

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

4 BOBBY SINGLETON, et al., \*  
5 Plaintiffs, \* 2:21-cv-1291-AMM  
6 vs. \* July 31, 2023  
7 \* Birmingham, Alabama  
8 \* 11:30 a.m.

9 WES ALLEN, in his official \*  
10 capacity as Alabama Secretary \*  
11 of State, et al., \*  
12 Defendants. \*

13 \*\*\*\*\*

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

16 vs. \*

17 WES ALLEN, in his official \*  
18 capacity as Alabama Secretary \*  
19 of State, et al., \*  
20 Defendants. \*

21 \*\*\*\*\*

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

24 vs. \*

25 WES ALLEN, in his official \*  
capacity as Alabama Secretary \*  
of State, et al., \*  
Defendants. \*

\*\*\*\*\*

TRANSCRIPT OF STATUS CONFERENCE  
VIA TELECONFERENCE

BEFORE THE HONORABLE ANNA M. MANASCO,  
THE HONORABLE TERRY F. MOORER,  
THE HONORABLE STANLEY MARCUS

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P R O C E E D I N G S

(In open court.)

JUDGE MOORER: Good afternoon, folks.

Let me call the three cases -- Milligan v. Allen, Singleton v. Allen, Caster v. Allen, and ask you if you would be kind enough to state your appearances. Let's start with counsel for Milligan, et al.

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

JUDGE MOORER: And good afternoon to you, sir.

And for the Caster plaintiffs.

MS. KHANNA: Abha Khanna for the Caster plaintiffs, Your Honor.

THE COURT: And good afternoon to you.

And for Singleton?

MR. QUILLEN: Henry Quillen for the Singleton plaintiffs, Your Honor.

JUDGE MARCUS: Mr. Quillen.

And for the defendants, we have the Secretary of State and the two intervening defendant legislators.

MR. LACOUR: Yes, Your Honor. Edmund LaCour present for the Secretary of State, as is my colleague Jim Davis, who is off screen to my right. And then to my left...

MR. WALKER: Dorman Walker, Your Honor, for the intervenor defendant legislators.

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1 JUDGE MARCUS: And good afternoon to you, as well.

2 We set the matter down for a status conference. I suppose  
3 it's really more like a pretrial conference preliminary to the  
4 hearing which we've set for August 14th.

5 There are a number of issues that we would like to address  
6 today. Let me list some of them for you, and then you will be  
7 able to address each of them as you see fit.

8 The first item we had in front of us that I wanted to  
9 raise was a motion for clarification that was filed by the  
10 Caster and Milligan folks.

11 The second item was a suggestion, I suppose, from the  
12 defendants that the plaintiffs ought to be filing an amended  
13 pleading of some kind before we proceed.

14 Third, I wanted to discuss with you the status and posture  
15 of discovery. With the agreement of all of the parties, we've  
16 set a close of discovery for August the 10th. The time is  
17 short. And we wanted to inquire about whether there were any  
18 particular discovery problems we should be addressing and  
19 resolving at this time.

20 Fourth, we wanted to get a more specific and detailed  
21 statement of what evidence each side was proposing to present,  
22 whether it be live, or in the form of documentary evidence, or  
23 to what extent you might be citing back to the record that was  
24 already created in the first preliminary injunction hearing  
25 that we've had.

1       And then we wanted to discuss something we had resolved  
2 earlier preliminarily. In the first preliminary injunction  
3 hearing, the parties agreed that documents, discovery  
4 responses, deposition testimony, hearing exhibits, and hearing  
5 testimony produced, obtained, or offered in Caster, Milligan,  
6 or Singleton may be adopted by any party to these three cases,  
7 subject to any objection by any party, as it pertains to their  
8 individual cases, as though produced in that case by  
9 affirmatively including such evidence in their proposed  
10 findings.

11       I really just wanted to make sure that we were operating  
12 or would be operating under the same ground rules, and if that  
13 not be the case, that you could address that for us, as well.

14       There may be other issues that you would like to raise,  
15 and we welcome you to do just that.

16       But let's begin, then, with Caster and Milligan's  
17 application, motion, for what's characterized as a  
18 clarification of the role of Milligan in this case.

19       Ms. Khanna, did you want to proceed? Or Mr. Ross?

20       MS. KHANNA: I'm happy to, Your Honor. And Mr. Ross  
21 can fill in anything that I left out.

22       JUDGE MARCUS: Fire away.

23       MS. KHANNA: Our motion for clarification is really  
24 just that. It's to clarify what is the role of Singleton in  
25 these preliminary injunction remedial proceedings.

1 I know that the purpose of the remedial proceedings, as I  
2 understand it, is to address the Section 2 violation, the  
3 likely Section 2 violation found by this Court and affirmed by  
4 the Supreme Court in the preliminary injunction order. And I  
5 believe -- and only two parties have that claim. So only two  
6 parties have brought that claim, only two parties have so far  
7 succeeded on that claim. And I believe the remedy to that  
8 claim is what is currently before the Court.

9 Our only -- as we indicated in our filing early this  
10 morning, our only question for the Court is whether or not the  
11 Singleton plaintiffs have the same party status when it comes  
12 to the Section 2 remedial proceedings, or are they more in the  
13 position of amicus status, since they are outsiders to the  
14 Section 2 litigation itself.

15 JUDGE MARCUS: So if I understand your position  
16 correctly, your view is that Singleton should be reduced to the  
17 role of amicus.

18 MS. KHANNA: When it comes to the Section 2  
19 proceedings, I don't believe that they have a stake in that  
20 claim the way that the plaintiffs who brought that Section 2  
21 case do. And I believe, yes, they should be amicus when it  
22 comes to anything that is resolving the Section 2 findings and  
23 injunction.

24 JUDGE MARCUS: Of course, they say the constitutional  
25 claim is also part of these proceedings. They were able to



1 present evidence on the constitutional matter in the first  
2 hearing, as did Milligan. And they ought not to be shut out  
3 for being -- having the opportunity do that this time.

4 Why would you suggest they should be shut out of a  
5 proceeding when they are plainly a party plaintiff in this  
6 action? We indicated in our June 20th order that any set of  
7 plaintiffs who objects to the new legislative plan would be  
8 required to file their objections by July 28th. Singleton did  
9 just that, as did you on behalf of your clients, and as did  
10 Mr. Ross on behalf of his.

11 What is the basis for keeping them out or relegating them  
12 to the role of amicus?

13 MS. KHANNA: Your Honor, I tell you I want to be very  
14 clear. We are not asking anyone to be shut out of anything.

15 Certainly the racial gerrymandering and constitutional  
16 claims were part of the preliminary injunction hearing, but  
17 those claims were not ultimately resolved, decided, appealed,  
18 or I believe subject to the remedial proceedings that are now  
19 addressing the Section 2 claim.

20 So the real -- and, again, I want to clarify. This is  
21 really just to clarify.

22 I am certainly aware that the Courts refer to the parties  
23 generally about the submissions for the objections to the plan.  
24 Our collective understanding with the Milligan plaintiffs was  
25 that that was about the Section 2 remedy for the Section 2

1 claim, whether or not it resolved the Section 2 claim that has  
2 been ruled in our favor, which is why we sought clarification  
3 as to whether those parties, when it comes to the Section 2  
4 remedy process, were limited to Section 2 plaintiffs or to any  
5 plaintiffs.

6 I don't think -- it's not a -- I don't think it's a  
7 critical, necessarily, distinction for the procedure of who  
8 gets to say what or submit what documents. Certainly we  
9 believe that the Singleton has their -- has the ability and the  
10 right, and they already have provided their -- their opinions  
11 and their analysis as to the map. It really is just a  
12 clarification about how narrow are these proceedings, or are  
13 they kind of -- are they opened up to kind of any objections or  
14 challenges from the three plaintiffs.

15 JUDGE MARCUS: Let me ask the question this way: I  
16 hear the Singleton folks to be saying if they're not permitted  
17 to participate in the August 14th hearing, and if you fail to  
18 carry your burden of proof on Section 2, the fallback would be  
19 the plan that's in effect now, SB-5, and they would have no  
20 opportunity to be heard regarding that item until after the '24  
21 elections, and that that would cause them, they say,  
22 irreparable harm, if I hear the essence of their pleading.

23 Have I mischaracterized that in your view, Ms. Khanna?

24 MS. KHANNA: I don't believe you have. And I think --  
25 I understand -- I understand that concern.

1 I guess that it begs the question of what are the purposes  
2 of the remedial proceedings. Is it to -- is it to provide  
3 avenue for any and all legal objections? Or is it to provide a  
4 resolution of the Section 2 issue that has prompted the  
5 remedial proceedings?

6 JUDGE MARCUS: Gotcha.

7 Mr. Ross, anything you wanted to add to that? I know you  
8 joined in that motion.

9 MR. ROSS: Yes, Your Honor. Just a few things to add.

10 One is that, you know, as the Court is aware, the cases  
11 were consolidated solely for the purposes of the preliminary  
12 injunction proceedings, and consolidation doesn't make  
13 Singleton a party to our case and doesn't make my clients a  
14 party to the Singleton case.

15 The other thing that I wanted to highlight for the Court  
16 is that in the event that the Court finds that SB-5 is not a  
17 proper remedy to the Section 2 violation, the Court would have  
18 to, you know, take in consideration whatever the Singleton  
19 plaintiffs say, whatever, you know, if the Court decides to  
20 allow for amici, for those folks to make their own applications  
21 to the Court about what they think the proper remedy is.

