

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

THE ARKANSAS STATE CONFERENCE OF
THE NAACP, et al.,

Plaintiffs,

v.

THE ARKANSAS Board of
Apportionment, et al.,

Defendants.

No. 4:21-cv-1239 LPR
February 5, 2022
Little Rock, Arkansas
11:59 a.m.

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE LEE P. RUDOFISKY
UNITED STATES DISTRICT JUDGE
VOLUME 3

Proceedings reported by machine stenography and displayed
in realtime; transcript prepared utilizing computer-aided
transcription.

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I N D E X - VOLUME 3 (February 5, 2022)

WITNESS FOR PLAINTIFFS:	Direct	Cross	Redirect	Recross
ANTHONY FAIRFAX		495	578	
BRAD LOCKERBY	590	628		
SHELBY JOHNSON	651	657	697	
RICHARD BEARDEN	708	730		
EXHIBITS RECEIVED				
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1 P R O C E E D I N G S

2 THE COURT: We are on the record. Thank you all for
3 coming in for this Saturday session. Sorry we couldn't start
4 earlier, but the roads were such, or at least my concern about
5 the roads were such that I thought it made more sense to give
6 there a chance to be a little bit of sunlight and more warming
7 on the road.

8 Before we start, does anybody have anything they want to
9 talk about administratively with the Court?

10 Plaintiffs?

11 MR. SELLS: No, Your Honor.

12 THE COURT: Defendants.

13 MS. MERRITT: No, Your Honor.

14 THE COURT: Mr. Sells, what are we doing now? Who is
15 up?

16 MR. SELLS: I believe it's Mr. Fairfax on
17 cross-examination.

18 THE COURT: Okay. Then let's call Mr. Fairfax back
19 to the stand.

20 Mr. Fairfax, as you get yourself settled; two things
21 for the record. One, I assume you understand that you are still
22 under oath?

23 THE WITNESS: Yes.

24 THE COURT: Okay. And the second one, I assume that
25 you have not spoken with your lawyers in a substantive way about

1 your testimony or anything having to do with the case, is that
2 correct?

3 THE WITNESS: That is correct.

4 THE COURT: Okay. We can proceed.

5 MS. MERRITT: Thank you, Your Honor.

6 ANTHONY FAIRFAX, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN
7 CROSS-EXAMINATION

8 BY MS. MERRITT:

9 Q. Good afternoon Mr. Fairfax.

10 A. Good afternoon.

11 Would you like me to remove -- would you like for me to
12 remove --

13 THE COURT: If you're comfortable with it, I think the
14 answer is yes.

15 MS. MERRITT: Thank you.

16 THE WITNESS: Good afternoon.

17 BY MS. MERRITT:

18 Q. Good afternoon. My name is Jennifer Merritt. I am a
19 senior assistant attorney general with the office of Arkansas
20 Attorney General, Leslie Rutledge. I don't believe we have ever
21 had the opportunity to meet before this afternoon. Is that
22 true?

23 A. I think that's correct, yes.

24 Q. Okay. It is a pleasure to meet with you this afternoon.
25 And I wanted to -- it's been several days since you testified

1 last week.

2 A. Yes, it has.

3 Q. We have had some breaks due to weather and some other
4 witnesses. So thank you for your patience in coming back to
5 visit with me.

6 One of your -- your CV is in the record as Plaintiffs'
7 Exhibit 7A. And when you testified and talked with the Court
8 last week, you talked a lot about your several decades of
9 experience doing redistricting work. Do you recall that
10 testimony?

11 A. Three decades, yes.

12 Q. Three decades of work. And in that three decades of work
13 you have -- you have done quite a bit of work it looked like for
14 various Plaintiffs' organizations. Is that true?

15 A. Correct.

16 Q. Have you done much work for states in your three decades of
17 experience, Mr. Fairfax?

18 A. No, I haven't.

19 Q. Okay. So in your three decades of experience, is it fair
20 to say, sir, that you have pretty much dedicated your career to
21 kind of finding ways to help -- help plaintiffs find ways to
22 draw more minority-majority districts, that's kind of been the
23 focus of your career?

24 A. I don't know if that's the way I would put it. When I tell
25 people, and they talk about majority-minority districts, I

1 sometimes will say just fair district.

2 Q. Okay. But when you are doing work in those three decades
3 of work, and when you look at your resume, you have got pages
4 and pages of work for organizations such as the NAACP or the
5 ACLU; is that fair?

6 A. That's correct.

7 Q. And when you are doing work for organizations such as that,
8 are you looking for ways to find ways to draw more
9 majority-minority districts, for the most part?

10 A. Again, I don't know if I can characterize it like I'm
11 looking for majority-minority districts. I look at it as I'm
12 looking at the jurisdiction, and trying to develop a plan that's
13 fair for that jurisdiction. So I don't necessarily seek out.
14 You know, occasionally there is some analysis that you do, where
15 you're intentionally looking at majority-minority, but when you
16 are, you know, doing a plan you may submit to something that is
17 more in line with developing a fair plan.

18 Q. Okay. And typically when an organization like that hires
19 you, it is because they don't think there are enough
20 majority-minority districts, would that be fair?

21 A. I think that's probably fair. I would agree with that.

22 Q. Okay. Thank you. Mr. Fairfax, do you have any personal
23 connections with the state of Arkansas?

24 A. No. No. Not that I can recall.

25 Q. Okay. Is this trip testifying in court this week, have you

1 been to Arkansas before this time?

2 A. A while back. Yeah, it's been probably two or three
3 decades I bet you, before -- I went to Fort Smith a long time
4 ago.

5 Q. What was your purpose of visiting Fort Smith two or three
6 decades ago?

7 A. That was when I worked for this government contracting
8 firm, EER Systems, and they had a contract out there. And so I
9 went out there. I was one of the electrical engineers, or the
10 electrical engineer that went out there and analyzed the systems
11 that they had out there at the base.

12 Q. Okay. And on that occasion two or three decades ago when
13 you visited Fort Smith for work, how long did you spend in Fort
14 Smith?

15 A. Probably -- it was probably less than a week.

16 Q. Okay.

17 A. Yeah, probably less than a week.

18 Q. And during that time, less than a week, two or three
19 decades ago when you spent some time in Fort Smith for work, did
20 you have occasion to visit other areas of the state, or did you
21 stay in the Fort Smith area?

22 A. Mostly the area. Yeah. Of course we wanted to see what we
23 could see, of course, being out of town, but I didn't travel the
24 state if that's what you're getting to, yeah.

25 Q. Okay. So with regard to your work in this case, you were

1 asked by the plaintiffs to prepare a proposed illustrative plan
2 for house districts; is that right?

3 A. That's correct.

4 Q. And in connection with that task, you were able to draw an
5 illustrative plan, one illustrative plan, is that right, for 100
6 house districts?

7 A. That's correct. Now that one illustrative plan, when you
8 do plan development, it always goes through iterations. So the
9 districts change, and they're added, subtracted, just the part
10 of plan development. So the ending product was one plan.

11 Q. Right. And so the plan that's been submitted to the Court
12 for consideration is one plan for 100 districts, right?

13 A. Correct.

14 Q. And it's my understanding that typically with plaintiffs in
15 these kind of cases submit plans to the Court, you are often
16 asked to do more than one plan, because the Court might not like
17 one plan, but might find that one might be more appropriate. Is
18 that fair? Are you typically asked to provide options?

19 A. Not necessarily. No, not necessarily. I think, you know,
20 the illustrative plan is exactly what I think I mentioned
21 before, just demonstrates a particular aspect. And the
22 understanding is, is that there are other aspects that could be
23 developed, other alternatives that can be developed. And so I'm
24 not quite sure what you're saying is accurate that you always
25 submit more than one plan.

1 Q. No. That was my question for you. Are you typically asked
2 to do one plan or typically more than one?

3 A. Oh, usually I'm asked to do probably one plan if we're
4 talking about submittal. If however that plan is alleged to
5 have something wrong with it, then I think it's appropriate to
6 produce maybe multiple plans, if you will.

7 Q. Okay.

8 A. To show that, oh, it can be done in a different way.

9 Q. Okay. And in this particular case, have you come back
10 since you prepared your initial illustrative plan and have you
11 been asked to do anymore work and redraw the lines in response
12 to any of the criticisms that have been lodged so far?

13 A. Not a complete plan. In my rebuttal report, for example, I
14 took a look at the HD 5 to address the concerns of Mr. Davis.
15 And so there was a different configuration on HD 5. So it
16 hasn't been a complete plan.

17 Q. And you certainly haven't provided any additional plans
18 other than the one that's been provided as an exhibit by the
19 plaintiffs. Nothing else has been submitted to the Court. Is
20 that fair?

21 A. That's correct, other than what you see in the rebuttal
22 report.

23 Q. Okay. And in the illustrative plan that you have prepared
24 for the Court's consideration in this case, you have drawn 16
25 majority-minority districts, right?

1 A. Correct.

2 Q. And that is an exact match to Arkansas's 16 percent black
3 population, right?

4 A. Yes. Relatively speaking, exactly.

5 Q. Yeah. So did you set out to do that, or did it just so
6 happen to work out that way?

7 A. It just happened to work out that way. I know. It lined
8 up. And sometimes that happens. It lines with what the
9 proportion of the population is.

10 Q. Okay. Was it in your plan -- do you know how many ways you
11 split the city of Pine Bluff? Is it five? Does that sound
12 right?

13 A. Pine Bluff, it might have been five, yes. I think it was
14 at least five. I -- might have been six, but yeah, five.

15 Q. The Defendants' Exhibit 1 has some -- an illustrative -- it
16 is like a demonstrative map that we had the GIS office prepare
17 for us. And that might be helpful to me. I know that that is
18 something that I can put my finger on quite quickly to help us
19 count those.

20 A. Sure.

21 Q. And if we could pull that up, if we could have the
22 technology person that could help, that would be helpful, but I
23 have a blow up of it as well. And I'm going to put on a mic, so
24 that I can still be heard by the court reporter and by everyone
25 in the courtroom, but there is a map that has a blow up of that

1 and that might help us count, so I'm gonna go get that real
2 quick.

3 A. Excellent.

4 THE COURT: Have the plaintiffs seen the map?

5 MS. MERRITT: It's on --

6 THE COURT: The blow up.

7 MS. MERRITT: Yes, Your Honor. It's on defendants'
8 exhibit list. It's Defendants' 1.

9 THE COURT: I guess what I'm asking you, Ms. Merritt,
10 is have they seen that blow up, or whatever blow up you are
11 going to show him?

12 MS. MERRITT: Yes, Your Honor. It's Defendants'
13 Exhibit 1. It is part of our exhibit list, and it's been
14 provided.

15 BY MS. MERRITT:

16 Q. So Defendants' Exhibit 1 is a series of three different
17 demonstratives. And I will represent to you, Mr. Fairfax, that
18 what we asked the Arkansas Geographic Information Systems office
19 to do was to take your proposed plan and then overlay on top of
20 that. And we'll hear from Shelby Johnson, who is our state GIS
21 officer. He'll talk about this too, but what we had him do is
22 overlay race information on top of your plan. And so that's
23 what these maps show. And there is one here that part of
24 Defendants' Exhibit 1.

25 MR. STEINER: Your Honor, just to be clear, I mean, we

1 haven't seen the blow up before now. I'll take the
2 representation that it's an accurate --

3 THE COURT: So that's -- I appreciate that. That is
4 what I was trying to ask. And I wanted Ms. Merritt to just show
5 you all the blow up and make sure that you had a second to
6 confirm that you agree it is an accurate representation of
7 Defendants' Exhibit.

8 MR. STEINER: This is Page 2 of the exhibit?

9 MS. MERRITT: It is either 2 or 3. You can see at the
10 top it says, House Illustrative and Voting Age, Any Part Black,
11 VTD Pine Bluff.

12 MR. STEINER: I say, Your Honor, it appears to be
13 close. I think that there is information in Exhibit 1 that is
14 not reflected in terms of there being some roads and things like
15 roads or rivers or something. There is more lines in Exhibit 1
16 than are on their blow up. You know, I defer to the Court as to
17 whether it is close enough that she can -- and I don't.

18 THE COURT: Let me ask you this. Do you all have an
19 objection to it?

20 MR. STEINER: Well, I don't believe there is any
21 foundation for it. She's given a speech about what it is. I
22 think there needs to be foundation as to what it actually is,
23 because I don't think that it was ever presented to Mr. Fairfax
24 or presented in an opposition report or anything like that,
25 but --

1 THE COURT: I appreciate it. I am going to
2 conditionally let Ms. Merritt use it under the assumption that
3 we later on, from another witness, learn exactly what this is.

4 MR. STEINER: Thank you.

5 MS. MERRITT: Thank you, Your Honor.

6 BY MS. MERRITT:

7 Q. Mr. Fairfax, so I'm going to approach, but not get too
8 close. Is this a comfortable distance for you?

9 A. Yes, that's fine. Thank you.

10 Q. I'll represent to you that -- and I just had these -- GIS
11 printed this for me. And we'll have Mr. Johnson --

12 THE COURT: Hold on a second, Ms. Merritt.

13 MR. STEINER: Can I move to somewhere where I can see
14 what she is pointing out?

15 THE COURT: Yes, you may.

16 BY MS. MERRITT:

17 Q. So this is a demonstrative of a blow up of your plan of the
18 illustrative and voting age, any part black by VTD for the city
19 of Pine Bluff. And when I look at this, I see House Districts
20 12, 11, 16, 17, 10. I'm counting 5, at least, for the city of
21 Pine Bluff. And did I count those house districts accurately,
22 Mr. Fairfax?

23 A. Yes, you did.

24 Q. Okay. And so my question for you is, in order for you to
25 draw 16 majority-minority districts in your proposed

1 illustrative plan, was it required that you split up Pine Bluff
2 into five districts?

3 A. I don't know that. I don't know if it was required to do
4 that. I think that's the keyword.

5 Q. Okay.

6 A. As I mentioned before, there are many different
7 alternatives, plan configurations that you can come up with.
8 And there is potentially a reason why this is split, to a
9 certain extent, so many. You know 17, 10, and 16 had three
10 incumbents there, so it had to be split at least, you know,
11 three. And so it's one of those cities that are significant.
12 And I think the population, I'm trying to recall the population,
13 but it's clearly a city that's greater than a State House
14 district, let's say.

15 Q. Okay. Now when you did prepare your illustrative plan,
16 isn't it true that you used computer software that told you
17 about communities of interest within the state of Arkansas?

18 A. Socioeconomic data if you are referring to that, yes.

19 Q. Yes. So it told you about shared commonalities of
20 economical or other interests between communities in order to
21 draw your maps, right?

22 A. The data was there, yes.

23 Q. And that's how you were able to identify, because you're
24 not an Arkansan, right?

25 A. Correct.

1 Q. You're not from here. You don't know these neighborhoods
2 or communities?

3 A. Insofar as what I research, but yes.

4 Q. Sure. So your computer software helped you identify where
5 the communities -- where the shared interest might lie among the
6 communities, correct?

7 A. Yes. The data was there for me -- socioeconomic data was
8 there for me to utilize.

9 Q. Right. And that socioeconomic data was there, and that's
10 how, for example, you were able to identify commonalities
11 between the cities of Pine Bluff and Arkadelphia?

12 A. Correct.

13 Q. Because they share some common socioeconomic data?

14 A. That's correct.

15 Q. Okay. On paper they look the same to you?

16 A. Yes. The data are the same. Yes. Or similar.

17 Q. Sure. Right. Now lifelong Arkansans, folks on the ground
18 might disagree with you, but the data looks similar?

19 A. That's correct. They could disagree.

20 Q. You're familiar with the Board of Apportionment's
21 redistricting criteria and goals, Plaintiffs' Exhibit 34?

22 A. Yes.

23 Q. And you're aware, aren't you, Mr. Fairfax, that equality of
24 population was a primary importance to the Board?

25 A. I'm hesitating, because of your use of primary.

1 Q. Well, and that's my question, because there is evidence in
2 the record that it was of primary importance. And they made
3 public statements to that effect, and I want to know if you were
4 aware of that.

5 A. When -- and that may be correct. I'm not ignoring that.
6 But when you put together a board or any legislative
7 redistricting committee puts together a list of criteria, they
8 state that in the written criteria. And like California
9 actually has a sequence of priority. So they state it. That
10 wasn't done this time. Meaning the stating that this population
11 equality is above all the other ones.

12 Q. And let me make sure that I understand your answer to my
13 question.

14 A. Uh-huh.

15 Q. My question to you was, were you aware that equality of
16 population was their primary goal. And I don't know if I heard
17 a direct answer to my question. Would you mind answering that?
18 Did you know that that was their number one goal?

19 A. I did not know it was their primary goal. It is not stated
20 on the website.

21 Q. Okay. And fair enough. I think that's a fair statement on
22 your part. So on their website, they did list all of their
23 criteria and goals?

24 A. Right.

25 Q. We can agree on that.

1 A. Uh-huh.

2 Q. Equality of population was listed as number one?

3 A. Right.

4 Q. We could say that was their primary goal, because it was
5 first? Fair?

6 A. No, that's not fair, because you always have to have a
7 list, yeah. Unless you say that list is prioritized, it is just
8 a list.

9 Q. Okay. Did you attend any of the -- did you attend any of
10 the public meetings of the Board of Apportionment?

11 A. No, I didn't.

12 Q. Did you review any of the transcripts of the public
13 meetings before -- as you were preparing your illustrative plan?

14 A. No, I didn't.

15 Q. Had you reviewed the transcripts, you might have been aware
16 that they made very clear public statements that equality of
17 population was their ultimate goal. And they wanted to reach an
18 equal population --

19 THE COURT: Do you have an object?

20 MR. STEINER: Objection. I was trying to let her
21 finish her question. But I think this is misstating or
22 mischaracterizing the Board minutes. So if she wants to show
23 him something and say, did you consider this, that's fine. But
24 I don't think what she just said is an accurate depiction of
25 what was said.

1 THE COURT: Sustained. And I'm not sustaining what is
2 or isn't accurate, but I'm sustaining the point that if you want
3 to ask him about the Board minutes, let's show him the Board
4 minutes, so he knows exactly what you are talking about.

5 MS. MERRITT: Well, we have several Board witnesses
6 who will testify about it, and I'm --

7 THE COURT: Ms. Merritt.

8 MS. MERRITT: Yes.

9 THE COURT: If you want to ask him a question about
10 what he knows or doesn't know of the Board minutes, and you want
11 to ask about something specifically the Board said in those
12 minutes or somebody from the Board said, that's perfectly fine.
13 It's fair game. You just need to show it to him and ask him if
14 he knew about it.

15 MS. MERRITT: Sure. It is a matter of me putting my
16 finger on it right at this moment.

17 BY MS. MERRITT:

18 Q. As an expert witness I can ask you --

19 THE COURT: Or one of your friends.

20 MS. MERRITT: Or one of my friends over there.

21 BY MS. MERRITT:

22 Q. As an expert witness, I can ask you to assume with me that
23 they made public statements. Of course, the judge is asking me
24 to show it to you, but I will ask you to assume with me that
25 they did make statements in the public meetings that our primary

1 goal is to reach a zero percent population variance. And we
2 will have witnesses who will confirm that and testify to that.
3 So my question for you is, assuming -- assume with me that they
4 did make that public statement. Is that fair and within the
5 Board's discretion to prioritize a zero percent population
6 variance and make that their top goal? That is legitimate,
7 isn't it?

8 A. Absolutely. But they have to state it. They have to state
9 that.

10 Q. Okay?

11 A. They have to state that in their criteria. They cannot
12 just assume that a discussion at a board meeting will craft
13 their criteria. After they have the discussion, then they need
14 to put it on the website as a criteria.

15 Q. Okay. And so they did put -- on their website they did
16 list equalizing population as number one goal. They list it as
17 number one, right?

18 A. It's positioned at number one. Not necessarily their
19 number one goal.

20 Q. Okay.

21 A. The assumption is that the one at the bottom is the least
22 goal that you are gonna have. And I think Section 2 is included
23 in there, and the Equal Protection Clause. So by what you're
24 saying those should be like third and fourth goals, where those
25 actually should be higher if you are using a prioritization.

1 Q. Right. The second and third goals were, you know,
2 complying with Voting Rights Act and nondiscrimination, correct,
3 and not favoring as well. Those were the second and third
4 goals. We can pull up Plaintiffs' Exhibit 34 and look.

