1 don't think we were bound to stick to that same prioritization
2 of those same legitimate principles, which the Supreme Court
3 blessed in *Allen* and has blessed repeatedly as things that a
4 state is allowed to do when it's doing the hard work of trying
5 to draw congressional districting lines.
6 JUDGE MANASCO: All right. So where are we now? I
7 take it that the state's position is that this is, although
8 it's a remedial proceeding, sort of functionally very much like
9 a preliminary injunction hearing, where if we were to grant the
10 relief that the plaintiffs request, we would be entering an
11 injunction against SB-5 instead of SB-1.
12 So indulge a hypothetical for a moment. If we were to say
13 again there is a violation and what has to happen is an
14 additional opportunity district, what would be the impact in
15 this context of the statement about an additional opportunity
16 district?
17 MR. LACOUR: Your Honor, I think our position would be
18 that that would be a violation of *Allen vs. Milligan* Supreme
19 Court's order because they have not satisfied *Gingles I*. And
20 so you would be requiring us to adopt a map that violates
21 traditional principles which the Supreme Court declared to be
22 unlawful.
23 JUDGE MANASCO: Well, at what point does the federal
24 court in your view have the ability to comment on whether the
25 appropriate remedy includes an additional opportunity district?

1 On liability? On remedy? Both? Or never?
2 MR. LACOUR: I don't think there's any prohibition on
3 the Court commenting on what it thinks an appropriate remedy
4 would be, but I do think that that statement had to have been
5 in the context of the 2021 plan and through traditional
6 principles that were given effect in that plan, because again,
7 this is again intensely local appraisal of -- it was an
8 intensely local appraisal of that plan.
9 JUDGE MANASCO: You can appreciate the concern,
10 though, that if all that's necessary to occur to avoid the
11 additional opportunity district is to redefine the principles,
12 that there never comes a moment where on the state's logic,
13 which we're still in the hypothetical world -- there never
14 comes a moment where the Court can say with force that there
15 has to be an additional opportunity district, because all
16 that's required is for the state to redefine the context every
17 time.
18 MR. LACOUR: Your Honor, I would dispute that
19 proposition. We couldn't rely on core retention. *Allen* made
20 that clear. So if we said the new context is core retention,
21 it is our number one priority, that would do us no good in a
22 future challenge. But what we did rely on are those three
23 principles that the Court has said are things that states can
24 do and have always done.
25 JUDGE MANASCO: But for example, SB-5 pays attention

1 to the Wiregrass. We weren't talking about the Wiregrass in
2 January of 2022.
3 Is there a point at which the context becomes somewhat
4 fixed? We have a census every ten years. So the numerical
5 features that -- the numerical demographics that we're dealing
6 with are fixed at that point in time.
7 But is there some point -- does the state acknowledge any
8 point during the ten-year cycle where the ability to redefine
9 the principles cuts off and the Court's ability to order an
10 additional opportunity district attaches?
11 MR. LACOUR: Your Honor, I think it sounds a lot like
12 a preclearance regime, which I don't think Section 2 --
13 JUDGE MANASCO: No. In this world, we've made a
14 liability finding. It's not -- I mean, it's not preclearance.
15 There's been a liability finding as to HB-1.
16 I take it you are urging us to make a liability finding
17 before we do anything, if we do, do anything with respect to
18 HB-5.
19 My question is: If we have to make the liability finding
20 every time and you say that until we make the liability finding
21 we can never comment on the appropriate remedy because the
22 context can be redefined, when in the cycle does the loop cut
23 off?
24 MR. LACOUR: Your Honor, there are obviously timing
25 issues that we discussed earlier today. If you find that there

1 is a problem with this map that it likely violates Section 2,
2 as well, then our time has run out, and we will have a court
3 drawn map for the 2024 election barring appellate review.
4 But so I think that would address that concern. But --
5 and this is how federal courts work when it comes to any law
6 that is challenged and is enjoined. If the new law that is
7 enacted that repeals the law whether it's dealing with the
8 First Amendment concern or dealing with -- with any other area
9 of the law that is touched with potential federal interest,
10 it's incumbent on the plaintiff to show that the new law is
11 also violative of federal law.
12 And if the new law looks identical or very, very close to
13 the old law, that's an easy showing to make, the problem for
14 the plaintiffs here is this is not the same map. This is --
15 JUDGE MANASCO: Let me ask it I guess a little more
16 finely. With respect to HB-1 when we made the liability
17 finding, is it the state's position that at that time this
18 Court had no authority to comment on what the appropriate
19 remedy would be because at that time the Legislature was free
20 to redefine traditional districting principles?
21 MR. LACOUR: Of course, the Court could comment on it.
22 And I think had the Legislature failed in its attempt to draw a
23 new map, then we would have moved to a pure remedial
24 proceeding, as Judge Marcus recognized on page 155 of Doc 172
25 in the Milligan case. But the Legislature did succeed in