22 And so the Court could take into consideration whatever  
23 concerns Singleton might want to raise about the proper remedy  
24 in this case, both through what they've already submitted, and  
25 if, in the event this Court does decide to enjoin SB-5, at any

1 remedial proceedings that the Court decides are necessary, with  
2 respect to the special master or proposed plans from any of the  
3 parties.

4 JUDGE MARCUS: But, of course, they say, as I  
5 reference from Ms. Khanna, that if you lose in the Section 2  
6 attack on SB-5, they don't get to be heard before the election  
7 in '24. Did you have an additional response to that beyond  
8 what Ms. Khanna had said?

9 MR. ROSS: No, Your Honor. I think Ms. Khanna's  
10 right, that in the event that the Court decides that SB-5 is a  
11 proper remedy for the Section 2 violation, then the Singleton  
12 plaintiffs, you know, they could have an opportunity, if  
13 they -- perhaps at a later date, but not necessarily as a part  
14 of these remedial proceedings, which is what the August 14th  
15 date was set for, based on our understanding. Obviously, if  
16 the Court has a different understanding, we will defer to you.

17 JUDGE MARCUS: I understand.

18 Mr. Quillen?

19 MR. QUILLEN: Yes. I keep hearing the term, you know,  
20 remedial proceedings or via -- or a remedial proceeding, but  
21 that's not how the Court has characterized them.

22 Procedurally we are in a situation where the State has  
23 passed a new plan. And it's very clear that a party with a  
24 gerrymandering claim against the plan does not lose their claim  
25 when a new plan is passed.

1       So I think procedurally the issue is a new plan has been  
2 passed, the Caster and Milligan plaintiffs believe that that  
3 plan violates the Voting Rights Act. We believe that that plan  
4 is an unconstitutional racial gerrymander. And there's no  
5 reason that one set of claims should be privileged over the  
6 other at this point, especially if doing so would run out the  
7 clock on our constitutional claims, if, as you noted, the  
8 Voting Rights Act claims do not succeed.

9       So, and unless there is going to be a procedure that  
10 allows the Singleton plaintiffs to pursue their claims timely,  
11 in the event the Voting Rights Act claim fails, we think that  
12 fairness allows that we be allowed to participate in August.

13       JUDGE MARCUS: Of course, they say, Mr. Quillen, that  
14 the difference, the salient difference here is that, with  
15 regard to the Section 2 claim, this Court has already found a  
16 likelihood of success on the merits.

17       And with regard to the constitutional claims that you  
18 filed and that the Milligan plaintiffs filed, we did not  
19 address it because there was no need to, and the doctrine of  
20 constitutional avoidance strongly suggested we ought not to do  
21 that.

22       Is that a distinction with or without a difference here?

23       MR. QUILLEN: It's without a difference, because what  
24 the Court held was that the Milligan and Caster plaintiffs were  
25 likely to succeed on their Voting Rights Act claim against the

1 2021 plan. Their -- and for -- with respect to their 2023  
2 plan, certainly a lot of the evidence that would justify a  
3 likelihood of success on the merits is going to be the same as  
4 it was before, but not all of it is because it is a new plan.

5 And so there is no presumption at this point before the  
6 hearing that they are going to prevail on their claim against  
7 the 2023 plan. So that's why it is a distinction without a  
8 difference.

9 JUDGE MARCUS: Thank you.

10 Mr. LaCour? And let me focus you specifically. I noted  
11 with considerable interest your response to the motion for  
12 clarification. Basically, you suggested mootness was a real  
13 issue unless they filed some amendment to their pleadings, but  
14 didn't really address your view about the motion to clarify,  
15 which, as I read it, essentially said that Singleton would not  
16 participate as a party at this juncture in the August 14th  
17 proceeding.

18 Do you have a view on that question?

19 MR. LACOUR: Your Honor, we view the case -- we view  
20 what's going to happen at the August 14th hearing, what this  
21 Court is actually doing much more like Mr. Quillen does. I  
22 think he's absolutely right.

23 There was a 2021 law. You all found that it likely  
24 violated Section 2. There's a new law. The old law has been  
25 repealed. All we have in the complaints right now are

1 allegations about potential violations by the 2021 law.

2 And as Mr. Quillen just said, there may be evidence as to  
3 the 2021 law that could be relevant to answering the question  
4 as to whether or not the 2023 law violates federal law.

5 But as you all said in your P.I. order, pages 2,010 to  
6 2,011, the new legislative plan, if enacted, will then be the  
7 governing law unless it, too, is challenged and found to  
8 violate federal law.

9 So our view of that, as you mentioned just a moment ago,  
10 Judge Marcus, the burden on the plaintiffs, whether that is the  
11 Section 2 plaintiffs in Milligan, Section 2 plaintiffs in  
12 Caster, or the Equal Protection Clause plaintiffs in Singleton,  
13 is to show that this new law is likely to violate federal law.  
14 If they cannot meet that burden, then this is the law that will  
15 govern the next election, and we can go to trial on the  
16 ultimate legality, not of the new law.

17 I think it's totally within the Court's discretion as to  
18 whether or not it will schedule the preliminary injunction  
19 motion that the Singleton plaintiffs filed last Thursday for  
20 hearing August 14th or not. We leave that up to you or not,  
21 begging to face another preliminary injunction motion.

22 But we do think that a new P.I. motion is essentially what  
23 everyone has filed as of Friday night, and that we are moving  
24 forward towards a new preliminary injunction motion as to a new  
25 law.

1 JUDGE MARCUS: Are you disputing that the pleadings  
2 that were filed by way of objections are sufficient to --

3 MR. LACOUR: Your Honor --

4 JUDGE MARCUS: -- keep this issue ripe and properly  
5 before this Court?

6 MR. LACOUR: Your Honor, there is Eleventh Circuit  
7 precedent that says you cannot amend your complaint through  
8 briefing.

9 We think it would be fairly simple for the plaintiffs to  
10 amend their complaints. We are not trying to slow things down  
11 in any way. We are on pace for August 14th. But this is not  
12 just a matter of doting I's and crossing T's. The nature of  
13 the claims that are actually being stated do have  
14 jurisdictional implications for the Court, too.

15 JUDGE MARCUS: Is it your view that in the absence of  
16 some amendment from Caster, Milligan, and Singleton, that this  
17 case is moot?

18 MR. LACOUR: Yes, Your Honor. We think that, as with  
19 any other law, if there is a preliminary injunction, then that  
20 law is taken off the books. It is incumbent on the plaintiffs  
21 to bring some sort of claim as to the new law if they feel that  
22 it violates their rights in some way. And that has not  
23 happened here yet.

24 So it is passing strange to be defending a preliminary  
25 injunction motion against a law when there is no live complaint



1 actually raising any allegation against that law.

2 JUDGE MARCUS: Also that turns on saying that these  
3 proceedings are in no sense remedial in nature, doesn't it?  
4 You have to really say we're back to square one. Isn't that  
5 really what you're saying?

6 MR. LACOUR: Your Honor, we think that is the nature  
7 of what is going on here. Yes.

8 The Legislature repealed the law that had been challenged  
9 and enacted a new law. I don't think we are sitting here under  
10 some form of preclearance. I think it is incumbent on the  
11 plaintiffs to show that this new law also is likely to violate  
12 federal law.

13 JUDGE MARCUS: Admittedly, this question of  
14 clarification and the question of amendment run together. And  
15 you have obviously raised that.

16 Ms. Khanna, would you like to respond both to Mr. LaCour  
17 and Mr. Quillen?

18 MS. KHANNA: Yes, Your Honor. I think I have a couple  
19 of points. I probably will respond a little bit to both.

20 First of all, when it comes to the scope of the  
21 August 14th hearing, what we have been envisioning as a  
22 remedial hearing, whether or not the new map actually remedies  
23 the likely violation found by this Court.

24 If you read the Covington case that we cited in our briefs  
25 from last week and from early this morning, it also says the

1 only injuries the plaintiff established in this case -- that  
2 was in the Covington case -- were that they had been placed in  
3 their legislative districts on the basis of race. The district  
4 court's remedial authority was accordingly limited to ensuring  
5 that the plaintiffs were relieved of the burden of voting in  
6 racially gerrymandered legislative districts.

7 So our understanding, Your Honor, based on Covington and  
8 the proceedings that we have laid out kind of pursuant to the  
9 rules or pursuant to the procedure laid out there, is that the  
10 these proceedings are limited to decide -- for the Court to  
11 review whether the new map alleviates the violation of the old  
12 map.

13 So I believe that response to Mr. Quillen's and  
14 Mr. LaCour's position about just kind of how expansive -- this  
15 really is a new preliminary injunction hearing --

16 JUDGE MARCUS: Let me ask you the question this way:  
17 Accepting all of that as true, and that one thing the  
18 August 14th hearing is designed to do is to determine whether  
19 SB-5 likely violates Section 2, are they not also free -- by  
20 that, I mean the Singleton folks -- to say that SB-5 also  
21 violates the Equal Protection Clause? It amounted to a racial  
22 gerrymander, and they want to be heard on that.

23 Why should the Court not give them the opportunity to  
24 present whatever body of evidence they want on that claim at  
25 the same time that you're going to go forward with your attack

1 on the Section 2? After all, that's what happened in round  
2 one.

