

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

4 ALABAMA STATE CONFERENCE *
5 OF THE NAACP, et al., *
6 Plaintiffs, * 2:21-cv-1531-AMM
7 vs. * November 21, 2024
8 WES ALLEN, in his official *
9 capacity as Alabama Secretary *
10 of State, et al., *
11 Defendant. *
12 *****
13

14 TRANSCRIPT OF BENCH TRIAL
15 VOLUME VIII
16 BEFORE THE HONORABLE ANNA M. MANASCO
17 UNITED STATES DISTRICT JUDGE
18
19
20

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P R O C E E D I N G S

(In open court.)

THE COURT: Good afternoon, everybody. Welcome back.
I hope everybody had a productive and restful evening.

All right. What evidence cleanup do we need to do, if
any?

MR. SMITH: Your Honor, for the defense, I think we
have come to an agreement -- can you hear me -- I think we have
come to an agreement with plaintiffs. I don't think there are
any objections outstanding on the depo designations, so I think
those are fine as amended.

THE COURT: Great.

MR. SMITH: And then we have a few exhibits to move
in, as I understand the plaintiffs do, as well with no
objections from other side.

THE COURT: All right. Have at it.

MR. SMITH: The defense would move in DX-12, DX-245,
DX-300 through 315, DX-328, PX-353 through 358.

THE COURT: PX-353.

MR. SMITH: Through 358.

THE COURT: Okay.

MR. SMITH: And PX-387.

THE COURT: PX-387. And it was only those last two
sets of numbers that were PX? Everything else was DX?

MR. SMITH: That's right, Your Honor.

1 THE COURT: Any objection?

2 MR. ROSBOROUGH: No objection.

3 THE COURT: Admitted.

4 MR. SMITH: Thank you, Your Honor.

5 THE COURT: All right. Anything else from the
6 Secretary?

7 MR. SMITH: No.

8 THE COURT: Great. Thank you. All right. From the
9 plaintiffs?

10 MR. ROSBOROUGH: Your Honor, on behalf of the
11 plaintiffs, we would like to move into evidence PX-1 through 5,
12 PX-147, PX-148, PX-244 through 246, and PX-248.

13 THE COURT: All right. Any objection?

14 MR. SMITH: No objection, Your Honor.

15 THE COURT: Admitted. Anything else from plaintiffs?

16 MR. ROSBOROUGH: No, Your Honor.

17 THE COURT: Okay.

18 MR. DAVIS: Judge, I forgot. Mr. Ross just asked
19 about the possibility of another stipulation, which we're happy
20 to consider.

21 Does Your Honor have any objection to us -- if we have
22 additional stipulations, filing those like next week or the
23 week after as long as we do so before say findings of facts and
24 conclusions of law are due?

25 THE COURT: I don't have any objection, I mean, as

1 long as you are agreed on that. And it's fine with me for them
2 to come with the findings of fact and conclusions of law.

3 MR. DAVIS: Understood. That gives us time to
4 consider whatever you wish to propose.

5 THE COURT: Okay. Great.

6 Anything else before closing?

7 All right. Who is closing for the plaintiffs?

8 MR. ROSBOROUGH: That would be me, Your Honor.

9 THE COURT: Okay. And are you reserving any time?

10 MR. ROSBOROUGH: I am not reserving any time.

11 THE COURT: Great. And have you discussed with
12 Frankie any time warnings that you might like?

13 MR. ROSBOROUGH: I have not. That's a great idea. I
14 would love a five-minute time warning, please.

15 THE COURTROOM DEPUTY CLERK: And that's 30 minutes,
16 correct, Judge?

17 THE COURT: It is.

18 MR. ROSBOROUGH: I'm going to amend my prior statement
19 if you don't mind and reserve five minutes for rebuttal.

20 THE COURT: Certainly.

21 MR. ROSBOROUGH: So a warning at the 20-minute mark
22 then I guess would be fantastic. Thank you.

23 THE COURT: All right. Mr. Rosborough, you may
24 proceed.

25 MR. ROSBOROUGH: Good afternoon, Your Honor, and good

1 afternoon to everyone.

2 First, on behalf of the plaintiffs, we would like to thank
3 the Court and the Court staff in particular for all of their
4 hospitality in making this trial run incredibly smoothly. We
5 really appreciate everyone's dedication.

6 THE COURT: Thank you.

7 MR. ROSBOROUGH: The core question in this case is
8 whether Alabama's State Senate districting plan abridges the
9 right of black Alabamians by providing them less opportunity
10 than other members of the electorate to participate in the
11 political process and elect candidates of choice. An intensely
12 local appraisal and searching practical evaluation of the past
13 and present reality of the political process in the relevant
14 areas reveals that the answer yes.

15 On a technical level, uncontested analysis of over a dozen
16 elections shows that black and white voters in the Montgomery
17 and Huntsville areas consistently favored different candidate
18 by large margins. Undisputed evidence shows this extreme
19 racial polarization occurs in general elections, primaries, and
20 nonpartisan races.

21 Even beyond racial polarization, we heard evidence of
22 intensive racial politics fix playing an excessive role in
23 Alabama. It shows how a decades-long pattern of state
24 officials regardless of party discriminating against black
25 people in a way that adversely affected their ability to

1 politically participate; how both parties used political and
2 campaign appeals that continued to invoke race seeking to
3 influence voters; how both parties used race-related policy
4 issues to maintain those patterns for many voters; and how race
5 and Civil Rights in particular continue to heavily influence
6 the identity of many black and white Alabamians.

7 The unrefuted evidence is that black candidates regardless
8 of party have never succeeded at obtaining statewide office
9 except in contested elections except for two state Supreme
10 Court justices who last won elections a generation ago and only
11 first after being appointed to office.

12 For black voters in the Montgomery and Huntsville regions,
13 we heard from black people, black voters who regardless of
14 party support more assistance to people in poverty, criminal
15 justice reform, improving deficient transportation systems
16 defunded in response to efforts to integrate transportation,
17 investing in neighborhoods plowed through by highways, and
18 improvements for school districts hobbled by segregation and
19 white flight.

20 Black people, regardless of party all believe that
21 addressing these issues would benefit their communities.

22 And we ask the Court to look at the ways these decades of
23 racial discrimination have made it harder for many black voters
24 to participate on equal terms in the political process.

25 Every single black Alabamian who testified in these last

1 two weeks, both for the plaintiff and the defense, spoke to the
2 way in which racial discrimination directly affected their
3 lives or the lives of their family and how Civil Rights
4 litigation and advocacy was necessary to open new opportunities
5 for black Alabamians.

6 Mr. Milligan, Mr. Douglas, Ms. Branyon, Mr. Coley all
7 testified to how black Alabamians lack sufficient access
8 disproportionately to vehicles or reliable public
9 transportation systems and must disproportionately work
10 hourly-wage jobs and experience time and resource barriers
11 making it harder to vote and complete other tasks.

12 Ms. Peoples, Mr. McCollum, Mr. Douglas, Mr. Milligan and
13 Mr. Simelton all confirmed that many black voters who are alive
14 today experienced segregated school systems as did white
15 Alabamians of similar age such as Senator McClendon who is
16 responsible for this plan.

17 And witnesses testified to how the state's legacy of
18 discrimination in education means that black Alabamians remain
19 comparatively undereducated, continue to face literacy
20 challenges, as well as other issues like chronic health
21 conditions, which can make it difficult to attend political
22 meetings or navigate Alabama's sometimes complex voting system.

23 Even where discrimination has fallen away, the effects
24 remain. Not only in the nearly 40 percent of voters who lived
25 through the cruelty of segregation, but in the public officials

1 more recent violations of federal Civil Rights law, the state's
2 failure to restore public transportation funding, eliminate the
3 vestiges of segregated schools, or draw districts that offer
4 black Alabamians a fair chance to elect preferred candidates
5 without the sword of litigation.

6 The trial record proves that all the indicia of a
7 political system still significantly defined by race are
8 present and the participation barriers this system helped
9 create.

10 But it also shows a way to remedy this vote dilution
11 through new reasonably configured State Senate districts in the
12 Huntsville and Montgomery areas that will give black voters a
13 fair opportunity in the State Senate.

14 Now, I want to step back, because although the factors in
15 a racial vote dilution analysis do interact with each other,
16 the Supreme Court has provided guidance for the Court's
17 analysis.

18 The recent *Milligan* decision from the Supreme Court, the
19 Court explained the purposes of the three preconditions.

20 Now, the first precondition asks whether black Alabamians
21 could form functional majorities in additional reasonably
22 configured single-member districts.

23 In terms of numerosity, no one disputes that plaintiffs
24 meet that requirement in all plans for State Senate District 25
25 and in Plan 3 for State Senate District 28.

1 The only dispute around numerosity concerns two of the
2 three plaintiffs' plans for the Huntsville district.

3 Now, in the *LULAC v Perry*, the Supreme Court explained
4 that calculating whether a district was sufficiently large
5 permits using Citizens Voting Age Population because it fits
6 the language of Section 2 that only eligible voters affect a
7 group's opportunity to elect candidates.

8 The Eleventh Circuit has adopted a slightly nuanced
9 approach in *Negron* explaining that CVAP is the relevant *Gingles*
10 1 figure unless there was no significant difference in
11 citizenship rates.

12 But here, plaintiffs' experts explained why CVAP was a
13 better measure to measure numerosity due to voting age
14 population percentages above 10 percent for groups like
15 Hispanics who reside in the area who have citizenship rates
16 under 50 percent contrasted with a very high citizenship rate
17 for white and black Alabamians in that area.

18 Dr. Trende's own memorandum to the Supreme Court of
19 Virginia explains why. Quote, the presence of non-citizen
20 Latinos and Asian Americans in a district can raise the Black
21 CVAP share above the Black VAP share making it a useful metric
22 for addressing a district's actual electorate.

23 Now, Dr. Trende offers some novel arguments for why the
24 Court should nonetheless reject a *Gingles* 1 finding pointing to
25 confidence intervals and uncertainty. But point estimate has

1 been the universally accepted standard, and other evidence
2 supports it here.

3 Number one, Dr. Trende doesn't really in all but maybe one
4 of his estimates dispute that the point estimate of the
5 districts here are above 50 percent.

6 Dr. Oskooii testified about how other information helped
7 undergird that support, such as the BVAP level and citizenship
8 disparities.

9 Mr. Fairfax also looked at voter registration records from
10 the state, which confirms a 51-plus percent rate for Plans 2A,
11 2, and 3. And voter registration data also accounts for both
12 citizenship and felony disenfranchisement data as only eligible
13 voters are registered.

14 Now, in terms of the confidence interval, Dr. Trende would
15 apply a requirement of more than the 50 percent plus one
16 adopted by the Supreme Court by holding plaintiffs effectively
17 to a heightened evidentiary burden via a 90 or 95 percent
18 confidence interval.

