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

BOBBY SINGLETON, et al., *
Plaintiffs, * 2:21-cv-1291-AMM
vs. * October 3, 2023
* 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 HEARING ON OBJECTIONS TO SPECIAL MASTER REPORT

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.)

COURTROOM DEPUTY CLERK: The cases before the Court today will be Singleton vs. Allen, Case Number 21-cv-1291; Milligan vs. Allen, Case Number 21-cv-1530; and Caster vs. Allen, Case Number 21-cv-1536.

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

We set the case down this morning to address sort of the last part of the remedial proceeding dealing with the selection of a map.

With that, let me ask you if you would be kind enough to state your appearances for the Milligan plaintiffs.

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

THE COURT: Good morning, sir, to you.

For the Caster plaintiffs?

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

JUDGE MARCUS: Good morning. Welcome.

For the Singleton plaintiffs?

MR. QUILLEN: Henry Quillen for the Singleton plaintiffs.

JUDGE MARCUS: And for the defendants for the Secretary of State?

1 MR. LACOUR: Edmund LaCour on behalf of the Secretary
2 of State.

3 JUDGE MARCUS: Good morning, sir.

4 MR. DAVIS: Jim Davis for the Secretary of State,
5 Judge.

6 JUDGE MARCUS: And for the intervening legislative
7 defendants?

8 MR. WALKER: Good morning, Your Honor. Dorman Walker
9 for the Chairs.

10 JUDGE MARCUS: And good morning to you, as well.

11 I understand -- I had asked the clerk to tell us who else
12 wanted to be heard among the nonparties, and as I understand
13 it, there were two: One was the Alabama Democratic Conference.
14 Do I have that right?

15 MR. SELLS: Yes, Your Honor. Bryan Sells with the
16 Alabama Democratic Conference.

17 JUDGE MARCUS: Mr. Sells, we welcome you, as well. We
18 will give you a chance to be heard.

19 And finally for Mr. Hillyer?

20 MR. PARK: Yes, Your Honor. Jack Park for Hillyer.

21 JUDGE MARCUS: Welcome to you, as well, and you will
22 have that opportunity, as well, to be heard. Thank you.

23 I thought we would begin, then, by turning to you,
24 Mr. Ross, to lead us off and let us hear what you have to say
25 about the maps.

1 There were three that were recommended by the Special
2 Master. Fire away.

3 MR. ROSS: Yes, Your Honor. I was going to allow
4 Ms. Khanna to go first, if you don't mind.

5 JUDGE MARCUS: Sure.

6 MS. KHANNA: Thank you, Your Honor.

7 Good morning, Your Honors. May it please the Court. It's
8 good to be here in person.

9 Abha Khanna again on behalf of the Caster plaintiffs.

10 JUDGE MARCUS: Welcome back. And I hope you're
11 feeling well and back to normal.

12 MS. KHANNA: Yes, Your Honor. Thank you.

13 JUDGE MARCUS: Thank you.

14 MS. KHANNA: A little over two years ago, we filed a
15 lawsuit asking this Court to enforce the promise of the Voting
16 Rights Act. And we sought preliminary relief for our clients
17 in time for the 2022 elections. Our claim was narrow.

18 The Section 2 demanded an additional congressional
19 district in which black voters had the opportunity to elect
20 their candidates of choice.

21 The legal standard was clear. *Gingles* had been in place
22 for nearly 40 years, and repeatedly applied by courts, and
23 affirmed by Congress ever since. And the evidence was
24 overwhelming.

25 The size and the concentration of the black population

1 easily allowed for an additional majority minority -- majority
2 black congressional district. And black and white voters are
3 starkly polarized. And race continues to infuse Alabama's
4 social, economic, and political reality, resulting in unequal
5 access to the political process.

6 Upon analysis of these facts and application of this law,
7 the Court found that Alabama's congressional map violated --
8 likely violated Section 2 of the Voting Rights Act.

9 As the Court made clear on this record, the question of
10 whether the map unlawfully diluted the black vote was not even
11 close. But despite the diligence of the parties and the Court
12 in developing and evaluating that extensive record, 2022 relief
13 was not to be.

14 The State asked the Supreme Court to push pause on the
15 state's Section 2 obligation in order to reevaluate the legal
16 standard, and possibly throw it out altogether. And so we
17 waited. And the black voters of Alabama waited while the
18 Supreme Court combed through the law and the record in this
19 case.

20 And upon reviewing both, the Supreme Court affirmed. It
21 affirmed the well-established legal standard applied by this
22 Court. It affirmed the Court's findings and conclusions
23 pursuant to that standard. And it affirmed that black voters
24 can continue to rely upon the protections of the Voting Rights
25 Act to achieve its promise of equal opportunity.

1 And when I read that opinion, I read it as a clear victory
2 for, of course, our clients, but for minority voters more
3 generally, and certainly for the Voting Rights Act.

4 The State of Alabama, however, read it as something
5 different. And when given the opportunity to right its wrong
6 and conform its map to federal law, the State refused. And so
7 we continued to fight and continued to wait for relief from the
8 likely Section 2 violation.

9 Now, today as we considered the Special Master's report
10 and recommendation, I dare say that we are on the cusp of
11 finally obtaining that relief. And to be sure, given the
12 magnitude and the moment of this case, I say that with hope and
13 humility and gratitude. And for sure we take nothing for
14 granted.

15 Let me turn to the three remedial maps that are before
16 this Court. As we stated in our written responses and
17 objections, the Caster plaintiffs firmly believe that the
18 Special Master's Remedial Plans 1 and Remedial Plan 3 fully and
19 fairly remedy the likely Section 2 violation, while complying
20 with this Court's clear instructions.

21 Remedial Plan 1 is based off of the VRA plaintiffs'
22 proposed remedial plan, which itself was based off of
23 Mr. Cooper's Illustrative Plan 2.

24 Illustrative Plan 2, like the other illustrative plans has
25 been fully vetted, well vetted by this Court and the U.S.

1 Supreme Court, both of which found it to be reasonably
2 configured, consistent with traditional districting principles,
3 and both of which rejected defendants' assertions of racial
4 predominance in the plan.

5 The VRA plaintiffs' proposed remedial plan modified
6 Illustrative Plan 2 to better conform to the 2021 enacted plan
7 and to reduce the number of county splits.

8 The Special Master's Remedial Plan 1 modifies it further,
9 to better conform it to the 2023 enacted plan. The end result
10 is a remedial map that offers a complete remedy. It adheres to
11 traditional districting principles. It retains nearly
12 90 percent of the state's population in their enacted district,
13 the highest core retention of any plan before the Court.

14 Remedial Plan 3 would remedy the Section 2 violation with
15 a different approach. Remedial 3 diverges only slightly more
16 from the 2023 plan to better preserve the cities of Mobile and
17 Birmingham.

18 The Special Master describes Mr. Ely's emphasis on
19 minimizing the number of districts affected and the number of
20 divisions within those two major metropolitan areas. The end
21 result is a map that, like Remedial Plan 1, provides black
22 voters --

23 JUDGE MARCUS: Let me ask you a question. To the
24 extent that Remedial Plan 1 split seven counties, and 2 and 3
25 split only six, they adhere more closely to the choice made by

1 the Alabama Legislature.

2 Why does that not make 2 and 3 superior to 1 so long as
3 they remediate the Section 2 violation?

4 MS. KHANNA: I think two responses to that, Your
5 Honor.

6 One is I think there's probably, depending on the metric
7 that we look at, they can come out differently on what actually
8 adheres most closely.

9 Remedial Plan 1 has the highest core retention, for
10 instance. So, in that sense, it adheres more closely, in terms
11 of the number of people affected. But certainly the
12 legislative policy choice when it enacted the 2023 plan was to
13 split no more than six counties.

14 I think that's a very valid preference to draw. I would
15 caution against kind of choosing among --

16 JUDGE MARCUS: No. I only raise it because it seems
17 to me we can all agree on some of the governing principles, one
18 of which is that while we are required to completely remediate
19 the vote dilution, we are also required to do it in the least
20 intrusive way; that is to say, we are required to do it in a
21 manner that it otherwise adheres as closely as would be
22 reasonably practicable to the choices made by the Alabama
23 Legislature.