1 passing a new map that comports with Section 2.
2 JUDGE MANASCO: I guess that brings me back to my
3 original question. The Legislature has drawn a new map. So
4 what was the import according to the state of the original
5 comment about the additional opportunity district?
6 MR. LACOUR: I think let the Legislature know that if
7 they were going forward with the exact same principles as they
8 went forward with in 2021, which was refine splitting
9 communities of interest, refine drawing really non-compact
10 districts that might be harder to represent, then you are going
11 to have to apply that in a way that ensures that there's not a
12 dispersate effect on the minority population, which is going to
13 require two majority black districts or something close to it.
14 But I don't think we were locked in forever sticking with
15 non-compact districts or sticking with an approach that
16 violates or breaks up communities of interest.
17 Now, we couldn't say it's really important to keep
18 together these communities of interest while splitting the
19 Black Belt. I think that much was made clear by this Court and
20 the Supreme Court. That's why we have a plan now that does
21 better on the Black Belt than every single one of the
22 plaintiffs' 11 plans. So now they are here asking you to split
23 the Black Belt in order to hit racial goals. And the Supreme
24 Court made clear that is unlawful, and it is unconstitutional.
25 JUDGE MANASCO: Let me ask you one more question about

1 the legislative findings with respect to SB-5.
2 Should Representative Pringle's testimony about his
3 understanding and knowledge of the findings play any role in
4 the amount of weight that we assign them?
5 MR. LACOUR: Your Honor, I don't think so for at least
6 two reasons. One is he is one of 140 members of the
7 Legislature. The Governor also had these in front of her when
8 she signed the law.
9 Second is there's a presumption of regularity that
10 attaches to any legislative enactment whether that's a
11 congressional enactment or Legislature's enactment.
12 And then third, the findings essentially are describing
13 the map. You can look at the map yourself, though, and you can
14 see what the priorities are in that map when it comes to
15 compactness, when it comes to county lines, and when it comes
16 to parts of the state that were kept together.
17 So what really matters is how the principles were embodied
18 in the plan and...
19 JUDGE MANASCO: So is there any impact to the state's
20 defense of the map, SB-5, if we set the findings aside?
21 MR. LACOUR: Your Honor, we think we would still
22 prevail. But at the same time, you do have an act of the
23 Legislature that does define communities of interest in a way
24 that is consonant with other evidence that's in the record.
25 Even Joseph Bagley in his report notes that multiple

1 historians have defined the Wiregrass to include the nine
2 counties that the Legislature included in those legislative
3 findings.
4 So I do think it's somewhat troubling for a federal court
5 to say that they know Alabama's communities of interest better
6 than Alabama's representatives know them.
7 But we don't need the findings to win. And we have got
8 evidence to back up what was done in the 2023 map. So either
9 way, plaintiffs' maps -- plaintiffs' maps would require us to
10 violate traditional principles.
11 And keep in mind as well, even on those objective factors
12 of compactness and county splits, the 2023 plan is more compact
13 or splits fewer counties or both than every one of the 11
14 illustrative plans. So if you are just looking at those two
15 factors alone, you are going to be forcing the state to adopt
16 either a less compact plan, a plan that does not respect county
17 lines as well as the 2023 plan, or a plan that fails on both of
18 those metrics all again in service of forcing proportionality.
19 And again, that is unlawful.
20 JUDGE MOORER: So, Mr. LaCour, what I hear you saying
21 is the state of Alabama deliberately chose to disregard our
22 instructions to draw two majority-black districts or one where
23 minority candidates could be chosen.
24 MR. LACOUR: Your Honor, it's our position that the
25 Legislature --