19 Effectively, in Dr. Trende's view, plaintiffs would need
20 to prove that plaintiffs' district would be over 50 percent
21 more than 90 or 95 times out of 100. That is not a
22 preponderance burden.

23 No decision has ever adopted this standard, though several
24 Courts have explicitly rejected it.

25 This is also an unworkable standard. Dr. Trende admits he

1 cannot calculate margin of error precisely and committed errors
2 in doing so in both cases he tried, both here and in North
3 Carolina.

4 In terms of geographic compactness of the minority
5 population, there's little to dispute here.

6 Mr. Fairfax's maps all unite the predominantly black
7 center in northwest of the city of Huntsville, eliminating
8 splits of communities of interest recognized by the state's map
9 drawer Mr. Hinaman with the nearby city of Decatur included all
10 centered around the largest employer in the area, the Redstone
11 Arsenal.

12 And as Mr. Simelton and Ms. Peoples both testified and as
13 no witness has disputed, the cities of Huntsville and Decatur
14 share broadcast and print media, public transportation
15 infrastructure, and institutions like schools and churches.

16 Dr. Bagley and Mr. Fairfax similarly testified to the
17 cities' shared interests.

18 In Montgomery, District 25 includes more of the city of
19 Montgomery than before while maintaining the district's tie to
20 the Enacted Plan to the Black Belt county of Crenshaw.

21 Dr. Trende failed to account for any of these factors in
22 his sparse analysis and misleading graphs.

23 In terms of reasonable configuration, the Supreme Court
24 explained this does not mean a beauty contest between the
25 plaintiffs' maps and the state's, but instead, looking at

1 several well-established and mostly objective criteria. Meet
2 or beat is not the standard.

3 Here, though, Mr. Fairfax's plans not only meet
4 traditional districting criteria, two of his plans do meet or
5 beat the state on all criteria.

6 Plans 1 and 2, 2A have roughly the same average
7 compactness scores overall, perform better on compactness for
8 the illustrative districts in majority-black districts, and
9 have all districts above the state's plans' own lowest
10 compactness scores. They have an equal number of county splits
11 and perform better in splitting other political subdivisions.

12 On Plan 3, as Mr. Fairfax testified, although SD7 in the
13 Enacted Plan performs slightly better on compactness, they're
14 similar.

15 SD5 in the -- performs better on compactness, however.

16 And SD7 and 25, as well as the other majority-black
17 districts perform better than the Enacted Plan's minimal or
18 least-compact measures.

19 And that's particularly meaningful here because both
20 Senator McClendon and Mr. Hinaman offered testimony that they
21 believe all of the Enacted Plan State Senate districts are
22 reasonably compact.

23 Now, finally, Dr. Trende and the Secretary offer no direct
24 evidence and only misleading circumstantial evidence to try to
25 argue that Mr. Fairfax used race as the predominant factor in

1 drawing his districts.

2 Mr. Fairfax offered credible transparent testimony about
3 how he focused on traditional districting criteria with --
4 while balancing his awareness of the *Gingles* 1 numerosity
5 requirement and making tradeoffs as needed.

6 Dr. Trende doesn't attack Plan 1 on racial predominance
7 grounds at all. And on 2 and 3, he did not draw any of his own
8 maps; he failed to account for numerous relevant factors,
9 including communities of interest that Mr. Fairfax discussed;
10 and he conflated a map drawer's mere awareness of race in
11 determining whether numerosity has been met with prioritizing
12 race.

13 Now, the second and third preconditions of *Gingles* ask
14 about whether black voters vote cohesively such that they could
15 actually elect a preferred representative if presented with an
16 opportunity. And the third condition, whether white voters
17 vote sufficiently as a block to enable them to defeat black
18 voters' preferred candidates.

19 The Eleventh Circuit has explained in the *Solomon* case,
20 racially-polarized voting when it comes to the preconditions
21 incorporates neither causation nor intent. It simply means
22 that the race of voters correlates with the selection of a
23 certain candidate or candidates.

24 Dr. Liu testified without meaningful dispute that Courts
25 typically credit the type of ecological inference analysis he

1 used for measuring this correlation. And looking at the racial
2 voting patterns across the 14 biracial elections in Huntsville
3 and 11 in Montgomery, he found black voters voted with a
4 supermajority margin for the same preferred candidates with
5 white support for the same candidates in the 10 to 20 percent
6 range or even lower.

7 None of defendant's experts performed such an analysis or
8 meaningful contested these results.

9 Dr. Liu also found that black candidates, including the
10 black-preferred candidates in these races were defeated every
11 time due to white bloc voting in Huntsville and in SD25.

12 He also found high levels of racially-polarized voting in
13 nonpartisan biracial mayoral races in Montgomery and Decatur
14 and in biracial State Senate elections in 2022 using
15 Dr. Bonneau's data.

16 Nonpartisan races, of course, lack partisan cues on the
17 ballot and also do not involve straight-ticket voting.

18 Although the Secretary criticizes Dr. Liu for focusing on
19 biracial elections, *Gingles* itself rested its decision solely
20 on an analysis of biracial elections. And the Eleventh Circuit
21 recently reiterated in *Wright vs. Sumter County* that evidence
22 drawn from elections involving black candidates is more
23 probative in Section 2 cases.

24 Now, I'd like to move on to the Senate Factors or the
25 totality analysis that the Court conducts after finding that

1 preconditions are met.

2 The totality considers both the presence and effect of
3 racial discrimination, disparities faced by black voters in
4 both political life, as well as in other areas that can affect
5 political participation, such as education, health care,
6 transportation, employment, as well as the degree to which race
7 infuses the political system in terms of voting patterns and
8 campaigns, and then in light of these realities, how black
9 candidates fare in contested elections in the type of districts
10 at issue as well as statewide.

11 The evidence from the trial is stark. Let's look at
12 Senate Factors 1 and 3 relating to past official discrimination
13 in the state and the present barriers that enhance the
14 opportunity to register and vote.

15 As Dr. Bagley testified, three times in just the last year
16 Alabama was found to have likely violated the Voting Rights
17 Act; twice in terms of its congressional map, and once in
18 partially enjoining a state law that illegally restricted
19 assistance for voters with literacy issues and disabilities.

20 Because of Alabama's history of discrimination, voters
21 with literacy problems remain disproportionately black.

22 More recently, voting rights' violations of federal laws
23 include but are not limited to the 2017 ALBC racial
24 gerrymandering finding, which included districts in the
25 challenged areas; a 2016 DOT finding about the closure of DMVs

1 in the Black Belt having a discriminatory effect; and NVRA
2 settlements, including regarding to registration opportunities
3 for black voters who disproportionately use public assistance
4 offices.

5 And in nearly every redistricting cycle since 1960,
6 Alabama has discriminated against black voters in violation of
7 either the Constitution or the Voting Rights Act.

8 Moving along to Senate Factor 2.

9 Now, this does look at racially-polarized voting, which we
10 already discussed, but the scope of the permissible analysis is
11 a bit broader. The Court can also consider factors such as the
12 degree of racially-polarized voting or the role political
13 affiliation apart from race plays as a primary cause.

14 First, there's no dispute that the actual levels of
15 racially-polarized voting here are extreme. And there is ample
16 evidence that race plays a major role in voting patterns both
17 in terms of choosing a party and then separate and apart from
18 party choice in the voting process.

19 As Mr. Douglas testified, based on his experience, race is
20 politics in Alabama.

21 Now, first, evidence from Drs. Burch and Bagley, but also
22 Bonneau and Hood all demonstrated that racial issues continued
23 to drive partisan alignment even after the Civil Rights
24 movement.

25 Senator McClendon, who was in charge of State Senate map

1 drawing, testified that he agrees that black and white voters
2 in Alabama share different views on the preservation of
3 Confederate monuments, as well as on the current prevalence of
4 racial discrimination.

5 The sole outlier here is Dr. Carrington. But even he
6 admits that race played some role in realignment. But
7 Dr. Carrington failed to consider any factors relevant or
8 specific to Alabama and could not identify key figures from
9 Alabama's realignment, such as Judge Vance or Fred Gray.

10 He cites the rise of the New Left, anti-communist views,
11 religious views, views on abortion and LGBTQ rights as evidence
12 that other factors led to white and black Alabamians' political
13 differences.

14 But the undisputed evidence is that black and white voters
15 in Alabama share roughly similar views on these issues. Yet
16 black voters did not move to the Republican Party, suggesting
17 that race played a much more significant role in this
18 realignment than he would suggest.

19 And no one has countered Dr. Burch's scholarship that post
20 the election of Barack Obama, racial resentment and vote choice
21 aligned, even after controlling for other factors.

22 As we mentioned earlier, second, Dr. Liu provided evidence
23 of RPV in nonpartisan elections.

24 Now, Dr. Bonneau did attempt to downplay this, but as he
25 acknowledged, he previously agreed with literature that

1 nonpartisan mayoral elections may remove the partisan cue and
2 that he conducted no analysis of his own in this case to
3 determine whether the factors that would allow voters to
4 identify party were present.

5 Now, we also heard testimony from Ms. Branyon that she won
6 as a black Republican in a 50/50 district this year based on
7 the support of black voters. And that's a district that's
8 elected only black candidates regardless of political party.

9 Similarly, Mr. McCollum testified that black voters tend
10 to vote for black candidates.

11 Now, on the flip side, similarly, Courts such as the Court
12 in *Alpha phi Alpha* in Georgia and *Mississippi State Conference*
13 *of the NAACP* have relied on the success of black legislative
14 candidates in districts outside of majority-black districts.

15 Here, other than Mr. -- representative Paschal, no black
16 Republicans -- no black candidates, period, have won election
17 to offices outside of such districts. No black Republican has
18 ever won statewide office in Alabama, and the parties have
19 stipulated that numerous black Republicans have lost other
20 elections, including the 2024 CD2 primary.

21 Given this history and present reality, we cannot say that
22 party has erased the persistent role of race.

23 Now, on Senate Factor 5, the *Gingles* court itself
24 recognized that political participation by minority groups
25 tends to be depressed where the group members suffer effects of

1 prior discrimination in areas such as inferior education, poor
2 employment opportunities, and low incomes.

3 Dr. Burch testified that all of those disparities are
4 present here.

5 And we also heard testimony from Dr. Bagley about
6 continual desegregation issues in the Madison and Huntsville
7 schools, as well as racial disparities in school discipline and
8 access to AP courses. The same is true in Decatur.

9 And we heard testimony at the end of the day yesterday
10 about how disinvestment for majority black Montgomery city
11 schools led predominantly white people to withdraw their kids
12 from city schools.

13 Dr. Reilly attempts to attribute other factors to these,
14 such as cultural practices, average lower age, family
15 structure, and criminal behavior. But his sources are sparse,
16 and these are unreliable explainers of socioeconomic
17 disparities.