5 A. Those should be higher is what I'm saying.

6 Q. Thank you very much.

7 A. Meaning those should be higher. The constitution will
8 trump population equality.

9 Q. Right. And so what the Board said was one person, one vote
10 in balancing the population to the extent they could, and
11 reaching a zero percent variance. That was what they were
12 trying to achieve. And so the Court will hear from several --

13 MR. STEINER: Objection. She is misreading the
14 exhibit. It said, balancing the legislative districts every ten
15 years after the federal census, so that they are, quote,
16 substantially equal for a generally plus or minus five percent
17 deviation.

18 THE COURT: Sustained. I get your point.

19 MS. MERRITT: Thank you. Let me rephrase.

20 BY MS. MERRITT:

21 Q. The Court will hear from witnesses later today who will
22 testify that they made statements in public meetings and that
23 the Board prioritized number one equalizing the population was
24 their primary goal, then the Board made public statements that
25 they will comply with the law; number two and three.

1 Okay. And so my question for you is, if they made those
2 statements, that's within their discretion. They are the
3 policymakers here. And I think you said yes?

4 A. Yeah. But there is a caveat. Remember I said yes, but
5 they have to state that. They didn't state it on their
6 redistricting criteria and goals.

7 Q. Okay.

8 A. They may have mentioned it in a board meeting and discussed
9 it, but when they resolved everything, they didn't place it
10 on -- place it inside the criteria that they said was their
11 criteria.

12 Q. So they didn't say it on their website is your criticism?

13 A. Correct.

14 Q. Okay.

15 A. I mean, I'm assuming this is reflected in what they
16 approved.

17 Q. Okay. The Board had their four geographic principles that
18 we see there in Plaintiffs' Exhibit 34. Do you see those?

19 A. Uh-huh, yes.

20 Q. Compactness, contiguous, maintaining the core of existing
21 districts, and then the communities of interest?

22 A. Correct.

23 Q. Okay. And you testified during your direct testimonies
24 last week that it was impossible to meet all four of those
25 geographic principles in all of the districts. Do you remember

1 giving that testimony last week?

2 A. I think it was phrased a little differently than what
3 you're saying.

4 Q. I wrote it down, because I found it so striking when you
5 said it, but I might have misheard you.

6 A. Well, maybe I misspoke, but what I'm saying is that it's
7 impossible to reach all of those absolutely, meaning it's
8 impossible to get zero deviations without splitting precincts or
9 splitting something. So that's what I'm saying.

10 Q. Right. That makes sense, because you said there are always
11 trade offs involved with pretty much all of the criteria. Do
12 you remember saying that?

13 A. Correct.

14 Q. And you also confirmed that redistricting is a judgment
15 call. Do you remember that?

16 A. The process is, yes.

17 Q. Yes. And so in this case, the process is a judgment call
18 for the Board of Apportionment to make. Would you agree with me
19 on that?

20 A. No. No. No. I'm -- what I'm speaking of, or what I was
21 speaking of was the map drawer is the person who is looking at
22 the criteria and making a judgment call of how to balance all of
23 that.

24 Q. Right. And in this case --

25 A. Not the Board.

1 Q. The Board is approving the map, so why isn't it their
2 judgement call?

3 A. On their map. Sure. They're basing it -- sure. On their
4 map they are making a judgment call. But on another person's,
5 another map drawer, that person is making a judgment call. Now
6 they both could be correct, or one could be correct and one
7 could be incorrect, but they are both making a judgment call.

8 Q. Okay. Good. So I think we agree on that. You know, I was
9 asking you if when they are drawing their map, that they get to
10 make those judgment calls when they're faced with these four
11 geographic principles, and they are trying to balance these
12 competing interests that can't be satisfied in every case.

13 A. Absolutely. No question about that. Doesn't mean that
14 they didn't violate something, but judging it on their own, so
15 yes.

16 Q. Okay. Okay. And the Board in this case did weigh all of
17 these different criteria, and they did publish a plan for public
18 comment at the end of October of 2021. We agree on that?

19 A. Yes.

20 Q. And they gave these factors the weight that the Board
21 members felt that those factors deserved. Can we agree on that?

22 A. Yes.

23 Q. And when they publish those maps they solicited public
24 feedback, right?

25 A. Correct.

1 Q. And did they make some changes in response to public
2 feedback? Are you aware of that?

3 A. I assume that's the normal process, yes.

4 Q. And then they approved the final map, right?

5 A. Right.

6 Q. You admitted on direct that if you want to equalize
7 population, you may lose compactness of your district. Do you
8 remember saying that?

9 A. That's a possibility, yes.

10 Q. And then among the geographic principles, assume with me
11 that the Board prioritized maintaining communities of interest
12 among the four. Would they have the right to do that in your
13 opinion if they wanted to do that?

14 A. You're saying, would they have the right to prioritize
15 communities of interest above other criteria?

16 Q. Above the other geographic criteria on their own list.

17 A. They have the right to do that. Yeah.

18 Now, they have the right to do that, but whether that ends
19 up violating some other aspect, that's a different story, but
20 they have the right to actually state that.

21 Q. Okay. Thank you.

22 Now, the governor, I'll show you where the governor
23 actually made a statement that I believe shows that they did try
24 to emphasize maintaining communities of interest, and I know
25 that was important to the Board, and I would like to show you

1 that statement if I could?

2 A. Sure.

3 MS. MERRITT: If we could turn on the ELM0, please.

4 BY MS. MERRITT:

5 Q. What I'm going to show you, Mr. Fairfax, is a copy of a
6 transcript of a Board of Apportionment meeting from October 29,
7 2021, and it is -- it's in the record as Document 2-6. It was
8 an exhibit to the plaintiffs' Preliminary Injunction Motion.
9 And on Page 24 of 26 of that document, this is Governor
10 Hutchinson speaking at this public meeting where they were --
11 and this is -- I'm sorry. This is an October 29th, 2021,
12 meeting where the Board was approving the plan. And Governor
13 Hutchinson is speaking --

14 MR. STEINER: Is there an exhibit, just for the --

15 MS. MERRITT: No. I'm just reading a statement. Is
16 that okay?

17 THE COURT: Ms. Merritt, how about you talk to me and
18 I'll talk to counsel?

19 MS. MERRITT: Yes, Your Honor.

20 THE COURT: There was an objection, I think, or at
21 least an inquiry. And I think he was asking whether this was an
22 exhibit or not. So first, I'm not saying it has to be an
23 exhibit, but I'm asking is this an exhibit?

24 MS. MERRITT: No, this isn't on our exhibit list,
25 Judge. I was just showing him something that is already in the

1 record, and I'm going to ask a question about it.

2 THE COURT: Okay. We're getting there.

3 MS. MERRITT: Will that be okay?

4 THE COURT: Hold on. Okay. So it is not an exhibit.
5 She is just showing and asking a question about it. What would
6 you like to know?

7 MR. STEINER: So if it's not an exhibit, it is not in
8 the record, at least for purposes of this PI hearing. So if she
9 wants to ask him a question about the statement, about the way
10 that it was filed, that's fine. I actually think it probably is
11 in the record, because I think all of the Board of
12 Apportionments are in the record as exhibits, as Plaintiffs'
13 exhibits. So I don't have an objection about that, but I do
14 object to the characterization of what is or isn't in the record
15 if she is saying I'm not putting it in or --

16 THE COURT: So I think I understand that you are
17 telling me that this is in the record. Is that correct?

18 MR. STEINER: I believe the October 29th meeting
19 minutes are in the record.

20 THE COURT: So as long as the October 29th meeting
21 minutes are in the record, I don't think at this point we have
22 an issue at all. So Ms. Merritt, you can go ahead and ask your
23 question.

24 MS. MERRITT: Thank you, judge.

25 BY MS. MERRITT:

1 Q. So Mr. Fairfax, the governor made a statement at this
2 meeting here at the bottom of Page 24 of 26 of Document 2-6 that
3 is in the Court's record where he is saying, I think that
4 everybody has done an extraordinary job in the population
5 variance, but also in protecting communities of interest. And
6 my question to you is, does that statement support my earlier
7 question, and evidence to you that from the Board of
8 Apportionment's perspective, that maintaining equalizing
9 population and trying to get as close to zero percent on
10 population variance, as well as maintaining communities of
11 interest, that those two particular factors appear to be of
12 primary concern, at least to the governor, who is one of the
13 three members of the Board of Apportionment?

14 MR. STEINER: I object to the -- if that is attempting
15 to characterize Governor Hutchinson's --

16 THE COURT: Hold on. I don't want that much of a
17 speaking object. I understand your objection. I'm gonna
18 overrule it, but the witness can answer it however he would
19 like.

20 All she asked was does that statement support what she
21 suggested.

22 THE WITNESS: I don't see it as a definite support of
23 what you're suggesting. I view it as him making a statement
24 that they did a great job on population equality, and on
25 communities of interest, not -- that doesn't say to me that

1 population equality should be prioritized.

2 BY MS. MERRITT:

3 Q. Okay. Fair enough. We will hear from some other witnesses
4 who can kind of speak -- go out more directly to that issue as
5 well.

6 A. Sure.

7 Q. Thank you. Now, let's -- the governor at the meeting, they
8 did adopt the plan that the staff had kind of put together. Is
9 that your understanding of how that worked? Staff drew the
10 lines, and then the Board approved --

11 A. Yes.

12 Q. -- the plan that their staff had put together?

13 A. They provide -- I'm sure that the Board provides input for
14 the staff to actually draw.

15 Q. Sure. And we'll hear a little bit more about that later
16 today, I'm sure. Now, you told the Court during your direct
17 examination that race was not your primary motivation in drawing
18 your 16 majority-minority districts. Do you recall that
19 testimony?

20 A. Predominant, right.

21 Q. Wasn't your predominant motivation. But again, you were
22 able to exactly match 16 percent. And so I'm curious, when did
23 you -- when did you begin to look at the racial data and try to
24 draw majority-minority districts? Like at what part -- what
25 time in the process, if you could help us flush that out.

1 A. Sure. Sure. You know, in every project I look at an
2 overview of demographic data, looking at population. If I can
3 do population changes in the jurisdiction, I'll look at that.
4 If I can go down to say for state, I usually go down to the
5 county level and look at different populations in the counties.
6 Look at changes, if I can, in the particular counties. So
7 that's, you know, that was prior or during that first early
8 phase, if you will, of plan development.

9 Q. So you looked at the race data early on?

10 A. I looked at race data for the jurisdictions, the states,
11 yes.

12 Q. Did you start off drawing the majority-minority districts,
13 and then develop the rest of the plan after that?

14 A. It was a combination. You know, usually, or not usually,
15 but many times when you are developing a plan that has what they
16 call VRA districts, Voting Rights Districts, you do want to draw
17 them, at least in the first batch, because if you don't draw
18 them in the first batch, you can actually violate something,
19 because you have all of a sudden drawn all of these other
20 districts and you have eliminated some of the configurations.
21 And so they were done with the adjacent districts.

22 Q. Okay. And is it fair to say you tried to create as many
23 majority-minority districts as you could that would, you know,
24 meet all of the rest of the criteria?

25 A. No. That is kind of a mischaracterization, as many as you

1 could. You know, that's done in, like I said, I have done that
2 in analysis. They call Max Black Plan. I mean, that was done
3 years ago. Not on Arkansas, but other states. This wasn't like
4 that. This is a -- trying to prove or show Gingles 1. And so
5 under the conditions of that, you are not trying to maximize
6 black representation. You're drawing under somewhat normal
7 conditions, although it's -- you know, it's difficult to be
8 normal under these conditions in drawing a potential plan. And
9 it illustrates something that can be done. I think there
10 probably could be more black districts drawn in the state.

11 Q. You haven't tried to draw a plan with more than 16?

12 A. No. I have an inclination, because when you are drawing
13 you get an idea, but I have an inclination.

14 Q. Okay. So even though you didn't specifically set out to
15 draw 16 to match Arkansas's relative 16 percent black
16 population, it did work out that way for you?

17 A. Yes.

18 Q. Okay. How much time did you have to prepare your
19 illustrative plan?

20 A. Well, I mean, I started in September.

21 Q. So you -- do you know that you had actually more time
22 probably than the Board did?

23 A. Yeah.

24 Q. Okay.

25 A. But it wasn't, of course, it wasn't full-time. I mean, it

1 was working on it an hour or two here as I work on other
2 projects, an hour or two there. So it's not full-time.

3 Q. Okay. But you had more time to really work with your
4 numbers and work with the lines, quite frankly, than the Board
5 staff did, given the late release of the census data?

6 A. Absolutely, of course. Yeah. Yeah. That is when I
7 started, when the census data released.

8 Q. Okay. Do you agree that redistricting is adherently a
9 human activity for those policymakers that do it on the ground?

10 A. Interesting question. I would say that it should always be
11 some type of human activity. You can integrate automation, I
12 think, to a point, but I think you probably ought to integrate
13 some human influence in it, so...

14 Q. And the Board staff at the public hearings explained to the
15 public that they believed it was human activity as well, because
16 they are trying to balance a lot of these different competing
17 interests. And I'm glad to see that you would agree with them
18 on that?

19 A. Sure. Sure. There is an automated process, as I said,
20 that you can probably use. You can create automated districts,
21 but I don't think we are at the level of automation that it can
22 actually substitute for human-beings making some of these
23 choices right now.

24 Q. Right. Right. Now, I would like to switch gears, and we
25 are gonna talk about a few of the proposed districts.

1 THE COURT: Before we switch gears, I have a couple of
2 questions.

3 THE WITNESS: Sure.

4 THE COURT: And I think Ms. Merritt asked about this,
5 but I may ask about it in a more wholistic way. So the
6 background here is that this is my first Section 2 case since I
7 have come to the bench, and this is my first vote dilution case
8 ever. So if I ask this in the wrong way, figure out what I'm
9 trying to ask and fill it in.

10 On the one hand, race obviously cannot predominate as you
11 draw the map, at least if you are doing it lawfully.

12 THE WITNESS: Right.

13 THE COURT: On the other hand, part of the idea here
14 is to figure out whether you can draw more black districts. I'm
15 trying to figure out how you chart that path -- and I'm not sort
16 of up at the 30,000 foot level, but down at the ground of you
17 actually doing the map.

18 THE WITNESS: Right.

19 THE COURT: When do you think about, look at, consider
20 black voting-age population in what place, when do you not --
21 what is the level of, it can't predominate, but you obviously
22 have to take it into effect somehow. How does that work?

23 THE WITNESS: Right. Yeah, it -- I say it's a
24 paradox. Gingles 1, where you are trying to show whether, or
25 determine rather, and answer the question, can you draw one or

1 more majority-minority districts that are sufficiently large and
2 geographically compact, at the same time adhering to state and
3 federal guidelines, which one of them is race can't predominate.
4 So how do they coexist. And the way that they potentially
5 coexist is that; number one, you do not draw just using racial
6 data. You don't just try to craft a district or districts using
7 racial data. You use the criteria. And here is what I try to
8 do. First, use the redistricting criteria compactness. And you
9 know, minimizing county splits, VTD splits and communities of
10 interest, and you know, not pairing all of those before you even
11 consider race. And so, to a certain extent, it's a disadvantage
12 really to the group, because of the fact that you are probably
13 not maximizing the number of districts, but what you're doing is
14 you're looking at, for example, just to give you an example.

15 THE COURT: That's what I want.

16 THE WITNESS: Right. If you have a district, an
17 existing minority district, and you're redistricting it, then
18 look first at where you can draw, not considering race. How can
19 you draw complete districts just using compactness, not
20 splitting VTDs, not splitting county splits. Then secondarily,
21 then take a look and see, okay, is this packed, is this a packed
22 district. And if it is, then you need to address that. If it's
23 a district that's, you know, for example, if you draw -- it's at
24 48 percent, 49 percent, look at it whether you have cracked the
25 minority population, and make a determination of whether you can

1 actually include that in a compact manner not splitting
2 political subdivision, so forth and so on and all of the other
3 criteria. So the way that you -- this is just one way, and I
4 read this is one technique is you don't use race as a dominant,
5 you use race as sort of a subordinate. And it shouldn't have to
6 be, because race should be an equal level, but if you use it as
7 a subordinate, then that's how you get out of trouble for race
8 predominate.

9 Q. So let me ask you this. And I'm sure Ms. Merritt is about
10 to go into some of the specifics. I heard her start to say
11 that, as opposed to -- so I don't want to go into the specifics
12 yet, but can you give me one example in Arkansas. I don't care
13 whether it's Little Rock, whether it's northeast Arkansas,
14 whether it's the delta. One example of one area, and just
15 explain to me, walk me through how you sat down and went about
16 creating -- went about answering the question of, is there more
17 than one, or more than the current number of districts that
18 could be drawn that are majority-minority?

19 A. Right. Right. Right. And the answer isn't -- let me be
20 clear. The answer isn't, I'm going to try to draw two or three
21 different majority black districts. It's not that. It's, you
22 try to draw districts that adhere to the criteria and follow the
23 federal guidelines. So just to give you, you know, one example.
24 In Pulaski County, so, in Pulaski County when I first began, I
25 don't know, maybe covering what she may cover, but in Pulaski

1 County when I looked at it, there were several districts that
2 were packed. And so you first have to address that. You have
3 to address the concerns of the packedness, meaning that you have
4 to literally remove those predominantly black precincts in order
5 to unpack them. So you remove those. And where do you place
6 them. You place them into the adjacent districts. And when you
7 place them into the adjacent districts, you may, because I don't
8 know until it's done, end up with another majority black
9 district. And so for example, you know, 30 or 34 -- House
10 Districts 30 and 34 were packed. You remove those. They were
11 placed in HD 33. HD 33 becomes a majority black district by
12 unpacking that. And then you move on. And then you address the
13 other districts. Every district isn't necessarily packed or
14 cracked. You are just trying to equalize the population, trying
15 to add population or subtract if it's high. But that's how you
16 address the majority black districts that are added. They are
17 added many times, because of -- I won't go as far as saying
18 violation, but what I see as problems and potential violations.
19 There are times also where you may accidentally create a
20 majority black district. And I use the word accidentally by
21 lack of any other better word. And that was done with HD 16,
22 where it was an accidental. And the sequence of districts -- of
23 the district creation actually created that HD 16. And we can
24 talk about that if she gets to it.

25 THE COURT: I appreciate your answer.

1 Go ahead, Ms. Merritt.

2 MS. MERRITT: Thank you very much. That was helpful.

3 BY MS. MERRITT:

4 Q. So I am going to turn to a few, a handful of the proposed
5 districts and just to highlight for everybody where we are
6 going, it's really what was in the Davis declaration, and really
7 that's what we are going to talk about, for the most part. So
8 what I am showing you, Mr. Fairfax, is your illustrative plan
9 for Arkansas State House District Five. Does that look familiar
10 to you?

11 A. Yes. Correct.

12 Q. And can you describe for me the shape of that district?

13 A. It is a shape that I probably -- I don't know, exists. I
14 don't know what to call it, but it is a shape that connects
15 three cities, three major cities.

16 Q. Right. So this is the district here that's got, as I was
17 looking at it, I can just kind of see some claws. I see a claw
18 up to Camden in Ouachita County, and then there is a claw down
19 the El Dorado with parts of El Dorado in Union County, and then
20 there are some claws down here to Columbia County to parts of
21 Magnolia, and then there is some stuff over in Lafayette County.
22 Do you see that?

23 A. Yes.

24 Q. So what we are doing, this District 5, would you agree with
25 me that it is overpopulated 2.97 percent as compared to the

1 districts that surround it?

2 A. Yes.

3 Q. Okay. And so for example, it's got, you know, more people
4 than District 2 here to the west. It's got, you know -- this
5 District 2 has got negative 4.64 percent population. Is that
6 true? Do you agree with Mr. Davis on that point?

7 A. I think so, yes.

8 Q. Okay. And then District 6 to the south, it's got negative
9 2.64 percent population as compared to your proposed District 5.
10 Is that true?

11 A. I think that's correct.

12 Q. And then District 7, which kind of surrounds your proposed
13 District 5 the rest of the way around, it's negative 4.55
14 percent in population. Is that true?

15 A. That's correct.

16 Q. And so in order to draw your proposed District 5, you have
17 had to overpopulate it by about 894 people?

18 A. I didn't have to do that. That's the way I did it.

19 Q. That's the way you did it?

20 A. And remember in the rebuttal report, there was a slight
21 configuration change, and it made the district more compact.
22 And it brought the deviations down to .67. So this is just one
23 example, as I say, of many configurations that can occur.

24 Q. Okay. Well, this is the only -- at least with regard to
25 the plan that you submitted to the Court with the maps, this is

1 the only district in this area of the state that's
2 overpopulated. Is that fair?

3 A. In that -- yeah, in that initial plan, but that doesn't
4 necessarily have to be the case. You can have different
5 configurations.