24 They characterize splitting six -- more than six counties
25 as being, quote, nonnegotiable. If you had to split more to

1 achieve the result of remediating, that would be one thing.
2 But if you can remediate the problem and still split only six
3 rather than seven, why wouldn't that be a superior choice?

4 MS. KHANNA: I think that would be a perfectly valid
5 preference based exactly on that reasoning.

6 Again, I think there are pros. There are advantages to
7 both Remedial 1 and Remedial 3. We, the Caster plaintiffs, are
8 agnostic, really. I think they both provide a complete remedy.
9 And they both do so within traditional districting principles.

10 Surely the sixth -- that seventh split is, you know,
11 different than the quote, unquote, nonnegotiable that the
12 Legislature adopted in enacting the 2023 plan.

13 You know, to the extent that the Court wants to give that
14 as much credence as possible, I certainly understand that the
15 six splits --

16 JUDGE MARCUS: Well, let me put it this way: Are we
17 not obliged to follow that rule of law which says you change
18 only that which you must change in order to remediate the
19 problem?

20 MS. KHANNA: Yes. Absolutely.

21 And that's why it's very important that all of the -- that
22 both Remedial 1 and 3 hew as closely as in -- with different
23 approaches hew closely to those criteria.

24 But, certainly, the metric that Your Honor mentioned on
25 the six versus the seven splits is a perfectly -- would be a

1 perfectly acceptable reason to go with Remedial Plan 3 over
2 Remedial Plan 1.

3 JUDGE MARCUS: Let me ask a slightly different
4 question. What's wrong with Remedial Plan 2?

5 MS. KHANNA: So as we stated in our papers, not only
6 does Remedial Plan 2 -- the new remedial district perform in
7 fewer elections overall, most troublingly, it -- the
8 black-preferred candidate would have been defeated in four out
9 of the five most recent election contests.

10 And I think it should -- the first red flag is where the
11 most recent election contests have black-preferred candidates
12 losing 80 percent of the time. That is, I would say, troubling
13 to say the least.

14 And I know that the Court -- I appreciate that the Court
15 asked for further inquiry into the performance of Remedial Plan
16 2 in District 2 in that plan. And I appreciate the Special
17 Master's response, which was to examine more closely any -- the
18 kind of unique characteristics that might have happened during
19 the 2022 elections that were under review in that instance.

20 But I think the mere fact that one would have to sift
21 through the idiosyncrasies of the election contests to explain
22 away the pretty near consistent defeat of black-preferred
23 candidates is reason enough for this Court to be very wary.

24 JUDGE MARCUS: Let me ask you a question about that.
25 I noticed with some interest that the briefs from the Caster

1 and Milligan plaintiffs highlighted five elections, biracial
2 elections, in 2022, but said not one word about the other
3 elections.

4 And when I looked at Dr. Liu's report, for example, one of
5 the experts of the plaintiffs, he looked at 11 biracial
6 elections going back to 2014 and running through 2022. So he
7 had a wider spectrum of time in order to make this performance
8 analysis. And on that calculus, he concluded that
9 African-Americans had won seven out of eleven.

10 Wasn't it somewhat unfair to simply focus on five races in
11 '22, and ignore the other races between '14 and '20?

12 MS. KHANNA: I don't think it's -- I don't think
13 anybody's ignoring any part of the record, Your Honor.
14 Certainly we are not.

15 When looking at the entire span of the elections analyzed,
16 District 2 in Remedial 2 performs less often than the
17 comparator districts in Remedial 1 and 3.

18 The reason that we emphasized the problematic nature of
19 the most recent election is because it's just that. It's the
20 most recent election. These are the -- our best indicator of
21 the trend in voting patterns.

22 And I think courts have said that you -- that looking at
23 the most recent elections is more probative and more
24 dispositive as we're moving forward. It's the reasons why we
25 don't look at 10, 12, 15 years elections previous.

1 Certainly we have the full breadth of elections before the
2 Court to analyze. And when we look at all of them, Remedial
3 Plan 2 still comes up shorter than the others, and particularly
4 short on the ones that we should find, I think, most
5 interesting, the ones that just happened frankly during the
6 lifespan of this case.

7 JUDGE MARCUS: When you raised the issue, we directed
8 the Special Master and his team to address it. And they did.
9 You saw the response that was made part of the record.

10 And, basically, their response boiled down to one
11 sentence: That the 2022 election was aberrant. It was kind of
12 an outlier because the performance, the turnout in the election
13 was so low that it was not as good an indicator to the extent
14 that this whole process is predictive in nature. It wasn't as
15 good as an indicator as the earlier election cited.

16 What is the response to that?

17 MS. KHANNA: I have three responses to that, Your
18 Honor. First is that when we start digging into assessments of
19 candidate quality, and how much money was raised, and the
20 popularity of incumbents, and evaluating turnout, kind of going
21 more granular into those things, we are now getting into a much
22 more subjective analysis than the pure election results, which
23 form the foundation of the Special Master's initial report and
24 of the expert's reports from plaintiffs' side in this case.

25 JUDGE MOORER: Ms. Khanna, aren't all elections driven

1 by what might be considered by granular factors? I mean,
2 generally speaking, it's better to be a candidate who has more
3 money than less, better sometimes to have a higher turnout than
4 less, depending on whether you're an incumbent or a newcomer.

5 I mean, so shouldn't we consider those at least as on par
6 with the -- with ultimate result?

7 MS. KHANNA: You are absolutely right, Your Honor,
8 that those are always factors in all elections. And, to me,
9 that is a reason why it is problematic to try to kind of pick
10 out a few elections and say, well, that one is an aberration
11 for this reason, this one is an aberration for that reason,
12 because then we would have to go through the span of elections
13 and say, well, which one was the most typical, or normal, or
14 the one we can expect the most.

15 And, again, I think we start getting into much more
16 subjective analyses over what of those factors somebody finds
17 more persuasive, as to what makes an election typical or an
18 outlier.

19 JUDGE MOORER: Well, ultimately, this -- and pardon me
20 for interrupting you.

21 Ultimately, if we pass one of these maps, we are going to
22 have a completely different set of circumstances. And
23 presumably the electorate will be savvy enough to realize that
24 they do have an opportunity to ultimately win, whereas you've
25 got these other elections where it was almost a foregone

1 conclusion that you would not.

2 So shouldn't that dynamic be something that factors
3 heavily into the new District 2 proposed Remedial Plan 2 and
4 our analysis of whether to select that, having been fully
5 vetted by the Supreme Court, as well?

6 MS. KHANNA: Well, certainly, Your Honor, I do hope
7 that black voters in Alabama will understand that there is a
8 new opportunity that never existed before, and that should
9 reinject hope and the prospect of equal opportunity that hasn't
10 existed so far.

11 But I think the question actually hits at a much more
12 foundational point, which is, the fact is the ability of
13 candidates to raise money and to gain traction is not unrelated
14 to the totality of circumstances evidence adduced in this case.
15 And the kinds of factors that create the inequities and
16 inequality in access to the political process.

17 So, for instance, gaps in wealth and income and employment
18 and education can and do create gaps in the ability of
19 candidates to raise and spend money.

20 So I think it's -- I would be -- I would caution against
21 kind of tying too much to what is considered a good candidate
22 or a viable candidate.

23 When I think it's -- they're all kind of intermingled with
24 some of the same factors that we're trying to remediate in the
25 first place.

1 JUDGE MANASCO: Ms. Khanna, let me ask it this way: I
2 understand that the Caster plaintiffs of the three remedial
3 plans recommended by the Special Master would prefer 1 or 3.

4 Do the Caster plaintiffs object to 2?

5 MS. KHANNA: Of the three options, yes, Your Honor.

6 I think given -- given what is -- what this Court has --
7 what the Special Masters and the Court have determined is
8 possible to -- possible to remedy, and possible to do so
9 consistent with legislative policy and traditional districting
10 principles.

11 Remedial 2 is -- is of those three is the outlier that
12 really does kind of require the Court to roll the dice on some
13 factors that don't provide the kind of certitude that the
14 Eleventh Circuit has required when looking at a remedial map.

15 JUDGE MANASCO: So let me ask a follow-up question.

16 So on that reasoning, why do the Caster plaintiffs believe
17 that we have the discretion to choose 1? So the six-split cap
18 is not simply in this case a metric. It might be in
19 redistricting law, or, at large, a metric among many metrics,
20 but in this case, it is part of the enactment of the 2023 plan.