18 We also heard about candidate funding and the differences
19 there from both sides.

20 The *Gingles* court itself recognized, though, that because
21 in situations with inferior education and poor employment
22 opportunities, black voters may earn less than white voters and
23 will not be able to provide the same support to candidates.

24 We heard about this from Mr. Coley; Ms. Branyon, who did
25 not receive party funds in her last election at all and only in

1 the last couple of months here; Mr. Douglas's testimony about
2 black candidates raising found for political offices.

3 We heard information about transportation, Internet and
4 computer disparities and about the origins of the defunding of
5 public transportation in the desegregation movement in the
6 '50s.

7 And we heard from Dr. Landers who testified to the health
8 disparities that black Alabamians face, chronic conditions at
9 higher rates, less access to care, and which affect the ability
10 to maintain employment and participate in community activities.

11 The final three factors concern racial appeals, the
12 ability to get elected to office in the jurisdiction, and
13 responsiveness of elected officials.

14 On racial appeals, we heard evidence from Dr. Bagley of
15 both parties have made racial appeals in recent years, and we
16 heard testimony from Mr. Coley, the GOP election chair just the
17 other day who circulated a "jobs not mobs" ad featuring a white
18 hand making a white supremacist's gesture next to a black
19 shaded fist, which represented black power.

20 We've already talked about the struggles for black
21 Alabamians to get elected to office in the jurisdiction. And
22 even in spite of past litigation, in the State Senate, black
23 senators hold about 20 percent of the seats despite making up
24 about 26 plus percent of the population.

25 No black Alabamian has ever been elected from a majority

1 white Senate district.

2 Finally, in terms of responsiveness, we heard from
3 Mr. Roberts and Mr. Coley about the Alabama Legislature and
4 governor passing laws to celebrate Confederate history;
5 Ms. Williams and Mr. Douglas to the Alabama Legislature's
6 reluctance to expand Medicaid and how that's negatively
7 impacted black Alabamians; testimony from Mr. Milligan,
8 Mr. Simelton, and Ms. Peoples that they don't hear from white
9 senators in their area despite their outreach; and testimony
10 from Mr. Coley and Ms. Branyon that white politicians have not
11 prioritized issues like criminal justice reform or public
12 transportation important to the black opportunities.

13 The record shows a political system still dominated by
14 race, including high levels of racially-polarized voting, a
15 recent history of official political discrimination, continuing
16 effects of that discrimination in areas bearing on political
17 participation, and a black population in Montgomery and
18 Huntsville that is compact and cohesive enough to help remedy
19 the problem.

20 For plaintiffs and other black voters, winning this
21 lawsuit will not change the entire Alabama political system,
22 but it will give them a fair shot at electing representatives
23 that will give them a voice and respond to their particularized
24 needs in these areas.

25 Plaintiffs, therefore, ask the Court to rule that

1 Alabama's 2021 State Senate map violates Section 2 of the
2 Voting Rights Act by failing to provide black Alabamians in the
3 Montgomery and Huntsville areas an equal opportunity to elect
4 candidates of choice, to enjoin the current map, and to require
5 the Legislature to redraw districts that remedy this racial
6 vote dilution.

7 On behalf of our clients, I thank you.

8 THE COURT: Who is closing for the Secretary?

9 MR. DAVIS: I am.

10 Judge, I'm happy to do this however you prefer. If you
11 still want to save your questions to the end, of course, that's
12 fine. If you want to interrupt me, I welcome on that, so I
13 focus on what you are entered in.

14 THE COURT: You are very kind. I am going to save
15 them to the end. I have been on my very best behavior so far,
16 and I am going to continue that pattern.

17 MR. DAVIS: Understood.

18 Your Honor, in just 2017, the Legislature passed remedial
19 plan that was blessed by a federal court holding that that plan
20 complied with the Constitution.

21 And in just 2021, in our most recent Section 2-case, where
22 we had the opportunity to present a full trial, the Middle
23 District of Alabama found that voting was not diluted in
24 Alabama.

25 It was perfectly reasonable for the Legislature to base

1 its 2021 District on that 2017 plan that had so recently been
2 approved by a federal court. But here, plaintiffs ask on what
3 we think is a thin record for the federal court to require
4 Alabama to redraw its district to guarantee the election of
5 additional Democrats in a state where most voters are
6 Republican. This is, we think, that it boils down to a
7 partisan matter.

8 I will address the *Gingles* arguments first and then the
9 totality of the circumstances.

10 The plaintiffs' claim that *Gingles* 1 can be met with a
11 minority BVAP district if a survey shows that black voters
12 might be a majority of the citizenship population. We say that
13 a best guess about the majority is not good enough to meet
14 their *Gingles* obligation.

15 The *Gingles* prerequisite should be interpreted first in
16 light of *Bartlett vs. Strickland*, which we contend requires a
17 majority BVAP district for plaintiff to satisfy *Gingles*. And
18 when it comes to reasonable construction, we believe the
19 *Gingles* prerequisite should be applied consistently with the
20 Supreme Court's admonition that legitimate yet differing
21 communities of interest should not be disregarded in the
22 interest of race. That's *LULAC vs. Perry*.

23 The Supreme Court has also said that a district that
24 reaches out to grab small and apparently isolated minority
25 communities is not reasonably compact. *Bush vs. Vera*.

1 Finally, in *Miller vs. Johnson*, the Court said that when a
2 state assigns voters on the basis of race, it engages in the
3 offensive and demeaning assumption that voters of a particular
4 race because of their race think alike, share the same
5 political interests, and will prefer the same candidates at the
6 polls.

7 We believe that plaintiffs' arguments require the Court to
8 make those type of racial stereotypes.

9 So on *Gingles* 1, plaintiffs' CVAP argument we think should
10 not be credited. Mr. Fairfax's Plans 1 and 2 and 2A all depend
11 on CVAP to reach what he contends is a voting majority for
12 black voters.

13 This would put the State in a horrible position if the
14 Court approved the use of that.

15 Number one, state law, we do not believe allows the
16 legislature to use anything other than census data. Sections
17 198 through 201 of the Alabama Constitution, we believe can
18 only be read to require the Legislature to district based on
19 actual census figures.

20 I would also refer the Court to Alabama Code Section
21 17-14-70.1, which we believe also prevents the Legislature from
22 using ACS data.

23 It further would put us in a quandary because the data
24 that Mr. Fairfax used was not available to the Legislature in
25 2021. How can Section 2 require the Legislature or require

1 Alabama to redraw its districts based on data that was unlawful
2 for the Legislature to use and that did not even exist when
3 they drew their districts?

4 The *Negron* case that we cited from the Eleventh Circuit
5 tells us there are occasions where CVAP is useful for
6 redistricting. But that's only when there's a big difference
7 in the citizenship rates between the majority and the minority
8 population at issue.

9 The LULAC case, and I think Mr. Rosborough referred to
10 this one, that dwelt whether there was a hollow majority.
11 There was indisputably a majority Hispanic district. Nobody
12 was questioning whether Hispanic Voting Age Population was
13 above 50 percent. And citizenship data was useful to determine
14 whether that was a real majority or whether non-citizenship
15 rates were so high that maybe that wasn't good enough, wouldn't
16 perform for the voters.

17 So we think it's one thing, as in *Negron*, for a Court to
18 use CVAP to assess whether a majority is hollow and whether it
19 will perform. But we think it's something else what plaintiff
20 asked here.

21 And as far as we can tell, Judge, this would be the first
22 case for a Court to hold that a plaintiff can use citizenship
23 data to prove that a district that is not majority Black Voting
24 Age Population, but it can nonetheless satisfy *Gingles* 1 by
25 relying on an estimate of the number of non-citizens.

1 So we think the CVAP, which is based on a survey, comes
2 with this margin of error should not be used.

3 One thing we know from hearing all the experts, no one can
4 tell us with any certainty whether these districts are majority
5 CVAP. They say it might be. And the point estimate is above
6 50 percent, but the margin of error extends below.

7 Even Dr. Liu could not say when he was talking about
8 election results whether a 51 -- excuse me -- a
9 racially-polarized voting analysis, which comes with its own
10 margin of error and confidence intervals, he would not say
11 whether a 51-percent point estimate meant necessarily majority
12 support because of the error margin likely contained values
13 below 50 percent.

14 That's page 110 of the transcript.

15 Dr. Burch said something similar in looking at
16 socioeconomic data, which is based on the ACS survey. I don't
17 have a page number for you there, but she was discussing
18 Dr. Hood's chart regarding rates of high school diploma
19 attainment.

20 Two other points on CVAP. Mr. Fairfax said he wasn't even
21 sure under his broad analysis whether his districts would stay
22 above 50 percent Black CVAP once the next year's ACS survey
23 comes out.

24 His Plan 1 he thought was majority CVAP at first, but when
25 a new round came out, it was no longer was above 50 percent

1 CVAP, so he had to do Plans 2 and 2A. What's going to happen
2 with the next ACS survey? He doesn't know, and we don't
3 either.

4 That leaves his Plan 3 in Huntsville, which we admit is
5 majority BVAP, but we contend is not reasonably constructed.

6 And if we could, let's pull up a few charts from
7 Dr. Trende's report. We are going to be discussing Figure 16
8 from Defense Exhibit 8 and Figure 21.

9 But to set that up, Supreme Court law makes clear that a
10 district that subordinates traditional districting criteria to
11 race is not reasonably configured.

12 And I think if you look at Mr. Fairfax's plans in
13 succession, starting with 1, and then he needed more black
14 people to account for the new survey, so he stretches out
15 further, and then he had to get to a majority BVAP district, so
16 he stretches it out even yet, and that's his Plan 3.

17 So if you look, he stretches the -- to use his language,
18 he calls this shape is similar to a dragon. This -- the
19 dragon's snout, the head goes out into Lawrence County. What
20 is the purpose for that? What traditional districting criteria
21 can explain it?

22 It cannot be for compactness, because going into Lawrence
23 County makes the district less compact. It cannot be to avoid
24 a county split, because it creates a county split. This
25 district has four county splits, and I'm not aware of any other

1 district, not only in this map, but in any prior maps, which
2 contain four county splits.

3 He didn't go into Lawrence County to avoid an incumbent
4 conflict, because it added one. So there's no criteria.

5 And it's hard to believe that it was communities of
6 interest that he was interested in -- that he was contending
7 that the black voters in Lawrence County had more in common
8 with the black voters in the core of Huntsville -- than the
9 black voters in the core of Huntsville had within the precincts
10 right next to it.

11 So if you see on this figure, Judge, there are plenty of
12 black voters in the area surrounding Mr. Fairfax's District 7
13 in Plan 3 that he could have added to that district if he was
14 truly interested in communities of interest. But he doesn't.

15 And the next figure will show you why, Figure 27, if we
16 could put those side by side. If he added those black voters
17 who were right adjacent to it, he would be adding a lot of
18 white voters, as well. So many white voters, that it would put
19 the district under majority 50 percent CVAP.