6 Q. Okay. And this is also the only majority-minority district
7 in that particular part of the state?

8 A. That's correct.

9 Q. Okay. As you mentioned when I first showed you your
10 proposed plan for House District 5, your proposal here does
11 split the cities of Magnolia, El Dorado and Camden, fair?

12 A. That's correct.

13 Q. And the city of El Dorado is actually split up into three
14 different house districts, right.

15 A. That's correct. Unfortunately, yes.

16 Q. Right. And this plan also splits multiple school
17 districts, including El Dorado School District into three
18 different house districts, right?

19 A. I believe so.

20 Q. On the bottom right, do you see that tiny -- let's see.
21 I'm going to look at it right here. That tiny little part right
22 there that juts down into Union County there. You see that, Mr.
23 Fairfax? You split three precincts outside of El Dorado
24 Municipal boundary, fair?

25 A. Yes.

1 Q. That's gonna have a pretty big impact on county clerks,
2 won't it?

3 A. I don't know if a big impact is the correct term. And as
4 you are probably aware, in the rebuttal report, I submitted a
5 new HD 5 that didn't have those splits included. And so there
6 are many different versions that you can create. The
7 illustrative plan is just a demonstration plan. It's not the
8 final plan. So if the state desired to take this, they could
9 actually modify it and unsplit those precincts.

10 Q. But at least as of the time that you submitted this plan to
11 the Court, this was the way you did it to reach a
12 majority-minority district in Proposed House District 5, right?

13 A. That's the configuration that I ended up with.

14 Q. Right. Those three precincts that you split out of Union
15 County, those only had populations of 362 people, 674 people and
16 689 -- 1689. Was that right? That's what Mr. Davis had pointed
17 out the population sizes in those three precincts?

18 A. Right. I think he's -- I think he's pointing to the
19 precincts that are above that 82, Route 82. So they're not in
20 that El Dorado. They're in Union still.

21 Q. Right.

22 A. But they're not in El Dorado.

23 Q. Right.

24 A. There are two of them that aren't. And so just to be
25 clear.

1 Q. So if you -- your voting any part black population is 50.07
2 percent in your proposed plan, correct?

3 A. I believe so.

4 Q. And in that 50,07 percent, is that based on the American
5 Community Survey numbers?

6 A. The voting-age population, or the citizen voting-age?

7 Q. Your 50,07, what is the basis of that?

8 A. I'm not -- I don't recall whether that was the voting-age
9 or the citizen voting-age. Could --

10 Q. Yeah. Let's look at that.

11 A. -- I see my --

12 Q. We'll look at Table 6 of your report. It's Page 16. Let
13 me see if I can pull it up. Mine has a lot of writing on it.
14 So let's see. Table 6, I'm going to try to -- this is in the
15 record. I don't know what Plaintiffs' Exhibit, for the purposes
16 of a Preliminary Injunction hearing is, but it is in the record
17 at Document 2-7. It is the report that you submitted in this
18 case, Mr. Fairfax. And it is Table 6 with District 5. And you
19 see the black citizen voting-age population for your proposed
20 District 5 at 50,01 percent. Do you see that?

21 A. Yeah. That's the black citizen voting-age population.

22 Q. Black citizen voting-age. And is that based on ACS?

23 A. Correct.

24 Q. And that's a survey?

25 A. Correct.

1 Q. And there is a lot of built-in error, margin of error in
2 the ACS data, correct?

3 A. There are errors associated, yeah. I don't know built in,
4 but yes.

5 Q. Based on the total voting-age population in your proposed
6 District 5, 50,01 percent of black citizen voting-age
7 population, doesn't that mean that you're only above 50 percent
8 by about two people?

9 A. I have never calculated it that way. I would probably say
10 it's .01, probably more than 2. Yeah. Probably more than 2.

11 Q. Well, if we have got -- I'm sorry. I've got my notes here,
12 but I mean, if we have only got 31. And I'm not very good at
13 math. That's why I'm a lawyer and not a doctor, but if I did my
14 numbers right, 50,01, how many do you think you are above 50
15 percent?

16 A. Well, let's see. Probably -- it may be 3 instead of 2.

17 Q. Okay.

18 A. I mean, if you look at 1 percent of 30,000, that's 300.
19 And then a tenth of a percent would be 30, and then a hundredth
20 would be 3, approximately.

21 Q. Okay. So your proposed District 5 is only two or three
22 people over 50 percent; is that right?

23 A. Yes. But it's above.

24 Q. Okay. All right. Just want to make sure I understand.

25 A. Sure. Sure.

1 Q. All right. So at least with regard to this proposed plan,
2 proposed House District 5, if we, for example, for this plan, if
3 we were to just cut out, even just one area, whether it's, you
4 know, let's just say these few little precincts here down in
5 Union County, you wouldn't be over 50 percent, would you,
6 Mr. Fairfax?

7 A. That is probably true, but that's true with any district in
8 the country probably that is at 50 percent. So any majority
9 black district probably can find one precinct that you can
10 remove, brings it down to 49.

11 Q. Okay. And so that same answer, would your answer be the
12 same if I said to you, sir, if we were to cut out, you know,
13 this part of Camden, your Proposed District 5, you are under 50
14 percent. That's true, right?

15 A. Probably.

16 Q. Same thing here. If we were to cut out Magnolia, you're
17 under 50?

18 A. Probably. You know, just looking at it from what you're
19 stating, yes, I'll say -- I'll agree. But like I said, there
20 are many different ways to configure the district.

21 Q. Right.

22 A. I'm tending to agree that there are places that if you cut
23 out then it would drop down to 50, below 50 percent.

24 Q. Right.

25 A. Doesn't mean that you can't correct it and draw another

1 district that is above 50 percent and modify it. So that's the
2 caveat to that.

3 Q. Sure. And even given the margin of error in the Citizen
4 VAP numbers that are based on the ACS data, isn't it possible
5 that the district you drew is under 50 percent black citizen
6 VAP?

7 A. It is possible, but it is also possible that it's above,
8 because that margin of error is plus, and it's minus. And the
9 same chance, the way the margin of error works is that it is the
10 same likelihood of being plus as it is being minus, so...

11 Q. Okay. But it is possible it is under as well, right?

12 A. Sure. Sure. It is possible, but yeah, it is also possible
13 that it could be on the positive side as well.

14 Q. Okay. All right. Thank you for that explanation. That's
15 helpful.

16 Okay. Let's talk about Proposed District 12. We'll switch
17 gears. We'll get off 5. I'm going to put 12 on the ELM0. And
18 this is a document that is in the record. I'm not going to show
19 you their exhibit number, but it's at Document 2-7, and it is
20 Page 50 of 156 for purposes of our record.

21 Does this appear to be your illustrative plan for State
22 House District 12, Mr. Fairfax?

23 A. It does.

24 Q. And I kind of -- looks kind of like a horseshoe shape to
25 me. Does that seem fair to you?

1 A. Right. There is an incumbent right there in that little
2 notch that you kind of drew.

3 Q. What is that now?

4 A. An incumbent.

5 Q. Oh, okay. And that makes sense. So they were trying to
6 maintain -- trying to avoid incumbents and things of that
7 nature?

8 A. Correct.

9 THE COURT: Let me stop you there. Where is the
10 incumbent?

11 THE WITNESS: When she did it where the 12 is, you see
12 where the Number 12?

13 THE COURT: Yep.

14 THE WITNESS: Sort of right above the Arkansas is an
15 incumbent.

16 THE COURT: Okay. I appreciate that.

17 BY MS. MERRITT:

18 Q. So since the Court had a question about that, tell us, were
19 you trying -- what were you trying to do in drawing your
20 proposed district plan in that way, Mr. Fairfax?

21 A. I wasn't trying to do anything. I was just trying to draw
22 12 in a compact fashion, really.

23 Q. Okay. And so Proposed District 12, as I see it, it
24 includes parts of Phillips County all of the way in the east,
25 and the Mississippi River which is Arkansas's eastern border,

1 and then it goes all of the way to the west here to Jefferson
2 County all of the way to the Pulaski County line; is that right?

3 A. That's correct.

4 Q. And so it goes from the delta all of the way to Pulaski
5 County; is that fair?

6 A. That's correct.

7 Q. And your proposed House District 12 has a population
8 variance of negative 4.98 percent, correct?

9 A. Correct.

10 Q. And so what this means, if I understand that correctly, is
11 that the voters in your proposed House District 12 have a
12 stronger voice than their neighbors to the south in Desha
13 County, right, or to the north in Lee County?

14 A. I just don't like the term stronger voice. I mean, any
15 time you have difference in population you can make a case that
16 someone has a stronger voice. I like to say that they -- it's
17 within the acceptable population deviation for that district.

18 Q. It's within the 5 percent that the Board said, you know, we
19 are not going to be above 5, fair enough, right?

20 A. Right.

21 Q. But what that does mean is if it's negative 4.98 percent as
22 opposed to their neighbors, and it is true that their vote has
23 more strength than their neighbors, fair enough?

24 A. Numerically speaking, yes, but it is still acceptable.

25 Q. Sure. Looking at the size and shape, we talked about the

1 shape of the district and where it stretches, is it fair to say
2 that this Proposed District 12 does not follow a major highway
3 or navigation system? Do you think that was a fair criticism
4 that Mr. Davis said?

5 A. Not really.

6 Q. Okay.

7 A. No. Because one, it's not part of any of the criteria.
8 And two, I have never seen it as any criteria, redistricting
9 criteria to follow a major highway.

10 Q. Right. Well, setting aside whether or not it is criteria,
11 is it true that it doesn't follow a major highway or navigation
12 system?

13 A. Yes. And that's the case in many districts in just about
14 practically every state that I have seen. Major highways don't
15 traverse into rural areas many times. And so that's a lot of
16 rural states that that can apply, so...

17 Q. Okay. Now, in your proposed House District 12, you do
18 include almost all of Phillips County. Do you see that there,
19 Mr. Fairfax?

20 A. Yes.

21 Q. But you cut out the county seat, Helena, West Helena,
22 right, and you include Helena, West Helena in a district with
23 Lee County, District 48; is that right?

24 A. That's correct.

25 Q. And you include all of rural Phillips County in a district

1 with a lot of Jefferson County and places to the west. Is that
2 fair?

3 A. That's correct.

4 Q. All right. So you split out the municipal center of
5 Phillips County, and you put it with another group, right,
6 another group of folks, another population?

7 A. That's correct. That Helena area is in 48.

8 Q. Okay. The rural voters in Phillips County are now going to
9 be, if the Court adopts, or the Court orders the state to draw
10 the lines like you are proposing, the rural voters of Phillips
11 County are going to be in a house district with voters in Pine
12 Bluff and Jefferson County. And that is like 56 percent of the
13 district is in Jefferson County. Is that fair? Is that right?
14 56 percent of the voters in your Proposed House District 12 are
15 in Jefferson County?

16 A. Well, this, once again?

17 Q. Can your answer my question? Is that right? 56 percent of
18 your voters in Proposed House District 12 are in Jefferson
19 County? Does that sound right?

20 A. I think that may be correct, as far as a statement, yes.

21 Q. All right. Thank you. That's what I thought. I just
22 wanted to make sure that that was right. I guess my question,
23 what do you think the voters in rural Phillips County have in
24 common with the voters in Pine Bluff?

25 A. Well, they are all in that delta region. And there is some

1 commonality in that delta region. And as I said before, this is
2 an illustrative plan. And so that District 12 could have
3 different configurations that is different than what I put it
4 together.

5 Q. Okay. And so if I asked you the same question, what did
6 the voters in rural Arkansas County have in common with the
7 voters in more urban Pine Bluff, would your answer be the same,
8 just that they all live in the delta?

9 A. I would probably say, to a certain extent, the same or
10 similar answer, yes.

11 Q. Okay. And then what about the same question. What do the
12 voters in more rural part of Jefferson County have in common
13 with voters in more urban Pine Bluff, same answer?

14 A. Yes. But let me just say this. This is not uncommon in
15 redistricting plans that you actually will be able -- or you
16 will actually draft a plan that crafts a rural area with a city.
17 I mean, unfortunately that happens. And the rebuttal report,
18 and I gave the example of the Board plan doing very similar,
19 where they removed Arkadelphia. And the remaining portion of
20 the county is in another district. And the case could be made
21 very similar to that in the Board plan, but for whatever reason,
22 they made the decision to do that.

23 Q. And we talked earlier about your proposal. You split Pine
24 Bluff into five different house districts, right?

25 A. Correct.

1 Q. Okay. And parts of Pine Bluff are in Proposed House
2 District 12, right?

3 A. Correct.

4 Q. And this proposed plan splits multiple school district
5 boundaries as well in Pine Bluff, including the Pine Bluff
6 Dollarway School District; is that right?

7 A. I believe so.

8 Q. And then you are also splitting Helena, West Helena, and
9 the Dewitt School Districts in your Proposed House District 12,
10 is that right?

11 A. Yes.

12 Q. All right. Thank you. I think we're --

13 THE COURT: Keep that map there for a second.

14 MS. MERRITT: Yes, Judge.

15 THE COURT: Mr. Fairfax, just so I understand it, in
16 your Illustrative District 12, where are the major black-voting
17 population centers? Pine Bluff, I would assume, is one of them?

18 THE WITNESS: Yeah.

19 THE COURT: Are there any others in that District?

20 THE WITNESS: Not that I can recall. You know, as I
21 mentioned before, I'm not looking at trying to draw major black
22 population centers, but I can't recall, and just to follow on
23 that the current District 12 takes a similar path. It just
24 doesn't extend into Jefferson. And in order to actually obtain
25 that population, I extended it a little further into Jefferson.

1 THE COURT: I want to be very forthright with you and
2 with everybody about the issues that I'm thinking about in my
3 head. Let's assume, just for purposes of an assumption, there
4 is a large geographically compact black community in some city,
5 and you can draw a big circle around it?

6 THE WITNESS: Right.

7 THE COURT: So let's assume that that district was --
8 in the proposed plan, that district was made up of one circle,
9 right, so one district they just put a circle essentially around
10 the large black population, right?

11 THE WITNESS: Very compact.

12 THE COURT: Very compact. Totally understandable to
13 say hey, let's split that one circle into two squares. And you
14 know, that way you can make two districts. I get that. And
15 let's say the squares aren't long. They are fairly even shaped.
16 Makes a lot of common sense to me, right.

17 On the other hand, one theoretically could take this
18 circle, which is a geographically compact group, and do pizza
19 pie triangles that in order to get the appropriate amount of
20 other population extend all of the way up like rays of sunlight.
21 At some point that becomes ridiculous, right? I mean, at some
22 point if you have a pizza pie all of the way out covering the
23 whole state. Yes, you have a geographically compact, you know,
24 minority community, but now you have sort of included three
25 quarters of the state.

1 THE WITNESS: Correct.

2 THE COURT: I'm trying to consider where on that
3 spectrum something like 12 falls?

4 THE WITNESS: Right.

5 THE COURT: Can you give me some thoughts about A,
6 whether I'm thinking about this correctly; and B, where on that
7 spectrum 12 falls?

8 THE WITNESS: Right. Right. You have to take into
9 consideration several things. You have to take into
10 consideration, let me fall back and say first that the sequence
11 of plan development can determine the configuration of future
12 districts, meaning that where you start may be -- may determine
13 where you're going to end up or how the configuration of the
14 other districts. So the configuration of 12 is a logical
15 configuration. When you think of 13, it's -- you have got 13 on
16 the top and 11 on the bottom. Where is it gonna go to grab
17 population? You have got the incumbent down there, and you are
18 trying to stay within the county boundaries. So as you are
19 flowing down, it actually is logical -- has a logical
20 configuration. On the bottom end you have that Arkansas River
21 where Desha is. That's the boundary for 11. And on the top,
22 you know, you see you have that Jefferson boundary. And then
23 you have that Arkansas for 13 that dips down where the words
24 Arkansas is. And so essentially it is a logical compact
25 district that you are creating, adding the sufficient amount of

1 population to get you to Jefferson. You don't want to go above
2 into Arkansas any further. You, of course, don't want to go
3 above that into Lonoke if you want, above Jefferson. And you
4 don't want to go below Desha, because that's where 11 is. So
5 you are forced and compelled to actually craft or draw that
6 district that extends out to Jefferson. Do you see what I mean?
7 You're hamstrung a little bit on the configuration. Doesn't
8 mean that you can't do that. I could have gone into Lonoke. It
9 doesn't make sense to do that. I could have gone below the
10 Arkansas River to Desha. That doesn't make sense really when
11 you think about it. So the only way to flow that is all of the
12 way where I thought, I mean, where I did really.

13 THE COURT: I appreciate that.

14 THE WITNESS: Okay.

15 BY MS. MERRITT:

16 Q. Just to make sure that we are clear for the record here,
17 and for the Court's help as well or understanding. The black
18 lines on this map, that's your illustrative plan lines, you drew
19 those lines, right?

20 A. That's correct. On this it looks kind of a different
21 coloring, you know, so --

22 Q. The red lines are the county lines, right?

23 A. That's correct.

24 Q. And the black lines on this map is where you chose to draw
25 this line, for example, the northern line of District 12, you

1 put that line there on purpose, right?

2 A. That's correct. Because there is an incumbent right above
3 the Arkansas words.

4 Q. Okay. Now, let's talk about District 16. And if we could,
5 why don't you -- can you describe the shape of District 16,
6 Mr. Fairfax?

7 A. Once again, it's hard to describe a shape of a district,
8 unless it's a square or a rectangle or a circle or something
9 like that. So it's an extended district.

10 Q. And so District 16, as we see here, it's shaded in blue,
11 and it, as I see it, I'm looking at it from the east. It looks
12 like it reaches from Pine Bluff in the east, down to -- it's
13 most of Dallas County is here, and then Arkadelphia to the west,
14 and then there is this kind of this, I don't know how to
15 describe this here, but it is kind of like a finger reaching
16 over there into Clark County to reach portions of Arkadelphia
17 and that population there to the west. Is that a fair
18 characterization of your --

19 A. I don't know if I'd use the word --

20 Q. -- Proposed District 16?

21 A. I'm sorry. I don't know if I would use the word finger
22 sticking out, but there is an extension, I guess, into
23 Arkadelphia.

24 Q. Okay. Thank you. Now, your proposed District 16, you
25 don't disagree that it is underpopulated by 1,293 folks, so it

1 is negative 4.29 on the population variance?

2 A. That's correct.

3 Q. So as compared to the surrounding districts, it's got fewer
4 people, right?

5 A. Correct.

6 Q. All right. Now, the Court has heard quite a bit about
7 this, but you have combined Pine Bluff and Arkadelphia in one
8 house district, because on paper they share sufficient
9 commonalities?

10 A. Correct.

11 Q. All right. You agree that at least there is no major east
12 west route between Arkadelphia and Pine Bluff?

13 A. Yes, but they can connect each other through roads and
14 connected roads.

15 Q. Right. But you know, a representative who is representing
16 District 16, they would have to drive outside their district to
17 drive from one city to the other, correct?

18 A. Actually, I checked that. And I think they don't have to,
19 but the roads are very small. They have to go through some very
20 small roads there, but they can drive and stay inside the
21 district.

22 Q. Okay. Did you check to see they are driving through some
23 fields or something, Mr. Fairfax?

24 A. No. I think the point that Mr. Davis was getting to is
25 that there is no major roads.

1 Q. Right. And it would be about an hour and a half drive to
2 get from one city to the other within one house district. Do
3 you concede that?

4 A. Using major roads, but less if they went through these
5 smaller roads, if you will.

6 Q. Okay. Well, and at least in a fairly small state like
7 Arkansas, when you can drive from one corner to the other,
8 that's a fairly lengthy drive for one house district when you
9 have got a hundred of them.

10 A. That, once again, that's not uncommon for a representative
11 to have to travel an hour and a half throughout their district,
12 especially in rural areas. Even more than that in some states.

13 Q. I guess everyone is entitled to their opinion on that
14 point.

15 Now, District 16, it does stretch west to grab additional
16 black population in Arkadelphia, correct?

17 A. I mean, I'm trying to struggle with the characterization of
18 grabbing black population. It extends into Arkadelphia, yeah,
19 and adds population.

20 Q. Okay. And --

21 THE COURT: Would you agree that there is a
22 significant black population in Arkadelphia that is part of that
23 district?

24 THE WITNESS: Yes. I would agree that there is black
25 population in there.

1 THE COURT: Okay.

2 BY MS. MERRITT:

3 Q. And that little shape that you wouldn't agree with me is a
4 finger shape, but that particular -- those precincts there that
5 District 16 reaches into in Arkadelphia, it does capture voters
6 in order to make this a majority black district, fair?