21 And as I understand the argument, we have knowledge that
22 we can completely remedy the vote dilution we found by picking
23 Remedial Plan 3, so the Caster plaintiffs say, which splits
24 only six counties.

25 So by the same logic that animates your objection to 2,

1 what's the basis for believing that we have the discretion to
2 choose 1?

3 MS. KHANNA: The reason I think the Court would have
4 the discretion to choose 1 is because 1 has the benefit of
5 having been vetted by the Court in the course of this
6 litigation, by this Court and by the Supreme Court.

7 The auspices of 1 have been clear. The map drawer has
8 been deposed. All of these kind of questions, I think, have
9 been answered, asked and answered by the Court.

10 So while it might -- while it does not comply with the
11 Legislature's reported nonnegotiable, I think it has the
12 benefit of being a court-blessed plan, for lack of a better
13 word.

14 JUDGE MANASCO: All right. Let me push back on that
15 just a little bit. And I certainly take your argument about
16 the benefit of confrontation in deposition. And, you know, we
17 have history in this case that has made a really robust record
18 about various redistricting principles and decisions.

19 It occurs to me when you look at 1, 2, and 3, that they
20 really all are very similar in a lot of ways. The core
21 retention measures -- the range of core retention measures
22 appears pretty tight.

23 The differences, if you were to lay 1, and 2, and 3 on top
24 of each other, the differences between 1 and 3 are really how
25 Mobile County gets split, not in whether it gets split. And

1 then what happens to Henry County.

2 And the compactness measures are quite similar. They're a
3 little different, but they're quite similar. The plans are --
4 both are contiguous in essentially the same way.

5 In that circumstance -- now, I'm not -- I certainly
6 understand that the Special Master's cartographer drew 3
7 separately from the process that created 1. But looking at
8 them objectively, given the similarities, is it really accurate
9 to say that as between 1 and 3, only 1 has the benefit of all
10 of that vetting, and 3 does not?

11 MS. KHANNA: Absolutely not, Your Honor. And I don't
12 mean to imply that.

13 And I guess I don't want to -- I don't want to suggest
14 that I'm pitting 1 against 3, or fight too hard in favor of 1
15 to suggest that I am against 3.

16 Caster plaintiffs are perfectly -- find either perfectly
17 acceptable. And I think that, you know, the auspices of
18 Remedial Plan 1 are clear through the litigation. The auspices
19 of Remedial Plan 3 are clear through Special Master's report.
20 And Remedial Plan 3 is the most court-drawn plan of the three.

21 So certainly I think there are -- I think like, as I
22 mentioned, I think there are advantages to both. I think there
23 are tradeoffs to both. And all of those tradeoffs, I believe,
24 result for Remedial Plan 1 and 3, result in a meaningful
25 opportunity to elect in an additional district.

1 So you will certainly hear no objection from the Caster
2 plaintiffs for the adoption of Remedial Plan 3.

3 JUDGE MARCUS: Let me just follow up on my colleague's
4 question to you about Remedial Plan 2, CD 2 in Remedial Plan 2.

5 I understand that you prefer 1 and 3 to 2. The question
6 that was put was: Do you object to 2? I just want to be sure
7 that I have your answer.

8 MS. KHANNA: Yes.

9 JUDGE MARCUS: Let me ask you this: Do you disagree
10 with the Special Master's conclusion that CD 2 in Remedial Plan
11 2 is an opportunity district?

12 MS. KHANNA: I don't disagree with any of the facts
13 reported in the Special Master's report.

14 The Special Master defines the opportunity district as one
15 in which a black-preferred candidate will often win. And
16 certainly the math adds up that I believe that there's, you
17 know, more than 50 percent of the elections analyzed would have
18 the black-preferred candidate winning. So I don't disagree
19 with any of the facts or --

20 JUDGE MARCUS: Well, he does more than cite facts. He
21 generates a conclusion at a higher order of abstraction. He
22 says CD 2 creates an opportunity district, and it remediates
23 the problem the Court identified.

24 Do you disagree with that?

25 MS. KHANNA: I do, Your Honor. And that is because I

1 think when the -- when looking at the 2022 elections, the
2 Special Master, we are all in agreement that the 2022 elections
3 are not successful for black-preferred candidates.

4 And when asked to go back and kind of explain that, the
5 Special Master then examined the kind of, as I mentioned, the
6 idiosyncrasies of that election -- the candidate quality, the
7 money raised, the turnout.

8 Because we don't have that same information for all the
9 elections, I hesitate to be able to say -- I don't have the
10 analysis in front of me, Your Honor, to be able to say that
11 that is, in fact, an outlier.

12 But as I mentioned, there are three reasons to be -- to be
13 wary of that, of kind of having to dig deep into that kind of
14 data. One is the subjectivity. Two is the fact that it's very
15 interrelated, those -- some of these criteria are very
16 interrelated with a lot of the totality of circumstances
17 evidence that we adduced in the case.

18 But 3 is that these kinds of analyses, I think, run the
19 risk of inviting Section 2 defendants, like the State of
20 Alabama, to do the same, to point their finger at -- that
21 candidate was just bad, that money was just not enough raised.
22 It turns out that incumbent was just too popular. The turnout
23 was not high enough. If only black voters had turned out high
24 enough.

25 We have seen these kinds of --

1 JUDGE MARCUS: Of course, doesn't all of that suggest
2 that a wider time frame is wiser than a narrower time frame to
3 reach these kinds of predictive conclusions?

4 After all, who knows what will happen in '24. And yet
5 this undertaking is predictive by law in nature, isn't it?

6 MS. KHANNA: Absolutely. And certainly that's why we
7 have the wider time frame.

8 Proper analysis that was conducted here by the Special
9 Master and by the plaintiffs' experts shows that that wider
10 time frame -- we don't object to the kind of broader analysis.

11 But looking within that wider time frame, it is, as a
12 legal matter, those most recent elections should draw our
13 attention.

14 JUDGE MARCUS: Let me ask you a final question: Do
15 you have any other objections to 2, other than that four out of
16 five lost in '22?

17 MS. KHANNA: Other than --

18 JUDGE MARCUS: And that, therefore, there was a big
19 doubt about whether it solves the problem.

20 MS. KHANNA: Well, I think our -- that is -- our
21 objection to 2 is the performance of Remedial Plan 2, and
22 whether or not it provides the remedy, the complete remedy with
23 certitude. And that is from the *Dillard* case from the Eleventh
24 Circuit.

25 And I think that the -- District 2, maybe it will, maybe

1 it won't, but it certainly does not provide the kind of
2 certitude that I think the Eleventh Circuit standard requires.

3 JUDGE MARCUS: What do you suppose we mean or meant
4 when we spoke of certitude? I look for certitude everywhere
5 and I can only find it in the house of worship.

6 You tell me. How do I find certitude here?

7 MS. KHANNA: Well, fortunately for us, we don't
8 actually have to look too far to find certitude because we can
9 look to Remedial Plans 1 and 3.

10 And I think -- Your Honor raises a lot of important kind
11 of foundational points about like what is certitude? And what
12 is an opportunity?

13 But I think the good news for all of us is that, as a
14 practical matter, we don't have to dig too deep into figuring
15 out the final answers to those questions in the abstract, where
16 we have two maps that meet all the criteria, let's -- I
17 understand the objection on the seventh county split.

18 So let's look only at Remedial 3, where the Court has in
19 front of it a map that meets all of its criteria in Remedial 3,
20 and provides a more robust opportunity to elect in the second
21 district. We don't have to wonder whether or not Remedial 2
22 may or may not provide -- meet that legal standard.

23 We have one that clearly passes the post. And as far as I
24 can see, Your Honor, there's not even -- there's no party or
25 nonparty to this case that has expressed even so much as a

1 preference for Remedial Plan 2, let alone a full-throated
2 endorsement.

3 Whereas Remedial Plan 3 I believe has, I think, about as
4 much kind of buy-in as we're going to get among all the various
5 parties and nonparties in this case.

6 JUDGE MARCUS: I thank you for your remarks.

7 If you want to bring it to a close -- I didn't mean to cut
8 you off right in the middle, but we will give the plaintiffs an
9 opportunity to come back and respond.