20 So this shows that Mr. Fairfax's goal, the one criteria
21 that could not be compromised was getting to 50 percent.

22 So we contend that it is clear that Mr. Fairfax -- that
23 District 7 in Plan 3 that race prioritizes that district, race
24 predominates that district, and no traditional criteria can
25 explain the decisions there.

1 We can take those down.

2 I would note, too, that of the precinct splits in that
3 district, there are several. And if you make any one of those
4 precincts whole, the evidence shows that it would raise the
5 district below 50 percent CVAP because it would add too many
6 white voters for Mr. Fairfax to achieve his goal.

7 The plaintiffs say that there are evidence -- that there
8 is evidence of connections between Decatur and Huntsville that
9 establish a community of interest.

10 We don't think that evidence does the trick, because
11 Mr. Fairfax is not joining Huntsville and Decatur. His
12 enjoining a few small discrete portions of Huntsville that
13 contain a lot of black voters with one small discrete portion
14 of Decatur that contains black voters. It is race; not joining
15 of cities that matters.

16 That evidence, too, on connections between Decatur and
17 Huntsville, we think is pretty weak.

18 For example, Ms. Peoples said, well, we are go back and
19 forth a lot, and the last time she's been was 2020. And even
20 if there is -- even if there are people commuting from Decatur
21 to go into Huntsville, plaintiffs I don't believe have shown
22 that it's people from these neighborhoods that they have
23 connected.

24 Mr. Fairfax testified that he is connecting neighborhoods
25 that are depressed socioeconomically. I don't think plaintiffs

1 have shown that these are the people going into Redstone
2 Arsenal to work, whether they're white or black voters in that
3 district. Maybe they are, but I don't think plaintiffs have
4 shown that that is the case.

5 For those reasons, Judge, we don't think that plaintiffs
6 have met their *Gingles* obligation in Huntsville.

7 We don't think they have in Montgomery either. There --
8 we do not dispute that Mr. Fairfax has drawn a majority BVAP
9 district in Montgomery. But we do not agree that that district
10 is reasonably constructed.

11 Mr. Fairfax breaks up a long-standing district to connect
12 west Montgomery with portions of Prattville, splitting
13 Prattville for the first time. And I think there's
14 insufficient evidence to show that there are communities of
15 interest connections between west Montgomery and Prattville.

16 And then he connects a heavily urban -- black portion of
17 central Montgomery with rural Crenshaw County picking up enough
18 dispersed black voters in the rural areas to cobble together a
19 50 percent plus 1 black majority.

20 But Mr. Fairfax admitted that the Elmore County precincts
21 he joins with west Montgomery do not necessarily have more in
22 common with west Montgomery than the precincts he removed from
23 SD26. That's page 295.

24 And he admits that he did not examine whether SD25 and
25 SD26 respect communities of interest. That's page 299.

1 So we think plaintiffs' claim fails on *Gingles* 1.

2 On *Gingles* 2 and 3, we do not dispute that in general
3 elections most black voters prefer Democratic candidates, and
4 most white voters in both the challenged areas prefer
5 Republicans. What we dispute is whether the Court should draw
6 any inferences from that fact alone.

7 As Drs. Hood and Reilly show, black voters everywhere, in
8 every state, vote overwhelmingly but not unanimously for
9 Democrats. And voting is therefore racially polarized in any
10 jurisdiction where a majority of white voters tend to support
11 Republicans.

12 And we don't think that the mere presence of Republican
13 votes is reason for a Court to assume that vote dilution is
14 likely or to assume that there's a problem with the system that
15 a Court needs to fix.

16 So for the *Gingles* 2 and 3, all plaintiffs have shown is
17 that there are a lot of Republican voters in an area. That
18 alone should not be enough to make us skeptical or to think
19 that there's a problem that needs to be fixed.

20 I will turn now to the table of the circumstances test.

21 These -- the Senate Factors that we usually use, it's not
22 just a check list. It's not a series of boxes to be checked.
23 They are a guide for Courts to help determine whether -- or to
24 answer the ultimate question of Section 2, which according to
25 the text is, is the political process leading to nomination or

1 election equally open to participation by members of a class of
2 citizens in that its members have less opportunity than other
3 members of the electorate to participate in the political
4 process and elect candidates of their choice.

5 So totality of the circumstances evidence, Senate Factor
6 evidence doesn't matter unless it helps us decide whether votes
7 are being diluted and whether the system is equally open.

8 So here I think before we even get to the Senate Factors,
9 we can know that plaintiffs have not met their burden of
10 showing the system is inequally open.

11 Dr. Burch does say there's a registration gap. But this
12 fluctuated. In 2018, as recently as six years ago, the gap was
13 less than 1 percent.

14 Mr. Simelton testified that 90 to 95 percent of the
15 members of the Alabama NAACP are registered to vote. Page 160.

16 And I don't think there's any indication here in the
17 record that it is harder for black voters to register and cast
18 a ballot than it is for white voters. There's only evidence
19 that black voters are overrepresented in certain socioeconomic
20 categories. But as we discuss, I don't think there's evidence
21 to provide that link that it in fact is today depressing the
22 vote.

23 So under the proper totality of the circumstances test, we
24 think the Court should enter a judgment for the defendant.

25 And here I will note the *Solomon* case. The Eleventh

1 Circuit there in an *en banc* decision said sometimes what
2 appears to be bloc voting on account of the race may instead be
3 the result of political choices of different groups. That's
4 what we think we have proven here.

5 It also says that to be actionable, a deprivation of the
6 minority group's right to equal participation must be on
7 account of a classification decision or practice that depends
8 on race or color; not on account of some other racially-neutral
9 cause.

10 So if plaintiff proves a dilution arguably, that dilution
11 is only actual if it's on account of race or color. It doesn't
12 show a Section 2 violation if it's caused by something else,
13 something other than race.

14 Now, we -- a lot of the evidence I am about to talk about,
15 we made some arguments along that same nature in the *Milligan*
16 case. And we acknowledged, Judge, that you are on those
17 panels, and you ruled just very recently on some of these
18 issues before.

19 In *Caster*, when we pointed out what Judge Watkins did in
20 our judicial elections case, you said, yes, I see that Judge
21 Watkins found that over there, but we don't have that record in
22 front of us.

23 True. At the preliminary injunction stage, we didn't have
24 time to do everything we have had to do now. But we think now
25 you do have that same record in front of you, and we hope you

1 will come to the same conclusions.

2 So to go through the Senate Factors now.

3 Senate Factor 1, history of discrimination. We have never
4 denied Alabama's history of discrimination in voting. But it's
5 just that -- it's history. If the focus here is on the Jim
6 Crow era and before, this factor is automatically met in every
7 single state, and it does nothing to show whether the system in
8 Alabama today is equally open to all races.

9 In plaintiffs' evidence of more modern discrimination
10 coming from Dr. Bagley, we don't think that should be credited.
11 Dr. Bagley does not do historical analysis when it comes to his
12 discussion of more modern issues. For example, he says
13 Montgomery schools are broken because the private schools in
14 the Montgomery area are segregation academies.

15 Well, Josh Roberts testified, president of Montgomery
16 Christian, and he says -- he didn't know some of the --
17 whatever the origins of some of these schools. In 2024, the
18 evidence shows that all of these schools are open to voters of
19 all races.

20 And even they're taking voters of all -- excuse me --
21 students of all races. They're accepting students of all races
22 who are benefitting from legislation allowing people who were
23 able to leave failing schools and helping them financially to
24 achieve new educational opportunities.

25 Dr. Bagley impugns the entire community of Pike Road as

1 being a white-flight community and being formed for that
2 purpose without even bothering to check if blacks were involved
3 in the formation of the town or the formation of the school
4 districts or whether they have historically been involved in
5 town leadership.

6 And you heard from Susan Copeland and Patty Payne. They
7 made clear that African-Americans have been a vital part of the
8 community from its inception.

9 You will also have the Doyle Fuller deposition available.
10 I won't go through it now, but in our findings of fact, we are
11 going to point out he's the one who was unable to testify
12 because of his cancer.

13 We will have some issues to point out from that deposition
14 along the same lines in our findings of fact.

15 And in Pike Road, Dr. Bagley's report makes clear, and the
16 evidence that you hear at trial makes clear that Pike Road has
17 a significant African-American population. This is not a white
18 enclave. And I think this shows that Dr. Bagley really
19 overextended himself making claims without bothering to look
20 into the truth of the matter.

21 He also cites laws that were subject to litigation that we
22 won, such as photo ID and felon disenfranchisement and argues
23 that's evidence of vote dilution.

24 He cites cases, which we may have lost at first but that
25 were stayed and had injunctions that never went into effect

1 like the *People First* litigation with Judge Kallon where
2 plaintiffs attempted to judicially amend voting laws based on
3 COVID.

4 He cites the brief driver's license closures and claims
5 that it affected voting, but you heard from Colonel Archer.
6 And Colonel Archer he testified that the offices that were
7 closed were not picked because of race. They were picked
8 because they were underutilized.

9 And while plaintiffs claim that those closures affected
10 voting, Colonel Archer made clear there were other offices in
11 the county where voters could get a photo ID for voting. Those
12 closures in no way affected anybody's ability to get an ID.

13 So Dr. Bagley's report is full of such examples and should
14 not be credited.

15 And to cap it off, I asked Dr. Bagley on page 602 of the
16 transcript, I said: Have you pointed to any laws in your
17 report that are in existence in Alabama that are presently
18 enforced that you contend make it harder for black citizens to
19 register to vote or cast a ballot than it is for white people?
20 And on line 19, he said no.

21 So we don't dispute the old history, Judge, from Jim Crow
22 era and before, but we don't think plaintiffs have shown that
23 there's modern discrimination affecting the openness of the
24 system.

25 On the extent of racially-polarized voting, Senate Factor

1 2, under *Solomon*, and as Judge Watkins noted here, the Court
2 should consider not just how people are voting, but why.

3 Voting is racially polarized in Alabama and portions at
4 least of Alabama as it is in all Republican-leaning
5 jurisdictions in that most black voters prefer Democrats, and
6 most white voters prefer Republicans.

7 And it's true that black candidates who run as Democrats
8 are having little electoral success just like the white
9 candidates who are running as Democrats in Alabama.

10 But that's not the same as vote dilution. If this is all
11 that the evidence shows, then plaintiffs' claims of a denial of
12 equal opportunity are a mere euphemism for political defeat at
13 the polls.

14 Our evidence shows we think that the racial bloc voting
15 that plaintiffs point to is not because of any kind of racial
16 bias, whether it's voters making their own political choices.

17 Dr. Bonneau shows -- in his analysis of legislative races,
18 it shows that black legislative candidates are not penalized by
19 their race. In other words, while black candidates were
20 running in Republican-leaning jurisdictions are losing, so are
21 the white Democrats who are running there. And the black
22 candidates are not losing at any greater rate than the white
23 candidates.