7 A. Once again, in order to make -- I'm struggling with. It
8 does add to the black population in the district.

9 Q. And the black population in District 16, according to your
10 report, is 50.6 percent, correct?

11 A. I believe so.

12 Q. And so how many people are we over 50 percent?

13 A. I think you're getting above my --

14 Q. Ten or so, perhaps?

15 A. Yeah. Yeah.

16 Q. It's close, isn't it?

17 A. I think it's more than 10, because you know, we have
18 already established, that 300, I think, was 1 percent, I
19 believe. So half a percent would be 150. So it's more than
20 150, let's say, if it's .6.

21 Q. About more than 150 people?

22 A. Yeah.

23 Q. Okay. But do you -- within -- still within the margin of
24 error within the ACS survey, right, so even as you drew Proposed
25 District 16, it is possible, isn't it, Mr. Fairfax, that it is

1 under 50 percent as you drew it, right?

2 A. It's possible, but it is also possible, we have talked
3 about this, that it could be higher. And it is the same
4 likelihood. And so there is nothing to show that it is on the
5 negative side.

6 Q. Okay.

7 A. So you have to assume that it also could be positive.

8 Q. Okay. And would you agree with me, Mr. Fairfax, if you
9 were to exclude these precincts here in Arkadelphia. I'm just
10 going to cover them up with my finger. If you were to put those
11 in District 19, you would be under 50 percent in District 16,
12 wouldn't you?

13 A. In my -- I kind of answered this before.

14 Q. Can you answer my question yes or no, for the record?

15 A. Yes.

16 Q. And you can go on with your answer. I just wanted to make
17 sure we have a clean transcript, because you were nodding yes.
18 You can go ahead with your answer.

19 A. All right. I appreciate that. Thank you. Yes, but as I
20 mentioned before, any black district or minority district that's
21 50 percent, you can take out a precinct most likely and it will
22 drop below 49 percent, so that's --

23 Q. Sure. And similarly, if you would bear with me, if we were
24 to, for example, cut out some of these precincts over here to
25 the east of your proposed District 16 in Pine Bluff, that would

1 similarly cut this under 50 percent, wouldn't it, Mr. Fairfax?

2 A. That's correct, although the incumbent is over there.

3 Q. Okay. Now, to the east, your District 16 actually grabs
4 precincts in Pine Bluff that are over 76 percent black
5 voting-age population, correct?

6 A. I'm sure that's probably where the incumbent lives.

7 Q. Okay. I think that's all my questions on Proposed District
8 16, unless the Court has additional questions.

9 Okay. Let's talk about Proposed District 48. Or actually
10 real quick.

11 Let's talk about 34 for a moment. This is in the record,
12 Document 2-7, Page 72 of 156. Do you recognize this,
13 Mr. Fairfax, as your proposal for State House District 34 here
14 in the Little Rock area?

15 A. Correct. Yes.

16 Q. How would you describe the shape of your Proposed House
17 District 34?

18 A. Once again, it is hard to characterize a shape that is not
19 a circle or square or something like that.

20 Q. Right. It's kind of a backwards C, perhaps. I don't know.
21 I couldn't describe it either, so I was wondering if you could.
22 As I see this Proposed House District 34, it includes portions
23 of downtown Little Rock, and the Hillcrest area for those of us
24 who are from Little Rock, and then it also includes more rural
25 and parts of southwest Little Rock. My question for you is what

1 commonalities did you see between the residents and voters, for
2 example, in Hillcrest and Lee Avenue and the folks and the
3 voters that live down in this part of the city in like the
4 Fourche Dam Park part of the city?

5 A. Well, all of them, 33 and 34 are wholly contained in the
6 city of Little Rock. And so if this was a city council plan, I
7 think that, you know, understanding and matching neighborhoods,
8 which by the way, I looked at trying to not split neighborhoods
9 in this particular area. It is very difficult. But with a
10 state legislative plan, that's a little different than a city
11 council plan that you would divide up the city by.

12 So legislative plan may have more commonalities at the
13 state level than if this was a local city plan. So I would have
14 a little more concern if it was a city council plan. And let me
15 just say that those just, to go on record, those little inlets,
16 there are incumbents that are located in that Pulaski, right
17 below the word Pulaski. So that's the reason why that jetted
18 in. And then up at the top there is also another incumbent. So
19 some of these configurations, it hamstrung me a little bit, but
20 I'm trying to make sure that I don't pair the incumbents. So
21 some of the configurations actually are a little odd because of
22 the incumbent location.

23 Q. But it's your opinion and testimony that this meets the
24 Board's criteria in terms of compactness?

25 A. Yes. Yes.

1 Q. Okay. All right.

2 THE COURT: Let me stop you for a second.

3 Mr. Fairfax, you have mentioned this a number of times, the
4 not pairing incumbents. Obviously, it's part of the criteria.
5 I get that. Was that a particularly important part of the
6 criteria for you? And if it was, why? Was it more important
7 than other criteria? I mean, for example, population or
8 anything like that.

9 THE WITNESS: Right. Right. No. It wasn't more
10 important, but the incumbent pairing would be what I think the
11 Board, in this particular case, would look to do. They would
12 look to try to not pair the existing incumbent. So it brings it
13 into a comparable plan that you are creating that the Board
14 would create, because you would assume that they are going to
15 look out for incumbents not pairing with each other. So you are
16 trying to simulate the same thing that they are doing.

17 THE COURT: I really mean this as a why. I want to
18 learn. Why would you assume that? Now if it was the legislator
19 drawing the map, there is an easy explanation for why you would
20 assume that, but with the Board of Apportionment who are made up
21 of members who are not in the legislator drawing the map, why
22 would that be the appropriate assumption, or at least in terms
23 of how important it is on the level?

24 THE WITNESS: Not necessarily -- yeah, it's not
25 necessarily that it juts up to the higher level, but you would

1 assume that they would not want to disrupt to legislature. I
2 mean, there is some benefit to the voters by not impairing,
3 regardless of the legislators. There is a benefit, so the
4 voters don't end up getting incumbents swapped back and forth.
5 So it's not just -- when you pair incumbents, you also hurt the
6 voters too. And so that's a critical point to think about.

7 THE COURT: Okay.

8 BY MS. MERRITT:

9 Q. Mr. Fairfax, I put up on the ELMO documents in the record,
10 Document 2-7, and it is on Page 86 of 156. Does this appear to
11 you to be a true and accurate copy of your illustrative plan for
12 Arkansas House District 48?

13 A. That's correct.

14 Q. And we have kind of looked at it a little bit earlier,
15 because it's right next door to House District 12, which we
16 talked about a little bit earlier. It is in the delta here
17 right next door to District 12. As we discussed earlier, your
18 proposal for House District 48 grabs Helena, West Helena out of
19 Phillips County. And the population of that city really
20 dominates the voters in the rest of this really rural district.
21 Would you agree with me on that, Mr. Fairfax?

22 A. I would say it's a significant population in the
23 districting.

24 Q. Right. In terms of the population, most of them live right
25 here in Helena, West Helena, right?

1 A. I can't recall whether it's most. It's a significant
2 portion.

3 Q. Okay. Isn't it true that there is no highway connection
4 from Helena to the rest of District 48 that does not exit the
5 District?

6 A. Right. And this gets into what we talked about before.

7 Q. The answer is yes?

8 A. Yes. There is no major highway.

9 Q. Sure. And so a representative from Helena would have to
10 leave his district or her district in order to visit his or her
11 constituents who might live in Brinkley or Marianna, true?

12 A. No. No. Because there are roads, as I said before, there
13 are roads in there that aren't major highways that extend up
14 north. They could go into Lee County.

15 Q. Well, we'll hear from some folks who actually live there
16 who might tell us what the condition of those might be.

17 All right. Well the population that you grabbed in Helena
18 is 72.77 percent black voting-age population, right?

19 A. I'll take your word for it. I didn't measure the black
20 population there.

21 Q. Okay. Assume with me that it is. It is 72.77 percent
22 black voting-age population. That population is larger than the
23 populations of the cities of Marianna, Clarendon and Augusta
24 combined, isn't it?

25 A. I'll take your word for it.

1 Q. Okay. Do you agree with me that those cities are each the
2 county seats of their respective counties in this proposed
3 district?

4 A. Yes.

5 Q. Okay. Are you aware that the current representative of
6 Helena, West Helena, Representative Tollett is a resident of
7 Marvell, Arkansas?

8 A. I remember that in Mr. Davis's declaration.

9 Q. So under your proposal, he would be drawn out of his
10 district into District 12, right?

11 A. Maybe there is some confusion. The data I had, had --
12 didn't have anyone in Marvell.

13 Q. Okay. Well, we'll try to clear that up. You needed to
14 include Helena in District 48 to make it a majority black
15 district, right?

16 A. Again, you know, your term is a needed to. In this area
17 specifically on the delta side, there are many different ways to
18 draw majority black districts.

19 Q. Okay. Let me ask it a different way. If we were to
20 include Helena, West Helena in District 12, this would not --
21 District 48 would not be a majority black district, would it?

22 A. Unless District 48 was reconfigured.

23 Q. Okay. Fair enough.

24 Now as you sit here today -- I don't have anymore questions
25 on District 48, unless the Court does.

1 THE COURT: The Court does not.

2 BY MS. MERRITT:

3 Q. As you sit here today, Mr. Fairfax, you don't know a way to
4 get to 16 majority black voting-age population districts without
5 splitting up Pine Bluff the five different ways that we looked
6 at on the Defendants' Exhibit 1, do you?

7 A. I don't necessarily agree with that. Like I said, there
8 are many different ways of drawing, I think, 16 different
9 districts, yeah. I don't necessarily agree that you would have
10 to split up Pine Bluff in five different ways.

11 Q. And that wasn't my question. So let's make sure that you
12 understand the question that I'm asking you. I know you said
13 that there are many different ways to do it, but you haven't
14 actually done it is my question, right. So as you sit here
15 today, you don't know of another way to do it that does not
16 split Pine Bluff at least five different ways, do you?

17 A. I don't know it specifically, but there is a level of
18 experience that you gain in drawing plans. And using my
19 experience, I would say that there are different ways of doing
20 it, recognizing though that you have three incumbents in that
21 area. So you are going to have at least three splits.

22 Q. Okay. And so as you sit here today, you haven't done the
23 exercise to try to do it any other way, is that fair?

24 A. That's correct.

25 Q. And so as you sit here today, the only way you know how to

1 get 16 majority-minority districts is to split Pine Bluff five
2 ways?

3 A. Once again, I guess if you're talking -- if you say I
4 haven't developed a plan, I agree with that.

5 Q. Okay.

6 A. But as I mentioned, there may be 17 districts. So Pine
7 Bluff doesn't have to be split if there's a 17th district. Do
8 you see what I mean?

9 Q. I'm not sure if I do. I mean, you might split it six ways
10 instead of five?

11 A. No. Let's say the assumption is that you don't split it,
12 and I think what you're inferring is that maybe you lose a
13 majority black district. I think that there is another one out
14 there that would keep it at 17, or keep it at 16 potentially.
15 So as I said, there are many different ways that you can
16 actually draw that plan configuration that I did.

17 Q. But you haven't actually done that to confirm that you
18 could, right?

19 A. That's right.

20 Q. The only way that you have been able to confirm that you
21 can do it and meet the redistricting criteria and satisfy the
22 law is the one plan that you have given the Court, right?

23 A. Correct.

24 Q. And that plan splits Pine Bluff five ways, right?

25 A. Correct.

1 Q. Okay. And so I'm gonna ask kind of the same question, but
2 with regard to some of the other decisions that you made in
3 drawing the map that you did. Okay. So as you sit here today,
4 Mr. Fairfax, you don't know exactly how you might draw a plan to
5 get to 16 majority black districts without, for example --

6 We haven't gone to the Blytheville District. Let's talk
7 about House District 55 real quick. I didn't mean to skip over
8 this. Let's talk about it. Let's talk about House District 55
9 in your plan. This is Document 2-7, Page 93 of 156. Does this
10 appear to you to be a true and accurate copy of your proposal
11 for House District 55?

12 A. Correct.

13 Q. Okay. Can you please describe the shape of this district?

14 A. I can call this a coastal district.

15 Q. You can call it what?

16 A. A coastal district.

17 Q. And it's coastal because why, it's following on the eastern
18 border there, the Mississippi River?

19 A. Correct.

20 Q. And it's got this narrow strip that kind of follows along
21 the river, fair enough?

22 A. Correct.

23 Q. And is it true that it's only one precinct wide almost the
24 entire length of the district?

25 A. No. No. Down at the bottom there are multiple precincts

1 down.

2 Q. Over here?

3 A. Yeah, and in Mississippi.

4 Q. All right. Would you agree with me that it is an
5 oddly-shaped district?

6 A. The last three decades, or two decades, it's been an
7 oddly-shaped district.

8 Q. Yeah.

9 A. So it's very similar to the last decade and the decade
10 before.

11 Q. And it does cross back and forth over I-55. I mean, you
12 don't dispute that that's true, do you?

13 A. No, but like I just mentioned, the other past two decades
14 did the same thing.

15 Q. Right. At it's most northern point right here,
16 Mr. Fairfax, your District 55 nearly cuts two precincts in
17 District 54 from the rest of that district?

18 A. I think the keyword is nearly, right. It doesn't cut two
19 precincts, but it nearly, I guess.

20 Q. It nearly does. So it kind of leaves. So this is 54 over
21 here to the west in Mississippi County. And then you have kind
22 of got 55 here, and it reaches up, and then there is just this
23 one little area here, and then there is what we kind of call an
24 island over here. The north, extreme northeastern corner of the
25 state of Arkansas is kind of an island here in your plan. Do

1 you see that?

2 A. Yes.

3 Q. There is only one highway that connects these two sections
4 of District 54 that are to the west and to the east of your
5 proposed District 55. Do you agree with that?

6 A. Yes. One highway.

7 Q. One highway.

8 A. Major highway, I assume.

9 Q. And that little strip of land that you left here to the
10 north of your proposed District 55, that little strip of land
11 there is only 1.25 miles wide, isn't it?

12 A. I didn't measure that. I saw that in Mr. Davis's
13 declaration, and I assume that that is correct.

14 Q. You didn't go back and double check to see that he was
15 wrong?

16 A. No. Because it -- it wasn't significant in my estimation.

17 Q. Okay. And do you disagree with him when he said that no
18 one lives in that strip of land right here?

19 A. No, I don't disagree. That could be the case.

20 Q. All right. And so --

21 THE COURT: Ms. Merritt, just to so the record is
22 clear, are you pointing to what I guess I will call the light
23 blue strip that goes vertically upwards, or are you pointing to
24 the green strip above it?

25 MS. MERRITT: I'm actually, Judge, thank you for your

1 question, I'm actually pointing to the green strip above that
2 blue area, so that the area that Mr. Fairfax chose to leave
3 within District 54.

4 THE COURT: I understand. You are pointing to the
5 green east west strip. That's fine.

6 MS. MERRITT: Yes. That reaches the northern Arkansas
7 boarder, has no one that lives there.

8 THE COURT: Okay. You can answer the question. Thank
9 you. If there is a pending question.

10 MS. MERRITT: I think I'm getting to my next question.

11 BY MS. MERRITT:

12 Q. Now, this population here to -- the island, I will refer to
13 it, if we can agree. I'm going to call, this island of
14 population here in the northeastern part of the state.

15 MR. STEINER: I object to the characterization, Your
16 Honor. I don't think it's an island under any dictionary
17 definition of the term island.

18 THE COURT: I understand your argument. I'm going to
19 overrule it, because I think I heard the witness agree that he
20 would characterize it as an island, but even if it's wrong, both
21 of the characterizations don't necessarily make it an island,
22 but we are having a conversation about it, so I think everybody
23 understands. So overruled. Go ahead.

24 MS. MERRITT: Thank you, Your Honor.

25 BY MS. MERRITT:

1 Q. Mr. Fairfax, you needed to reach east around your Proposed
2 District 55 and into this island here in the northeastern part
3 of the state in order to capture population to include in your
4 District 54. Is that right?

5 A. That is correct in what you are saying. That's not how I
6 reached the -- those two precincts attaching to 54. They were
7 reached -- I originally had the configuration of the northern
8 end, almost identical to the existing plan, 2011, but then I
9 added Blytheville. And when I added Blytheville I removed those
10 two precincts, causing that 1 point some mile difference that
11 you are talking about.

12 Q. Well, your Proposed District 55 is under populated by 1,072
13 people with a negative 3.56 percent variance, isn't it?

14 A. Uh-huh.

15 Q. Is that a yes?

16 A. Yes. I'm sorry. Sorry about that.

17 Q. And so in District 54, by contrast, is overpopulated by
18 1,462 people with a 4.85 percent variance, correct?

19 A. Correct.

20 Q. And so isn't it true that the populations of these two
21 precincts, 54 and 55 in your proposal could be equalized just by
22 drawing your lines a little bit different, couldn't they?

23 A. It's a possibility.

24 Q. But doing that would change things with regard to the
25 majority black district in 55, wouldn't it?

1 A. And they're both within acceptable deviations. So you
2 don't have to.

3 Q. I don't know that I heard a direct answer to my question.
4 Would including the population that is in this island in the
5 upper northeast corner of the state in District 55 change the
6 status of 55 as a majority-minority?

7 A. As I mentioned before --

8 Q. And I'm sorry. Would you please directly answer my
9 question?

10 A. Okay. Let me say yes, but can I follow up?

11 Q. Sure.

12 A. Okay. Yes. However, as I mentioned before, any district
13 that is around 50 percent, you can find a precinct or two to
14 change it from 40 -- 50 percent down to 49 percent. That is not
15 uncommon.

16 Q. Uh-huh. Okay. Moving those two precincts that is District
17 55, would that also improve the compactness of those two
18 districts?

19 A. Possibly. That's difficult. And the reason for it is it
20 extends the district and elongates it a little further, which
21 would most likely, or could lower the Reock measurement in that
22 little notch that's in that precinct that's over -- that you
23 call an island is -- would also reduce the compactness
24 measurements and the Polsby-Popper side. I'm not sure that
25 would increase it. It could decrease it.

1 Q. What about the other redistricting criteria, you know, by
2 including this little island here in District 54, which of the
3 Board's redistricting criteria and goals does it further, in
4 your opinion?

5 A. By including that?

6 Q. By including it in District 54.

7 A. At this moment, I can't think of any.

8 Q. Okay. All right. Including it in District 55, would that
9 improve contiguity of District 55?

10 A. No. It is already contiguous.

11 Q. Okay. And you are not sure if it would improve
12 compactness, but it could?

13 A. It could also decrease by what I just said.

14 Q. Okay.

15 A. It elongates and also you have a little notch cut out in
16 that precinct that could lower it. So it also could lower it.

17 Q. All right. Now including this little island of land in the
18 northeast corner of the state in 55, that would also reduce the
19 black VAP in District 55 to under 50 percent, based on your
20 data?

21 A. I believe what you are saying is correct.

22 Q. Okay. And so you pretty much have to include those two
23 precincts in the northeast corner of the state in District 54,
24 not District 55, in order to create 55 as a majority-minority
25 district, correct?

1 A. No. No. Remember I said I had a configuration with the
2 precincts in there. And it was majority black. And remember I
3 added Blytheville and modified it. Removed those precincts. So
4 there is a configuration with those precincts added that you can
5 create a majority black district. As I mentioned before, there
6 are many different ways you can draw these district.

7 Q. But your plan that you submitted to the Court, this is how
8 you chose to draw the lines?

9 A. As an illustrative plan.

10 Q. Okay.

11 A. Not as any final plan, right.

12 Q. Okay. Table 6, going back to your report where you have
13 got those numbers with regard to the voting-age population,
14 District 55 has a black citizen voting-age population of 50.03
15 percent. And so is that about 6 people or so over 50 percent?

16 A. That's maybe say nine or something like that, since you
17 said .06.

18 Q. Less than 10 people over 50 percent?

19 A. It could be 10 people, but yes, somewhere around there.

20 Q. And it's possible, isn't it, Mr. Fairfax, that your plan as
21 you drew it is actually under 50 percent given the error rate in
22 the ACS survey, right?

23 A. Yes, but it is also likely that it is above that amount.

24 THE COURT: Can you put that up for a second?

25 MS. MERRITT: Yes, Your Honor.

1 THE COURT: Mr. Fairfax, if this is in your rebuttal
2 report, just tell me that and I can look at your rebuttal
3 report. I think you had mentioned in your testimony that there
4 is a way for those two districts up at the extreme northeast to
5 be in 55, for there still to be a reasonably drawn black
6 majority voting district?