10 But I'd like to move on, if we can, to Mr. Ross and the
11 Singleton folks, if we could.

12 MS. KHANNA: Thank you, Your Honor. We'll do that.

13 JUDGE MARCUS: Thank you.

14 MR. ROSS: Thank you, Your Honor.

15 I'd like to first thank the Special Master and his team,
16 and thank the Court for the time to -- and the diligence and
17 the thoughtfulness by which you have all approached this.

18 I will jump right in and discuss the Milligan plaintiffs'
19 reference for Remedial Plan 1, which, as Ms. Khanna said, is
20 based on the plans that have already been approved by this
21 Court.

22 I think a few things that Ms. Khanna didn't mention about
23 Remedial Plan 1, which are important to the Milligan
24 plaintiffs, is that we believe that this better protects
25 communities of interest.

1 This Court cited some of the evidence that plaintiffs
2 presented from Representative Jones, from Dr. Bagley talking,
3 and from our witnesses who are here today -- excuse me --
4 clients -- about the community of interest that exists between
5 Chickasaw, Prichard, Mobile, and that portion of northern
6 Mobile County.

7 This Court recognized that overlapping community of
8 interest with the Black Belt, and we think that that community
9 should be included within the remedial district. And that's
10 what's accomplished in Plan 1.

11 We also believe that Dothan is a part of the Black Belt.
12 We had testimony that the defendants, the former mayor of
13 Dothan presented, in which he testified that he believed that
14 Dothan and Montgomery should be kept together in a
15 congressional district.

16 We had testimony also from the same witness that about 30
17 black voters showed up to the -- the state legislative hearings
18 in T-shirts supporting keeping Dothan as a part of the Black
19 Belt. And Dr. Bagley also testified in his expert report this
20 past September that Dothan, like Mobile, has significant
21 historical and socioeconomic connections to the Black Belt.

22 And so we think for that reason, Remedial Plan 1, even
23 though it splits an additional community or -- excuse me -- an
24 additional county, it's really important to recognize its
25 respect for particular communities of interest.

1 I also know that the Brennan Center filed an amicus brief,
2 in which it referenced the fact that Remedial Plan 1 is the
3 least likely of the remedial plans to lose population in CD 2.
4 We think that's relevant, you know, consideration --

5 JUDGE MARCUS: Let me ask you a question about that.

6 MR. ROSS: Yes, Your Honor.

7 JUDGE MARCUS: I noticed with interest what the
8 Brennan Center said. I have been unable to locate any case
9 that suggested one of the relevant considerations when you do a
10 *Gingles* analysis, whether it's I, II, or III, or the totality
11 of the circumstances. And part of this predictive thing is to
12 actually make a projection about where a population may be two,
13 four, six, or eight years out.

14 Is there anything out there that supports the suggestion
15 that one ought to be looking at that kind of population,
16 demographic analysis prospectively in making these kinds of
17 determinations?

18 MR. ROSS: Your Honor, I think it's all a predictive
19 analysis. And so that's one thing that the Court could
20 consider. I don't think that it's something the Court
21 absolutely has to consider. But it's a reason -- one of the
22 reasons why the Milligan plaintiffs prefer Plan 1 over the
23 other plans.

24 Your Honor, if I may turn briefly to Plan 3.

25 JUDGE MANASCO: Before you turn, let me ask you a

1 question. Do the Milligan plaintiffs have an objection to
2 Remedial Plan 3?

3 MR. ROSS: No, Your Honor, we don't have an objection,
4 but we have a preference for Remedial Plan 1.

5 JUDGE MANASCO: I'm clear on the preference.

6 MR. ROSS: Yes.

7 JUDGE MANASCO: So if there is no objection to 3, what
8 is our authority to adopt 1? I mean, 3 splits six counties, 1
9 splits seven. And I think what I'm hearing is that in order to
10 adopt 1 on the basis of better respect for communities of
11 interest, that we would need to not only disregard the
12 six-split cap, but we would also need to, at a minimum, credit
13 the argument and possibly make a finding that Dothan is part of
14 the Black Belt.

15 So if 3 is not objectionable, what is the basis for the
16 suggestion that we have the authority to choose 1?

17 MR. ROSS: Sure. Your Honor, I -- I think because
18 plaintiffs have an objection to Plan 2, which we can discuss,
19 Plan 1 is the only plan that respects the overlapping Black
20 Belt and Mobile community of interest that this Court has
21 already recognized. And so for that reason, that, aside from
22 Dothan, is one of the reasons why this Court could choose Plan
23 1 over Plan 3.

24 JUDGE MANASCO: That seems in tension with the fact
25 that you don't have an objection to 3.

1 MR. ROSS: Well, I think, Your Honor, as I said, we
2 have a preference for 1.

3 I think understanding that 3 is a court-drawn plan and
4 it's a plan that provides -- regularly performs, I think we
5 hesitate to object to it, given that it's in the Court's
6 discretion to decide which plan to adopt.

7 But, as I said, we have a preference for Plan 1 for the
8 reasons that we've stated.

9 JUDGE MANASCO: Thank you.

10 MR. ROSS: Thank you, Your Honor.

11 So with respect to Plan 3, for all the reasons that
12 Ms. Khanna said, we support it as an alternative.

13 It's been supported also by -- I shouldn't say supported.
14 It's been -- the defendants have also stated that Plan 3 is the
15 least objectionable of the three plans, and so we think that
16 that should be given some deference.

17 With respect to Plan 2, Judge Moorer had a question about
18 black candidates and the likelihood of their success statewide.
19 I think that's true of nearly all the elections, certainly all
20 the elections involving black candidates that my expert Dr. Liu
21 has looked at.

22 None of those candidates won statewide elective office, as
23 this Court knows. No black candidate has won statewide
24 elective office in over 25 years. So it's certainly true of
25 all of the elections that, you know, there was not necessarily

1 a hope that these candidates would win statewide elective
2 office, and yet they still ran, and those elections still
3 performed.

4 I think with respect to the Special Master's response to
5 our objection, there are a couple of things that are really
6 important to note. One is that the Special Master looked at
7 Democratic turnout. He did not look at black voter turnout.

8 I provided a copy of the census data from 2022 to chambers
9 and opposing counsel in an e-mail this morning. And in that
10 data, the U.S. Census Bureau found that black voter turnout was
11 47 percent in 2022, and that white voter turnout was
12 45 percent. And so it's not that black voter turnout was, in
13 fact, higher than white voter turnout in 2022.

14 It's also important to note that under CD 2 in Plan 2,
15 black voter registration was 50.63 percent, meaning that under
16 CD 2 of Plan 2, black voters were the registered majority in
17 that plan. And yet they still were not able to elect their
18 preferred candidates of choice in the five congressional races.

19 And I also agree with everything that Ms. Khanna said.
20 One point that I think is really important is that but for this
21 Court's injunction being stayed, the 2022 elections were the
22 elections in which black voters would have had their first
23 opportunity to elect their candidate of choice, and yet in
24 those elections we see that the black candidates would have
25 lost four out of five elections.

1 And then in the fifth election, I think the percentage by
2 which they won was something like 0.1 percent.

3 So it's not only as important to think about that in terms
4 of recency, but that was, in fact, the very election in which
5 this Court was hoping -- excuse me -- this Court's injunction
6 expected the 2022 -- excuse me -- the remedial plan to be put
7 in place.

8 One other thing that I think is really important, as the
9 Special Master references, that the Democratic candidate in
10 2018 spent and had more money than the Democratic candidate in
11 2022. And his point was that they were both the
12 black-preferred candidate, but I think one thing that's really
13 important is the racial salience there.

14 In 2018, it was a white candidate who ran who had
15 significantly more money. In 2022, it was a black woman who
16 reason who had significantly less money. And this Court has
17 already found about the history of racial discrimination in
18 this state means that black voters are less able to afford -- I
19 will quote you -- to contribute to political campaigns and to
20 afford to run for office.

21 And so that's important recognition that this Court has
22 already noted, and that the Supreme Court in *Gingles* itself
23 notes that black candidates are less likely because of history
24 discrimination to be able to raise money.