3 MS. KHANNA: Your Honor --

4 JUDGE MARCUS: They were permitted to put in their  
5 constitutional argument and the data surrounding it. The  
6 Milligan folks were able to put theirs in, as well. The State  
7 and the intervening defendants responded. We ruled. And we  
8 simply didn't address the constitutional claim on a preliminary  
9 injunction because of what we found to be a likely violation of  
10 Section 2.

11 What I'm asking simply is why shouldn't they be permitted  
12 to put on whatever proofs they can on the constitutional attack  
13 at the same time that you're proceeding with your Section 2  
14 claim in the same proceeding before the three judges you see  
15 seated in front of you?

16 MS. KHANNA: I think that's because we believe that  
17 this proceeding on August 14th is meant to effectuate and  
18 remedy the Section 2 violation found.

19 Our understanding of the August 14th hearing was that it  
20 is -- the Court's review is going to be limited to whether or  
21 not the new map remedies the violation found in the old map.  
22 That's what the Covington case did. And that's what the  
23 Covington case found.

24 Our position, particularly as the Caster plaintiffs who  
25 have solely a Section 2 claim, is that to the extent there are

1 other constitutional claims kind of swirling out there against  
2 the new map, the old map, those should not be shoehorned into  
3 this case in a way that will either muddy the waters or cause  
4 undue delay. So --

5 JUDGE MARCUS: Let me ask you a question. How are you  
6 harmed if you're given every opportunity to present your  
7 Section 2 claim, as is Milligan, the State can respond in any  
8 way it sees fit, and Mr. Quillen is free to perfect it the  
9 same -- in the same overall hearing his constitutional claim?

10 For all I know, if we allowed him to do that, Milligan's  
11 counsel may say, well, we want to put our constitutional claim  
12 in, too.

13 MS. KHANNA: All the more reason I think that becomes  
14 a much more expansive hearing than I understood was envisioned  
15 for August 14th.

16 As the Court is aware, the previous preliminary injunction  
17 lasted over a week, I believe. It was --

18 JUDGE MARCUS: It was seven days.

19 MS. KHANNA: Right.

20 And I thought this was going to be a one-day remedial  
21 hearing to address whether or not the new map remedied the  
22 violation found in the old map. If, in fact, it is now an all  
23 bets are off, come one come all, anyone who's got something to  
24 say and has a potential claim, that might be a fallback.

25 JUDGE MARCUS: I think that's a little bit hyperbolic

1 one for all, everybody puts in everything. I mean, we do have  
2 pleadings. We do have parties. And we do have objections. So  
3 I suppose they're cabined more than that would suggest.

4 MS. KHANNA: I apologize, Your Honor.

5 JUDGE MARCUS: How long do you think it would take you  
6 to present your Section 2 argument as to why in your view SB-5  
7 likely violates Section 2? How long and what do you imagine  
8 doing, in terms of the presentation of evidence, both live and  
9 by way of documentary evidence?

10 MS. KHANNA: Your Honor, I think that entirely depends  
11 on how the defendants respond to our objections.

12 As the Court is aware, our objections were very  
13 straightforward. The Caster objections were, I think, less  
14 than 15 pages. And we have the same expert who provided  
15 analysis -- performance analysis in the last hearing provide an  
16 analysis that shows this one does not perform. So if the -- if  
17 there's a dispute about experts, if they're going to dispute  
18 our expert's analysis, then that might make this more  
19 expansive.

20 But based on what we have submitted so far, I believe  
21 that's resolved between -- with attorney argument, as long as  
22 everyone can stipulate to the admission of the expert  
23 declarations.

24 JUDGE MARCUS: Let me pin you down in that regard.

25 You submitted an expert report throwing in the question of

1 racial polarization. Is it your intention to rest on the  
2 report, or do you intend to call your expert live --

3 MS. KHANNA: I am --

4 JUDGE MARCUS: -- on racial polarization?

5 MS. KHANNA: I am ready to call my expert live, if  
6 needed. And it will depend on whether or not the defendants  
7 provide expert testimony disputing that. If it's basically  
8 undisputed, I don't know if we need to waste the Court's time  
9 to present evidence that everybody agrees is correct. And we  
10 can probably stipulate around that.

11 JUDGE MARCUS: Other than the expert dealing with  
12 racial polarization, what else would you be planning to put  
13 into evidence on August 14th?

14 MS. KHANNA: So our expert also provided a performance  
15 analysis of SB-5 to show that it does not perform for black  
16 preferred candidates. That would be a part of the testimony.  
17 Again, that would depend on if it's disputed.

18 The other --

19 JUDGE MARCUS: How does that -- is that a different  
20 witness than the racial polarization witness?

21 MS. KHANNA: No. It's the same expert, just two  
22 portions of the analysis.

23 JUDGE MARCUS: Okay. Is there anyone else you would  
24 be planning to call live to present any expert testimony on  
25 your claim regarding Section 2?

1 MS. KHANNA: Not as it stands right now. Again,  
2 depending on if the defendants put in new expert testimony that  
3 requires a certain rebuttal, certainly that might change.

4 And, again, depending on what the defendants put in, we  
5 would then request an opportunity perhaps to depose the map  
6 drawer. It all depends on the nature of the defendants'  
7 defense of this -- of these objections.

8 JUDGE MARCUS: Gotcha.

9 Mr. Ross, who would you be calling and what would you be  
10 planning to put on August 14th?

11 MR. ROSS: Yes, Your Honor.

12 Well, I think similar to Ms. Khanna, it will depend a  
13 great deal on how the defendants respond to our brief. It's  
14 possible that the defendants will stipulate that, you know, the  
15 performance analysis that our expert performed is correct, and  
16 that there's no need for him to come and testify.

17 If that were the case, we could imagine either putting on  
18 very limited testimony from the two -- we had a declaration  
19 from Dr. Bagley regarding the history of some of these  
20 communities of interest the State had identified. His  
21 testimony could also perhaps go in through declaration, if the  
22 Court would prefer that, to limit the amount of time he is to  
23 testify.

24 And then we also had a declaration from Representative  
25 Jones, who is a state representative who is on the

1 reapportionment committee. We can imagine him coming and  
2 testifying or not.

3 Truly, Your Honor, I think we could, similar to what  
4 Ms. Khanna is saying, keep this fairly limited depending on  
5 what the State says in response to our objection.

6 JUDGE MARCUS: Let me ask you the same question I  
7 asked Ms. Khanna: Are you planning to put on your expert  
8 witness who put in a report in the objections live?

9 MR. ROSS: Your Honor, again, I think it depends on  
10 what the State says. If the State is willing to stipulate to  
11 the information in Dr. Liu's report, then it may not be  
12 necessary for him to come and testify live. If they dispute  
13 what he says or they have their own expert that comes out with  
14 different results, then it may be necessary for him to come  
15 testify.

16 Our understanding, based on the data that they provided to  
17 us, is that their own analysis came to the same results as  
18 Dr. Liu, that the Cd2 map would not perform. And so it's hard  
19 for us to imagine that there would be any difference, but if  
20 there is, that's the instance in which we think there may be  
21 live testimony from an expert.

22 JUDGE MARCUS: If we allow Singleton to participate  
23 August 14th, to present his claim, would that lead you to put  
24 in your own constitutional evidence? Or are you satisfied at  
25 this point in these preliminary proceedings to go forward



1 simply with Section 2?

2 MR. ROSS: We intend to only go forward with our  
3 Section 2 claim, Your Honor.

4 From our perspective, our racial gerrymandering case was  
5 decided in January 2021. The Court -- excuse me --  
6 January 2022. The Court decided to hold off on that issue.

7 We have litigated and won with the Caster plaintiffs only  
8 on the Section 2 issue. And so the remedial proceedings that  
9 this Court is addressing is only on our Section 2 issue. So we  
10 do not intend to present any evidence on our constitutional  
11 claims.

12 JUDGE MARCUS: My last question on discovery and  
13 timing of the hearing. Do you agree with Ms. Khanna that this  
14 is a day or two hearing?

15 MR. ROSS: Again --

16 JUDGE MARCUS: The constitutional issue is not part of  
17 it?

18 MR. ROSS: I think for the Caster and Milligan  
19 plaintiffs, I could see it being, you know, no longer than a  
20 couple of days, Your Honor.

21 JUDGE MARCUS: Gotcha. Thank you.

22 Mr. Quillen, tell me about, if you are permitted to  
23 participate on the constitutional claim in this hearing on  
24 August the 14th, what would you be presenting live, what would  
25 you present by documentary evidence, and how long would it take

1 you?

2 MR. QUILLEN: We would expect to call likely two or  
3 three of our plaintiffs as witnesses with, you know, direct  
4 testimony that I would estimate in about two hours total for  
5 all two or -- for both or all three of those.

6 We have evidence that you've seen in our objection about  
7 the performance of our districts and the plans that our  
8 plaintiffs propose to the Legislature. We also have  
9 information about the demographics of the Seventh Congressional  
10 District under the new plan. And we would hope that we can get  
11 those facts in by stipulation or admission from the State and  
12 not take up the Court's time with those during the hearing.

13 JUDGE MARCUS: Mr. LaCour, tell us what it is you  
14 propose to be doing at this August 14th hearing. Sharpening my  
15 question: Who do you plan to call? What do you plan to  
16 present?