24 Dr. Bonneau said that two-thirds of Alabamians cast
25 straight-ticket votes. They're voting for a team, not for

1 players. Strong indication that what's driving voting decision
2 is party, not the race of the candidates, not the race of the
3 voter.

4 And he says, The bulk of the evidence suggests that party
5 not race best explains the outcome.

6 Dr. Hood shows that white Republican voters are willing to
7 support black conservative candidates. You can look at the
8 election of Kenneth Paschal. Plaintiffs say this is one
9 election, that it was just a special election, but he won in
10 majority white Shelby County. And they must be happy with him
11 because no one's risen up to primary him.

12 Bill McCollum testified about Tierre Agnew in Fayette
13 County and said he won as a black Republican in a district that
14 is over 90 percent white in a board of education district.

15 Dr. Carrington showed that while race may have played some
16 role for some voters, the better explanation for why a majority
17 of white voters shifted to the Republican Party is issues, not
18 race.

19 Judge Watkins found that type of evidence extremely
20 important in his analysis.

21 Dr. Bagley admits on page 584 of the transcript that he is
22 not offering no opinion that white Alabamians in 2024, quote,
23 do not like black people. And on page 626, I asked him: Do
24 you contend that white voters in Alabama in 2024 who tend to
25 support Republicans are racially biased? And he said no.

1 He admits that voters who care about issues such as
2 abortion and the Second Amendment and climate change have a
3 clear party preference depending on what their position is on
4 those issues. And he admits that Alabama voters are smart
5 enough to know which party stands for what on these issues.

6 On evidence like this, Judge, we believe you should find
7 as Judge Watkins did that partisanship and issues better
8 explains the results of Alabama elections than race.

9 I'm running out, so I am going to have to go quickly
10 through some of these to get my points out.

11 Senate Factor 3, plaintiffs point to, well, a lot of
12 counties used to elect their county commissions at-large. And
13 the *Dillard* litigation had to take care of that.

14 Well, even if that's true, a majority -- an at-large
15 system that no longer exists is not diluting votes today. We
16 don't think that's even relevant.

17 Senate Fact 5, effects of past discrimination. We proved
18 we believe that socioeconomic gaps by themselves do not prove
19 racial discrimination.

20 Dr. Reilly shows that these gaps occur everywhere in every
21 state. It's not just states that used to have -- that -- it's
22 not only in states that used to have Jim Crow laws. It's not
23 only in states that were covered by Section 5 and had
24 especially pernicious voting discrimination in the '50s and
25 '60s.

1 They occur in New York, New Jersey, Illinois, Michigan,
2 and everywhere throughout the country.

3 And, in fact, Alabama's gaps are usually larger -- excuse
4 me -- smaller than some of these Northern blue states.

5 So take incarceration. If it's plaintiffs would argue the
6 gap in incarceration rates in Alabama, if that's evidence that
7 Alabama is treating black and white defendants differently in
8 the criminal justice system, then Alabama has a more
9 egalitarian criminal justice than every state but one, and
10 that's Hawaii.

11 We just don't think the gap itself should be proof that
12 the gap is caused by racial discrimination.

13 Political campaigns being characterized by racial appeals.
14 We think plaintiffs go too far. They assert that any statement
15 made by any politician in any context anywhere can be a racial
16 appeal. We think it should be limited to actual campaign
17 communication to voters.

18 They also -- well, I think of the few statements
19 plaintiffs point out to that were actually made as part of a
20 campaign, even crediting those as racial appeals is hardly
21 enough to say Alabama elections are characterized by such an
22 appeal.

23 It ought to take more than a few sporadic commercials or
24 events to say that Alabama's system is characterized by that.

25 And honestly, the Doug Jones ad, they say that's a racial

1 appeal. Those ads were designed it seems to us to pull black
2 voters into the process, to encourage them to vote. How can
3 that possibly be evidence of vote dilution?

4 Their view of this Senate Factor, we think is inconsistent
5 with the text of Section 2.

6 Electoral success. Yes. Blacks have not been winning
7 statewide elections in Alabama, but that's because they have
8 tended to run as Democrats. White Democrats have had no better
9 success.

10 Republican voters usually don't vote for Democrats, and
11 that is what we have proven is going on here.

12 We will have more to say on lack of responsiveness and
13 tenuousness of the policy in our conclusions of law, but I want
14 to make sure I get to talk about the black Republicans you
15 heard from.

16 You are not limited to the Senate Factors. You are
17 encouraged to consider any issue that you think is relevant to
18 whether there's vote dilution. And we think the black
19 Republicans who testified is important testimony showing the
20 system is equally open.

21 So while most black voters tend to support Democrats, not
22 all do. And these black Republicans who testified show that
23 the process is equally open for blacks who wish to be involved
24 in Republican Party politics.

25 They were welcomed by the Republican Party. They were

1 supported by the party. Valerie Branyon won her election in a
2 majority white county.

3 And I think this evidence proves another point, as well,
4 and that's that we should not stereotype black voters and
5 assume that they all want to be represented by the same state
6 senators.

7 There are voters like Valerie Branyon in Huntsville and
8 Montgomery I have no doubt. And the analysis uses those voters
9 in *Gingles* 1. We count the black Republicans to try to get the
10 50 percent plus 1, and then we disregard their interest for the
11 whole rest of the analysis.

12 A black Republican voter in Montgomery, for example --
13 let's say that black Republican is in current 25, a majority
14 Republican district. That black voter is part of the voting
15 majority electing Republicans as they want to do.

16 But what this process does, if the Court requires that we
17 draw the districts, we bury them in a majority Democratic
18 district they don't want, and it's all done because of their
19 race.

20 And we think Section 2 should not be wielded to stereotype
21 voters.

22 As noted before, the *Solomon* decision makes clear that any
23 vote dilution must be on account of race or color, and we don't
24 think it is.

25 Some of our witnesses said that race can't be ruled out as

1 a factor. Well, of course, they can't prove a negative. We
2 can never rule out the fact that there may be individual voters
3 out there who are motivated by things that they should not be
4 motivated for.

5 We think we have proven, though, that the system as a
6 whole is not defined by racial bias.

7 Mr. Simelton testified on page 194 that he knows of no
8 NAACP members who wanted to engage with either the Republicans
9 or Democratic Party and were turned away.

10 I know of no serious contention in this case that black
11 voters who choose to support the Democratic Party are unwelcome
12 or are unable to participate in its affairs.

13 The black Republicans who testified show that those who
14 choose to support the Republican Party are likewise welcome to
15 do so.

16 And in the end, while black Democrats are disappointed in
17 the outcome of a lot of elections in Alabama, the white
18 Democrats are equally disappointed. So we don't think it comes
19 down to race or color.

20 I am going to close with noting something the Court said
21 in the Fifth Circuit in the *Clements* decision, *LULAC vs.*
22 *Clements*. They wrote that the Voting Rights Act does not
23 guarantee that nominees of the Democratic Party will be elected
24 even if black voters are likely to favor that party's
25 candidates. Rather, Section 2 is implicated only where

1 Democrats lose because they are black, not where blacks lose
2 because they are Democrats.

3 So we think here, even if you find that the plaintiffs
4 have met their *Gingles* obligation, that we prevail on the
5 totality of the circumstances, that plaintiffs simply have not
6 shown that the vote -- that the system is inequally opened to
7 black or white voters or that it's on account of race or color.

8 Thank you.

9 THE COURT: Thank you. All right. Mr. Rosborough.

10 MR. ROSBOROUGH: Four minutes; is that right?

11 THE COURTROOM DEPUTY CLERK: That's correct.

12 MR. ROSBOROUGH: All right. I will see what I can do.

13 THE COURT: You may proceed.

14 MR. ROSBOROUGH: Okay.

15 Your Honor, we heard from the defendant on *Gingles* 1
16 first. And in terms of the standard, the thing that they
17 ignore is that despite the use of CVAP not being a new issue at
18 all, no Court has ever adopted their view of Citizen Voting Age
19 Population involving confidence intervals, involving any of the
20 standard that they put in place.

21 Now, they say that no case has ever adopted a district
22 that's not majority BVAP, but that's because Courts considering
23 CVAP don't need to consider the BVAP. It's never -- it's not
24 at issue in the case. There's only -- if you are considering
25 CVAP, then that's the metric. It doesn't mean that you have to

1 meet two different standards at once.

2 We heard about the Alabama Constitution and the
3 requirements there. But that concerns equal population, not
4 how to meet *Gingles* 1.

5 We also heard about the unfairness to the State, if they
6 were forced to comply with data that they didn't have at the
7 time. But Mr. Hinaman and Mr. -- Senator McClendon both
8 testified they never even examined the possibility of drawing
9 additional majority-black districts. So this is not a
10 realistic proposition.

11 And, of course, the census data captures a moment of time
12 that census data seeks to be -- is no longer accurate after the
13 day it's met. Eight years into the decade, there's no
14 requirement to redraw, and neither would there be here.

15 Now, we heard some testimony about Montgomery, as well and
16 splitting the city of Prattville. But, of course, this ignores
17 the tradeoffs there. We heard a lot from witnesses of Pike
18 Road.

19 Defendants failed to mention that Mr. Fairfax's map unites
20 a current split in Pike Road. So there are going to be
21 tradeoffs. And, of course, this is an illustrative plan.

22 Now, in terms of racially-polarized voting, I won't say
23 too much about this, because we dealt with this on the
24 briefings on motion in limine. But defendant's conception of
25 where a legally operative racially-polarized voting would be

1 under the current standard ignores the realities that
2 percentages of where groups live matters, turnout matters, the
3 degree of RPV matters.

4 So the current RPV standard does not create some sort of
5 nationwide bail in for everywhere there's a Republican
6 majority.

7 And of course, we heard from Dr. Reilly's admission that
8 in 31 of the states in the polls he looked at, Republicans --
9 white voters do not by majority support the Republican Party.

10 We also heard about voter registration, but this ignores
11 the persistent turnout gap, which Dr. Burch explained is a
12 better measure for evaluating how racial discrimination is
13 operating within the political system.

14 We also heard mentions of quote, unquote, segregation
15 academies, which mischaracterized the plaintiff evidence. As
16 we all know, that term refers to the origins of these schools.
17 And it does go to how separate educational systems were
18 created. It's nobody saying anything about the current intent
19 of those schools.

20 And, in fact, we heard from Ms. Payne at the end of the
21 day when she said -- when asked, why did you say in this
22 article, why did you mention the Civil Rights movement
23 alongside with cotton and agriculture? Well, there are
24 different perspectives on life in Montgomery, okay?

25 And so, you know, we heard, well, we haven't proven the

1 disparities are caused by race. Well, I think I disagree with
2 that. I think Dr. Burch did a lot of work. Dr. Bagley did a
3 lot of work doing linking those things. And we heard testimony
4 from our own clients, from the other plaintiffs here, other
5 witnesses about the role discrimination has played in their
6 experiences.