7 THE WITNESS: Correct.

8 THE COURT: Could you just -- again, I'm not asking
9 you to get really specific, but could you just generally explain
10 to me what that district would look like?

11 THE WITNESS: Sure. So if you added those precincts
12 and have somewhat of the same configuration as the 2011 plan,
13 then what I had the configuration was into Crittenden, the 55
14 extends a little further down into Crittenden, down around
15 Marion on the west side, if you will.

16 THE COURT: Can you move that? Okay.

17 Okay. I appreciate it.

18 THE WITNESS: Sure.

19 BY MS. MERRITT:

20 Q. But when you start making changes like that, it's going to
21 have a ripple effect on your other districts, isn't it,
22 Mr. Fairfax?

23 A. Absolutely.

24 Q. And you have several other majority-minority districts
25 there in the delta that might be impacted by including that

1 population. And is that why you chose to draw the lines the way
2 you did in your proposal?

3 A. No. No. No. That is because Blytheville was added.

4 Q. Okay. All right. So going back to the line of questions I
5 was asking you before we went back to 55. You know, as we sit
6 here today, you have not gone back and drawn a proposal with 16
7 majority-minority districts that does not create this island of
8 District 54 in the northeast corner, you haven't tried to do
9 that and seen how it would impact the rest of your plan, have
10 you?

11 A. No. Not in seeing how it would impact the rest of the
12 plan, yeah.

13 Q. Okay. And as you sit here today, Mr. Fairfax, you have
14 not -- you don't know a way to get to your 16 majority black
15 districts without, you know, splitting out those two precincts
16 from the city of El Dorado, for example. You haven't gone back
17 to crunch those numbers and figure out exactly how to make it
18 work?

19 A. Yeah. Remember I mentioned that in my rebuttal report.
20 There is an example of that.

21 Q. There is an example of that specific one?

22 A. Right.

23 Q. Have you gone back and figured out exactly how that --
24 doing that one change would then impact all of the other
25 districts around it and redrawn all of the other districts from

1 there?

2 A. You are speaking of 55 or 5?

3 Q. The two districts -- precincts in the city of El Dorado. I
4 mean, every change that you make is going to impact everything
5 around it. I guess my point is that you have not gone back and
6 prepared an alternative illustrative plan other than the one
7 plan that the Court has seen?

8 A. That is correct. I have not prepared another illustrative
9 plan.

10 Q. Okay. And so as you sit here today, you don't know how to
11 get to 16 majority-minority districts, for example, without
12 splitting out the city of Helena, West Helena from the rest of
13 Phillips County, right?

14 A. But I'm confident that I could do so, yes.

15 Q. You are confident you could, but you haven't done it yet?

16 A. No. No. No.

17 Q. Okay. Likewise, same question. Sitting here today, you
18 don't know how to get to 16 majority black districts without
19 combining African-American populations in Arkadelphia and Pine
20 Bluff, three counties away?

21 A. I did look at a different version that goes down south. So
22 you could take a southern route and create another HD 16 that
23 doesn't include Arkadelphia. So there is another option.

24 Q. Have you submitted --

25 A. No. No.

1 Q. -- rebuttal, given that to the Court, or to us?

2 A. No. I just recalled -- I just recalled doing that, because
3 of the fact that there was a concern about that.

4 Q. Sure. And so while certainly there are probably
5 theoretically infinite ways that you can draw these lines, as
6 you sit here today, we only have the one plan to go from, and
7 this one proposal for the 16 majority-minority districts, right?

8 A. Correct. And the alternatives for HD 5, and what I'm
9 meticulating right now.

10 Q. Okay.

11 MS. MERRITT: If you could give me just one moment to
12 confer, Your Honor.

13 THE COURT: Sure.

14 MS. MERRITT: I don't have any other questions. Thank
15 you. I appreciate your time.

16 THE COURT: Let me ask a couple of other questions,
17 and then we'll take a break, and then we'll do redirect.

18 Mr. Fairfax, so, one, I think, pretty self-contained
19 question, at least I hope, is in your report or your rebuttal or
20 anywhere else that I might have, do you at all provide where the
21 sort of major black population comes from in any of these
22 districts? I guess what I'm trying to figure out is, is there
23 any way for me to see in these constructive districts, or in the
24 Board's districts where the major pockets of black voting-age
25 population is?

1 THE WITNESS: Right. Right. I don't have that in my
2 report. I mean, that is something that I look at over, you
3 know, as an overview, just to understand the demographics of the
4 state. And I can kind of articulate that to you.

5 THE COURT: No, but I just wanted to make sure again
6 as I'm going back and looking. .

7 THE WITNESS: Yeah.

8 THE COURT: It's not like there is a place that I
9 should look for that?

10 THE WITNESS: No. No.

11 THE COURT: Okay. In terms of the three compactness
12 scores; Reock, Convex Hull and the other that I'm forgetting
13 what the word is right now, I'm trying to figure out a little
14 better what those mean in terms of what the scores mean. So for
15 example, number one, on each of those, is there a number you
16 don't like to go above, that you think once we get above it,
17 we're no longer reasonably compact, either when you are drawing
18 initially for a state, or when you are looking at something like
19 this. And then number two, for each of these scores, how do I
20 interpret differences? So is .1 a big difference? Is .5 a big
21 difference? Is .02 is big difference? How do I know that?

22 THE WITNESS: Right. Right. It's not always black
23 and white in situations. And the reason why I say that is
24 because there is a difference between a low compactness
25 measurement on the coastal area. And there is many people that

1 believe -- analysts, let's say, political science, that when you
2 are dealing with that you have to take in that consideration.
3 You can't just look at the number. You have to look at the
4 jurisdiction and the shape of the jurisdiction related to, you
5 know, what that number is. So it's a little bit of a misleading
6 comparison if you want to compare something that may be on the
7 coastal district to something that is inside a city, let's say.
8 So you have to consider that. That being said, there are, on
9 the reports, the Maptitude reports, they provide you a standard
10 deviation. And you know, some people feel that if you are
11 within one standard deviation it is called insignificant. You
12 have got to get to two standard deviations to really make it a
13 significant amount. So I think that's why they provide it, so
14 you can actually look and compare and say okay, this is
15 insignificant. Okay. This is significant. But then you have
16 to consider the jurisdiction boundaries. And so, you know,
17 comparing, as I said, something on the coastal area and saying
18 oh, wow, this is, you know, two standard deviations difference
19 is not an accurate way really to compare, because of the
20 jurisdiction hamstrings you actually, and how you are actually
21 drawing the district. So it's not as if -- there is no number.
22 Besides that standard deviation, there is really no number that
23 you can actually provide, because there are differences,
24 depending upon where you are looking at comparing.

25 THE COURT: So if we take away for a second coastal

1 districts. I get that issue. Non coastal districts, I take it
2 for most of this we are talking about between zero and 1.

3 THE WITNESS: Uh-huh.

4 THE COURT: Is there a number beyond which you would
5 say, as a general matter, this district is no longer compact or
6 reasonably compact or shouldn't be drawn like this?

7 THE WITNESS: It's very difficult to say. And even --
8 I remember reading something from Reock, you know, the person
9 who created Reock. And even he said in his measurements under
10 .19, I think it was. He didn't say that you shouldn't create
11 districts like that. He said you should just look at them
12 carefully then. And so with that expectation is that you could
13 be much lower than that. It's not the number. You have to look
14 at the circumstances and why that number exists. And so the
15 coastal district is an example, but it also even internally, I
16 mean, this is why it gets a little hairy. The shape of the
17 precincts and voting districts can determine the compactness
18 measurements too. The shape of the jurisdiction, if you are
19 trying to actually include a city, and many cities have
20 irregularly-shaped boundaries, and so that could lower it. And
21 so again, this gets into what I was saying as far as counsel was
22 talking about human intervention. It does take human
23 intervention now to look into and actually understand what is
24 going on versus just a black and white number.

25 THE COURT: Moving towards a comparison. And I

1 understand often it's not apples to apples, because your new
2 illustrative district is a little bit different from the current
3 district and they are moved around.

4 THE WITNESS: Right.

5 THE COURT: I get that.

6 THE WITNESS: Right.

7 THE COURT: But equalizing for that, or assuming that
8 difference away for a second. If we're -- if we're dealing with
9 the exact same geographic area or very similar, how -- what am I
10 supposed to take from say a score where one is a .2, and one is
11 a .3?

12 THE WITNESS: Right.

13 THE COURT: I'm trying to make those numbers mean
14 something to me.

15 THE WITNESS: Right.

16 THE COURT: How do I know whether that's a big
17 difference, a small difference an insignificant difference?

18 THE WITNESS: Right. Right. Right. And you have a
19 difficult job. But look at the standard deviation. That gives
20 you some indication, but also let me just give you an example,
21 the HD 5.

22 THE COURT: Okay.

23 THE WITNESS: Which on appearance, you know, I'll
24 admit that it looks a little different, but it's more compact
25 than the 2011 plan for HD 5. And so what I would say to you is

1 look at what was allowable and acceptable in the past, and look
2 what's allowable for the Board. And that becomes at least a
3 benchmark that you can say, well, that is better than what was
4 done past and previous without having to get into that, you know
5 .1, .2, versus .3. Do you see?

6 THE COURT: I do. Do I have anywhere the standard
7 deviations? Are those in your report?

8 THE WITNESS: On the compactness reports they will
9 list it for each of the measures, so you will look on that and
10 that is one of the data points that they'll include.

11 THE COURT: And with that, just so I know, what is
12 that a standard deviation from? Is that a standard deviation
13 from some idea mean?

14 THE WITNESS: It is just a -- yeah, a standard
15 deviation of a mean for all of the data points, just giving you
16 an idea of the variance of all of those compactness
17 measurements.

18 THE COURT: So a standard deviation from the mean of
19 the other districts that you have drawn in Arkansas, or no, I'm
20 trying to figure out --

21 THE WITNESS: Right. Just of that plan. Yeah. Yeah.
22 Just of that plan.

23 THE COURT: All right. So --

24 THE WITNESS: Yeah.

25 THE COURT: I'm not suggesting you have done this.

1 I'm trying to figure out the numbers. I'm not sure that means
2 much to me, because you could have a plan that's really non
3 compact, and then the standard deviation from the mean wouldn't
4 be that bad for anything, because they're all bad.

5 THE WITNESS: Right. Right. But then you look -- no,
6 I'm sorry.

7 THE COURT: No, go ahead.

8 THE WITNESS: But then you do look at the number
9 itself, and so I'm not saying -- certainly don't look at, you
10 know, the compactness number. I'm saying compactness and, you
11 know, the standard deviation. And you know, compactness is one
12 of those things that you do compare. I think, you know, a .3, a
13 .5 is meaningless unless you know that the other plans are .3
14 and .5. And so it's meaningless. And that's why I mentioned,
15 look at those boundaries of the other plans to see. I think it
16 should be acceptable. If you fit within the range of those
17 acceptable boundaries, then you have an idea that it's a compact
18 plan.

19 THE COURT: That -- I appreciate your point. That is
20 helpful. Is there -- I mean, you have done this for a long
21 time. Is there a number on each of these plans when you get --
22 you like look, I feel good about this number, or on
23 alternatively, a number that you get, and again, I'm asking
24 hypothetically.

25 THE WITNESS: Right.

1 THE COURT: Not about the Arkansas plan necessarily,
2 but is there a number that you get alternatively where you are
3 like, that can't be good, I have to go back and sort of at least
4 look really hard to see if I need to make changes.

5 THE WITNESS: Yeah. Yeah. I mean, certainly if you
6 get down below .1, then you want to say, uhhh, but even then it
7 depends upon the circumstances. What is the situation that's
8 involved in that? And that's, you know, that's your next step.
9 But sure, I'm looking at -- when I'm developing plans I'm
10 printing out reports periodically just to see where I'm at. I'm
11 making some judgment calls. But for the most part there isn't a
12 number, I just have somewhat of a -- you know, I guess the
13 experience of this number seems a little low, let me see what I
14 can do to raise that up.

15 THE COURT: Okay. My last question. I think I
16 understand that the total population numbers in your report for
17 total voting-age population, and for BVAP come from the census.
18 And the total citizen voting-age population and the black
19 citizen voting-age population come from the ACS estimates first.
20 Do I have that correct?

21 THE WITNESS: That's correct.

22 THE COURT: Okay. Is it fair to say -- and I'm --
23 push back if it is not fair.

24 THE WITNESS: Okay.

25 THE COURT: Because I really want to know. Is it fair

1 to say the black voting-age population and total voting-age
2 population numbers are therefore more accurate than the total
3 citizen voting-age population and the black citizen voting-age
4 population numbers on the theory that the census numbers are
5 more accurate than the ACS estimates?

6 THE WITNESS: Interesting. You are measuring two
7 different things. And so when you say accurate, you know, I'm
8 hesitant a little bit. One of them that's the voting-age
9 population is -- comes from what they call a 100 percent count
10 survey, because the idea is you count everybody in the decennial
11 census. The other is, as you said, the American community
12 survey where basically 250,000 surveys a month are sent out to
13 try to, you know, get ahold of this, all of these different
14 variables. And so they are addressing two -- or they're looking
15 at two different questions. So one is the voting-age
16 population, the other is the citizen voting-age population. The
17 only hesitancy I have is where else can you get the citizen
18 voting-age population. There isn't. And so -- and I'm not
19 talking about a unique survey. You may have a survey someone
20 has done for a metropolitan area, but not for the entire country
21 and all of the cities that we have put in place. And I'm not an
22 attorney, and so let me caveat that. I think courts use what is
23 called the best available data. That is the best available data
24 that exists out there, you know, good, bad or indifferent. I
25 happen to think it's good. I mean, it fills the bill of what it

1 is supposed to do.

2 And can I address the margin of error that was brought up?

3 THE COURT: Yes.

4 THE WITNESS: As I mentioned before about the margin
5 of error, you have a high margin of error and a low. And you
6 don't really know what it is. And therefore it could be
7 anywhere in that range. And if we or you started to say okay,
8 we don't know what's in this range, so we have to include the
9 margin of error, then let's say it's 4 percent, then in the
10 point value, that's the one that the data is, is 50. Then what
11 you are saying is, is that you have to now create districts that
12 are 54 percent, because the margin of error is 4 percent. That
13 just doesn't seem fair. And it is the same likelihood that it's
14 50 -- same likelihood that the 50 is exactly right, but you are
15 putting a burden to say no, you have to create 54 percent
16 districts now, because it's got a margin of error of 4 percent.
17 That is just, I think, patently -- I'm not coming from a legal
18 point of view, but that's just not fair to the community as
19 trying to do so, putting unfair burden.

20 THE COURT: Thank you for your answer. We are going
21 to take a ten-minute break, and then we are going to do
22 redirect.
23
24
25

1 (Recess taken from 2:06 p.m. until 2:21 p.m.)

2 MR. STEINER: May I proceed?

3 THE COURT: You may.

4 MR. STEINER: Thank you, Your honor.

5 REDIRECT EXAMINATION

6 BY MR. STEINER:

7 Q. Mr. Fairfax, I'll try and be brief. Did you remember Ms.
8 Merritt asked you some questions on Cross about District 55?

9 A. Yes.

10 Q. And if we can look at your rebuttal report, I think it's
11 Exhibit 12.

12 And Stephen, we can look at Page 12, which is PDF of Page
13 13, and then Page 13.

14 And I understand the Judge said if it's in your rebuttal
15 report you can look at it, but can you just explain in your
16 rebuttal report these configurations of the districts from the
17 2001 plan, the 2011 plan, and then your illustrative plan?

18 A. Sure. I'll work backwards, I guess. District -- Figure 6
19 rather is the 2001 plan for HD 55. And you notice that it does
20 not extend into Crittenden. It is only in Mississippi, but it
21 also slices or intersects the highway.

22 Q. And that was the case in 2001. How about in 2011?

23 A. Correct. Sorry. In 2011 it extends into Crittenden, and
24 it still intersects the highway.

25 Q. And then in your illustrative plan, what did you do there?

1 A. And so I just further extended it into Crittenden like the
2 2011 plan, and it intersects the highway as well, just like the
3 other two plans.

4 Q. And I think you said you extended up into -- to capture all
5 of Blytheville; is that right?

6 A. Yes, that's correct.

7 Q. Is there an interest that you were serving by including all
8 of Blytheville in your illustrative plan?

9 A. Yes. There was community input that desired the entire
10 city of Blytheville to be included, so I included it.

11 Q. And I don't know if you were here for Representative
12 Hodges' testimony, but is it your general understanding that the
13 northern parts of Blytheville are somewhat wealthier and
14 somewhat more white than the rest of the Blytheville; is that
15 right?

16 A. That's correct.

17 Q. So when you extended it to include all of Blytheville, was
18 that adding -- was that with a view towards adding minority
19 population by capturing those districts on the north of
20 Blytheville?

21 A. No. No. No, it didn't.

22 Q. And those districts that are to the north that are part of
23 54 that Ms. Merritt referred to as a mile and quarter to connect
24 an island, do you remember that?

25 A. Yes.

1 Q. And was that -- were those districts in the city of
2 Blytheville?

3 A. No.

4 Q. And so you drew around the city line; is that right?

5 A. Correct.

6 Q. Did you look -- I think you said you looked at other ways
7 to do it. And I think you reported on that in your report, but
8 can you just summarize whether there are other ways to keep this
9 a majority-minority district in your estimation?

10 A. Yes. The previous plan, if you will, of iteration of that
11 plan actually included those two precincts in there.

12 Q. And I think you talked about that you used as a starting
13 point the prior plan. Why was that something that you did, and
14 why was it important to do that?

15 A. Normally in the process of plan development you start with
16 the current legal plan. And in most cases the criteria, and
17 also the criteria for the Board, they include considering the
18 existing district configurations. And so that's why you start
19 with that original, or the current plan, if you will.

20 Q. And I think one of the criteria on the Board of
21 Apportionment's list of criteria was maintaining the core of
22 existing districts; is that right?

23 A. Right. Exactly.

24 Q. And can you explain the relationship between maintaining
25 the core and using as your starting point the current existing

1 plan or the 2011 plan?

2 A. Well, that's usually what they mean when they say
3 maintaining the existing core, meaning that the current
4 configurations are the core aspects of the districts. And so if
5 you start there and then alter from that point, you have a
6 better chance of maintaining the core versus if you just started
7 from scratch.

8 Q. And if you start with existing districts, does that have
9 any impact on your maintaining incumbents in their districts?

10 A. Yes. Yes. If you start with the existing districts, then
11 theoretically all of the incumbents are included in the plan
12 originally.

13 Q. And then you have to make adjustments, but you started with
14 them in their districts?

15 A. That's right.

16 Q. And then Ms. Merritt asked you some questions about Helena,
17 West Helena being the population center, and more than half of
18 the population of one of your districts. Do you recall that?

19 A. Yes.

20 Q. If I represent to you that Helena, West Helena has a
21 population of about 10,700 people, if you accept that, does
22 that -- would that population be the majority of the population
23 of any district that you or any other mapper draws?

24 A. Not for a State House District that is 30,115.

25 Q. And if we can look, Ms. Merritt asked you some questions.

1 If we can go to the chart that is on Page 16 of your -- I'm
2 sorry, PDF Page 16 of your report, so it is Exhibit 7. That is
3 PDF 16. It is Page 12 and 13 of your report.

4 Okay. Do you have that chart in front of you?

5 A. Yes.

6 Q. Okay. And this is showing the voting age and black
7 voting-age population and then also black citizen voting-age
8 population of each of your 16 illustrative districts; is that
9 right?

10 A. That's correct.

11 Q. And Ms. Merritt asked you some questions about the black
12 citizen voting-age population of those districts, is that right?

13 A. That's correct.

14 Q. And in drawing your maps, and in determining whether
15 something was a -- and she asked about the margin of error that
16 is associated because the citizen voting-age population is drawn
17 from a survey, and not an enumeration of the population; is that
18 right?

19 A. That's correct.

20 Q. And can you explain where the voting-age population comes
21 from?

22 A. From the decennial census.

23 Q. And is the census a -- well, let me take a step back. You
24 understand that there is a difference in political science
25 between doing a population or an enumeration and doing a survey;

1 is that right?

2 A. Correct.

3 Q. Okay. And what is the decennial census?

4 A. It occurs every ten years to count every person in the
5 country.

6 Q. And so that would be an enumeration; is that right?

7 A. Yes. And let me say every resident in the country, because
8 there are people visiting, so that's one caveat.

9 Q. And is there a margin of error associated with a population
10 that is enumerated and that has purported to count everyone?

11 A. No. No. There isn't a margin of error. There is
12 potentially an undercount, but there isn't a margin of error
13 associated with the 100 percent survey.