17 You know pretty clearly what the claims are by Caster, by  
18 Milligan, and by Singleton. They've laid it out not in a  
19 general way, but with great specificity. You've seen a couple  
20 of expert reports submitted, at least by Caster and Milligan,  
21 in this case.

22 What is it that you will be doing on August 14th by way of  
23 defending SB-5?

24 MR. LACOUR: Yes, Your Honor.

25 To echo what my friends on the other side have said, it

1 will depend at least in part on what they say in their replies  
2 and whether we can stipulate to certain facts.

3 As Ms. Khanna was saying, the question for the Court is  
4 going to be whether the 2023 plan, at least in their view, is  
5 whether the 2023 remedies the Section 2 violation.

6 Our contention is that there are many ways to satisfy  
7 Section 2. And any law that does not violate Section 2  
8 remedies a Section 2 violation. So if the plaintiffs cannot  
9 show that the 2023 law likely violates Section 2, then the  
10 violation has been remedied.

11 I think the Caster plaintiffs' view and perhaps the  
12 Milligan plaintiffs' view, as well, is that the only way to  
13 satisfy Section 2 is to apply the Voting Rights Act to  
14 guarantee two strong democratic districts in Alabama under a  
15 2023 law. We think that is a flat reading of Section 2. If  
16 the law is applying neutral principles in an equal way, it's  
17 going to be potentially a different outcome.

18 So with that, I mean, when we were litigating the 2021  
19 law, one of the major issues was communities of interest. And  
20 the Supreme Court said in Allen basically two holdings when it  
21 came to communities of interest. One was that based on the  
22 very hastily assembled preliminary injunction record that we  
23 were able to put together around Thanksgiving, Christmas of  
24 2021, that the evidence for the gulf was just not very  
25 compelling at that time. The gulf has a community of interest.

1 And then second, they found that *Gingles I* was satisfied  
2 by the plaintiffs because under either plan a community of  
3 interest would be split, either the gulf in the plaintiffs'  
4 plans, or the black belt in the State's plan.

5 Well, that is not true of the 2023 plan. The black belt  
6 is in the minimal number of districts that it can be fit into,  
7 which is two. We do better than every plan the plaintiffs have  
8 put forward when it comes to putting the black belt together  
9 into just those two districts. All 18 core counties are in two  
10 districts. Not a single black belt county, whether 18 core  
11 counties or the five sometimes black belt counties are split.

12 Of those five sometimes black belt counties, four of them  
13 are also in the western black belt district, which is District  
14 7. Only one of them is not in one of those two black belt  
15 districts; that is, I believe Escambia, which could not be put  
16 into one of those two districts without violating one person  
17 one vote, or contiguity requirements, which I don't think  
18 Section 2 requires us to violate contiguity or one person one  
19 vote in service of racial quotas.

20 So all that to say, when it comes to the evidence, if  
21 plaintiffs are willing to stipulate that the gulf is a  
22 community of interest, composed of Baldwin and Mobile counties,  
23 and we think there is substantial -- substantial evidence to  
24 that effect, and that the wiregrass, which is also promoted in  
25 the 2023 map and which is also split in every one of the maps

1 the plaintiffs have come forward with is also a community of  
2 interest, then there won't be a lot we're going to have to put  
3 on factually to back up those legislative judgments that are in  
4 the 2023 Act saying, here are three communities of interest we  
5 are prioritizing in this map -- the black belt, the wiregrass,  
6 and the gulf.

7 If they are going to continue to press an argument that  
8 the gulf is not really a community of interest and is made up,  
9 or that the wiregrass is not really a thing, then we will come  
10 forward with fact witnesses who can attest to the fact that,  
11 yes, these are not made up.

12 There's plenty of evidence going back quite some time to  
13 substantiate that these are legitimate communities of interest  
14 in the state. And --

15 JUDGE MARCUS: Let me ask the question this way: How  
16 many fact witnesses do you intend to call and who would they be  
17 on communities of interest? As I have heard it posited, it's  
18 certainly the black belt. There's the gulf port, there's the  
19 wiregrass.

20 Are you planning to put on, and if so, who and how many  
21 are you planning to present to establish that each of those are  
22 legitimate communities of interest?

23 MR. LACOUR: Judge Marcus, I don't think anyone is  
24 disputing the black belt is a community of interest. So I  
25 don't think we will be needing to come forward with evidence on

1 that.

2 But we think it would probably be somewhere in the range  
3 of five to seven witnesses. I don't think any of their  
4 testimonies will be particularly long, but it could probably  
5 take up a full day of hearings if we indeed do need to confirm  
6 what the Legislature has expressly stated in new 2023  
7 legislation, which is that these are communities of interest,  
8 designating specific counties, including the black belt  
9 counties that the parties had already agreed were part of the  
10 black belt community of interest throughout the 2021  
11 litigation.

12 JUDGE MARCUS: Let me ask you this question. You've  
13 seen the expert reports that have been submitted by Caster and  
14 Milligan regarding racial polarization. Basically, they  
15 updated the opinions they rendered both in writing and orally  
16 on round one.

17 Do you intend to contest in any way what they've  
18 presented? Or are you prepared to concede what they assert on  
19 racial polarization? And if you are going to contest racial  
20 polarization, the nature and extent of it, are you planning to  
21 call an expert at the hearing, and if so, how long will that  
22 take as you see it?

23 MR. LACOUR: Your Honor, we have sent the reports,  
24 which came in Friday evening, to our expert, and he is looking  
25 them over. At most, it would be one expert. At the moment,

1 though, I do not know if we are going to have any point of  
2 contention as to the facts.

3 And if we can all agree that the facts are what they are,  
4 we wouldn't needlessly require racially polarization voting  
5 experts or so-called performance experts to show up. We can  
6 instead argue about the legal implications of the facts.

7 JUDGE MARCUS: I'm just trying to get a sense of the  
8 nature of the defense. We'll see it more specifically on  
9 Friday. But this is relevant to how we plan the proceedings,  
10 and perhaps the discovery that may go forward between now and  
11 the 10th of August.

12 If I hear you right, your position is likely to be that  
13 the Legislature denominated these three communities of  
14 interest. And much of your argument as to the validity of SB-5  
15 turns on respecting those communities of interest.

16 Do I have that right, or have I misunderstood?

17 MR. LACOUR: Your Honor, if you read *Allen v.*  
18 *Milligan*, the Court, we think, made quite clear that in *Gingles*  
19 *I*, it is important that the plaintiffs, as Ms. Khanna said and  
20 Mr. Ross said to the Supreme Court, meet or beat the challenged  
21 plan on certain traditional redistricting principles.

22 And the Supreme Court on multiple occasions has said those  
23 principles include compactness, maintaining political  
24 subdivisions, maintaining communities of interest. That's  
25 LULAC, that's *Bush v. Vera*, that's *Abrams*. Then most recently,

1 it's Allen v. Milligan. And so we do think it is their burden  
2 to come forward with a *Gingles I* map that can match our map.

3 And before the Supreme Court, I mean, the Milligan  
4 plaintiffs said the heart of their case was the cracking of the  
5 black belt. It's, I believe, page 5 of their brief. And both  
6 sets of plaintiffs under Section 2 are complaining about the  
7 purported cracking of the black belt.

8 That cracking has been remediated. There is no more  
9 cracking of the black belt in its plan.

10 And so you can imagine, and I think this is essentially  
11 what the Supreme Court said in Allen, when we defended the 2021  
12 map, saying you can't crack the gulf. They came back and said,  
13 well, you crack a different community of interest. Your real  
14 standard is it's okay to crack one community of interest, so  
15 under our plan, we match you on that. We only crack one and  
16 you crack one.

17 Well, now there are three communities of interest that are  
18 at issue. We cracked none of them. They cracked two of them.  
19 Justice Kavanaugh's footnote 2, in his concurrence, said it was  
20 very important in the case that they only split six counties in  
21 some of their maps.

22 We think that same rationale applies to communities of  
23 interest, as well. And we don't see why that would not be the  
24 case.

25 JUDGE MARCUS: If I understand your position -- and



1 help me if I get it wrong. Your argument and your proofs will  
2 essentially say we did a better job this time, or the  
3 Legislature did, to bring it into compliance by SB-5 because  
4 they posited and we have maximized the interest of the three  
5 communities of interest. That's the big difference between  
6 round one and round two.

7 MR. LACOUR: I wouldn't phrase it quite that way, Your  
8 Honor. I think the point is what you're testing for *Gingles* I  
9 is whether it is legitimate principles that explain some  
10 purported disparity, or whether it is potentially race that  
11 explains that disparity.

12 So if one person one vote were the sole obstacle to  
13 additional majority-minority district, that's not a  
14 discriminatory effect on account of race that you don't get the  
15 additional district. That's a potential --

16 JUDGE MARCUS: No. I understand all of that. I'm  
17 just -- I guess really what I'm really driving at is to find  
18 out what the shape of this August 14th hearing will look like.

19 MR. LACOUR: Yes, Your Honor.

20 JUDGE MARCUS: And I think I hear you to be saying two  
21 things. One, whether you are going to contest the racial  
22 polarization data and expert opinions they've presented remains  
23 to be seen depending on what you learn from your expert.