7 Now, yes. If the framing of racial bias is we don't like
8 this person of another race, which is Dr. Reilly's framing,
9 well, you know, in that case, you are never going to prove
10 that. Then that's not standard here, right?

11 Dr. Reilly, you know, says that, you know, well, it could
12 be these other factors, right? So what is it? Cultural
13 practices. Lack of study time.

14 You know, there's very little support in those areas.

15 Finally, Mr. Davis mentioned racial appeals. I do think
16 we have a different view about racial appeals. Yes, sometimes
17 racial appeals reveal racial bias. But part of the inquiry
18 here is whether race still infuses the political system. It's
19 actually the core of one of their arguments that it's politics,
20 not race.

21 So whether a racial appeal is positive or negative, what
22 it shows is race still matters. If race didn't matter, you
23 wouldn't make the appeal.

24 Finally, the defendant highlights the testimony of black
25 Republicans. And I'd like to consider some of those.

1 Number one, black Republicans have never won statewide
2 either. I think it's the clearest indication of this saying,
3 well, this is really about party if black -- you know, if
4 candidates ran as Republicans, they would win.

5 We've heard Representative Paschal's name in Shelby County
6 a lot, but we haven't heard much of anything else. And we
7 heard Mr. Coley testify about all the black Republicans he
8 tried to support. Every one of them lost.

9 We heard Dr. Bonneau's admission that race may affect the
10 chances of Republican -- of black Republicans.

11 We heard Ms. Branyon testify about the way discrimination
12 has affected her life, about the lack of responsiveness of the
13 white majority on that board that motivated her to run, to
14 improve the transportation system.

15 We heard from Mr. McCollum at the end. He have said that
16 in his experience, black voters tend to vote for black
17 candidates.

18 And so I think the defense own witnesses sort of undermine
19 their own argument. Discrimination still mattered for them,
20 whether they made different political choices.

21 Ms. Branyon won in a 50/50 district because she appealed
22 to black Democrats. Race still mattered there, right?

23 The final thing I will say here is we have heard a lot
24 about blue states and partisan grievances. And as I said at
25 the end of the closing, this lawsuit is not going to change any

1 of those things. It's not going to change the political
2 system. The plaintiffs here are nonpartisan organizations and
3 individuals.

4 If we win these districts, it will not create -- it will
5 not undermine the political supermajority as far as I
6 understand. What it will do is give the political power that
7 has been diluted from black voters in the Montgomery and
8 Huntsville area, it will give people in those areas the
9 opportunity to have more control over their own destiny, to
10 elect candidates with shared experiences who will be
11 responsive, responsive to their issues, whether or not it
12 actually affects the change itself in the Legislature, and that
13 matters.

14 Thank you.

15 THE COURT: All right. Thank you both.

16 All right, Mr. Rosborough, since you were up there, I will
17 start with questions for you.

18 MR. ROSBOROUGH: Okay.

19 THE COURT: All right. First, the question about
20 CVAP, just to make sure that I understand.

21 Are there other cases not involving a non-citizen
22 population as substantial as the one that was involved in, say,
23 *LULAC*, in which, CVAP has been used in lieu of BVAP as the
24 majority measure for numerosity?

25 MR. ROSBOROUGH: I do not know if I have any specific

1 cases to list for you. But what I can say is that the Fifth
2 and Ninth Circuits at least require the use of CVAP as the
3 *Gingles* 1 measure in every single case.

4 And so undoubtedly, assuming -- and I do believe it's
5 true, although, you know, in Texas it may be that more cases
6 concern Hispanic populations than black populations -- that by
7 definition, there are cases within those circuits where CVAP
8 would have been used.

9 And, you know, I will also say in -- you know, I often
10 times we report both, experts report both. In the *Milligan*
11 case we have expert reports in, the *Gingles* 1 expert has both
12 figures.

13 So it's provided there. Sometimes where there's not much
14 of a difference, the Courts choose to rely on BVAP. The
15 Eleventh Circuit gives a little bit more flexibility than the
16 Fifth and the Ninth.

17 So I don't, and we will certainly take a look and address
18 it in post-trial briefing to identify specific cases. But I
19 feel confident that because of the way that the Fifth and Ninth
20 at least have interpreted the LULAC decision that there are
21 cases.

22 THE COURT: Okay. All right. Turning to a different
23 topic, to reasonably configured.

24 So there are a number of different ways to analyze that
25 question, right? There's statistical scores, there's the

1 eyeball test, there's traditional districting principles. And
2 sometimes all of the indicators point in the same direction;
3 sometimes the indicators are divided. And sometimes the
4 indicators -- certain indicators may not be particularly
5 conclusive one way or another.

6 Do the plaintiffs have any position as to where that
7 analysis ought appropriately to begin?

8 MR. ROSBOROUGH: On reasonable configuration
9 specifically?

10 THE COURT: Uh-huh.

11 MR. ROSBOROUGH: To my mind, the best recent guidance
12 is the *Milligan* decision from the Supreme Court.

13 There, I think the Court noted several factors, such as
14 compactness, and there, I believe it -- I believe it looked at
15 average compactness of the plan; split of political
16 subdivisions, contiguity, of course, an equal population, and
17 communities of interest. That being the one that there's -- it
18 is the -- the other factors I think one can say are purely
19 subjective. That is the one where some -- or other way around
20 -- objective communities of interest are where some
21 subjectivity can come into play.

22 And I think the guidance has been -- honestly, it's a
23 question for the fact finder. And so you might have heard our
24 questions to Dr. Trende in our arguments there. And I think
25 our point was never that in considering these -- all of these

1 objectives factors the Court could not also employ some degree
2 on the compactness inquiry of an eyeball test, but rather that
3 that was for the Court to do in light of all the information
4 about all the factors that the Court had rather than for an
5 expert to come in and say, I've looked at some maps. To me,
6 this looks non-compact based on my own say so.

7 So those are the factors I think. And the *Milligan* Court
8 wasn't new in doing that. The *LULAC* decision mentioned these
9 factors. There's been several decisions -- maybe *Johnson vs.*
10 *De Grandy* also mentioned some of these factors.

11 So and I think here what we're looking at is, you know,
12 again, it's not it's not a meet or beat on every single of
13 those factors. There is some -- there's some balancing,
14 there's some subjectivity. Is it -- I know that -- I was
15 reading the *Alpha phi Alpha* decision by Judge Jones in Georgia,
16 and there in evaluating compactness, he said, there are some of
17 these plans here that I find reasonably compact where the
18 plaintiffs have the same or slightly higher average compact
19 ness score and the same in the district.

20 There are some others that I find reasonably compact where
21 they're 200th of a point lower. It's not meaningful
22 difference. It's a ballpark. And there's so much I find
23 non-compact, which are more significantly off, right?

24 And I think that's right. You know, and it is considering
25 all the information together. And I think if what the

1 information says that on these important factors that there's
2 nothing that's way off, that points to reasonable
3 configuration; not it's the best district you can draw, but
4 that it's something reasonable, because the purpose of *Gingles*
5 1 is not to, of course, as Your Honor knows, to draw the
6 remedial district.

7 It is a demonstrative. It is to show, yeah, the
8 population here could form a district that the state could
9 reasonably draw.

10 And that is why I also do think that looking at the
11 state's own districts can be informative, as well.

12 And if you have districts drawn by the state that are
13 significantly less compact, that shows that at least in the
14 state's judgment, and we actually have testimony from Senator
15 McClendon, Mr. Hinaman, yes. They believe that every single
16 State Senate district they drew was reasonably compact. And I
17 do think that means something, as well.

18 THE COURT: And you -- I think may have glanced at my
19 next question a little bit, which is, what is the plaintiffs'
20 position on the role of the eyeball test?

21 MR. ROSBOROUGH: The role of the eyeball test, it is
22 not an expert's role. That -- I think that would invite the
23 sort of -- if we think of the *General Electric v Joiner* case
24 ipse dixit by experts is not permissible.

25 That's sort of the prime definition of it. If we allow

1 experts to employ the eyeball test, then it's basically -- you
2 know, there's no way to measure that. There's no way to
3 understand that. It's just their own say so.

4 Now, the Court -- I'm sorry. Did you want to ask a
5 follow-up?

6 THE COURT: Go ahead.

7 MR. ROSBOROUGH: Okay. The Court I think is in a
8 different position, because the Court has all of the
9 information.

10 Now, I think there may be -- there may be situations where
11 an eyeball test alone in the most extreme situations could do
12 it. Think of the *Gomillion vs. Lightfoot* case with the city of
13 Tuskegee, right, drawn to exclude every single black resident
14 in the city, which looked like a 26-armed octopus. Or I think
15 the original *Shaw* case, which basically just followed a
16 highway.

17 So there are certain outliers there.

18 In situations where it's not so apparent where the
19 districts look like some of the state's districts, for
20 instance, then I think it becomes, well, it's probably not
21 appropriate to rely on that alone. You have to take it in
22 context.

23 It's a thing you can consider, right? This seems a little
24 -- this seems a little unusual to me. Okay. Well, what are
25 the objective factors here that go into that?

1 And then there's other things. What are the shape of the
2 precincts in the area looks like? Sometimes those things that
3 look odd in the map are the results of the map drawer trying to
4 observe the VTDs and precincts that the state or the other
5 counties have drawn themselves and to keep those together.

6 Or why might something create a district that has this one
7 extra little piece, which might look a little odd, but the
8 reason might be to preserve a town or city boundary, to keep
9 together a community of interest, right?

10 And I think it's an analysis of the whole map and not a
11 particular, you know, I am going to look at one little piece of
12 a district. It's the whole district.

13 THE COURT: Got it.

14 Okay. All right. Looking at *Gingles* 2 and 3, on the one
15 hand and the Senate Factors that also consider
16 racially-polarized voting, I mean, in redistricting litigation,
17 we have shorthanded a lot of this to racially-polarized voting.
18 But I think it maybe means something a little bit more nuanced
19 for *Gingles* 2 and 3 than it does in the Senate Factor context.

20 I want to give you an opportunity to respond sort of
21 directly to the point that if the racially-polarized voting
22 dynamics that we observe, even if they appear to be extreme
23 looking at objective measures, that if they are driven more by
24 party than by race or perhaps even -- and I am going to ask
25 Mr. Davis about this in just a minute -- or at least as much by

1 party as they are by race, that that affects the Senate Factor
2 analysis in a way that it might not affect the *Gingles* 2 and 3
3 analysis.

4 Meaning, I really want to sort of ask you to look at
5 racially-polarized voting from two separate lenses in light of
6 the argument about party dynamics.

7 MR. ROSBOROUGH: Absolutely. It is an important
8 question. And I spent a lot of time reading and thinking about
9 it.

10 I think the case law from -- well, the plurality opinion
11 in *Gingles* thinks there's no place for anything beyond the
12 actual analysis of the existence of the patterns, but that's
13 just the plurality, right? So we have some different
14 interpretations.