25 Milligan plaintiffs have also presented evidence of

1 racially polarized voting, both in Democratic and Republican
2 primaries. And so the fact that a black woman received less
3 money and less support from white voters, I think is really
4 significant, as compared to 2018, when a white Democrat ran for
5 the 2018 gubernatorial election that the Special Master
6 referenced.

7 With that, Your Honor, if you don't have any questions,
8 I'm happy to --

9 JUDGE MARCUS: No. Thanks very much.

10 And, again, Mr. Ross, as I said to Ms. Khanna, we will
11 give you the opportunity to come back and rebut.

12 MR. ROSS: Thank you.

13 JUDGE MARCUS: Let's turn to Singleton, Mr. Quillen.

14 MR. QUILLEN: Good morning, Your Honor.

15 JUDGE MARCUS: Good morning.

16 JUDGE MOORER: Good morning.

17 MR. QUILLEN: The Singleton plaintiffs do believe that
18 it is very important that Plan 1 split seven counties. And
19 even though I think, as everyone agrees, it is not necessary to
20 remediate the Voting Rights Act violation to do so.

21 I would just add that Plan 3 also does a much better job
22 at preserving two of the state's largest municipalities --
23 Birmingham and Mobile. The Special Master's Plan 3 seems to
24 make particular efforts to keep Birmingham together, and it did
25 so better than the other plans. And it kept Mobile together

1 significantly better than the other plans.

2 So, in terms of preserving communities of interest, as the
3 State said in the redistricting guidelines, municipalities can
4 be communities of interest, too. And so even if there is some
5 evidence in the case, although not a finding, that certain
6 parts of Mobile County are part of the Black Belt, that Dothan
7 is part of the Black Belt, we can all take judicial notice of
8 the fact that Birmingham is a municipality and Mobile is a
9 municipality, and that they are kept together much better in
10 Plan 3 than in Plan 1.

11 Obviously, as you know, the Singleton plaintiffs have
12 wanted to keep counties together. Plan 3 does that better than
13 Plan 1. And if we can't have our whole county remedy, we
14 certainly think that it is better for building biracial
15 coalitions across the state.

16 JUDGE MARCUS: Well, you understand the problem with
17 the plan that you offered basically is that it starts from
18 square one. It rebuilds everything. It adheres to nothing.

19 MR. QUILLEN: Right. And that's why -- I mean, we
20 have certainly said some nice things about the Singleton plan
21 in our brief, but we are here to advocate for Plan 3 as being
22 the best of the Special Master's plans.

23 JUDGE MARCUS: Thank you very much.

24 JUDGE MANASCO: Let me ask you a question.

25 MR. QUILLEN: Yes.

1 JUDGE MANASCO: I understand the preference. But as
2 you have gathered, I'm trying to understand what objections
3 there are. Do the Singleton plaintiffs object to the Special
4 Master's Remedial Plan 3 on any ground?

5 MR. QUILLEN: Object to Plan 3? No. We -- we do
6 not -- we do not have a basis to conclude at this time that
7 Plan 3 fails on any of the absolute criteria, that remediation
8 of the Voting Rights Act, compliance with Constitution.

9 I will say we certainly, in the three days we had to look
10 at it, we were not able to do a full expert analysis of
11 whether, you know, a computer analysis would determine that
12 there was evidence of racial gerrymandering. We just don't
13 have any evidence of that kind. And for that reason, we are
14 not claiming at this time that the -- any of the Special
15 Master's plans failed to remediate the Voting Rights Act
16 violation or failed to comply with the Constitution. So we do
17 not object to any of them.

18 JUDGE MARCUS: Thanks very much.

19 MR. QUILLEN: That's all I have, if there are no more
20 questions.

21 JUDGE MARCUS: Thank you, sir.

22 JUDGE MANASCO: Thank you.

23 JUDGE MARCUS: Counsel for the Secretary of State.

24 MR. LACOUR: Good morning, Your Honors.

25 JUDGE MARCUS: Good morning.

1 MR. LACOUR: I will be brief.

2 We have registered our objections in our written filing to
3 all three plans. I don't intend to go over those this morning.

4 We just did want to reiterate that we do think Plan 1 is
5 the most objectionable for the reasons that Your Honors have
6 covered this morning with the plaintiffs. It splits more
7 counties than is necessary. It splits both Mobile and Dothan
8 between two different districts when that is not required.

9 Mr. Ross stated that there were at least two reasons, I
10 guess, why Plan 1 might still be better than Plan 3, consistent
11 with traditional restricting principles, that Plan 1 puts
12 Prichard and Chickasaw together in CD 2, while Plan 3 does not.

13 Based on what we have seen from the Special Master's maps,
14 it appears all of Chickasaw is within District 2 in 3. And
15 also in Plan 3 that nearly all of Prichard is within District
16 2. So we didn't think that would be any rationale for choosing
17 Plan 1 over Plan 3.

18 Further, there's no evidence in the record that Dothan is
19 part of the Black Belt. That's a brand new assertion. What
20 Mr. Bagley, plaintiffs' expert said, pages 8 and 9 of his
21 supplemental expert report filed within the last couple of
22 months, was that there are some socioeconomic conditions that
23 are common between Dothan and the Black Belt, and he gave only
24 one piece of data, which was that there are segregated schools,
25 that public schools tend to have a higher percentage of black

1 students, and there's a private school in Dothan that tends to
2 have a higher percentage of white students. He deemed that an
3 intimate connection between Dothan and the Black Belt. That is
4 the only piece of evidence he had to try to connect the two.

5 Of course, if segregated schools is enough to connect any
6 part of the state with the Black Belt, then it's an issue that
7 is not common to -- I mean, that is not uncommon to many parts
8 of the country, unfortunately.

9 So for that reason, we do want to reiterate, as well, that
10 whatever plan the Court chooses, that ideally that you choose
11 it quickly so we can start implementing that new plan right
12 away, if possible, to get started today or first thing in the
13 morning.

14 JUDGE MANASCO: Let me ask you a couple of questions
15 about that. Is there today a Purcell objection to Remedial
16 Plan 3?

17 MR. LACOUR: We not have a Purcell objection to
18 Remedial Plan 3.

19 JUDGE MANASCO: Let me ask another question inspired
20 in part by my discussion with Mr. Quillen just a minute ago.

21 I understand the State's concerns about considerations of
22 race and redistricting. Is there any -- and Mr. Quillen told
23 me, I think, that there is -- that the Singleton plaintiffs are
24 not aware of a specific evidentiary basis to have a concern
25 that Remedial Plan 3 is an unconstitutional racial gerrymander.

1 Is the Secretary aware of any such evidentiary basis?

2 MR. LACOUR: Your Honor, we have articulated at least
3 one grounds, which is that the remedy is going to make the map
4 less compact, typically if you are remediating a racial
5 gerrymander, the map -- the remedial map ends up looking better
6 on traditional principles like compactness. The result of this
7 map is going to be less compact districts across the south of
8 the state.

9 In our view, that means that racial goals have
10 predominated over non-racial goals like compactness, which our
11 reading of the case law says that would be racial predominance.

12 JUDGE MANASCO: That is an argument, I think, if I
13 understand that correctly, that would apply to 1, 2, and 3; is
14 that right?

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

16 JUDGE MANASCO: That they are less compact.

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

18 JUDGE MANASCO: Is there evidence that they're
19 unreasonably less compact, or more precisely, not reasonably
20 compact?

21 MR. LACOUR: Our view is that compactness is a
22 comparative metric that it depends on why you end up having a
23 less compact district. And, for instance, the reason why you
24 would have a less compact district, then that would be racial
25 predominance.

1 But I don't think there is some platonic ideal of
2 compactness that's out there that a court or a Legislature can
3 look to, to determine that this is more compact versus that.
4 There's, of course, the eyeball test, and if it looks like a
5 salamander, then perhaps you can say it's a gerrymander.

6 But I think if -- the key is to look to what is giving way
7 and why.

8 JUDGE MARCUS: Is it your view, though, to follow up
9 on Judge Manasco's question, that a Remedial Map 3 is not
10 reasonably compact? I ask the question because we have
11 examined at great length all of the metrics that have been
12 given to us by all of the parties -- Reock, Polsby-Popper, cut
13 edge, you name it. Is it your view that this map CP3 or CD 2
14 and remedial map 3 is not reasonably compact?