14 Q. Okay. And in drawing the majority black districts, did you
15 measure to determine whether something was a majority black
16 district, voting-age population primarily or citizen voting-age
17 population of the black community?

18 A. Both.

19 Q. Okay. And in making the determination as to whether
20 something counted as a additional majority black district, which
21 of those two did you rely on for making that determination?

22 A. Well, I used both. And so voting-age population is the
23 primary one, but many courts are now moving to showing both
24 citizen voting-age population and black voting-age population,
25 so I included both.

1 Q. And we have talked about the Board's plan having 11 black,
2 majority black districts; is that right?

3 A. For the Board plan.

4 Q. For the Board plan?

5 A. Yes.

6 Q. And the Board plan to determine a majority black district
7 uses voting-age population, right?

8 A. That's correct.

9 Q. And how many districts under the Board's plan would have a
10 majority black CVAP?

11 A. There were 9. There were two that were below 50 percent.

12 Q. So two of the Board's -- two of the majority black
13 districts in the Board's plan moved from majority black to not
14 majority black if you switched from black voting-age population
15 to black CVAP; is that right?

16 A. That's correct.

17 Q. Okay. And Ms. Merritt asked you a bunch of questions.

18 THE COURT: Hold on. Before we move on. Can you put
19 that chart back up? Just illustratively, Mr. Fairfax, I'm only
20 going to point to one of these, but the same issue occurs,
21 although not with this large a gap in some of these other
22 columns. If you look at District 36, the BVAP is 50.41, while
23 the BCVAP is 56.96. Is that essentially explainable by the
24 margin of error in the citizen statistics, or is there another
25 reason that the BCVAP would be significantly higher than the

1 BVAP?

2 THE WITNESS: Right. It probably has nothing to do
3 with the margin of error. It has to do with those that are
4 noncitizens in that particular area. So the census counts them,
5 but in the survey, what they do is they also count them, but
6 they classify as citizens and noncitizens. So you are able to
7 remove the noncitizens and look at the citizens. And so that is
8 why that population, black population represents a higher
9 percentage of the citizens in that particular district.

10 MR. STEINER: Just to follow up on that.

11 BY MR. STEINER:

12 Q. What is the -- HVAP is the Hispanic or Latino voting age
13 population; is that right?

14 A. That's correct.

15 Q. And what is that for 36?

16 A. That is 2.22 percent.

17 Q. That is Hispanic CVAP, right?

18 A. That's correct.

19 Q. What was the Hispanic voting-age population?

20 A. 10.53 percent.

21 Q. And then just I think there is one other, but if you look
22 at like 29, do you see the same thing where there is a 20.93
23 percent Hispanic voting-age population, but citizen voting-age
24 population is a little bit less than 7 percent; is that right?

25 A. That's correct.

1 Q. And that commonly causes an increase in the white and black
2 CVAP?

3 A. Correct.

4 Q. And is that part of the reason why in some states and in
5 some areas with heavier, I think you said, Latino or Asian
6 populations, the CVAP becomes a much more important
7 determination as to whether there is an actual opportunity to
8 elect candidates?

9 A. That is correct.

10 Q. But in terms of the population that the candidate
11 represents, that would be looking more at the population or the
12 voting-age population; is that right?

13 A. That's correct.

14 Q. And so Ms. Merritt asked you a bunch of questions about
15 whether you could reach 16 majority black districts if certain
16 of your districts, you know, without certain things in certain
17 of the districts. Do you remember those --

18 A. Yes.

19 Q. -- series of questions in her sort of summation?

20 A. Yes.

21 Q. Now, compared to -- I think you said in each of the cases
22 you put information in your rebuttal report about how you could
23 make modifications to address some of Mr. Davis's concerns; is
24 that right?

25 A. That's correct.

1 Q. And can you just explain again your understanding of the
2 purpose of drawing an illustrative map compared to a remedial
3 map?

4 A. Yes. The illustrative map is exactly what it says. It
5 illustrates or demonstrates that something can occur. It is not
6 intended to be the adopted plan. It is just supposed to
7 demonstrate that something can occur, where of course the
8 remedial plan will ultimately be the plan that is adopted.

9 Q. And you were asked a lot of questions about having 16
10 majority black districts. And I don't want you to testify as to
11 legal requirements or anything else, but in your understanding
12 of drawing an illustrative plan that has more majority black
13 districts than the Board's plan, do you need 16 majority black
14 districts?

15 A. No. No.

16 Q. Do you need 15?

17 A. No.

18 Q. How many do you need it to be more than the Board's 11?

19 A. Just one more.

20 Q. So that would be 12?

21 A. Yeah. 12.

22 Q. And at the beginning of your cross-examination, or towards
23 the beginning, Ms. Merritt asked you some questions about
24 whether you agreed that there was judgment involved, and
25 judgment calls in terms of balancing the different priorities.

1 Do you remember that?

2 A. Yes.

3 Q. And I think you agreed with her that there is some
4 judgement calls and that that is appropriate for the Board to
5 make?

6 A. Absolutely.

7 Q. And it is appropriate for the Board to make judgment calls,
8 right?

9 A. That's right.

10 Q. Now can the Board's judgment calls, in your experience,
11 override the requirements of the Equal Protection Clause of the
12 Constitution?

13 A. No.

14 Q. Can they override -- can those judgment calls override the
15 requirements of the Voting Rights Act?

16 A. No.

17 Q. And can those judgment calls override the requirement that
18 districts have substantially equal populations of plus or minus
19 5 percent from the idea size?

20 A. It's a tricky situation there, because the -- there are
21 cases that jurisdictions can exceed that plus or minus 5
22 percent. And legislative districts do that.

23 Q. So it's possible you could go above the 5 percent with some
24 judgment?

25 A. Yes. Yes. Yes.

1 Q. But neither you nor the Board did that in exercising
2 judgment?

3 A. That's correct.

4 Q. And your illustrative plan is in all 100 districts within
5 the 5 percent judgment guideline that the Board set out; is that
6 right?

7 A. That's correct.

8 MR. STEINER: No further questions.

9 THE COURT: Thank you very much for your testimony,
10 Mr. Fairfax. It was very helpful to me.

11 THE WITNESS: I appreciate it. Thank you.

12 THE COURT: Who's next?

13 MR. SELLS: Your Honor, at this point we are going to
14 turn the podium over to the Defendants, so they can put up their
15 expert witness who needs to leave town. We are taking him out
16 of order.

17 THE COURT: I understand that. Before we do that, I
18 think we're going to do a court reporter break just to switch
19 court reporters. So five minutes. I'm going to stay here. You
20 all go about your business though.

21 (Recess at 2:37 p.m.)

22 REPORTER'S CERTIFICATE

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

25 /s/Teresa Hollingsworth, CCR
United States Court Reporter

Date: February 6, 2022.

Teresa Hollingsworth, CCR
United States Court Reporter
Teresa_Hollingsworth@ARED.uscourts.gov (501)604-5165

1 (Proceedings resumed at 2:46 p.m.)

2 THE COURT: Plaintiff, just to make sure, I know
3 as a technical matter the defendants reserved the ability
4 to do an opening until their case in chief. I assume
5 you're all okay since this is going out of order. I have
6 no idea if they're going to do an opening at some point.
7 But if they do it, I assume you're okay with that even
8 though it's going to take place after this witness?

9 MR. SELLS: Of course.

10 THE COURT: Mr. Steinberg, let's swear the
11 witness in, and then you have the floor.

12 BRADLEY LOCKERBIE, PLAINTIFFS' WITNESS, DULY SWORN

13 DIRECT EXAMINATION

14 BY MR. STEINBERG:

15 Q. Could you state your name for the record?

16 A. Bradley Lockerbie.

17 Q. And what is your occupation?

18 A. I am a professor of political science at East
19 Carolina University.

20 Q. How long have you been a professor there?

21 A. I've been there for approximately 13 and a half
22 years.

23 Q. Prior to that, where did you teach?

24 A. I was at the University of Georgia.

25 Q. How long have you been a professor altogether

1 roughly?

2 A. Approximately 32, 33 years.

3 Q. What subjects do you teach courses in?

4 A. I teach broadly in political science. Within that
5 discipline, I teach American Government, Voting Behavior
6 and Public Opinion. I teach Religion in American
7 politics. I teach -- American Voting Behavior, Religion
8 in Politics, and just the basic intro.

9 Q. Do you teach courses in statistical methods?

10 A. I apologize. I teach the -- the one I've been
11 teaching this semester. My students are wondering where I
12 am.

13 I teach a statistics classes for the undergraduates
14 in political science. It's a required class. I have also
15 taught statistics when I was at University of Georgia at
16 the graduate level I taught there.

17 Q. That course includes teaching ecological regression?

18 A. Teaches the technique of ecological regression as
19 well as many other regression techniques, include logistic
20 regression.

21 Q. What are some of the topics you published on,
22 particularly ones that might bear on your testimony today?

23 A. I have taught on -- excuse me -- written on the topic
24 of political participation both in the United States and
25 outside the United States. I have published repeatedly on

1 voting behavior, why citizens vote the way they do. I
2 have worked on election forecasting, been part of a group
3 that regularly publishes on that since 2000. I have done
4 some work on southern politics as well and received grants
5 from the National Science Foundation -- or subcontracts,
6 not grant -- two times to look at southern party
7 activists.

8 Q. Have you published a paper on race and voting
9 behaviors?

10 A. I did a paper on race, religion, and voting behavior
11 which I specifically looked at the role of race and
12 religion together in terms of whether African-Americans
13 who were part of a church voted differently than those who
14 were not members of an Evangelical church.

15 Q. Sounds like an interesting paper.

16 I'd like to show you what's been marketed as Exhibit
17 13. Flip a page or two so we can confirm this is an
18 accurate, up-to-date copy of your CV. This is an
19 up-to-date to copy of your CV?

20 A. That looks up to date, yes.

21 MR. STEINBERG: I would like to move this into
22 admission as Defendants' 13.

23 THE COURT: Any objection?

24 MR. SELLS: No objection.

25 THE COURT: It's admitted.

1 (Defendants' Exhibit 13 admitted into evidence.)

2 BY MR. STEINBERG:

3 Q. Were you asked by office to write a report in this
4 case?

5 A. Yes, I was.

6 Q. Do you recall when that was?

7 A. I believe it was on the 11th of January. I was asked
8 to review Dr. Handley's report and offer commentary.

9 Q. How much time were you told that you had to complete
10 it?

11 A. About a week to maybe a day or two more than a week.

12 Q. Not very much time.

13 And is this -- this has been marked as Defendants'
14 Exhibit 11. Is this your report?

15 A. You need to pull it down a little bit. I just see
16 the blank page.

17 Q. Sure. Sorry, sorry.

18 A. Yes. That appears to be my report cover, which was
19 five days after the request came in.

20 Q. Just to verify this is Page 2. Does this look like
21 Page 2 of your report?

22 So I'd like to move this into admission as
23 Defendants' Exhibit 11.

24 THE COURT: Any objection?

25 MR. SELLS: Yes, Your Honor, may I ask some voir

1 dire questions for purpose of making my objection?

2 THE COURT: You may.

3 MR. SELLS: Thank you.

4 VOIR DIRE EXAMINATION

5 BY MR. SELLS:

6 Q. Professor Lockerbie, I gather from your CV that we
7 just looked at that you've written one book, nine book
8 chapters, approximately 35 articles, and 39 other
9 scholarly papers. Is that correct?

10 A. That sounds correct.

11 Q. In your book, do you conduct any analysis of minority
12 electoral opportunity?

13 A. No.

14 Q. In your nine book chapters, do you conduct any
15 analysis of minority electoral opportunity?

16 A. Not as you phrase it, no.

17 Q. In any of your 35 articles, do you conduct any
18 analysis of minority electoral opportunity?

19 A. No.

20 Q. In any of your 39 other scholarly papers, do you
21 conduct any analysis of minority electoral opportunity?

22 A. No.

23 Q. Have you ever read a Supreme Court case called
24 Thornburg versus Gingles?

25 A. I've read selections from it.

1 Q. When was that?

2 A. Most recent time would probably have been within the
3 last three months.

4 Q. What parts of that case did you read?

5 A. I don't recall.

6 Q. You don't remember.

7 Have you ever had Lisa Handley's book about analyzing
8 minority electoral opportunity?

9 A. No, I have not.

10 Q. Have you ever read the articles that Lisa Handley
11 wrote that are in the defendants' exhibits that I think
12 you were in the courtroom when those were presented to her
13 that are about analyzing minority electoral opportunity?

14 A. I don't recall whether they were the ones presented
15 in court, but I have read at least one of her articles.

16 Q. Which articles was that?

17 A. One that appeared in the North Carolina Law Review.

18 Q. Okay. Do you consider that article authoritative on
19 analyzing minority electoral opportunity?

20 A. I don't know whether it would be considered
21 authoritative or not.

22 Q. I'm asking do you consider it authoritative.

23 A. I haven't evaluated it in those terms.

24 Q. Can you identify a single text other than that
25 article that you consider authoritative with regard to

1 analyzing minority electoral opportunity?

2 A. With the name and title, no.

3 Q. Okay. Now, your opinions about minority electoral
4 opportunity in proposed House Districts 98 and 34 are
5 based on adjusted effectiveness scores, correct?

6 A. Correct.

7 Q. Can you identify any court cases that have relied on
8 adjusted effectiveness scores to analyze minority
9 electoral opportunity?

10 A. While I cannot identify a particular court case, I
11 can note that Dr. Handley did some of that or referenced
12 it in her North Carolina Law Review article where she
13 reviewed or commented on the work of Charles S. Bullock
14 and Richard Dunn.

15 Q. And it's your opinion that that constitutes an
16 adjusted effectiveness score?

17 A. What she referenced did, yes.

18 Q. Okay. Can you identify any other articles or peer
19 reviewed publications that have used an adjusted
20 effectiveness score?

21 A. The one she referenced, the Bullock and Dunn article.

22 Q. Any others?

23 A. Not off the top of my head, no.

24 MR. SELLS: Your Honor, we move to exclude
25 paragraphs 10 to 15 of Professor Lockerbie's report, which

1 are the ones where he purports to analyze minority
2 electoral opportunity, on the grounds that he is not an
3 expert in that area of political science and that his
4 adjusted effectiveness scores are not a reliable method of
5 analyzing minority electoral opportunity.

6 Now, I realize that the Daubert standard in a bench
7 trial is low, but Professor Lockerbie has exactly zero
8 experience in analyzing minority electoral opportunity.
9 So while the bar may be low, even Professor Lockerbie
10 slides under it.

11 And he purports that Bullock and Dunn use these
12 adjusted effectiveness scores, but he can't identify a
13 single court case that has relied on them or a single
14 other publication. And we don't even know the Bullock and
15 Dunn publication is a peer reviewed article.

16 So on that basis, we would move to exclude any
17 opinion testimony regarding minority electoral opportunity
18 by Professor Lockerbie.

19 THE COURT: Mr. Steinberg, what's your response?

20 MR. STEINBERG: My response is that minority
21 electoral opportunity and its analysis is not a specific
22 subfield of political science that is meaningfully
23 different from predicting electoral outcomes in a district
24 and deciding whether a Democrat or Republican is likely to
25 win that district apart from whether that person is the

1 minority-preferred candidate, and that Dr. Lockerbie's
2 method of observing a baseline of statewide candidates'
3 performance looking at local candidates' outperformance is
4 not something that's outside political science literature
5 generally, whether or not he has studied that that
6 approach is used in predicting the outcome of an election
7 in a Section 2 case.

8 THE COURT: Last shot, Mr. Sells.

9 MR. SELLS: Well, there clearly are books
10 written about analyzing minority electoral opportunity.
11 There are articles written about that subject.
12 Mrs. Handley has had a hand in dozens of them. And for
13 Professor Lockerbie to be unaware of that, I think further
14 underscores his lack of qualifications in this particular
15 area. He may speculate, but he doesn't have the
16 experience or training necessary to offer opinions in this
17 area.

18 THE COURT: I'm going to take this under
19 advisement for now. I'm going to allow the expert
20 testimony and allow the admission of the entire report.
21 However, that is just conditionally. If it is going -- if
22 it is going to bear on my decision, I will in my decision
23 make clear whether or not I am accepting Dr. Lockerbie as
24 an expert and whether or not I'm granting that motion.

25 MR. SELLS: Thank you, Your Honor.

1 DIRECT EXAMINATION CONTINUED

2 BY MR. STEINBERG:

3 Q. Now, Dr. Lockerbie, what were you asked to offer an
4 opinion on?5 A. I was asked to offer an opinion on Dr. Handley's
6 report.7 Q. Well, specifically, what subjects were you asked
8 to --9 A. To evaluate her statistical analyses on the
10 ecological inference, ecological regression, and the like,
11 as well as the selection of cases that would serve as the
12 baseline for her report.

13 Q. And did you form some opinions on these subjects?

14 A. Yes, I did.

15 Q. Okay. Could you summarize your opinions briefly?

16 A. One, I would argue that the selection of the
17 lieutenant governor -- lieutenant gubernatorial candidate
18 Bland is problematic in that he was not a high-profile
19 candidate. He raised I think approximately \$12,000 in his
20 campaign compared to his opponent who raised over
21 \$850,000. I looked at that race and -- or looked at that
22 and noted that I would be -- or have some questions about
23 how well he was known across the state with the campaign
24 budget that was -- or campaign that was only able to
25 generate \$12,000, whether he would be able to buy

1 sufficient advertising that would both make him known as a
2 candidate and, B, make voters aware of his race.

3 Q. And did you offer other opinions besides the --

4 A. I looked at the effectiveness scores that she was
5 able to generate. And I was able to find in many
6 instances she did not count as being, quote, effective
7 districts ones that had in fact elected African-Americans,
8 some with relatively low white population in the district,
9 but nonetheless there were African-American candidates
10 elected.

11 Second, I noted that in many instances, the predicted
12 values for a African-American candidate to win office were
13 substantially lower than the vote that was obtained by
14 those candidates.

15 Q. And did you opine on whether the voting pattern of
16 whites that Dr. Handley observes is caused by primarily
17 racial bias or bipartisanship?

18 A. I did look at that. Specifically, I looked at the
19 races where you have white Democrats and races in which
20 you have black Democrats for the state legislature. I
21 believe it was six of one, seven of another, or five and
22 six. I forget which off the top of my head. But the
23 distinction between them was .7 percent, which any
24 standard test of statistical significance would show that
25 it is not a statistically significant difference.

1 Q. Now, you averaged Dr. Handley's estimated percentages
2 of white support for white Democrats and for black
3 Democrats in State House races -- State House contested
4 races between two parties and compared the two.

5 Why would a comparison of that kind be useful for
6 this purpose?

7 A. Well, if we look at the vote share for white
8 Democrats and African-American Democrats and noted a wide
9 disparity, that might give us pause as to whether there
10 was race as a primary factor in determining the vote
11 outcome. If the two are very similar, it would indicate
12 that partisanship played at least a role in the outcome of
13 the election.

14 Q. Now, you said the difference was seven-tenths I
15 believe of one percent.

16 A. Seven-tenths of one percent.

17 Q. That's based on Dr. Handley's estimates?

18 A. Using the numbers that Dr. Handley provided to me --
19 or provided to the Court, I believe it was 18.3 percent
20 versus 19 percent.

21 Q. When you stated that that was not statistically
22 significant, could you elaborate upon that?

23 A. Certainly. If you have a sample size of 13, the
24 difference between the two candidates or two races would
25 have to be substantially different than that to achieve

1 even a modest level of statistical significant. It
2 definitely would not fall at the .05 level which is one of
3 conventions -- one of the looser conventions in political
4 science.

5 Q. I believe you were here the other day for
6 Dr. Handley's testimony on the confident intervals, at
7 least R x C estimates in the State House races. And does
8 her testimony on that affect your view of the significance
9 of small differences that we see between averages --

10 A. Well --

11 Q. -- R x C numbers?

12 A. She made the point I believe that the confidence
13 intervals could have been as much as seven percentage
14 points. That's ten times what I observed -- or what I
15 observe when I looked at the figures that I calculated
16 there which would indicate that the confidence intervals
17 overlap considerably, meaning there's not a statistically
18 significant different.

19 Q. Did you also compare the percentage of the white vote
20 Anthony Bland, an African-American candidate, received in
21 Dr. Handley's estimates to the percentage of the white
22 vote that white statewide Democratic candidates received
23 in Dr. Handley's estimates?

24 A. I did.

25 Q. What's your assessment of those differences?

1 A. The differences are not statistically significant.

2 Q. Dr. Handley says in her rebuttal report that the
3 average of those state -- white statewide Democrats in the
4 white vote is 2.4 percent higher I believe than Bland's
5 white share.