15 In the Eleventh Circuit, I think the *Solomon* versus
16 Liberty County case is actually a reasonable statement of where
17 the law is on that.

18 And there, they said when you're looking at *Gingles* 2 and
19 3, causation, intent, none of that comes into the picture. It
20 is purely an analysis of whether white voters vote -- black
21 voters vote as a block, and whether white voters vote -- also
22 vote as a block in a way that is sufficient numbers that they
23 prevent black voters from electing preferred candidates.

24 So you know it is purely demonstrative, right? It shows
25 that if -- yeah.

1 So Senate Factor 2, I think it's a wider inquiry, right?

2 I'll say a couple of things about that. I think number
3 one, the arguments I have heard from the defendants have
4 treated it as sort of a trump card, or like a full affirmative
5 defense, where if there's evidence that political party itself
6 is a driver of voting patterns, then plaintiffs lose.

7 But Senate Factor 2, although an important one, is part of
8 the totality of the circumstances. So the strength of that
9 evidence would need to be weighed against all of the other
10 evidence.

11 I have never seen it be recognized. You know, the *LULAC*
12 *vs. Clements* case in the Fifth Circuit was cited. That's not
13 the law in the Eleventh, and that case is, as far as I know, an
14 outlier among the circuits.

15 You know, I think that Courts have given guidance on what
16 are those sort of considerations, then, under Senate Factor 2.

17 One of those as I mentioned that the *Solomon* case is the
18 degree of racially-polarized voting.

19 Now, we have the majority in *Gingles*, but then the
20 concurrences from Justice White and Justice O'Connor joined by
21 others said the race of the candidates and the failure of black
22 candidates can go to this. And the Mississippi NAACP Court I
23 believe recognized this recently that that's another thing we
24 look at in there, that if the only places where black
25 candidates win are majority-black districts, that's another

1 indication that race itself is playing a role here.

2 There are other factors Courts have credited and looked
3 at. You know, it's not a starting point of when we get to
4 political party, how party and race interact.

5 You know, straight-ticket voting is an example. And we
6 talked about this with Dr. Bonneau who admitted, yeah, there's
7 a lot of racial reasons, and there's a lot in the record in
8 this case of reasons why -- you have to look in the first
9 place, why are voters choosing to affiliate with parties. That
10 matters. And if race and racial reasons are a driver of that,
11 that, you know, that's something that influences it.

12 So that's my view of the role. There are several sort of
13 different ways to look at it, and the role that political, you
14 know, like partisanship plays in it is part of that if the
15 *Gingles* 2 analysis.

16 But it's not -- you know, it's not an affirmative defense.
17 And if it would be, I don't think it's met here as there's
18 ample evidence of how race still drives party choices and how
19 lack of black candidate success across statewide elections,
20 regardless of party, outside of majority-black districts.

21 THE COURT: Okay. And in this circuit at this time,
22 what is the basis for focusing the *Gingles* 2 and 3 analysis --
23 so I am not asking about the Senate Factor piece -- on the race
24 of the candidate rather than the cohesiveness or not of the
25 minority and the bloc voting or not of the majority?

1 MR. ROSBOROUGH: So I believe the race of the
2 candidate goes more to the election selected to analyze, rather
3 than what's driving the patterns.

4 The Eleventh Circuit case law on this -- and, again, this
5 is an area where there's some different views in the different
6 circuits. Some circuits say it is the race of the candidate.

7 The view in the Eleventh Circuit in numerous cases is that
8 biracial elections are more probative when analyzing the
9 existence of these patterns. The Court need not limit
10 themselves to this. But it's also not improper to rely on
11 biracial elections.

12 And so to me, the analysis is about racial voting
13 patterns, right? But as I think Judge Tjoflat explained in
14 *Nipper*, the race of the candidate does tell us something. It
15 does matter. Because if you are looking at white versus white
16 elections, you might see whether there's still cohesiveness
17 there, but -- and I think as Dr. Liu testified -- without the
18 choice of a black candidate, it may be -- you may be getting a
19 false impression.

20 Now, I don't think -- you know, the pattern of
21 racially-polarized voting is so consistent here. I don't even
22 really think it's an issue in this case.

23 But my understanding is that, you know, ultimately, what
24 Dr. Liu analyzed was he looked at biracial elections, but the
25 actual analysis is about racial voting patterns, right? He

1 looked at how black voters vote, voted in these elections, and
2 he looked at how white voters voted in these elections for
3 these same candidates.

4 It was in the choice of elections where he and most other
5 experts that do this choose to either predominantly or
6 exclusively rely on biracial elections.

7 THE COURT: Thank you.

8 MR. ROSBOROUGH: You're welcome.

9 THE COURT: All right. Mr. Davis.

10 I am going to give you both a brief opportunity to comment
11 on the other's answers if I have asked something that has
12 triggered any additional further comments.

13 Okay.

14 Mr. Davis, I want to start with racial predominance,
15 because I want to be completely sure I understand the
16 Secretary's position.

17 Is the argument -- and when I say racial predominance,
18 what I mean is the argument that race predominated in the
19 drawing of the illustrative maps.

20 MR. DAVIS: I understand.

21 THE COURT: Is the argument that the maps are
22 methodologically infirm for that reason and should have been
23 attempted in some other way according to some other method, or
24 is the argument that the maps illustrate that relief would be
25 unconstitutional?

1 MR. DAVIS: I think it's closer to the latter.

2 THE COURT: Okay.

3 MR. DAVIS: I don't mean that race predominates simply
4 because an expert like Mr. Fairfax considers the question of
5 whether another district is possible and looks around to see if
6 they can cobble it together.

7 But when you look at how that district is constructed --
8 let me put it this way: I do not believe that the State could
9 draw Mr. Fairfax's District 7 in Plan 3 without violating the
10 Constitution. I believe if we drew his District 7, a plaintiff
11 could come in and prove quite easily that race predominated,
12 and we would lose, and that district would be enjoined.

13 If the State can't do it on the front end, how can Section
14 2 require it on the back end?

15 THE COURT: All right. So let me probe a little bit
16 further on that.

17 Does the Secretary acknowledge that definitionally the
18 task of a *Gingles* 1 expert is race conscious; meaning, that at
19 least to some degree -- and we can talk about how and to what
20 degree -- but that at least to some degree in order to be able
21 to attempt the task that a *Gingles* 1 expert's work cannot be
22 race blind?

23 MR. DAVIS: I don't think -- I acknowledge that a
24 *Gingles* 1 expert's work cannot be completely race blind, at
25 least -- well, I would have to think about that.

1 I'm considering -- I think it was Justice Alito in his
2 dissent said he wasn't so sure maybe it should be race blind.

3 But I think even if we agreed that a *Gingles* 1 expert has
4 to consider race to some extent, we still think this district
5 fails.

6 Number one, it's because the state couldn't do it on the
7 front end. But also -- and I hope I didn't misunderstand the
8 Court's earlier question about whether there was a problem with
9 the process. If you mean -- I do think there's a problem with
10 what Mr. Fairfax did and that he has made decisions -- that it
11 seems as though every tradeoff he made, race won out. And I
12 think that creates a problem for him.

13 THE COURT: Okay. And that's really what I'm trying
14 to get at, is that if -- I mean, in a theoretical conceptional
15 world, a plaintiff wanting to pursue a case retains a *Gingles* 1
16 expert and says, Dr. Expert, can this be done? In order to
17 answer the question, the expert has got to consider race to
18 some degree to get to a yes or a no. And what I'm trying to
19 figure out is A, how the State would contend that that would be
20 appropriate; and B, the degree of appropriateness.

21 And I think I have some answers from what you just said.
22 So I think for example the State would argue that if in the
23 tradeoffs that the *Gingles* 1 expert performs, because I think
24 all *Gingles* 1 experts make tradeoffs between various criteria
25 as they draft maps, if race always wins in the tradeoffs, then

1 the State's argument would be that race predominated.

2 MR. DAVIS: Correct.

3 THE COURT: So that's a piece of an answer, I think.

4 But I'm trying to understand -- and I understand the
5 understand that if what a *Gingles* 1 expert comes up with,
6 regardless of how they got it, that if what they come up with,
7 the Secretary regards as an intentional racial gerrymander,
8 then the Secretary's position will be that that was race
9 predominant.

10 MR. DAVIS: Correct.

11 THE COURT: What I am trying to understand is in what
12 world a *Gingles* 1 expert could consider race to a sufficient
13 degree to meet the task without meeting an objecting from the
14 Secretary. If it doesn't have to be race blind and it cannot
15 be race predominant, how can the work be lawfully attempted in
16 the Secretary's view?

17 MR. DAVIS: I understand. I'm not sure there's one
18 answer to that question, because the work of a *Gingles* 1 expert
19 in this case might be very different and look very different
20 from what they're doing in something in Mississippi or Georgia.

21 It might be something that we only know looking at what
22 specific districts they're trying to prove.

23 I think the easiest analysis for this case, at least, is
24 to see is this something that the State could do at the front
25 end? How can Section 2 require what the Constitution would

1 prohibit?

2 I take your point, though, you know, how -- in the
3 ordinary case, when does a *Gingles* 1 expert cross the line? I
4 can tell you I'm not sure that current case law at least would
5 say that the mere consideration of race pondering the question
6 of can I do this and exploring different configurations, that
7 that would be enough to say that the *Gingles* 1 expert has
8 crossed the line into racial predominance. We might not agree
9 with that case law, but I think current case law permits a
10 *Gingles* 1 expert to do this.

11 But when you look at the end result and the *Gingles* expert
12 says, here, I have done it, this district complies, I think you
13 have to look at what decisions they've made. Have they made
14 too many tradeoffs where race ran out -- won out over
15 traditional districting criteria?

16 THE COURT: All right. That's very helpful. Thank
17 you.

18 All right. Let's talk about racially-polarized voting.
19 And for the purpose of the question I'm about to ask, I'm only
20 talking about *Gingles* 2 and 3.

21 MR. DAVIS: I understand.

22 THE COURT: I want to talk about Senate Factor and
23 totality, polarization dynamics separately.

24 Counsel for the plaintiff characterized the degree to
25 which black voters are cohesive and the degree to which white

1 voters vote as a block as extreme and at least somewhat,
2 perhaps completely undisputed in this case.

3 To what degree, does the Secretary dispute
4 racially-polarized voting for purposes of *Gingles* 2 and 3?

5 MR. DAVIS: We agree that in both jurisdictions -- I
6 mean Huntsville and Montgomery.

7 THE COURT: Both areas.

8 MR. DAVIS: That a majority of white voters support --
9 tend to support Republicans, a majority of black voters tend to
10 support Democrats.

11 If that is all it takes for there to be racially-polarized
12 voting to satisfy *Gingles* 2 and 3, they have met that.