15 MR. LACOUR: That would be our view, Your Honor, if
16 you are thinking about it as a *Gingles* I matter. For example,
17 I think reasonable compactness is set by the -- by the
18 intensely local appraisal of the challenged map. And because
19 at the end of the day, CD's 1 and 2 become less compact, and
20 the map overall becomes less compact, that we are dealing with
21 a map that's not reasonably compact.

22 But we understand that that's an argument that would apply
23 to all three maps, which is why we have put our objections on
24 the record, but then made clear we find most objectionable plan
25 number 1, and then, finally, that we are eager to go ahead and

1 start reassigning voters as quickly as possible.

2 JUDGE MARCUS: From your perspective, is there any
3 difference between Remedial Map 2 and 3? I mean, in terms of
4 preference.

5 I understand the State's position to be we disagree with
6 all three. And then I understand your position to be of the
7 three, we object most extremely to number 1.

8 MR. LACOUR: Yes.

9 JUDGE MARCUS: What about between 2 and 3? Is there
10 any difference from your perspective?

11 MR. LACOUR: Your Honor, we think they both have sort
12 of a unique flaw. One splits the Wiregrass more than the
13 other. The other has a more irregular set of lines going into
14 Mobile, so we don't have a preference between the two.

15 JUDGE MARCUS: Remedial Plan 3 keeps six of the eight
16 counties in the Wiregrass together, does it not?

17 MR. LACOUR: I believe 3 -- yes. Six of the nine,
18 whereas 2, only five of the nine. 2 has a more regular line in
19 the Mobile -- in Mobile County, whereas 3 has a more irregular
20 line that ends up bifurcating part of the CD 1 portion of
21 Mobile County between sort of the southern half that's cut off
22 by CD 2 with a northern sort of island of CD 1 at the northeast
23 side of Mobile County.

24 So we don't have a strong preference between 2 and 3. We
25 just note those are two oddities.

1 JUDGE MARCUS: Other than the objection you have
2 raised specifically about compactness, looking at traditional
3 districting criteria, is there any other objection you would
4 lodge as to 3? Other than you say it isn't compact enough. Of
5 course, the question is whether it's reasonably compact.

6 But holding that aside, is there any other objection using
7 the metric of traditional redistricting criteria that you would
8 raise with regard to 3?

9 MR. LACOUR: Just the one that we went over sort of
10 the merits phase, the remedial proceeding when it comes to
11 communities of interest, but that would be an objection we have
12 as to all three maps. It's not something unique about Remedial
13 Plan 3, in terms of division of communities of interest.

14 JUDGE MARCUS: I understand.

15 Thanks very much.

16 MR. LACOUR: Thank you, Your Honors.

17 JUDGE MARCUS: Mr. Walker, did you want to be heard on
18 behalf of the intervening legislative defendants?

19 MR. WALKER: No, thank you, Your Honor.

20 The Chairs have filed their objection and agree with the
21 arguments made by Mr. LaCour today. That's all we have to say.

22 JUDGE MARCUS: Thanks much.

23 MR. WALKER: Thank you, sir.

24 JUDGE MARCUS: Let me hear from Mr. Sells from the
25 Alabama Democratic Conference. And then we'll turn, Mr. Park,

1 to you.

2 MR. SELLS: Thank you, Judge Marcus. And may it
3 please the Court. Again, I'm Bryan Sells on behalf of the
4 Alabama Democratic Conference, which I will refer to as the
5 ADC, as it's commonly known.

6 The ADC objects to all three plans. As we have noted in
7 our written objections, we think that none of them live up to
8 the standard that this Court set, which is that it may not
9 adopt a remedy that fails to with certitude completely remedy
10 the Section 2 violation. And the reason why none of the plans
11 satisfy that standard is because each of them still permits a
12 white voter veto, as demonstrated in the expert analysis of the
13 2022 governor's race.

14 Now, the Special Master provided a response to our
15 objection that, while we appreciate the work that they did
16 bringing the data to bear as they have in a very short time,
17 amounts to guesswork about how this district will perform in
18 the future. And it's -- I would say it's akin to a
19 back-of-the-napkin analysis about turnout based on simply four
20 election cycles.

21 JUDGE MARCUS: Let me probe that a little bit further,
22 and help me with it.

23 MR. SELLS: Yes, sir.

24 JUDGE MARCUS: As I understand what the Special Master
25 did, was he looked at 17 elections. He looked at the election

1 cited by Dr. Liu, of which there were 11 biracial. He looked
2 at all of the races examined by Trey Hood, the State's expert.
3 And he superimposed one essentially on top of the other and
4 found there were 17 separate elections he examined over an
5 extended period of time running from 2014 through 2022.

6 Was there something methodologically wrong with what he
7 did or how he approached this question in order to come up with
8 the best performance analysis he could?

9 MR. SELLS: No, Your Honor. I will be very frank that
10 I think that where the Special Master started in his report was
11 absolutely appropriate, in coming up with that number of 17
12 metric. But he should not have stopped there. That is the
13 essence of our objection, is once he determined that the
14 black-preferred candidate would not carry every election in his
15 proposed remedial CD District 2, he conducted no further
16 analysis to ask why. And that matters.

17 Suppose -- let me give you a hypothetical. Suppose you
18 had the same 17 elections, and there were 15 wins and 2 losses.
19 You would think that was an adequately performing district.
20 But then suppose I tell you that the two losses were the only
21 two elections with black candidates. That wouldn't look like a
22 remedial district or a district that completely remedies
23 Section 2 violation.

24 Another hypothetical. Suppose you have the same --

25 JUDGE MARCUS: What I want you to tell me

1 methodologically --

2 MR. SELLS: Yes.

3 JUDGE MARCUS: He looked at 17.

4 MR. SELLS: Yes.

5 JUDGE MARCUS: He started with biracial on the theory,
6 and the courts have repeatedly said it, that they may be most
7 probative.

8 And then he went on to elections that were not biracial,
9 and he went back eight years in time. Should he have gone back
10 further in time? Or should he have looked at other elections
11 that he did not look at?

12 MR. SELLS: No, Your Honor. I don't have an issue
13 with his choice of 17. My issue is with his lack of analysis
14 of the instances in which the black-preferred candidate would
15 have lost in his proposed remedial districts.

16 We took those same elections using existing analysis from
17 the Milligan plaintiffs' expert. And the pattern hits you in
18 the face if you look at Dr. Liu's analysis.

19 The one loss that is consistent across all three plans is
20 the one where white voters really disliked the black-preferred
21 candidate. That was Yolanda Flowers. And we submit that
22 that's more important than the number of times out of 17.

23 JUDGE MARCUS: What is it that you would have us infer
24 from that observation?

25 MR. SELLS: That none of the remedial plans with

1 certitude completely remedy the Section 2 violation, especially
2 when you have an alternative that does not suffer that defect,
3 and that's the ADC plan.

4 JUDGE MANASCO: Mr. Sells, what is your best case for
5 the proposition that the Special Master's work was a
6 back-of-the-napkin analysis?

7 MR. SELLS: I can give you some examples for it.

8 The Special Master cites the fund-raising.

9 JUDGE MANASCO: No. I need the best precedent that
10 tells me to set it aside as a back-of-the-napkin analysis.

11 MR. SELLS: The Special Master did not consider, for
12 example, the funds raised by other black candidates that
13 prevailed in his out of 17 analysis.

14 He looked at only Yolanda Flowers's fundraising. And I
15 would be willing to wager a guess that there were black
16 candidates who won under his analysis who raised and spent less
17 money than Ms. Flowers.

18 JUDGE MANASCO: Mr. Sells, I think I might not have
19 been clear. I understand the social science critique that you
20 have with the methodology.

21 MR. SELLS: Yes.

22 JUDGE MANASCO: But our court is not at liberty to
23 participate in a social science experiment. We have specific
24 rules that are supplied by controlling precedent that we have
25 to follow in deciding exactly what a court-ordered plan should

1 look like.

2 So I still need the best legal precedent that diminishes
3 the Special Master's analysis on the grounds that you are
4 urging us that it is diminished.