6 What's your reaction to that 2.4 percent difference?

7 A. That also would not be statistically significant,
8 especially given the sample size.

9 Q. Do you have an explanation of why people in these
10 other races would outperform Bland slightly?

11 A. I would assume from what I know that they have --
12 they had substantially more money than he did in the
13 campaign, so that they would have been able to mount
14 something that was more effective.

15 Q. And do you think that down ballot races, for say --

16 THE COURT: May I stop you for a second?

17 Is that just speculation or do you know one way or
18 the other whether one or more of them had more money or
19 something else?

20 THE WITNESS: I do know that the other ones had
21 more money than he did.

22 THE COURT: How do you know that?

23 THE WITNESS: I reviewed an article from the
24 Arkansas Gazette which was published in January of 2019
25 and gave the finance figures for the races.

1 THE COURT: Okay.

2 BY MR. STEINBERG:

3 Q. Can I ask you how likely do you think it is that many
4 voters were aware of Bland's race?

5 A. I would imagine that not too many voters were aware
6 given his campaign --

7 THE COURT: Wait, wait, wait. Let's not talk
8 over each other.

9 Mr. Sells, what's your objection?

10 MR. SELLS: Lack of foundation, speculation.

11 THE COURT: Hold on. Just looking at the
12 question.

13 MR. SELLS: His answer began with I would
14 imagine --

15 THE COURT: I understand. Hold on. I want to
16 look at this.

17 Can you rephrase the question?

18 MR. STEINBERG: Sure.

19 BY MR. STEINBERG:

20 Q. To begin with, does the fact that Bland spent -- or
21 raised, I believe you said, 12,000 plus some hundreds of
22 dollars make it less likely in your view or unlikely that
23 the majority of the electoral would be aware of Anthony
24 Bland's race?

25 A. Yes.

1 Q. Do you think that he had sufficient advertising
2 budget to make the electorate aware of his race?

3 A. No, I do not.

4 Q. Do you know the name of the unsuccessful lieutenant
5 governor candidate in your own state most recently?

6 A. No. I do not.

7 Q. Do you think voters often know much about lieutenant
8 governor candidate?

9 A. I think that is considered a lower profile race.

10 Q. Now Dr. Handley says that you failed to analyze
11 racial -- or address racially polarized voting in the
12 Democratic gubernatorial primary between Jered Henderson
13 and Laticia Sanders, that Sanders won a majority of the
14 black vote but white voters largely opposed her.

15 What is your response to that?

16 A. One, that a party primary is different than a general
17 election. So you're going to see different results there.

18 Her can't candidacy struck me as atypical for a
19 Democrat in that she was, as I recall from my reading of
20 the election, very strongly prolife and I forget -- I
21 think she was progun control too -- or excuse me --
22 antigun control.

23 Q. What reading are you referring to?

24 A. I saw a newspaper story which the exact issue is
25 eluding me on that one.

1 Q. What about Dr. Handley's claim that white voters are
2 less supportive of black Republicans than white
3 Republicans in her ecological inference estimates?

4 A. I believe there were only two races like that. One
5 of the races involved a former Democrat who became --
6 trying to think there. In one race you have two blacks
7 running against each other. And so the -- there can't be
8 racial polarization in the race if you look at the voters.
9 And the second one it was -- was that the Hodges race? I
10 apologize.

11 Q. Perhaps. Perhaps I could refresh your recollection.

12 A. Thank you.

13 Q. Sure. I believe I have it here.

14 This is from Dr. Handley's report. Could we return
15 the ELM0 back on?

16 Are you referring to district --

17 A. It just disappeared.

18 Q. Okay. Are you referring to District 11 here the
19 black Republican candidate being Ricky Lattimore?

20 A. Yes.

21 Q. This is I think you said a three-way race?

22 A. Three-way race where you have the former Democratic
23 incumbent who had won either overwhelmingly or in
24 noncontested races.

25 Q. Now, in your report, you talk about the composition

1 of the state chamber as a whole.

2 A. Yes.

3 Q. Is that right?

4 And I think you suggest that the timing of the
5 decline of the Democratic party in State House elections
6 suggests that this is not a reaction to an association of
7 the Democratic party with support of African-American or
8 African-American causes. Is that --

9 MR. SELLS: Objection. Leading.

10 THE COURT: Sustained.

11 MR. SELLS: All day long.

12 THE WITNESS: I review --

13 THE COURT: Hold on. Ask a different question
14 or at least rephrase that one.

15 BY MR. STEINBERG:

16 Q. Did you review this declaration of the House
17 parliamentarian?

18 A. Yes, I did.

19 Q. It's been marked as Defendants' Exhibit 12.

20 Now, when does the decline in Democratic House --
21 State House membership begin?

22 A. 2011.

23 Q. 2011 after the 2010 election?

24 A. Correct.

25 Q. Do you think that this event in Arkansas politics can

1 be attributed to a reaction to the civil rights movement
2 and the passage of --

3 MR. SELLS: Objection. Leading.

4 THE COURT: Sustained.

5 THE WITNESS: I would argue --

6 THE COURT: Hold on.

7 MR. STEINBERG: My question was struck. I have
8 to ask a different question.

9 THE WITNESS: I apologize.

10 BY MR. STEINBERG:

11 Q. To what do you attribute this decline?

12 A. The 2011 decline appears to be related to the secular
13 decline in the Democratic party as a result of the 2010
14 election, certainly not events that occurred 40 years
15 beforehand.

16 Q. Now, the other day, did you hear Dr. Handley say this
17 is possibly a reaction to election of Barack Obama?

18 A. I did hear her say that.

19 Q. Do you agree or disagree with that?

20 A. I disagree in that, if there was a year in which
21 racial animus was going to drive the State House
22 representatives away from Democratic party, it would have
23 occurred when then-Senator Obama was on the ballot, not at
24 a mid-term election.

25 Q. But instead what happens in the 2008 election?

1 A. 2008, election the Democrats lost three seats out of
2 instead of -- went from 75 to 72.

3 Q. Now, finally, on this question of race versus
4 partisanship, Dr. Handley says that you were failing to
5 take account of differences in racial attitudes among
6 Democrats and Republicans, that survey data showing large
7 differences on questions of policy like affirmative
8 action, education on race.

9 Do you disagree with her that these attitudinal
10 differences exist?

11 A. No, I do not.

12 Q. So why doesn't that affect your conclusion that race
13 is not driving this voting pattern?

14 A. There are two points I think I need to make on that
15 particular issue. One, she does not draw a connection
16 between those attitudes and voting behavior. All it is is
17 a connection between racial attitudes and party
18 identification. Nor is it tied specifically to Arkansas.

19 Second and I think also important is that she
20 presents it as if there is one side that is correct and
21 one side that is wrong, at least I think is the inference
22 that any reading would draw from it. I think these are
23 highly debated issues in American politics where people of
24 good will are on both sides of the issue.

25 Q. So if I could understand that, you're saying that if

1 -- if some people joined the Republican party because they
2 see that the Republican party is against some policy and
3 the Democrats are for it, immigration policy. Can't draw
4 the further inference that that's because the racial bias
5 unless we say that that view --

6 MR. SELLS: Objection. Leading.

7 THE COURT: Sustained.

8 MR. STEINBERG: Yes. I think I'll move on from
9 that topic.

10 BY MR. STEINBERG:

11 Q. I would like to turn to your opinions about
12 opportunities to elect in particular districts. And I
13 would like to begin with the districts that were formerly
14 numbered as 33 and 49, have now been numbered 74 and 78,
15 the ones currently represented by Jay Richardson and Tippi
16 McCullough.

17 Could you summarize your opinions on those districts?

18 A. As I recall, those two districts are ones with a
19 minority black population, but the candidate that the
20 African-American voters supported was able to win those
21 elections, or they were uncontested elections which would
22 indicate that the Republicans didn't even see them as an
23 opportunity for them. They go hunting where the ducks
24 are, so to speak.

25 Q. Now, the other day and in her rebuttal report,

1 Dr. Handley says those districts do not provide black
2 voters with electoral opportunities because there are
3 simply too few of them to determine the outcome of the
4 elections, if I'm fairly characterizing her view.

5 What's your response to that?

6 A. I think there are two points to make there. One, and
7 I think a very vital point, is that if whites are evenly
8 divided or close to evenly divided, even a modest
9 proportion of African-Americans on the district can be the
10 decisive tipping point for the district.

11 Second, if African-Americans and whites support the
12 same candidates, I think she referred to it is as a,
13 quote, happy accident. But I think it also would be
14 accurate to refer to it as the candidate that
15 African-Americans preferred was able to win the election
16 in that district. And if an African-American can win the
17 district, how one can say they don't have an opportunity
18 to win it struck me as bizarre.

19 THE COURT: Let me stop you there.

20 Dr. Lockerbie, what is your view if the black
21 population was one percent of the district, but it was
22 more than likely 50 percent, 51 percent or even
23 significantly likely 60 percent that the black-preferred
24 candidate would win the district, would you still say
25 there that's an opportunity district?

1 THE WITNESS: It's an opportunity district in
2 that the candidate they prefer has a more than 50 percent
3 chance of being victorious.

4 THE COURT: How does -- how does that work with
5 the issue of a primary, right?

6 So maybe the candidate they prefer in the general
7 election would prevail, but what about in terms of the
8 candidate they prefer in the primary getting through?

9 THE WITNESS: From what Dr. Handley said in her
10 testimony, there are so few African-Americans voting
11 within Republican primaries that the Democratic primary
12 would more likely to be dominated --

13 THE COURT: That's what I'm talking about. So
14 what about in the Democratic primary?

15 THE WITNESS: That would make it more likely
16 that an African-American candidate would able to be
17 victorious in the primary because there would be a larger
18 proportion of the electorate.

19 THE COURT: Well, but if it was one percent,
20 okay, so now maybe it's four percent or five percent. But
21 what -- why do you assume that at five percent versus 95
22 percent the black-preferred primary candidate can get
23 through the Democratic primary?

24 THE WITNESS: In that Democrats have been more
25 likely to vote for African-American candidates in general.

1 THE COURT: Okay.

2 BY MR. STEINBERG:

3 Q. I would like to turn to the districts currently
4 represented by David Fielding and Monte Hodges, the
5 districts numbered as 98 and 34 under the board's plan.

6 Could you summarize your opinions about these
7 districts?

8 A. Could we look at them on the screen? That might help
9 me a little bit.

10 Q. What do you want to see?

11 A. The vote totals.

12 Q. The vote totals. Okay. African-American.

13 So I'm -- here in 2020 I'm referring to Number 5 and
14 55.

15 A. Mm-hmm. Yes. If you can leave those on the screen.

16 Q. I don't need to show you the 2018?

17 A. I may ask you -- go ahead and put those up for me. I
18 apologize. The districts numbers change so many times, it
19 makes it difficult.

20 Q. In 2018 they'll still be 5 and over 55.

21 A. So looking at the Monte Hodges district, couple of
22 points to make. He did very well in -- let's see. This
23 is -- the year is not on the screen.

24 Q. This is 2018.

25 A. 2018. He did less well as I recall in 2020, but

1 still was able to win the district. He did, as I recall,
2 better than the effectiveness score would indicate by a
3 five to seven point sum, I believe, which would also point
4 to the effectiveness scores as perhaps understating
5 support for African-American candidates.

6 I recall in his testimony, Representative Hodges made
7 the point that, even under the new districts, that he had
8 a plausible chance of victory. He would have to, quote,
9 work hard, I believe, as would any other African-American
10 Democrat.

11 Q. So what are you saying about the district as redrawn?

12 A. As redrawn, an African-American candidate still has a
13 reasonable chance to be victorious. Like I said, as
14 Representative Hodges put it, they would, quote, have to
15 work hard, but they could win the district.

16 Q. And same question about 5. I'll try to -- I think
17 that we can see both elections now, 2020 and 2018.

18 A. We look at both those races, we see that the
19 African-American candidate was victorious quite handedly
20 in both years. If we look at the -- let me see here.

21 So it went from 56.9 down to -- the other year was
22 56.8. So the African-American candidate was able to do
23 quite well in those two districts and --

24 Q. You understand that this district has been redrawn?

25 A. Right. And it --

1 Q. Dr. Handley says that under its new configuration,
2 it's effectiveness score is I believe .448.

3 A. Point 448. So if we did the adjustment that we had
4 been debating earlier today that a Democratic candidate
5 still should be very competitive with slightly over 50
6 percent at a minimum I believe.

7 Q. Well, let's turn to that debate. Dr. Handley is very
8 critical of these adjustments that you're making, and she
9 says that the more accurate thing to do would simply be to
10 take her effectiveness score for a new district and
11 predict, all things being equal, that is what a House
12 Democratic candidate would get.

13 Why don't you agree with that?

14 A. From looking at the state legislative races, if we
15 just used her effectiveness scores, the African-American
16 Democrat would have won, I believe, 16. And it turns out
17 that it was 24 districts that were won. So that indicates
18 by right at 50 percent better than she would have
19 forecast.

20 Q. And was there also outperformance by black House
21 Democratic candidates --

22 A. Yes.

23 Q. -- the effectiveness scores in their old district?

24 What do you say to the criticism that you're assuming
25 these, I think Dr. Handley called them, bonuses the House

1 Democrat got over Bland in the past will remain constant?
2 What if they drop?

3 A. If they drop, that would change things. But I took
4 what she presented to us and assumed that it neither went
5 up or down because, theoretically, it could go in either
6 direction. I just assumed that the bonus stayed the same.

7 Q. As you understand --

8 THE COURT: Let me stop you for a second though.

9 Dr. Lockerbie, do you agree or are you contesting
10 that, in general, there's some kind of incumbent bonus,
11 and if an incumbent is not going to run, most likely, even
12 if a person from the same party wins, they're going to
13 generally win with less of the vote?

14 THE WITNESS: That is the -- what you just
15 stated is what the profession has been saying for years,
16 though I should also note two things about it: One, we
17 study Congressional elections more than legislative
18 elections. And in Congressional elections, one of the
19 premiere authors on that, Gary Jacobson, author of *The*
20 *Politics of Congressional Elections*, and it's in its
21 fifth, sixth, or seventh edition I believe, makes the
22 point that the incumbency advantage has dropped
23 tremendously in the last 20 to 30 years.

24 Second, looking at the State House in Arkansas over
25 the last decade or so, when I was looking at sort of the

1 term limit stuff, I went back to see how many of the
2 current legislator had been elected in 2010. And only
3 eight of them had been in the legislature from 2010 to
4 present, which indicates to me there is considerable
5 turnover. Whether incumbents are fearing defeat or they
6 just opt on for other jobs, I just don't know.

7 THE COURT: Or term limits?

8 THE WITNESS: Well, they haven't been hit with
9 term limits yet from what I was looking at.

10 BY MR. STEINBERG:

11 Q. On this question of incumbency, I'd like to show you
12 Parliamentarian Johnson's declaration again.

13 Do these elections look to you like elections where
14 incumbency is playing a very large role in protecting
15 members?

16 A. It doesn't appear to be with the -- especially the
17 drop that occurs between 2010 and 2012. And then you go
18 down the list and you see a decided drop for Democrats.
19 So even if they're incumbents staying on the ballot,
20 they're not as likely to win as they were in the past or
21 they have left office for whatever reason and Democrats
22 don't do well.

23 Q. Did Dr. Handley -- have you heard anything from
24 Dr. Handley, have you seen anything in her report where
25 she shows that these effectiveness scores are more

1 predictive in open seat elections, more predictive for
2 nonincumbent Democrats?

3 A. No. I didn't see anything that took into account the
4 incumbency status.

5 Q. Before I leave these effectiveness scores, there was
6 a fair amount of testimony a couple of days ago about how
7 they were compiled. Do you recall this testimony about
8 precinct splits and how they might affect effectiveness
9 scores?

10 A. Yes, I did.

11 Q. Do you recall she testified that the way she handles
12 these splits assumes that voting is the same in a part of
13 the precinct as in the whole?

14 A. Yes. I do recall her saying that.

15 Q. And do you recall she testified that this assumption
16 should only lead to significant errors if there is
17 racially polarized voting and a district is split along
18 racial lines -- sorry -- precinct is split along racial
19 lines?

20 A. I recall her saying that she was assuming that the
21 split was the same or the division didn't change the
22 racial makeup or the level of racial voting.

23 Q. My question is, can parts of a precinct differ
24 politically even if the racial composition of those two
25 parts of precinct is the same?

1 A. Yes, it could differ.

2 Q. Sometimes precincts have Republican neighborhoods and
3 Democratic --

4 MR. SELLS: Objection.

5 THE COURT: Sustained.

6 BY MR. STEINBERG:

7 Q. Do you recall Dr. Handley's testimony that, in
8 addition to making the Bland effectiveness score, she
9 averaged Democratic statewide candidates' vote shares in
10 the proposed districts?

11 A. Yes, I do.

12 Q. And her testimony that she got about the same
13 results?

14 A. Yes.

15 Q. And do you recall that she described this as a kind
16 of check on the accuracy of her Bland base scores?

17 A. I do recall her saying that.

18 Q. Does that alter your opinion on the predicted value
19 of the Bland scores, that these -- this index rises to
20 about the same result?

21 A. No. It would indicate to me that, instead of Bland
22 being distinct necessarily, that there is a partisan
23 component to it -- that is at least a partisan component
24 to it.

25 Q. Now, I just have one other --

1 THE COURT: Hold on a second.

2 MR. STEINBERG: Sorry.

3 THE COURT: No. Don't be sorry.

4 Dr. Lockerbie, I understand the point you're making
5 about Bland versus other elections. I get that point.
6 But doesn't the fact that they're similar suggest the
7 Bland effectiveness score can be used without concern?

8 I guess -- I understand the other point you're
9 making, but what I want to understand is your -- why you
10 believe that the Bland score can't be used even given the
11 -- even given the check against other elections.

12 THE WITNESS: I think my concern is that, if
13 Bland and other Democrats perform about the same, that
14 would indicate that it's not a racial component, that
15 white Democrats are -- elections are as predictive as a
16 black Democrat's election is predictive.

17 THE COURT: I'm probably asking the question in
18 a poor way. I understand that. I get that objection.

19 But that is a different -- I think that is a
20 different objection than the original objection, which
21 was, look, Bland is only one candidate and there might be
22 other reasons that other candidates do better or do worse
23 or anything like that.

24 To the extent I accept the check that Dr. Handley
25 did, wouldn't that mitigate the concern about Bland only

1 being one race, like -- not black/white one race -- one
2 election race. Wouldn't that mitigate that concern? It
3 might raise other concerns but wouldn't it mitigate the
4 original concern?

5 THE WITNESS: I think to mitigate that other
6 concern -- and she doesn't have it and I understand that
7 we deal with the world we're in. But there were not other
8 statewide African-American candidates running which you
9 would combine and I think that would mitigate concern
10 about one electoral contest, but she only has the one
11 African-American candidate.

12 THE COURT: Okay.

13 BY MR. STEINBERG:

14 Q. Well, I do have one other question on this topic.

15 Does enlarging the effectiveness score from Bland to
16 an average statewide election mitigate the concern that
17 elections for statewide offices don't predict elections
18 for state legislative offices --

19 MR. SELLS: Objected. Leading again.

20 THE COURT: Sustained.

21 You can rephrase the question.

22 BY MR. STEINBERG:

23 Q. Do you have a concern that election for statewide
24 offices --

25 MR. SELLS: Objection. Leading again.

1 THE COURT: You can rephrase the question.

2 BY MR. STEINBERG:

3 Q. Are elections for statewide offices necessarily
4 predictive of state legislative elections in your view?

5 A. No, they are not or they are at least flawed or
6 predictions with a good bit of variance around them.

7 Q. Do you think that voting can be more or less
8 polarized --

9 MR. SELLS: Objection. Leading.

10 THE COURT: Sustained.

11 BY MR. STEINBERG:

12 Q. I do have one other topic that I would like to
13 address.

14 Now, in her rebuttal report and in her testimony the
15 other day, Dr. Handley said that black Democrats simply
16 have not won many state legislative elections outside of
17 majority black districts. Do you recall that?

18 A. Yes, I do.

19 Q. I think that she said that the one exception in a
20 contested race was District 11 and that there were special
21 circumstances there because it was a three-way race. Do
22 you recall that?

23 A. Yes, I do.

24 Q. Why doesn't that affect your view that 45 percent
25 black districts can elect black candidates?

1 A. Looking at the population that is African-American
2 within a district, if you get to 45 percent and there is
3 a, quote, black preferred candidate that gets overwhelming
4 votes -- overwhelming vote of the African-American
5 community, you do not need a terribly large number of
6 whites to cross over to the Democratic side to give the
7 African-American Democrat a victory.