13 We have a question, because I think we've shown that the
14 districts would underperform -- excuse me. That's not what I
15 mean to say. That a district in these areas, even if it was
16 under 50 percent black would still likely elect the black
17 voter's candidate of choice, or I should say most black voters'
18 candidate of choice.

19 And in that case, we question whether there's legally
20 polarized voting. I don't want to concede that. I don't have
21 a case to put in front of you that says that's sufficient to
22 say they have not met *Gingles* 2 and 3.

23 THE COURT: Understood. Okay.

24 Let's talk about racially-polarized voting in the context
25 of the Senate Factors or totality of the circumstances. And I

1 understand -- I am not saying whether I agree with it or not --
2 but I am saying I am clear about what the State's position is
3 with respect to the role of party.

4 Is the Secretary's argument that party is more important
5 than race, at least as important as race, or in the mix along
6 with race, and plaintiffs have simply failed to prove that race
7 is assigned greater weight by voters than as party?

8 MR. DAVIS: I think the record shows that party is
9 more important than race.

10 THE COURT: Okay.

11 MR. DAVIS: I think -- the -- we cannot rule out that
12 race is an issue for some voters. We cannot rule out that race
13 played a role over the course of history and where the parties
14 moved. But we think the task of Section 2 is to consider
15 whether -- whether voting is -- whether black votes are diluted
16 today, whether the system is equally open today.

17 And the *Solomon* -- I disagree with Mr. Rosborough here.
18 He said the State treats it as a trump card and that we think
19 we would win if we show that party is the issue.

20 Well, yes, I do think we win if party is the issue.
21 Because *Solomon* says for it to be legally actionable, it has to
22 be on account of race or color.

23 So I think *Solomon* requires a judgment for defendants if
24 you agree that party better explains the election outcomes than
25 race.

1 I don't think we have to prove that race plays zero role
2 that nobody in the state the influenced by race. But looking
3 at the system as a whole, if the party better explains the
4 results of elections rather than race, yes, I think we win
5 under *Solomon*.

6 THE COURT: All right. And you -- you may have just
7 answered my next question, which was going to be what is the
8 Secretary's best case to support judgment in favor of the
9 Secretary on a basis that the dynamics observed are more party
10 based than race in a situation where the *Gingles* analysis lines
11 up as it does here?

12 MR. DAVIS: I'm sorry. Are you asking me to assume
13 that plaintiffs -- that you agree that plaintiffs have
14 satisfied their *Gingles* obligations?

15 THE COURT: Well, assume that the cohesiveness and
16 bloc voting pieces of *Gingles* 2 and 3 are as they are here.

17 MR. DAVIS: Okay. Well, I would think the best cases
18 for us for the Eleventh Circuit it would be *Solomon*. But also
19 while I don't contend this is binding on you, I think Judge
20 Watkins's decision in the judicial elections case is the best
21 case for us.

22 THE COURT: Okay.

23 MR. DAVIS: I think that is the case where we had the
24 record closest to this one. And we think it should come out
25 the same way.

1 THE COURT: Okay. All right. Reasonably configured.

2 MR. DAVIS: Yes.

3 THE COURT: Same question for you that I asked of
4 Mr. Rosborough. There are lots of different indicators
5 throughout the case law that Courts consider to determine
6 reasonably configured. There's meet or beat. There's measures
7 of compactness, you know, statistical measures of compactness,
8 there's eyeball tests, there's traditional districting
9 criteria.

10 Does the Secretary have a position on the order in which I
11 ought to undertake analysis of those various factors or some
12 that ought to be assigned more weight than others?

13 MR. DAVIS: This is embarrassing. Can I read your
14 question?

15 THE COURT: You may. I'm sorry. That means it was a
16 bad question.

17 MR. DAVIS: No. It was not a bad question.

18 THE COURT: I don't have my realtime up, so I am not
19 going through the agony of reading myself as I ask questions.

20 MR. DAVIS: No. I'm not sure there's any particular
21 order that's required.

22 This is so much of Section 2 jurisprudence. There's an
23 absence of clear lines, which I know makes it hard for the
24 Court. Think about how the legislators feel. It's tough to
25 make the obligations.

1 Meet or beat, I do think that's a factor. You have to
2 consider whether it can be done in a way that it is at least
3 comparable to what the State was able to accomplish. But I'm
4 not sure it matters whether you consider it here or over there
5 at the beginning or the front end of the analysis.

6 Compactness, yes, sure, that's a factor that you can
7 consider. But I don't know that any of those are a trump card.
8 I think they should all be considered when you are looking at
9 reasonable configuration.

10 But I don't think that plaintiffs can just wipe away all
11 race-based decisions by saying, well, you don't just have to
12 meet or beat or every criteria, or it's not a beauty contest.
13 At some point, I think we have to grapple with has race crossed
14 the line into predominance where what's going on here is this
15 expert is proposing that we do something that would be unlawful
16 if it was enacted.

17 So we can see that reasonable construction like almost
18 every part of the Section 2 analysis is messy. And maybe the
19 cleanest way to do it is to look at how far race has gone, how
20 much race is driving the decision. Not simply that it's on its
21 mind, not simply that he's required at this point to see
22 whether it could be done, but is race winning at every step.

23 THE COURT: Okay. All right. Last question, I think,
24 is also one I asked Mr. Rosborough, which is: In assessing
25 racially-polarized voting both for purposes of *Gingles* 2 and 3

1 and for purposes of totality of the circumstances and Senate
2 Factors, what is the Secretary's position as to the appropriate
3 consideration that should be given to the race of the candidate
4 rather than the race of the voter?

5 MR. DAVIS: Okay. I think it's a consideration at
6 times. I think there are a lot of cases that say -- at least
7 at the time those cases were written -- that an election --
8 when you're doing an RPS analysis, that a biracial election is
9 more relevant.

10 I don't think anybody's ever said that that's all you
11 should do. And I think at least now -- Dr. Liu limiting
12 himself to biracial elections, it may not be per se a failure,
13 but it masks the fact that if he'd looked at multiracial
14 elections or at cases with white Republicans against white
15 Democrats, he would see that there's no real difference there.

16 I think -- you know, because it doesn't control for party
17 for one thing is a problem. But also I think a broader variety
18 of elections, it might still show a pattern of
19 racially-polarized voting, but I think if Dr. Liu had taken a
20 broader view, we would see that there's not much difference in
21 the degree of polarization when it's a white Democrat or a
22 black Democrat.

23 THE COURT: Got it.

24 All right. I think that might be all my questions.

25 It is.

1 MR. DAVIS: Thank you.

2 THE COURT: Thank you.

3 All right. Have my questions to either one of you created
4 a need for anybody to tell me anything I have not already
5 heard?

6 MR. ROSBOROUGH: I will be as -- very brief on a
7 couple of points if you will indulge me.

8 THE COURT: Sure.

9 MR. ROSBOROUGH: I think in hearing your questions to
10 Mr. Davis and the answers, there might have been one part of
11 the answer that I left out, in terms of racially-polarized
12 voting in the *Gingles* -- in the preconditions analysis, and,
13 that, of course, is not just bloc voting on each side, but that
14 the white majority consistently defeats the black-preferred
15 candidates there. And I think that is present here.

16 There was a reference to Dr. Trende. He didn't actually
17 analyze the districts at issue. He I think looked maybe at one
18 of Mr. Fairfax's illustrative districts and tried to say that
19 it could perform with some amount of crossover voting. I don't
20 think that's relevant to that inquiry.

21 I do think -- I want to address the *Alabama NAACP vs.*
22 *Alabama*, the judicial elections case, because I know that that
23 case the Secretary cited a lot. And I think if -- of course,
24 obviously, as Your Honor knows, it's another district court
25 decision and doesn't have precedential weight.

1 But even crediting the analysis that went there, I do
2 think the results would be different here. And, of course, one
3 similarity is that Dr. Bonneau was an expert in that case, too.

4 And, of course, one of the key points the Court relied
5 upon in that case was his bivariate regression analysis looking
6 at how black candidates performed in Alabama State Supreme
7 Court judicial elections compared to white candidates. And he
8 found that black candidates did a little better.

9 In this case, we had a lot of discussion about this. He
10 performed the same analysis, an error was pointed out, he
11 agreed with the error, he agreed that that changed the result
12 such that black candidates did worse. And then at trial, he
13 walked back the usefulness of the analysis completely.

14 So I think that is something to take into shape. And
15 obviously, we have different evidence from him and different
16 evidence from other people in this case.

17 Finally, I think looking at how we treat the role of race
18 versus party, and Mr. Davis mentioned the *Solomon* case.

19 Even if that case were to be read to say that there's some
20 sort of causal requirement on grounds of race, which is not how
21 I read it, but even that were the case, it doesn't mean -- it
22 would not mean showing that race is the far more important
23 factor than party.

24 Under the way we look at things, it would mean it's a
25 motivating or a substantial factor. And I think it was the --

1 I think maybe the Court in Mississippi recently that adopted a
2 similar view. I might be mixing up decisions.

3 But in any case, the evidence here certainly I think it
4 shows that race is more important, but certainly at a minimum
5 shows that race still plays a substantial role. And that would
6 be enough even under that view.

7 THE COURT: All right. Thank you.

8 MR. ROSBOROUGH: Thank you.

9 THE COURT: Mr. Davis, is there any of that you would
10 like to respond to?

11 MR. DAVIS: There is. And I'm not sure how this
12 matters. We all agree you are not bound by what Judge Watkins
13 did.

14 But I do want to respond to this. Yes, Dr. Bonneau was in
15 this case. Yes, he did analyze judicial elections, which we
16 have not asserted here because he found a mistake, withdrew it,
17 no problem.

18 But he also -- this case and before judge Watkins -- did a
19 straight-ticket voting analysis that was part of his opinion.

20 There was lots of stuff before judge Watkins in addition
21 to that one discrete portion of Dr. Bonneau's report.

22 We -- we had a conversation -- I crossed plaintiffs'
23 expert just like I did Dr. Bagley, and there, the expert said,
24 no, white -- voters in Alabama aren't smart enough to be able
25 to choose which party is -- takes the different positions on

1 the issues.

2 And Judge Watkins didn't credit that expert. Here,
3 Dr. Bagley was honest enough to admit that, yes, voters
4 generally know which party takes which position on which
5 issues.

6 So there was similar evidence, although it wasn't quite
7 lining up the same. My point is that one thing about
8 Dr. Bonneau in no way differentiates the record in that case
9 and the record in this case.

10 THE COURT: All right. Thank you.

11 All right. Anything from anyone else?

12 MR. DAVIS: No.

13 THE COURT: All right. This was enormously helpful.
14 And congratulations on a trial well run by all. Thank you very
15 much.

16
17 (Whereupon, the above proceedings were concluded at
18 3:17 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

11-21-2024

Christina K. Decker, RMR, CRR

Date

Federal Official Court Reporter

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