24 And, two, you're saying that if there's no stipulation or  
25 agreement about communities of interest, at most, you would

1 present five to seven witnesses going to those communities of  
2 interest, and it would take maybe one day.

3 Did I get that right?

4 MR. LACOUR: That's right, Your Honor.

5 JUDGE MARCUS: Okay.

6 Questions, Judge Manasco?

7 MR. LACOUR: Your Honor --

8 JUDGE MARCUS: I'm sorry. Sure.

9 MR. LACOUR: We may have one or two experts, as well,  
10 who would testify about the *Gingles I* maps from the plaintiffs  
11 because we do think that if they're going to prove a Section 2  
12 violation of the 2023 map, that you have to have that intensely  
13 local appraisal of the electoral mechanism that is being  
14 challenged. That's language directly from *Allen v. Milligan*.  
15 And so we have experts who have looked at their maps in light  
16 of the 2023 law --

17 JUDGE MARCUS: You're talking about the illustrative  
18 maps that we pointed to and that the Supreme Court pointed to  
19 in round one.

20 MR. LACOUR: Yes, Your Honor. And I think there's a  
21 12th map that was proposed to the Legislature that we have  
22 looked at, as well.

23 JUDGE MARCUS: That was proposed this time around.

24 MR. LACOUR: Yes. Yes, Your Honor.

25 JUDGE MARCUS: Got it.

1 Judge Manasco, questions?

2 JUDGE MANASCO: All right. Well, not many from me.

3 The first is to Ms. Khanna. Ms. Khanna, do the Caster  
4 plaintiffs have an objection to the Court setting the motion  
5 for preliminary injunction that the Singleton plaintiffs have  
6 filed for a hearing in the same room at the same time as the  
7 remedial proceedings on August 14th?

8 MS. KHANNA: Yes. And I think especially for some of  
9 the reasons that we just heard from Mr. LaCour.

10 To the extent that this is going to -- that either the  
11 defendants or the Singleton plaintiffs are trying to turn an  
12 August 14th remedial hearing into a new trial on the merits, I  
13 believe that expanding the scope of it distracts and detracts  
14 from the real purpose of it, which is whether or not the  
15 Section 2 violation has been remedied.

16 JUDGE MANASCO: Do I understand, then, that you may  
17 also have an objection to some of the evidentiary presentation  
18 that Mr. LaCour just described?

19 MS. KHANNA: I do. I have to say I'm learning about  
20 it in realtime as Your Honor is, so I'm a little confused about  
21 what Mr. LaCour is envisioning.

22 But from what I understand, they are planning to  
23 relitigate the Section 2 issue anew, re-defend it. Basically  
24 saying, well, we didn't have enough time in a holiday P.I.  
25 briefing, so we would like to just take our next opportunity to

1 present evidence that we couldn't have -- we didn't -- we  
2 didn't provide the first time.

3 I do not believe that was the intended scope of these  
4 proceedings. And I frankly don't even believe that his  
5 conception of kind of the legal posture here makes sense. The  
6 only question for Section 2 purposes, when it comes to *Gingles*  
7 *I*, is whether or not plaintiffs' illustrative district is  
8 reasonably configured. Irrespective of the enacted map, is the  
9 illustrative district reasonably configured?

10 This Court and the Supreme Court have already determined  
11 that plaintiffs have provided illustrative districts that are  
12 reasonably configured. So whether or not it is our -- I don't  
13 think our illustrative districts became more or less reasonable  
14 because the State of Alabama enacted a new map last week.

15 If Alabama -- to the extent that Mr. LaCour said that we  
16 believed that our duty to establish *Gingles I* is it must meet  
17 or beat the enacted map, I have never echoed those words. We  
18 used the enacted map to show that -- to show that our maps were  
19 reasonably configured. Not because it was a beauty contest,  
20 not because we had to meet or beat something, but to show that  
21 the State of Alabama saw fit to have so many splits or have so  
22 many different configurations, and that we are applying those  
23 same principles by those same metrics.

24 We still clearly had a dispute at the first phase about  
25 whether or not various communities of interest were -- you

1 know, existed in the first place. But, ultimately, what this  
2 Court found was that the black belt is a community of interest.  
3 I don't believe Mr. LaCour is denying that. And that,  
4 therefore, our illustrative districts are reasonably  
5 configured.

6 The idea that this is -- plaintiffs' Section 2 claim would  
7 just be resolved because there's no longer what Mr. LaCour  
8 refers to as cracking of the black belt, I think relies on a  
9 fundamental misconception of what cracking is in the Section 2  
10 context.

11 Cracking is not just whether or not there's a line in the  
12 middle of it. Cracking is the dispersion of the minority  
13 population to nullify their vote, to dilute their vote, and to  
14 insure that they are put in districts where they are not  
15 provided an opportunity to elect.

16 Keeping a minority group whole in a district where it  
17 cannot have an opportunity to elect is not a resolution for  
18 cracking. This is not a -- like I said, this is not a beauty  
19 contest. This is a functional exercise of how these districts  
20 are drawn.

21 I don't mean to litigate --

22 JUDGE MANASCO: So what --

23 MS. KHANNA: Yeah, go ahead.

24 JUDGE MANASCO: So what is, in your view, the proper  
25 role of the 2023 map in the remedial proceedings at this stage?

1 MS. KHANNA: The role of the 2023 map is to see  
2 whether or not the Section 2 violation that has been found is  
3 resolved.

4 So things that are kind of off the table -- have  
5 plaintiffs provided illustrative maps that are reasonably  
6 configured? Yes. Is there racially polarized voting in this  
7 area? Yes. Those are all -- *Gingles I, II, III*, have already  
8 been decided.

9 So the question that is, okay, so there's an entitlement  
10 to an additional opportunity district. Does this map provide  
11 that additional opportunity district? And that, I believe, is  
12 the question for the remedial proceedings.

13 Whether or not the defendants have some other reasons for  
14 enacting the new map, whether or not they think that it does  
15 something else better or worse than the old map, that tells me  
16 they are defending a different case and a different claim.

17 The claim before the Court right now is not whether or not  
18 the new map was enacted with discriminatory intent. It's not  
19 whether it was a community of interest map or the ideal map.

20 The question is does it provide a sufficient  
21 opportunity -- equal opportunity for black voters to elect  
22 their candidates of choice. And those issues have already been  
23 decided when it comes to the liability. And now the question  
24 is does the map meet the resolution for that.

25 JUDGE MANASCO: All right. Mr. Ross, if you will

1 comment on what Ms. Khanna just said. And then I assume  
2 Mr. LaCour would like an opportunity to respond.

3 MR. ROSS: Your Honor, I have very little to add to  
4 what Ms. Khanna said. I agree with her that this case at this  
5 stage is solely about whether or not SB-5 provides the proper  
6 remedy, whether it creates a new remedial opportunity district  
7 for black voters in Alabama. It's not about communities of  
8 interest. The Supreme Court and this Court has already  
9 resolved all of the issues.

10 Mr. LaCour is trying to litigate the case on the merits.  
11 That may be a matter in a year or two years from now. But it's  
12 not a matter for this remedial hearing that's coming up in  
13 two weeks.

14 JUDGE MANASCO: Mr. LaCour.

15 MR. LACOUR: Yes. The Supreme Court said Section 2  
16 never requires a state to adopt districts that violate  
17 traditional districting principles.

18 And when they were discussing why the illustrative plans  
19 did not require the State to adopt a district that would  
20 violate traditional districting principles, it was because they  
21 did as well or better as those principles. So you were picking  
22 among equals.

23 And when you are dealing with disparate impact liability,  
24 for example, in the employment context, it's not enough to  
25 challenge an employment hiring policy on the fact that it

1 creates a disparate impact. You have to come forward with an  
2 alternative that does as well or better and has less of a  
3 disparate impact.

4 And that's essentially what the Court held Section 2 is  
5 doing with *Gingles I*. If they can come forward with a map that  
6 is otherwise equal to ours, then there is some reason to think  
7 discrimination might be at play. There's some discriminatory  
8 effect on account of race potentially when we didn't choose  
9 among those equals.

10 But what they are asking this Court to do flies in the  
11 face of Allen. They're asking you to order a map that does  
12 markedly worse on those legitimate principles solely because of  
13 race. That is affirmative action in districting, that is  
14 quotas for districting. That -- and that is not what Section 2  
15 requires. Again, Section 2 never requires the adoption  
16 districts that violate traditional districting principles.

17 Now whose principles and which principles? It's not the  
18 principles of the State of California. If they came forward  
19 and said this is how California draws districts, so we think  
20 it's a great way for Alabama to draw districts, too, that  
21 wouldn't be relevant.

22 And when you are validating the 2023 map -- again, under  
23 Allen's language, the intensely local appraisal to specific  
24 electoral mechanism challenge, the 2023 map, the principles  
25 that matter are the ones that thrive and that are embodied in



1 that map.

2 So going back to Justice Kavanaugh's footnote 2, he said  
3 it was important that they had maps that split only six  
4 counties. By that same logic, if our 2021 map had split 20  
5 counties, and they came forward with illustrative plans that  
6 also split 20 counties, we couldn't be heard to complain that  
7 they had too many county splits. And maybe having all those  
8 counties split would make it easy to draw another  
9 majority-black district.