1 JUDGE MOORER: I am not asking you your position. Did
2 they or did they not? Did they disregard it? Did they
3 deliberately disregard it or not?
4 MR. LACOUR: Your Honor, District 2 I submit is as
5 close as you are going to get to a second majority-black
6 district without violating *Allen* -- the Supreme Court's
7 decision in *Allen*, which is the supreme law of the land when it
8 comes to interpreting Section 2. So I think this is as close
9 as you could get without violating the Constitution, without
10 violating *Allen vs. Milligan*. So I do think --
11 JUDGE MOORER: In the view of the state?
12 MR. LACOUR: Yes, Your Honor.
13 JUDGE MARCUS: Let me ask the question one more time.
14 Can you draw a map that maintains three communities of
15 interest, splits six or fewer counties, but that most likely if
16 not almost certainly fails to create an opportunity district
17 and still comply with Section 2?
18 MR. LACOUR: Yes. Absolutely.
19 JUDGE MARCUS: Thank you.
20 MR. LACOUR: If there are no further questions.
21 JUDGE MARCUS: No. No. You have got time left which
22 you may or may not use.
23 MR. LACOUR: I will just say that keep in mind again
24 this Court found that the Black Belt was a substantial
25 community of interest of great significance. Plaintiffs are

1 here now asking you to split the Black Belt among three or
2 mother districts in service of racial proportionality. But the
3 plaintiffs got it right the first time in their brief to the
4 Supreme Court. Section 2 never requires that result. And for
5 that reason, plaintiffs' challenge fails.
6 JUDGE MARCUS: Thank you very much.
7 I take it no one else has anything else to present to us
8 in these proceedings. Mr. Ross?
9 MR. ROSS: I had a few words to respond, but I am
10 happy to defer to Your Honor.
11 JUDGE MARCUS: Thank you. Did you have anything else
12 to present by way --
13 MR. ROSS: No. Just argument, Your Honor.
14 JUDGE MARCUS: Ms. Khanna?
15 MS. KHANNA: No, Your Honor. I had a question, but no
16 further evidence or anything.
17 JUDGE MARCUS: And, Mr. LaCour?
18 MR. LACOUR: That is all from us, Your Honor.
19 JUDGE MARCUS: All right. Your question, Ms. Khanna?
20 MS. KHANNA: This is at the risk of seeking out
21 another clarification. I heard from Mr. LaCour just now he
22 said, and I will quote from the transcript, Your Honor, there
23 are obviously timing issues that we discussed earlier today.
24 If you find that there is a problem with this map, that it
25 likely violates Section 2, as well, then our time has run out,

1 and we will have a court drawn map for the 2024 election
2 barring appellate review.
3 And I just wanted to seek some clarification if the state
4 is able to provide about does that -- does that mean that we
5 will not find ourselves in the same loop we found ourselves
6 last time where the state might seek to stay any ruling in
7 plaintiffs' favor to ensure that there's not a remedy in time
8 for 2024, or are we all agreed among the things that are not in
9 dispute is that there will be something in time for 2024 if
10 this Court finds it is warranted?
11 JUDGE MARCUS: Did you want to respond, Mr. LaCour?
12 MR. LACOUR: Yes. We are not waiving the right to
13 seek a stay on appeal or to seek appellate review. Our
14 position is simply that if there's an order because that
15 October 1st deadline that has been put forward by the Secretary
16 of State, that --
17 JUDGE MARCUS: Of course, the Secretary of State, if
18 my recollection is correct, put it in two slightly different
19 iterations. At one point, he said early October. And at
20 another point, he said the first. So I don't -- but I think
21 the thrust of it is essentially the same.
22 MR. LACOUR: Yes, Your Honor.
23 JUDGE MARCUS: That would be correct, would it not?
24 MR. LACOUR: Yes, Your Honor.
25 JUDGE MARCUS: Okay.

1 MR. LACOUR: So we are not waiving the right to seek
2 any sort of appellate review if need be, including stay
3 application. We're simply making the point however that if
4 this order -- if there is a preliminary injunction and it does
5 go into effect, and it is not stayed, because of the time
6 constraints with that October deadline as it currently stands,
7 as a practical matter, I cannot see the Legislature coming back
8 into session enacting another 2023 plan. So they have taken
9 their shot under the current timing -- in light of the current
10 timing restraints. That's the only point I was making.
11 JUDGE MARCUS: Thanks very much.
12 Thank you all for your efforts. We will adjourn in a
13 moment.
14 We wanted to set a deadline for filing post findings of
15 fact and conclusions of law. And we will direct the parties to
16 submit proposed findings of fact and conclusions of law no
17 later than 8:00 a.m. this Saturday, which is the 19th of
18 August.
19 Let me ask my colleagues whether they had anything else
20 they wanted to address.
21 Judge Manasco?
22 JUDGE MANASCO: Nothing from me.
23 JUDGE MARCUS: Judge Moorer?
24 JUDGE MOORER: No, sir.
25 JUDGE MARCUS: This Court is adjourned.