5 MR. SELLS: So I don't think that there is legal
6 precedent regarding back-of-the-napkin analysis. I think,
7 frankly, this is an area where there isn't a lot of guidance
8 for how the Court should proceed. And the Court in its orders
9 has stated accurately what guidance there is, that this Court
10 may not adopt a remedy that does not with certitude completely
11 affix the Section 2 violation.

12 JUDGE MANASCO: I mean, federal courts have been
13 ordering remedial plans when legislatures or other governing
14 bodies have failed to pass them for as long as the Voting
15 Rights Act has been around.

16 So every case is different. There are intense fact-bound
17 questions and local determinations. I certainly understand
18 that.

19 But we really aren't in uncharted territory here. So if
20 there is not legal precedent that tells me to disregard the
21 Special Master's analysis on the grounds that you are
22 suggesting, what is the basis of our Courts' authority to do
23 so?

24 MR. SELLS: Well, Judge Manasco, I want to push back
25 on the premise of your question a little bit, because the kinds

1 of performance analyses that everyone is relying on here don't
2 go back 40 years. They go back about 10 years, maybe 12 years
3 now that we are in the 2023. It's the result of the advances
4 in computer technology.

5 So we're not actually looking that far back to where this
6 kind of an analysis was done in court. But I think -- I think
7 you -- what I would say about the Special Master's analysis is
8 by comparison to the other expert analysis that's been done in
9 this case by experts for both sides, frankly, it's not as
10 thorough, and it hasn't been the subject of deposition,
11 cross-examination, and so on.

12 It was something that he pulled together in three days --
13 admirable. That's not a lot of time. I'm not faulting him for
14 that. But it doesn't stack up against the kinds of other
15 analysis that this Court has relied on and that, frankly, we
16 rely on in our objection to all three plans.

17 That's much more solid analysis that has been the subject
18 of testing in court.

19 JUDGE MARCUS: Are there any other objections to the
20 three remedial plans the Special Master has offered?

21 MR. SELLS: That is our only objection, Your Honor,
22 that in light of a plan that doesn't suffer that defect --
23 that's the ADC plan. And there may be other ways to draw a
24 plan that doesn't give white voters a veto. We -- that's our
25 only objection.

1 JUDGE MARCUS: Let me ask you a question: As between
2 the three, did you have a preference?

3 MR. SELLS: No, Your Honor.

4 JUDGE MARCUS: Thanks very much.

5 Mr. Park?

6 MR. PARK: Thank you, Your Honor. May it please the
7 Court.

8 JUDGE MOORER: Good morning.

9 MR. PARK: I represent amicus Quin Hillyer.

10 His point was to keep Mobile County intact. And while
11 that ship has sailed, he set forth good reasons for not carving
12 out Chickasaw and Prichard.

13 What I would like to offer the Court is the benefit of
14 some experience. First, with respect to Plan 2, you might
15 reject it because of its use of water contiguity. It may be in
16 the guidelines, but we learned years ago that if you use the
17 Tennessee River as a dividing line between districts, you have
18 got a contiguity problem because there is an island in the
19 Tennessee River.

20 To the best of my knowledge and belief, no one has ever
21 used a bridge to connect two parts of a district. And Plan 2
22 uses the Mobile causeway to connect two parts of that district.

23 The other point I'd make is that racial gerrymandering,
24 the jurisprudence is downstream of *Gingles* I. Not every
25 *Gingles* I showing is going to be a constitutional showing.

1 And with respect to the plans, the remedial plans, I would
2 note that Remedial Plan 1 has that dive into Houston County to
3 capture some part of Dothan. In the 1992 plan there was a
4 legislative district that did that, and it was deemed a racial
5 gerrymander sometime after that.

6 And Plan 3, there's that hook into Mobile County. In the
7 2010 plan there was a senate district in Montgomery that had
8 kind of a hook in it. And the hook was there to provide the
9 representative with a district. The representative lived in
10 that district. It was Quinton Ross. But it was a racial
11 gerrymandering because of its demographics and the way it
12 looked.

13 I tried unsuccessfully to load some of this stuff into
14 Maptitude. And I cannot say that -- anything about the
15 demographics of these features of the remedial plans, but they
16 warrant a look, in my judgment.

17 If there are any questions.

18 JUDGE MANASCO: Mr. Park, let me ask you a question
19 about your contiguity point.

20 I take your point to be -- I want to make sure I
21 understand it first -- that anytime that a district is
22 separated somewhere by a body of water with a bridge, that the
23 bridge is insufficient to make the district contiguous.

24 MR. PARK: No, Your Honor. It's just that the state
25 has never done it before. And this Court ought not to be the

1 first to adopt a plan that does that.

2 JUDGE MANASCO: So has Mr. Hillyer performed an
3 evaluation of all the districts in the state to determine
4 whether a river runs through any of them without a bridge?

5 MR. PARK: No, Your Honor. But, again, I --

6 JUDGE MANASCO: It strikes me as a remarkable
7 proposition that a body of water that has a bridge can make a
8 district not contiguous. It's certainly not a proposition that
9 anybody else in the case has raised, so I guess my question
10 is --

11 MR. PARK: It makes it contiguous, but it's such an
12 unusual feature, Your Honor, that has never previously been
13 indulged and should not be indulged for the first time in a
14 remedial plan.

15 JUDGE MANASCO: Well, how can Mr. Hillyer say that
16 it's never previously been indulged if he's not made an
17 examination of the rest of the other districts in the state?

18 It seems entirely possible to me that there are rivers
19 that run through other districts that have bridges, and that
20 those districts are regarded as contiguous.

21 MR. PARK: It -- what you're doing in Mobile is
22 connecting part of Mobile with another part of Mobile. And
23 they're not otherwise contiguous.

24 My instinct would be that the districts that you're
25 talking about are otherwise contiguous, notwithstanding the

1 fact that a river runs through them.

2 JUDGE MOORER: Well, if you were going to put Mobile
3 and Baldwin County in a district as some want, just all of
4 Mobile and all of Baldwin, the only thing that really links
5 them, as a practical matter, is a bridge.

6 MR. PARK: Yeah.

7 JUDGE MOORER: Or the causeway.

8 MR. PARK: Yes, Your Honor. But you run it around
9 Spanish Fort and the top of that. I know you have got to cross
10 the bridge over the bayou.

11 But, nonetheless, that's always been considered part of
12 the same community. And it's part of those two counties.

13 JUDGE MARCUS: Let me ask the question this way,
14 Mr. Park: Other than the issue of a district connected by a
15 bridge over a waterway, that is the issue of contiguity, is
16 there any other objection that you have on behalf of Quin
17 Hillyer to the three plans that have been recommended by our
18 Special Master? That is to say, is there any objection based
19 on the other traditional criteria -- reasonable, compactness,
20 splitting as few political divisions as possible counties,
21 municipalities, precincts, one-person-one-vote, all of the
22 things that go into the mix, and creating a district that
23 actually performs; that is to say, remediates the vote dilution
24 problem we likely found?

25 Is there any other objection that Mr. Hillyer has, other

1 than the issue of the bridge and the water?

2 MR. PARK: No, Your Honor.

3 Simply because his position was Mobile County ought to be
4 kept intact, and this Court has already -- the remedial -- none
5 of the remedial plans do that.

6 So more than that, I don't know that the amicus can say.

7 JUDGE MARCUS: I appreciate it.

8 MR. PARK: If there are no further questions, thank
9 you.

10 JUDGE MARCUS: Thank you very much.

11 Any other comments from any of the parties about the point
12 made by Mr. Park on contiguity? Whether from the State, or
13 from the plaintiffs, or from the Alabama Democratic Conference?

14 I only raise it because this objection about contiguity by
15 water using the bridge is something that has not been raised by
16 anybody else at any point. And I just wanted to see if anyone
17 else had anything else to say about that.

18 If the answer -- any of the plaintiffs have anything on
19 that issue?

20 MR. ROSS: Just briefly, Your Honor. That in the
21 guidance the Legislature adopted in the 2023 and 2021, they
22 said that water contiguity was fine. So it's consistent with
23 the State 's own redistricting guidelines.

24 JUDGE MARCUS: Right. I understand that.

25 I'm just curious if there was any -- any objection or any

1 further comment on that from the State? Mr. LaCour?