10 But by the same token, if there was a new law -- if the  
11 old law was repealed, and you had a new legislature come along  
12 and say, those guys did not give sufficient weight to this  
13 legitimate principle of county splits, and we really want to  
14 keep them together because the Singleton plaintiffs are suing  
15 us over counties, or because we think keeping counties whole is  
16 just a really great way to draw districts, and they drew a map  
17 in 2023 that split only six counties, then those old maps with  
18 the 20 splits from the plaintiffs wouldn't really shine any  
19 light on whether there is discrimination -- discriminatory  
20 effects on account of race in the 2023 law.

21 And that follows, I think, from different parts of the  
22 opinion. The Court said deviation from properly constructed  
23 plaintiffs' map shows it is possible that the State's map has a  
24 disparate effect on account of race.

25 Now, if the only reason they're able to get to another

1 majority-black district is by violating traditional principles,  
2 then that doesn't show that there is a disparate effect on  
3 account of race. It simply shows that under neutral principles  
4 neutrally applied, that it's not possible to draw another  
5 majority-minority district.

6 And so what they are turning Section 2 into is exactly  
7 what the Allen court said it is not, which is a tool for  
8 forcing proportionality and forcing racial gerrymandering.

9 And we think that, quite frankly, they are ignoring the  
10 Court's opinion, and they are pretending like it didn't come  
11 down, and also pretending like the 2021 map was not repealed  
12 and was not replaced. But they were.

13 And so the job for this Court is to assess whether the  
14 2023 law violates Section 2. And if that finding is not made,  
15 then that is the map that should govern.

16 JUDGE MANASCO: Judge Marcus, that's all from me.

17 JUDGE MARCUS: Thank you.

18 Judge Moorer, questions?

19 JUDGE MOORER: This is for Ms. Khanna and Mr. Ross.

20 Let's assume that the Court takes a different view than  
21 you, and is more akin to the view that the defendants have.  
22 How long would it take to present your case then?

23 MR. ROSS: Your Honor, you know, I think we have  
24 serious concerns with the view that Mr. LaCour has expressed.  
25 He has essentially --

1 JUDGE MOORER: I understand that. But let's just say  
2 the judges decide more along their lines. How long?

3 MR. ROSS: Your Honor, I think it would take a  
4 substantial amount of time.

5 We would need to -- it sounds like Mr. LaCour is going to  
6 relitigate *Gingles I*, so we would need to consider those  
7 arguments. It also sounds like he is trying to relitigate, you  
8 know, what are communities of interest. Those are all things  
9 that we would need to prepare evidence on.

10 You know, Mr. LaCour is trying to have a trial on the  
11 merits and not a trial --

12 JUDGE MOORER: I understand. I understand you don't  
13 like that.

14 MR. ROSS: Yes.

15 JUDGE MOORER: Let's get past that. And let's just  
16 say we make a mistake and go with him. How long does that  
17 take, then, for you to present?

18 MR. ROSS: I think it would take us -- we would need  
19 some time to consider what Mr. LaCour presents, and then  
20 consider whether or not we need to put on additional evidence.

21 So we would need some time to consider for that, to  
22 process. And then we would also need probably at least a week  
23 to present evidence in response to everything that he is  
24 talking about if he were to -- the Court did want to relitigate  
25 the preliminary injunction proceedings. We don't think that's

1 proper, but it would take substantial amount of time.

2 JUDGE MARCUS: Substantial being a week?

3 MR. ROSS: I'm saying, Your Honor, in addition to us  
4 needing to -- it sounds like Mr. LaCour has new experts that  
5 he's going to present on *Gingles I*. Our *Gingles I* experts  
6 haven't come and testified and weren't -- and we weren't  
7 anticipating to have them come testify on this matter because  
8 the Supreme Court of the United States resolved the issue of  
9 whether or not our *Gingles* maps were reasonably configured.

10 And so if Mr. LaCour wants to relitigate that issue, and  
11 if this Court thinks that that's necessary, then we would want  
12 the opportunity to present evidence on that issue.

13 JUDGE MARCUS: Other questions, Judge Moorer?

14 JUDGE MOORER: I think that's it for now.

15 JUDGE MARCUS: Mr. LaCour, let me sort of --

16 JUDGE MANASCO: I'm sorry, Judge.

17 JUDGE MARCUS: Sure. Go ahead.

18 JUDGE MANASCO: I need to hear from Ms. Khanna about  
19 how long Caster -- I need to hear her answer to Judge Moorer's  
20 question to Mr. Ross.

21 MS. KHANNA: Yes, Your Honor.

22 I agree with -- I agree with Mr. Ross. I mean, it's --  
23 like I said, we are hearing this for the first time now that  
24 this is what the State is envisioning.

25 Relitigating the entire P.I., which took weeks to brief,

1 to get expert reports, to line up our witness testimony, and  
2 then ultimately took seven days to present, is something we had  
3 not envisioned doing, and it seems to be what Mr. LaCour is now  
4 suggesting is required.

5 And I will say I'm troubled, as indicated in our motion --  
6 in our brief this morning, I'm troubled what appears to be kind  
7 of a bait and switch.

8 We have had this conversation with the Court about what  
9 does the remedial proceedings look like. And I believe the  
10 State is changing that up.

11 So I can't sit here and tell the Court exactly what we  
12 would need to do in the event that the expectations that have  
13 been set have completely been upended. It will just be  
14 extremely more onerous, burdensome, and lengthy is all I can  
15 say for us to totally relitigate the entire case.

16 And I think if that's what Mr. LaCour had intended, and  
17 the defendants had intended, it seems like something that  
18 should have come up when the Court asked these questions the  
19 first time -- specifically when the Court asked about amending  
20 the pleadings -- what does that look like? What is it at  
21 trial? What is the burden?

22 We had these conversations. And for us to be having them  
23 again with Mr. LaCour's newfound ideas of how this case will  
24 proceed, it's very difficult to respond in realtime about what  
25 we'll need to do. And it's very difficult to prepare for that

1 hearing without really understanding what it's about.

2 And to me it sounds like some of what Mr. LaCour -- some  
3 of what -- the issues that Mr. LaCour is raising are a matter  
4 of attorney argument. What is the legal standard? What is  
5 this hearing about? And what are they allowed to do? And  
6 it's, frankly, not even about the remedial standard anymore.

7 What I understand Mr. LaCour to be litigating is some kind  
8 of intent claim about communities of interest that is -- that  
9 is not the claim we brought.

10 JUDGE MARCUS: Mr. LaCour, let me press the point this  
11 way. Is it your view and your intention to present expert  
12 witnesses who will challenge whether the 11 illustrative maps  
13 that we reviewed on round one and found to be reasonable, and  
14 that the Supreme Court said the same thing about, is now open  
15 for re-litigation?

16 I'm talking about the 11 illustrative maps presented in  
17 round one, which they put into evidence to establish if they  
18 could, that *Gingles* and Section 2 were likely violated. We  
19 reviewed those, among many, many other things. And we  
20 concluded that those illustrative maps were reasonable for  
21 liability purposes under Section 2. The Supreme Court  
22 addressed that, as well.

23 Are you planning to present an expert to challenge the  
24 reasonableness of those 11 maps?

25 MR. LACOUR: Your Honor, there are two issues with the

1 maps.

2 So the reasonableness issue could be done with attorney  
3 argument if the plaintiffs will concede that there are  
4 legitimate communities of interest that are being split. And  
5 they can say that's irrelevant. We can split them up, because  
6 in 2021 you split up the black belt. So we get to split up  
7 your communities of interest for time immemorial for at least  
8 the next 10 years. We can have a legal dispute about that. We  
9 won't need to have factual witnesses come in.

10 But I think there is a serious legal question as to  
11 whether or not reasonably configured is for untethered,  
12 in-the-ether kind of notion, or whether it is tethered to the  
13 specific electoral mechanism being challenged.

14 And we think the clear reading of Allen, the one that also  
15 comports with the Equal Protection Clause, is one that actually  
16 tethers it to the challenged map, not to whatever some expert  
17 demographer --

18 JUDGE MARCUS: Let me -- I don't mean to interrupt  
19 you. But let me question put my question again directly to  
20 you.

21 To the extent the plaintiffs say there are obviously  
22 multiple legitimate communities of interest, and they arguably  
23 pull in opposite directions, does that end the concern about  
24 trying to go back and reattack the illustrative maps in round  
25 one, and leave this issue essentially to a legal argument?

1 MR. LACOUR: Sorry, Your Honor.

2 So not to fight the premise. But I don't think that the  
3 communities of interest -- our intention in our map. I think  
4 that was the problem potentially with the 2021 map was that we  
5 favored one, but not the other. And that could give rise to an  
6 inference of discrimination or discriminatory effect.

7 You have got this neutral principle, and the Supreme  
8 Court's decision in De Grandy talks about this.

9 JUDGE MARCUS: I don't mean to be cutting you off, but  
10 time is short, and I want to go right to the heart of my  
11 question.

12 MR. LACOUR: Yes.

13 JUDGE MARCUS: I understand the legal argument.

14 MR. LACOUR: Yes, Your Honor.

15 JUDGE MARCUS: You have made it very clear.

16 What I'm asking is a factual question. Are you planning  
17 to put on expert opinion testimony, or do you propose to do  
18 that to attack the illustrative maps that we've already ruled  
19 on for purposes of liability in round one?

20 MR. LACOUR: Your Honor, we reserve the right to do  
21 that. It will depend on what the reply says. But there are  
22 two issues.