1 Thank you all for your efforts.

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3 (Whereupon, the above proceedings were concluded at

4 2:36 p.m.)

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1 CERTIFICATE

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4 I certify that the foregoing is a correct

5 transcript from the record of proceedings in the

6 above-entitled matter.

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11 Christina K Decker 08-14-2023

12 Christina K. Decker, RMR, CRR Date

13 Federal Official Court Reporter

14 ACCR#: 255

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FILED
2023 Sep-11 PM 12:56
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARCUS CASTER, ***et al.*****,**	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No.: 2:21-cv-1536-AMM**
	)	
WES ALLEN, ***in his official capacity as Alabama Secretary of State*****,** ***et al.*****,**	)	
	)	
Defendants.	)	

ORDER

This congressional redistricting case is before the court on a stay motion filed by Alabama Secretary of State Wes Allen, *Caster* Doc. 226; responses filed by the *Caster* Plaintiffs and the Plaintiffs in the related cases, *Caster* Doc. 235, *Milligan* Docs. 285, 287; and a reply filed by the Secretary, *Caster* Doc. 237.[1] For all the reasons explained in the order denying Secretary Allen's Emergency Motion for

[1] This case is one of three cases currently pending in the Northern District of Alabama that challenge Alabama's congressional electoral map. The other two cases are *Singleton v. Allen*, Case No. 2:21-cv-1291-AMM, and *Milligan v. Allen*, Case No. 2:21-cv-1530-AMM. *Singleton* and *Milligan* are pending before a three-judge court that includes the undersigned judge. All parties agreed during preliminary injunction proceedings that any evidence admitted in one case could be used in any of the three cases unless counsel raised a specific objection. *See Singleton* Doc. 72-1; *Caster* Doc. 74; Dec. 20, 2021 Tr. 14–17; Jan. 4, 2022 Tr. 29; *Milligan* Doc. 203 at 5–6; *Milligan* Doc. 272 at 26; *Caster* Doc. 182 at 5–6; Aug 14, 2023 Tr. 61. Accordingly, the court considered evidence adduced in all three cases.

Stay Pending Appeal in *Singleton* and *Milligan*, *see Milligan* Doc. 289, which order is attached hereto as Appendix A, the Secretary's motion is **DENIED**.

DONE and **ORDERED** this 11th day of September, 2023.

ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

APPENDIX A

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.

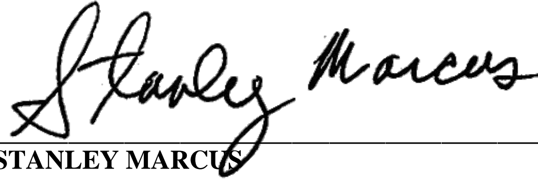
Finally, we find that the public interest weighs decisively against a stay. We observe that the words "public interest" do not appear in the Secretary's stay motion, other than in his recitation of the applicable legal standard. *Milligan* Doc. 276 at 3.

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.

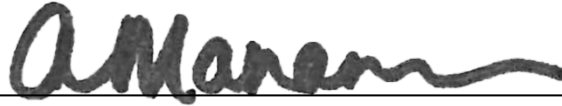
* * *

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.

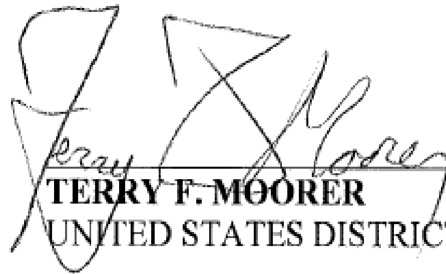
DONE and **ORDERED** this 11th day of September, 2023.



STANLEY MARCUS
UNITED STATES CIRCUIT JUDGE



ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE



TERRY F. MOORER
UNITED STATES DISTRICT JUDGE