2 MR. LACOUR: No, Your Honor. No specific objection on
3 that.

4 JUDGE MARCUS: No objection on those grounds. Thank
5 you.

6 Mr. Walker?

7 MR. WALKER: No objection, Your Honor.

8 JUDGE MARCUS: All right. Thank you.

9 By way of rebuttal, Ms. Khanna?

10 JUDGE MOORER: And, Ms. Khanna, can you address the
11 two things that Mr. Parks had pointed out? One being that
12 north part of Mobile County and then the portion of Houston
13 County that he said in other instances had constituted to
14 gerrymander?

15 MS. KHANNA: Yes.

16 With respect to Houston County, I know he referenced a
17 case, a state legislative case from a different cycle where
18 that was found to be a racial gerrymander. My understanding of
19 that case is that there was no other reasons adduced other than
20 race on that record. I don't think it provides a basis to say
21 that any split of Houston County is automatically a racial
22 gerrymander.

23 With respect to what he referred to as the hook in Mobile
24 County, I believe he likened it to a different hook in a
25 different map in a different city. And then also said that

1 there was no demographic analysis of that hook.

2 So I think it goes without saying that there's no legal
3 basis to say that any hook or kind of seemingly non-square
4 feature of a map is automatically suspect.

5 I'm not exactly sure I even know what hook he's referring
6 to, because certainly I think all of the plans, as laid out in
7 the Special Master's report, particularly Plans 1 and 3, are
8 very reasonably configured and consistent with the
9 municipalities, the VTDs, and everything, that are comprised in
10 those maps.

11 I have no comment on the water contiguity issue. I mean,
12 I think that goes only to Remedial Plan 2, which we object to,
13 anyway.

14 And with respect to the Houston County split again, that
15 goes only to Remedial Plan 1. So that would bring me back to
16 maybe my -- maybe what we're all kind of getting to is that
17 perhaps Remedial Plan 3 is the one that is drawing some -- as
18 best consensus as perhaps we're going to get.

19 And certainly the Caster plaintiffs again have no
20 preference between 1 and 3, and certainly support 3 as a remedy
21 to this violation.

22 I did want to touch briefly on the defendants' objections
23 on racial gerrymandering grounds. I certainly -- again, it
24 will come as no surprise that we -- we think the Court should
25 reject the racial gerrymandering objections. It has

1 rejected -- I think this is now the fifth time that the
2 defendants have raised these concerns. And this Court, the
3 Supreme Court has on multiple occasions rejected them, and
4 rightly so.

5 Defendants try hard to find fault with the remedial plans,
6 particularly 1 and 3. I would say particularly 3, where it
7 sounds like they are really grasping at straws.

8 In their papers, they say something about election
9 officials having trouble assigning voters to districts, which
10 it seems like a particularly thin read, particularly where they
11 have no Purcell objection to Remedial Plan 3.

12 And, ultimately, in response to the Court's questions, the
13 only kind of evidentiary point they can point to is that it
14 might perform -- it might become second runner-up in a beauty
15 contest on geographic compactness scores, which, of course, is
16 not the legal standard for reasonable compactness, is not the
17 legal standard for *Gingles* I, is not the legal standard for
18 racial predominance, or any of the areas that we have been
19 discussing in this case.

20 I think, if anything, defendants' persistent and
21 broad-brushed objections to all of the remedial plans make
22 clear, and reveal that from the very beginning of this case.
23 Their real objection was not with the way that Mr. Cooper drew
24 the lines, and not with the way that Dr. Duchin drew the lines,
25 and not with this configuration or that county split.

1 But, really, their objection is with any plan that affords
2 a second black opportunity district for Alabama voters. That
3 is telling. And certainly it only emphasizes the need for this
4 Court to impose the remedy to the Section 2 violation found.

5 If I could have just one quick closing remark, Your Honor.

6 JUDGE MARCUS: Sure.

7 MS. KHANNA: Ultimately, Alabama's approach to these
8 proceedings was a model in how not to remedy a Section 2
9 violation.

10 States and jurisdictions simply should not have to be told
11 again and again and again to follow the law, as outlined by the
12 courts.

13 And I'm hopeful that the fruitlessness of the State's
14 approach here will serve as a wake-up call to Section 2
15 defendants elsewhere to not follow in Alabama's footsteps, and
16 instead, to take the Judiciary at its word.

17 In contrast --

18 JUDGE MOORER: Ms. Khanna, excuse me for interrupting,
19 but how do you respond to the argument by ADC that these plans
20 give a veto to white voters?

21 MS. KHANNA: I understand ADC's concerned about
22 wanting to ensure a stronger and more robust black opportunity.
23 But I also am cognizant, as the plaintiff in this case, our
24 claim is narrow. We are not trying to upend the law. We're
25 not trying to even upend the map.

1 And I understand that the constraints of the law require
2 that the Court adhere as closely as possible to legislative
3 policy while remediating -- remedying the Section 2 violation.
4 I believe that that's -- there is a clear and narrow path
5 before the Court in the Remedial Plans 1 and 3 offered by the
6 Special Masters.

7 And while there will always be policy preferences for any
8 other configuration, we the Caster plaintiffs are not here to,
9 you know, to get an opportunity to draw the map that we want or
10 that we would have drawn if we were in charge of the policy and
11 the pen. We're only here to get the relief to which we're
12 entitled under the law.

13 I would just like to contrast and point, Your Honor, as a
14 final note of thanks, the approach outlined in the Special
15 Master's report and recommendation in contrast to Alabama's
16 approach to the remedial process, I believe serves as a model
17 of how to remedy a Section 2 violation.

18 The report provides a thoughtful and a thorough analysis
19 of the governing law and instructions from this Court. It
20 considers every relevant aspect of what comprises a proper
21 remedy, and it carefully evaluates the advantages and drawbacks
22 of each of the remedial proposals.

23 On behalf of the Caster plaintiffs, I would like to
24 express my gratitude to the Special Master, to Mr. Ely,
25 Mr. Scodro, for their diligence in developing these proposed

1 plans on a very tight timeline, and for their thoughtful
2 consideration of our comments and our proposals and our
3 concerns.

4 The Caster plaintiffs respectfully request that this Court
5 adopt either Remedial Plan 1 or Remedial Plan 3. And we firmly
6 believe that under either plan, black voters will be able to
7 realize the promise of the Voting Rights Act. And the state as
8 a whole, including defendants, will benefit from having a
9 congressional map that better reflects and represents the
10 voters and the residents who call Alabama home.

11 Unless there are any further questions, Your Honor.

12 JUDGE MARCUS: Thanks very much.

13 MS. KHANNA: Thank you.

14 JUDGE MARCUS: Mr. Ross?

15 MR. ROSS: Yes, Your Honor. Just a few points.

16 With respect to Plan 1 and Mr. LaCour's comments about the
17 community of interest there, I think my point was that Plan 1
18 keeps Mobile, Prichard, and Chickasaw together in a remedial
19 district more whole than the other plans do.

20 With respect to the comments of the Hillyer amici, I think
21 it's important to note the Sinkfield case is from 20 years ago
22 and was vacated, and so it's not even good law for the points
23 he's citing it for.

24 And all the reasons that Ms. Khanna pointed out, it's
25 simply not even an amorphous objection -- it's very much an

1 amorphous -- excuse me -- objection at this point.

2 And so beyond what we've said, I don't have anything to
3 add, except to thank this Court and thank the Special Master
4 for all of your hard work. And again emphasize our preference
5 for Plan 1, but our clients have no objection to the adoption
6 of Plan 3.

7 JUDGE MARCUS: Thank you, counsel.

8 For Singleton, any further, counsel?

9 MR. QUILLEN: I certainly don't want to be
10 representing the only plaintiffs not to thank the Special
11 Master, so thank you to the Special Master and to his team for
12 all of your work.

13 But if there are no questions, we have nothing further.

14 JUDGE MARCUS: No. I think it covers it.

15 Thank you.

16 Two final observations for you: One, this Court will rule
17 shortly on the matter. We are fully aware of the exigencies of
18 time.

19 Two, we wanted to take a moment to thank counsel, all
20 counsel for your considerable efforts. The case in many ways
21 is difficult because the time urgencies are so real and
22 immediate. And we appreciate all of your efforts.

23 With that, this Court is adjourned.

24

25 (Whereupon, the above proceedings were concluded at

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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

10-10-2023

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

Date