23 One is this *Gingles* I reasonably configured issue, and the  
24 second is racial predominance because there is -- I think this  
25 is another fact -- factor in Allen.



1       You had eight justices, the plurality, and you had the  
2       dissenters agree that a *Gingles I* map in which race  
3       predominates is not a *Gingles I* map that passes *Gingles I*.

4       Then at the end of III-B-1, the Chief Justice's plurality  
5       opinion, the Court said, The line we've drawn is between  
6       consciousness of race and predominance. And, of course, the  
7       four dissenters would have held that a map, a *Gingles I* map in  
8       which race predominates is not a map that passes the test of  
9       *Gingles I*.

10       Now, on top of that, as the dissent also pointed out,  
11       while the plurality affirmed this Court's finding that the  
12       Cooper maps were not race predominant, the plurality didn't say  
13       a word about the Duchin maps, which appeared to -- appears to  
14       mean that four, maybe five or more justices did think that the  
15       Duchin maps were maps in which race predominated.

16       So we do have expert testimony that is going to show, we  
17       think, that race played a predominant role in the formation of  
18       these illustrative plans. And that, too, would be proof that  
19       the Section 2 claim fails, that Section 2 is satisfied by the  
20       2023 law.

21       Again, Section 2 is not designed to ensure proportional  
22       representation. Quite the contrary. And if the only way you  
23       can get your second majority-minority district is through a  
24       predominant use of race, that creates very serious  
25       constitutional problems, which is why Section 2 doesn't allow

1 plaintiff to prevail in a challenge on a map like that.

2 So it would be those two issues where we might need some  
3 expert testimony.

4 JUDGE MARCUS: And what is it that you might be doing  
5 to address that? Tell me more specifically. More concretely.

6 We're two weeks out. We've got a window for discovery.  
7 And I don't think we should be just leaving this issue  
8 untethered until we get to August the 14th.

9 So I really look to you to inform the Court about what you  
10 propose to do. And I am not sure, just speaking for myself,  
11 that I fully understand.

12 I think you're saying maybe you're going to put an expert  
13 on to say this is what's wrong with the illustrative maps, or  
14 at least some of them, at least Duchin's maps, as opposed to,  
15 say, Cooper's maps.

16 But I think I also hear you to say that if the parties are  
17 prepared to concede that there are multiple competing  
18 communities of interest at large here, that becomes  
19 unnecessary.

20 Have I misunderstood that?

21 MR. LACOUR: Well, Your Honor, it depends on what you  
22 mean by competing.

23 So if you mean one community competing with another  
24 community, and kind of break one of them up, or another,  
25 factually that's just not the case we submit.

1 If you mean competing with the racial goals of the  
2 plaintiffs to draw a second majority-black district, then, yes,  
3 we can tee that legal issue up.

4 If they say it's very important, and Section 2 requires  
5 you to crack established communities of interest so we can get  
6 to another majority-black district in the state, then if that's  
7 their position, and they agree with us that that is the issue  
8 teed up, then we won't need those witnesses, and we can just  
9 hash it out over what Allen means, and what its predecessor  
10 cases mean.

11 JUDGE MARCUS: All right. I've got it.

12 Any further word, Ms. Khanna? Mr. Ross?

13 MS. KHANNA: Yes, Your Honor.

14 I guess I am -- I continue to be confused by what I  
15 believe is a moving target from the State of what exactly  
16 this -- they're planning and what the case is about.

17 What I just heard from Mr. LaCour is that the questions  
18 are too full that they plan to present at the hearing. One is  
19 on the *Gingles I* map -- the *Gingles I* maps, whether or not  
20 those are reasonably configured.

21 Those *Gingles I* maps have not changed. Those 11 *Gingles I*  
22 maps have not changed. The Court's findings that they are  
23 reasonably configured has not changed. And the Supreme Court's  
24 affirmance that they are reasonably configured has not changed.  
25 That is law of the case.

1 The second thing I heard him to say is that he wants to  
2 litigate racial predominance in some illustrative maps. I'm  
3 going to speak solely for Caster and Mr. Cooper's maps.

4 This Court has found that race did not predominate in our  
5 illustrative maps, in Mr. Cooper's maps. The Supreme Court  
6 affirmed that race did not predominate in those illustrative  
7 maps. That is law of the case when it comes to these  
8 preliminary injunction proceedings.

9 Now, to the extent they want to relitigate that, what I  
10 heard Mr. Davis say last time was that there could not be a  
11 trial on the merits this year. That would have to happen next  
12 year. That's what Mr. Davis said. And that right now the  
13 Court needs to move forward to close out and remedy the  
14 preliminary injunction proceedings before reopening the trial  
15 on the merits.

16 When it comes to these preliminary injunction proceedings,  
17 the legal or factual issues that Mr. LaCour believes are in  
18 dispute are not in dispute. They have been fully completely  
19 resolved.

20 Whether or not Ms. Duchin's -- Dr. Duchin's maps may have  
21 had race predominate, I don't think is actually relevant to the  
22 Section 2 claim. And if that's somehow going to be a  
23 hampering, I would say that the Caster plaintiffs have every  
24 right then to move forward with what I believe are these issues  
25 that have been fully resolved by all available courts. And we

1 are moving forward to the single issue of whether or not  
2 that -- now that we have established liability, we've  
3 established there's Section 2 liability is there -- does the  
4 map that Alabama's provided remedy that liability.

5 The establishing of liability is irrespective of this line  
6 or that line in the newly enacted map. The question is whether  
7 or not it remedies the Section 2 violation.

8 JUDGE MARCUS: Anything further from any of the other  
9 attorneys?

10 MR. ROSS: Your Honor, if I could just add that in the  
11 Supreme Court's opinion, five justices agreed that all 11 maps,  
12 including Dr. Duchin's maps, were reasonably configured, and  
13 that this was not a beauty contest between various maps. And  
14 so the Supreme Court has actually resolved this issue again.

15 The Supreme Court -- it's true that the Court didn't go  
16 over this racial predominance analysis that Alabama is putting  
17 forward here, with respect to Dr. Duchin's map. But with  
18 respect to the traditional *Gingles I* analysis, the Court did  
19 consider Dr. Duchin's maps, it did say that was reasonably  
20 configured. It said that it protected communities of interest.  
21 It met all of the objectives, guidelines that states use to  
22 make that measure -- excuse me -- that courts use to make that  
23 decision.

24 One other thing, Your Honor, I just wanted to highlight is  
25 that Mr. LaCour is sort of conveniently leaving out the fact

1 that Alabama has never in the history of its legislation, to my  
2 knowledge, included information about which communities of  
3 interest it wants to prioritize. It's only now, after the  
4 Supreme Court has ruled that our maps are reasonably  
5 configured, that Alabama has decided to write in, you know,  
6 essentially the arguments that were rejected by this Court and  
7 by the Supreme Court.

8 And so it can't be -- the Supreme Court, in fact, in  
9 Bethune-Hill has said that it's not the case that legislatures  
10 get to make up, you know, new and viable rules that prevent  
11 plaintiffs from proving their claims.

12 What's relevant here are the objective factors that the  
13 Supreme Court and this Court has already looked at about what  
14 is reasonably configured. And the Court has resolved that  
15 issue already.

16 JUDGE MARCUS: I am curious about one thing, Mr. Ross.  
17 Do you agree that there are a couple of communities of interest  
18 at issue here in connection with these maps --

19 MR. ROSS: Your Honor --

20 JUDGE MARCUS: -- the gulf port, the wiregrass, and  
21 the black belt?

22 MR. ROSS: Your Honor --

23 JUDGE MARCUS: How you work them out and reconcile  
24 them in light of all of other the things that you have to take  
25 into account remains to be seen. But is there a dispute that

1 there are legitimate communities of interest here more than  
2 one?

3 MR. ROSS: The Milligan plaintiffs have always  
4 contested that there's any gulf port community of interest. We  
5 have presented expert and witness, lay witness testimony about  
6 how there is no community of interest between Baldwin and  
7 Mobile.

8 Our testimony from our experts and our clients was that if  
9 there is a community of interest that's between Mobile,  
10 particularly northern portion of Mobile and the city of Mobile,  
11 and the black belt. And that is what our position has always  
12 been.

13 And so, you know, I would need to confer with my clients  
14 and colleagues.

15 JUDGE MARCUS: I understand.

16 MR. ROSS: I don't believe we would concede that there  
17 is a gulf port community of interest made up of Mobile and  
18 Baldwin.

19 JUDGE MARCUS: Let me ask one final question that I  
20 prefaced earlier.

21 When we had our last proceeding, the parties submitted a  
22 joint submission that amounted to some of the rules of  
23 engagement for the preliminary injunction hearing. And I read  
24 from one of them to you earlier, with regard to the Caster and  
25 Milligan Section 2 claims.

1 The parties had agreed that -- and I'm reading now from  
2 Number 4. This document was filed in '21 -- December 23rd,  
3 '21 -- in the district court.

4 And in it, the parties agreed that documents, discovery  
5 responses, deposition testimony, and hearing exhibits, and  
6 hearing testimony produced, obtained, or offered in Caster,  
7 Milligan, or Singleton may be adopted by any party to these  
8 three cases, subject, of course, to any objection by any party  
9 as it may pertain to their individual case, as though produced  
10 in that case by affirmatively including such evidence in their  
11 proposed findings of fact.

12 Does that rule of engagement apply here or not in your  
13 view, Ms. Khanna?

14 MR. ROSS: I'm sorry. Are you asking me or  
15 Ms. Khanna?

16 JUDGE MARCUS: I am starting with Ms. Khanna, just in  
17 the same order. Then I will turn to you, sir.

18 MS. KHANNA: The question is whether any of the  
19 evidence presented in the August -- in preparation for the  
20 August 14th proceedings can be used in any case?

21 JUDGE MARCUS: Yes.

22 MS. KHANNA: I don't -- I don't -- I don't have a  
23 problem with that, Your Honor, as a principled rule.

24 I think it does maybe also require us to get back to the  
25 original question of the motion for clarification of what --



1 JUDGE MARCUS: I understand that.

2 MS. KHANNA: Yeah. Once we know that --

3 JUDGE MARCUS: Holding -- bear with me. Holding that  
4 issue aside, if you put in evidence on the Section 2 claim,  
5 Mr. Ross can adopt it. If Mr. Ross puts in evidence on the  
6 Section 2 claim, you can adopt it.

7 If -- I underscore "if" -- Mr. Quillen is participating in  
8 these proceedings, and he proposes to cross-examine, or there  
9 may be something relevant for his claim that he will draw out  
10 of one or more of your witnesses, that, too, would be  
11 admissible.

12 The State doesn't want to go through two proceedings or  
13 three. We've already gone through that once. And I assume the  
14 State, too, would take the position that any of the evidence  
15 that comes in that is offered and comes in, to the extent it's  
16 relevant, may be considered by one or more parties in the case.

17 Do I have that right?

18 MS. KHANNA: You do, Your Honor. And that's -- I  
19 believe that absolutely continues to be correct.

20 JUDGE MARCUS: Mr. Ross?

21 MR. ROSS: Your Honor, I think, with respect to  
22 Ms. Khanna and her clients' claims, it would -- that would  
23 still hold true, particularly because we are in the same  
24 position, with respect to the remedial proceeding.

25 I am not sure that that's true with respect to the

1 Singleton plaintiffs, that --

2 JUDGE MARCUS: I understand.

3 MR. ROSS: -- we would agree that their evidence would  
4 come into our remedial case.

5 JUDGE MARCUS: Mr. LaCour?

6 MR. LACOUR: Your Honor, we would have no objections  
7 to following similar evidentiary admissions approach when it  
8 comes to the three preliminary injunction motions.

9 JUDGE MARCUS: They agree that what they -- Mr. Ross  
10 and Ms. Khanna agree, at least for the Section 2 claims, what  
11 comes in for one comes in for all. And you agree with that?

12 What they're qualifying is any agreement, with regard to  
13 Singleton, because they don't believe Singleton should be  
14 playing a role in this remedial proceeding. But if Singleton  
15 plays a role in this proceeding, I'm asking you whether you  
16 have any objection to the evidence coming in, in each of the  
17 three respective cases.

18 MR. LACOUR: No objections, Your Honor.

19 JUDGE MARCUS: Mr. Quillen, any comment about that?

20 MR. QUILLEN: I think the rule served us well the  
21 first time around when we had plaintiffs pursuing  
22 constitutional claims and plaintiffs pursuing statutory claims.  
23 And I think that the exception where a party can object, if  
24 they feel like there's a reason to, protects their interest, so  
25 we would be happy with that rule.

1 JUDGE MARCUS: All right. So we do have agreement at  
2 least on that much with the caveat that I mentioned.

3 With regard to a couple of other procedural and  
4 preliminary matters, I expect that the parties will be  
5 submitting proposed findings and conclusions, regardless of  
6 what the shape of this August 14th hearing will be. Do I have  
7 that right?

8 Do I have any objections to submitting findings of fact  
9 and proposed findings and conclusions at the end of the  
10 proceeding?

11 Ms. Khanna?

12 MS. KHANNA: Not at all, Your Honor.

13 JUDGE MARCUS: Mr. Ross?

14 MR. ROSS: No objection.

15 JUDGE MARCUS: Mr. LaCour?

16 MR. LACOUR: No objection, Your Honor.

17 JUDGE MARCUS: Mr. Quillen?

18 MR. QUILLEN: No objection.

19 JUDGE MARCUS: I think that covers everything I had on  
20 my agenda. But let me turn finally to my colleagues, Judges  
21 Manasco and Moorner, and see if they have any other inquiry.

22 Judge Manasco, any questions for any of the parties?

23 JUDGE MANASCO: Nothing further from me.

24 JUDGE MARCUS: Judge Moorner?

25 JUDGE MOORER: Just one thing. And that is, I take it

1 that some of the evidence that was previously presented in our  
2 first round of hearings might be presented again in this  
3 hearing, as I would think some of it might still be the same,  
4 such as whether there's political cohesiveness between the  
5 minority group and racial bloc voting, that type of thing.

6 JUDGE MARCUS: Ms. Khanna?

7 MS. KHANNA: I couldn't agree more, Your Honor. That  
8 is, I think, a lot -- I think a lot of these issues have been  
9 decided on that. The evidence has been presented and been  
10 resolved.

11 To the extent -- I guess I would say that regardless of  
12 the kind of contours of the August 14th hearing, we would  
13 hopefully all agree that the evidence that has already been  
14 presented and accepted by this Court does not need to be  
15 redone, and can be incorporated into whatever this hearing ends  
16 up looking like, whatever this challenge ends up looking like.  
17 I would hope that we could all move forward, given the  
18 established record, incorporate that record going forward, and  
19 then adding anything additional so as to make it as efficient  
20 as possible.

21 JUDGE MARCUS: Mr. Ross, any disagreement with that?

22 MR. ROSS: No, Your Honor.

23 JUDGE MARCUS: Mr. LaCour?

24 MR. LACOUR: No, Your Honor. To the extent the  
25 evidence is relevant, it remains relevant and could be

1 considered.

2 I did want to answer one thing. Ms. Khanna suggested that  
3 we were -- I think she said bait and switch.

4 From the June status conference with Your Honors, we said  
5 that -- I'm reading from the transcript -- the key sticking  
6 point is that this is new legislation that would be governing  
7 the 2024 elections unless it is challenged, and this Court  
8 finds that it, too, is likely to violate federal law, which  
9 more or less was paraphrasing this Court and the preliminary  
10 injunction order, as well. So it's not something new. I think  
11 perhaps this sort of arises from a disagreement legally over  
12 the import of the Allen v. Milligan decision and how *Gingles I*  
13 works.

14 But we do think -- I think it's been our consistent  
15 position since the Allen decision that the burden is on the  
16 plaintiffs to show that there is a Section 2 violation. And  
17 they may be correct that everything they put forward in 2021 is  
18 all they need to --

19 JUDGE MARCUS: Mr. LaCour, nobody is disputing that  
20 the burden of persuasion rests with the plaintiffs to establish  
21 that SB-5 violates, or likely violates Section 2. So the  
22 burden is not the dispute.

23 The question is -- concerns the body of evidence that was  
24 presented in round one, as to which we made express findings of  
25 fact, many of them, and the Supreme Court said that they

1 accepted the findings of fact that we made in rendering the  
2 ruling that they made.

3 There's no dispute, then, that the record evidence  
4 presented in round one is part of this case, is there?

5 MR. LACOUR: No. We're not disputing that. We're  
6 just saying that that is not -- it is not a closed record if  
7 there were new evidence to show.

8 And there's not going to be evidence along these lines,  
9 but if new evidence came along, smoking-gun proof, that the  
10 black belt was not a community of interest, it might be a  
11 different case. Or the evidence showed that all the maps split  
12 20 counties --

13 JUDGE MARCUS: Are you planning to present evidence  
14 that the black belt is not a community of interest?

15 MR. LACOUR: No, Your Honor. It was a hypothetical,  
16 Your Honor. We are not going to present evidence along those  
17 lines.

18 I'm just saying if there is new evidence, and it is  
19 relevant as to whether 2023 law does or does not violate  
20 Section 2, the Court should not turn a blind eye to it.

21 JUDGE MARCUS: Let me ask you this, and we have talked  
22 about this before. If the Singleton folks are in, and they  
23 present their case, I heard Mr. Quillen say it wouldn't take  
24 him more than a couple of hours to present it.

25 What would the State be presenting by way of rebuttal to

1 that constitutional claim, and how long would it take?

2 MR. LACOUR: Your Honor, I don't really even see much  
3 factual dispute that's even possible with their preliminary  
4 injunction motion. So I don't intend to bind the defendants to  
5 this, but it may be that we don't even need to put on factual  
6 witnesses.

7 The way I read the P.I. order, or P.I. motion rather, is  
8 that we have some obligation under the Equal Protection Clause  
9 to take race into account and sort of undue past Section 2 or  
10 Section 5 districts. And we don't think that's a correct  
11 reading of the Equal Protection Clause, but that's a discrete  
12 legal issue.

13 JUDGE MARCUS: Gotcha. Thank you.

14 Anything further? If not, this Court is adjourned.

15 Thank you all.

16

17 (Whereupon, the above proceedings were concluded at  
18 12:58 p.m.)

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CERTIFICATE

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

Christina K Decker

08-03-2023

Christina K. Decker, RMR, CRR

Date

Federal Official Court Reporter

ACCR#: 255