8 Q. I have a few particular questions about District 11.
9 This has been marked as Defendants' Exhibit 8, declaration
10 -- supplement declaration of Josh Bridges. Have you seen
11 this document?

12 A. I believe I have, yes.

13 Q. If you look at Paragraph 5, who does it tell us --

14 MR. SELLS: Objection. Hearsay.

15 THE COURT: Overruled.

16 BY MR. STEINBERG:

17 Q. Who does Bridges claim won the 2012, 2014, and 2016
18 elections in District 11?

19 A. Mark McElroy.

20 Q. Now, what does it say happened in the 2016 primary?

21 MR. SELLS: Objection. He's reading off a
22 document that hasn't been admitted that is clearly hearsay
23 and making it evidence because he's just reading the page
24 that's in front of him. That's totally improper.

25 THE COURT: I appreciate it, Mr. Sells. The

1 Rules of Evidence are relaxed in a preliminary injunction
2 hearing like this. I'm going to overrule your objection.

3 THE WITNESS: It states that he defeated Bob
4 Ware in the primary.

5 BY MR. STEINBERG:

6 Q. And what percentage of the vote did McElroy get here?

7 A. He received just under 55 percent.

8 Q. Now, I want to show you what's been marked as
9 Defendants' Exhibit 9. It's a newspaper article in SE Ark
10 Today. Have you seen this article?

11 A. I believe I have.

12 Q. What race does Mr. Ware appear to be to you?

13 A. African-American.

14 Q. Last, I would like to show you what's been marked
15 Defendants' Exhibit 10, an article in the Arkansas
16 Democratic-Gazette.

17 If you look at the third paragraph, what does it say
18 McElroy's response was?

19 MR. SELLS: I'm going to repeat my objection.
20 Hearsay, improper testimony. I mean, we could read the
21 newspaper into the record all day long.

22 THE COURT: I appreciate your point on this one.
23 While a hearsay objection, I don't have to -- I don't have
24 to sustain in a hearing like this and I can let it in. I
25 do need to know more about this. I can't even see when

1 this is, what this is, where it's from to make sure it's
2 something that I can even evaluate. I need some more
3 information.

4 BY MR. STEINBERG:

5 Q. So this is the last page of it. It's from --

6 A. Could you pull it down?

7 Q. -- Arkansas Democrat-Gazette. On the top page, it's
8 dated September 2018.

9 THE COURT: You can ask questions -- you can ask
10 questions about it if you want to and if the witness knows
11 the answers.

12 MR. STEINBERG: Okay.

13 BY MR. STEINBERG:

14 Q. Based on your reading of this article, what did
15 McElroy do when Circuit Judge Don Glover announced he
16 would run in the Democratic primary?

17 A. He opted to leave the Democratic party and run as an
18 independent.

19 Q. Then if we could put up this from Dr. Handley's
20 report, what was the outcome of the general election in
21 2018?

22 A. Mr. McElroy came in second and Mr. Glover became the
23 winning candidate.

24 Q. Finally, 2020.

25 A. We had a very close election in which Mr. McElroy

1 returned to office.

2 Q. In your opinion, does McElroy's status as a former
3 three-term incumbent enhance his chance of --

4 MR. SELLS: Objection. Several basis for the
5 objection. Clearly, a leading question. But also this
6 goes way beyond Professor Lockerbie's declaration in this
7 case that we didn't have any notice that this guy was
8 going to opine about all of this kind of stuff.

9 THE COURT: I'm going to sustain the objection
10 on leading and, since I don't have to yet, not deal with
11 any of the other objections unless Mr. Steinberg rephrases
12 his question.

13 BY MR. STEINBERG:

14 Q. So in light of this information, what opinion do you
15 draw, if any, about black electoral opportunities in a
16 nonminority black district?

17 MR. SELLS: Objection.

18 THE COURT: Now, I'm going to overrule the
19 objection.

20 THE WITNESS: In a nonmajority black district,
21 there are several instances in which an African-American
22 candidate was capable of victory, which would indicate
23 that -- well, I'll just leave it at that.

24 BY MR. STEINBERG:

25 Q. If I could just put up the numbers again. What was

1 the white vote share for Glover here?

2 A. For Glover it was white vote shares, 6.1 percent
3 using the last of the columns.

4 Q. What percentage of the vote did Glover get total?

5 A. 49.7.

6 Q. Do you recall what the black population of this
7 district was?

8 A. No, I do not.

9 Q. Assuming it was 46 percent --

10 MR. SELLS: Objection.

11 THE COURT: Sustained.

12 THE WITNESS: District 11 shows that the --

13 MR. STEINBERG: Sorry. I haven't asked a
14 question.

15 THE WITNESS: I'm sorry. I apologize.

16 BY MR. STEINBERG:

17 Q. This is from Dr. Handley's report. What does she say
18 black voting age population of current District 11 is?

19 A. 46.2 percent.

20 Q. So if more than six percent white voters voted for a
21 black Democrat, could a black Democrat win the district
22 with that population?

23 A. Yes.

24 Q. Dr. Lockerbie, I don't have any further questions for
25 you. I hope you make your plane.

1 THE COURT: Plaintiffs.

2 CROSS-EXAMINATION

3 BY MR. SELLS:

4 Q. Professor Lockerbie, I want to start where we left
5 off on House District 11.

6 I understood your testimony that the elections in
7 House District 11 that Lisa Handley analyzed shows that
8 minority voters can elect in a district that is less than
9 majority black. Did I get that right?

10 A. I believe you did.

11 Q. But at the time you told the Court that that was your
12 opinion, you didn't know what the population of House
13 District 11 was, right?

14 A. Not off the top of my head, no.

15 Q. Just wanted to make sure I understood that sequence
16 of events correctly.

17 Now, Professor Lockerbie, you're being paid for your
18 work in this case, correct?

19 A. That is correct.

20 Q. How much?

21 A. 500 an hour.

22 Q. And how many hours have you spent on this case so
23 far?

24 A. I don't know the exact number off the top of my head.

25 Q. Can you give me a ballpark within, like, say, four

1 figures?

2 A. Four figures?

3 Q. Yes.

4 A. I'm not certain what you mean by "four figures."

5 Q. In term of dollar amount. But if you want to do
6 rounding to five the number of hours you've --

7 A. I have probably put in at least 30 hours, including
8 the time here and travel.

9 Q. So that's at least 15,000 so far?

10 A. Yes.

11 Q. You live in North Carolina, correct?

12 A. That is correct.

13 Q. Are you registered to vote in North Carolina?

14 A. Yes, I am.

15 Q. And North Carolina allows voters to register -- to
16 choose a political party affiliation when registering to
17 vote, correct?

18 A. That's correct.

19 Q. And you are affiliated with the Republican party,
20 correct?

21 A. That's correct.

22 Q. And you served as an expert in a case called Donald
23 J. Trump For President, Inc. versus Kathy Boockvar, et al,
24 correct?

25 A. Yes.

1 Q. And in that case, your client was former President
2 Trump's 2020 campaign, right?

3 A. That is correct.

4 Q. Former President Trump is a Republican, right?

5 A. Yes.

6 Q. You also served as an expert in a case called Nielsen
7 versus DeSantis, correct?

8 A. That's correct.

9 Q. And in that case, your clients were the Republican
10 National Committee, the Republican National Congressional
11 Campaign Committee, and the Republican Party of Florida,
12 correct?

13 A. I believe so, yes.

14 Q. And in this case, your clients are the Governor,
15 Attorney General, and Secretary of State of the State of
16 Arkansas, correct?

17 A. That is correct.

18 Q. And do you know what party those three officers are
19 affiliated with?

20 A. I know the Governor is a Republican. I assume the
21 others are.

22 Q. Why do you make that assumption?

23 A. Because Arkansas has turned Republican.

24 Q. Based on your work so far in this case, which party
25 would likely to gain -- which party would be likely to

1 gain from a reduction in the number of minority
2 opportunity districts from 12 to 11?

3 A. I would assume that the Republicans would benefit.

4 Q. All right. I want to make sure I understand your
5 race versus party testimony correctly. I heard you say a
6 couple of times that there is at least a partisan
7 component to voting in Arkansas. Did I get that right?

8 A. Yes.

9 Q. So you're not suggesting that the vote share of black
10 candidates is only explained by party, are you?

11 A. No.

12 Q. You're not testifying that race plays no role in
13 Arkansas politics, are you?

14 A. That is correct.

15 Q. But you didn't do any analysis to determine the
16 relative contribution of, let's say, the race or partisan
17 identification of the voter or of the candidates on vote
18 choice or vote shares in Arkansas, right?

19 A. I don't know how that would have been possible.

20 Q. Well, actually a good bit of your published work has
21 focused on examining the relative contributions of a
22 voter's partisan identification and other factors like
23 economic outlook --

24 A. Correct.

25 Q. -- on vote choice. Isn't that right?

1 A. That's correct.

2 Q. In those papers, you actually do try to assess the
3 relative contributions of those factors on some dependent
4 variable of vote choice, either vote choice or vote share,
5 correct?

6 A. Right.

7 Q. Are you saying that those methods couldn't be used in
8 this case?

9 A. They would -- I don't know how we would be able to
10 make use of those methods in this case in that we do not
11 have measures of party affiliation that are as good as,
12 say, a question asking people their party affiliation from
13 a survey.

14 Q. Like the survey that's done every four years along
15 with the presidential elections?

16 A. Which survey?

17 Q. The Cooperative Election Survey, CES, that you have
18 used in your own work in the past.

19 A. I don't believe I've used that survey in my work.

20 Q. Where do you get party identification from in your
21 work?

22 A. The American National Election Studies.

23 Q. Okay. The ANES. And that doesn't happen in
24 Arkansas?

25 A. The number of respondents in any one state is

1 typically too small to make inferences. And if we
2 translate it down to state legislative districts or
3 precincts, it is less than useful.

4 Q. Let me ask you this. Did you look up whether the
5 ANES or the Cooperative Election Survey, CES, is available
6 in Arkansas and how many respondents there were in, let's
7 say, the 2020 election?

8 A. No.

9 Q. So there are methods out there; you just chose not to
10 use them, correct?

11 A. I didn't make a choice because it is common
12 knowledge, at least with the American National Election
13 Study with which I'm familiar, that, unless you're talking
14 about California or New York, the sample sizes in any one
15 state are going to be prohibitively small so you couldn't
16 work with them.

17 Q. What other investigation did you do to determine
18 whether there's similar data here in Arkansas?

19 A. I did not.

20 Q. Do you know whether Arkansas allows voters to choose
21 a party affiliation when registering to vote?

22 A. My reading of the voter registration form showed that
23 there is a place where you can write in your party
24 affiliation.

25 Q. I want to talk a little bit about your effectiveness

1 scores. And I don't want to be unfair to you. So if it's
2 okay with Your Honor, I would like to give you a pen and a
3 pad of paper in case you need to write down some numbers
4 because we're going to go over some numbers. All right?

5 A. Okay.

6 THE COURT: It's okay with me.

7 THE WITNESS: I guess you're the one that
8 matters.

9 THE COURT: One of them.

10 BY MR. SELLS:

11 Q. So, first, I would like to understand how you
12 actually calculate the adjusted effectiveness score that
13 you say you rely on in this case. Let's start with House
14 District 98. I want to put on the ELM0 a little cheat
15 sheet that I've prepared.

16 Now, I've already filled in the black voting age
17 population and the effectiveness score that appears on
18 Lisa Handley's exhibit. We can go back and look at that
19 if you're uncertain about those numbers.

20 A. I'll take your word.

21 Q. All right. So can you walk me through how you would
22 compute the adjusted effectiveness score for those two
23 districts starting with District 98?

24 A. What I would have done is looked at that
25 effectiveness score and then looked at how well the

1 Democrat did in the election to see if the person did
2 better or worse than the predicted value from
3 Dr. Handley's score.

4 Q. Pause right there. I want to drill down and we're
5 actually going to calculate those effectiveness scores
6 together. What documents do you need to look at?

7 A. I would need to look at the election returns from the
8 98th district.

9 Q. That would be Plaintiff's Exhibit 8C, Page 002, I
10 believe. So we need to switch to the presentation.

11 So District 98 was old District 5. Do you remember
12 that?

13 A. I believe so, yes.

14 Q. So what number do we need here?

15 A. The 56.8.

16 Q. Okay. That's the 2020 election.

17 What number do we need next?

18 A. Are we just doing that one district for that one
19 year?

20 Q. We're going to do both years for both districts.

21 A. Then I would need the 2018.

22 Q. That's on the next page.

23 A. 56.9.

24 Q. Okay. What number do we need next?

25 A. We need to go back to the effectiveness scores.

1 Q. For the current or the proposed?

2 A. If we're looking at what's expected in the proposed
3 -- well, first of all, I have to look at the current to
4 see how much better was done.

5 Q. Okay. Let's look at Plaintiff's Exhibit 8A at Page
6 2. Do you see that?

7 A. Okay. And that is -- we're still looking at
8 district --

9 Q. We're looking at District 5.

10 A. Okay. That wasn't highlighted on mine. And so the
11 effectiveness score -- the effectiveness score is 50.8.

12 THE COURT: Can I make sure we're all talking
13 about the same thing here? When we're talking about
14 current District 5, are we talking about the 2011 board
15 plan District 5 or the 2021 board plan District 5?

16 THE WITNESS: I believe you're talking about the
17 2011.

18 MR. SELLS: That's correct, Your Honor.

19 THE COURT: Okay.

20 BY MR. SELLS:

21 Q. Okay. What do we do next?

22 A. I subtracted the effectiveness score provided by
23 Dr. Handley from the actual election returns.

24 Q. Okay. So if we could go back to the ELM0.

25 You would subtract that number from that number?

1 A. Yes.

2 Q. And that is 6.0, 6.1. Easy math, right?

3 A. Yes.

4 Q. I like easy math.

5 A. Don't we all?

6 Q. What do we need next?

7 A. We would then look at the effectiveness score for the

8 proposed districts as I recall.

9 Q. Okay. That's already on the screen because I filled

10 it in, the .448.

11 A. Okay.

12 Q. Right?

13 A. So we would add to District 98's 448 six points for

14 one year and 6.1.

15 Q. So .508 and .509. Easy math.

16 A. So far.

17 Q. Did I get it right?

18 A. I think so.

19 Q. So what's the adjusted effectiveness score for

20 District 98?

21 A. It is greater than .5. The exact one for -- it's

22 different for 2018 and 2020.

23 Q. What -- which one do you use?

24 A. Given that they're both above .50, I would conclude

25 that they're opportunity districts or effectiveness above

1 .5 based on the actual election returns.

2 Q. Okay. How do we calculate the numbers for 34? Same?

3 A. Same process.

4 Q. Let's go back and look -- and get those numbers.

5 A. If I'm reading it correctly, the effectiveness score
6 for District 34 is .755.

7 Q. That's the current, not the proposed. I think that's
8 the wrong number. We need to go look at the election
9 results. That is 8C, Page 3 and 2 -- 2 and 3.

10 This is for House District 55, which is 34 in the
11 proposed plan.

12 A. So in this year it is that Monte Hodges got 52.2
13 percent. Which year is that?

14 Q. 2020.

15 A. Was it -- it darted away 52.2.

16 Q. Then we have to scroll down to Page 4.

17 A. He received 61.7 percent.

18 Q. All right. Now, we have to look at the effectiveness
19 score for that district in the old plan which is at Page
20 8A -- or Exhibit 8A, Page 3.

21 A. That is which district did you say?

22 Q. District 55.

23 A. 55. And that is 50.02 or 50 -- 50.2, excuse me.

24 Q. Okay. Now, back to the ELMO we'll do the math
25 together. 0.2. Did I get that right?

1 A. No.

2 Q. No?

3 A. 2.0.

4 Q. 2.0. And over here it is 11.5.

5 A. I believe, yes.

6 Q. And then to get the final effectiveness score, we add

7 that to .462, correct?

8 A. Correct. .482.

9 Q. 482 and .577. Did I get that right?

10 A. No. 11.5 -- let's see here. Move it over. Okay, so

11 let's see .462. Excuse me. You're correct on that one.

12 Q. Okay. So which of those two is the adjusted

13 effectiveness score?

14 A. I would argue that neither alone is the effectiveness

15 score, but that one is just below .5, one is just above .5

16 or it is at .577.

17 Q. What is your conclusion with regard to minority

18 electoral opportunity in District 34?

19 A. That it would be a competitive district.

20 Q. Is that the same thing as an opportunity district or

21 different from an opportunity district?

22 A. I believe it would be different.

23 Q. You're not claiming District 34 is an opportunity

24 district?

25 A. Not based on the numbers from Dr. Handley that she

1 provided, no.

2 THE COURT: Stop there for a second.

3 What are your definitions? What's the difference
4 between a competitive district and an opportunity
5 district? I just want to understand your testimony.

6 THE WITNESS: Certainly. An opportunity
7 district as defined by Dr. Handley is, it requires that
8 the effectiveness score be above .50. I would argue a
9 competitive district would simply have to be close to the
10 .50. Could be on either side of it, but as long as it
11 was reasonably close.

12 THE COURT: Okay.

13 BY MR. SELLS:

14 Q. Based on your adjusted effectiveness score, would the
15 black-preferred candidate usually win or usually lose?

16 A. It would depend on which of the two adjustments were
17 employed. One is decidedly above .5. One is just below
18 .5.

19 Q. If the Court were to reject the notion of the
20 adjusted effectiveness score altogether and look just at
21 the effectiveness score, neither House District 98 nor
22 District 34 would be opportunity districts, correct?

23 A. If the requirement is that they be above .50, that
24 would mean they would not be opportunity districts; though
25 I think one should also look at how the state legislative

1 races turned out when the effectiveness scores were in
2 that range to see how state legislative candidates did to
3 get more purchase on that.

4 Q. The effectiveness score of .448 and .462 don't give
5 you any indication that black-preferred candidates are
6 likely to win?

7 A. That alone, no.

8 Q. And you don't have any information other than what
9 you've done in your adjusted effectiveness scores that
10 black-preferred candidates are likely to win in these
11 districts?

12 A. I don't have the exact numbers in front of me, but I
13 recall that a number of African-American state legislative
14 candidates won in districts with effectiveness scores at
15 .45 to .499.

16 Q. Can you tell me which ones those are?

17 A. No.

18 Q. I want to ask you about House District 74 and 49
19 next, so we'll go back to the computer.

20 Make sure I understand your testimony about those.
21 Let's look at Plaintiff's Exhibit 8A at Page 6. I want to
22 focus on House District 74 first.

23 Now, you didn't calculate an adjusted effectiveness
24 score for this district, right?

25 A. No, I don't believe I did.

1 Q. Is it your testimony that House District 74 is likely
2 to provide black voters with an opportunity to elect the
3 candidates of their choice?

4 A. Yes.

5 Q. And that conclusion is based only on the
6 effectiveness score, correct?

7 A. Dr. Handley provided, yes.

8 Q. And if we could look at the line for House District
9 49. House District 49 has a black voting age population
10 of 14.57 percent and effectiveness score of .531. And is
11 it your testimony that House District 49 is likely to
12 provide black voters with an opportunity to elect
13 candidates of their choice?

14 A. Yes.

15 Q. And that is based solely on the effectiveness score,
16 correct?

17 A. The effectiveness score provided by Dr. Handley, yes.

18 Q. I would like to go back to the ELM0 and ask you about
19 some hypothetical districts. My question to you for each
20 one is going to be whether you think the district provides
21 black voters an opportunity to elect candidates of their
22 choice.

23 Okay. The first district has a black voting age
24 population of 12.37 percent and an effectiveness score of
25 .501. Would you consider that district one in which black

1 voters have an opportunity to elect candidates of their
2 choice?

3 A. Yes.

4 Q. The next district has a black voting age population
5 of 2.78 percent and an effectiveness score of .614. Would
6 you consider that a district in which black voters have an
7 opportunity to elect candidates of their choice?

8 A. Yes, as I told the judge earlier.

9 Q. How about that district?

10 A. As I told the judge earlier, yes.

11 Q. Do you know how many black voters that would
12 represent in a district of 30,000 people?

13 A. I don't pretend to do math in my head, but I would
14 guess it is a remarkably small number.

15 Q. I wish Tony Fairfax was here because he could tell us
16 how many black folks that represents.

17 Let me ask you this. Are you aware of any cases in
18 which a Court has said that one African-American soul is
19 enough to turn a district --

20 A. Your question --

21 Q. -- from -- hang on. I haven't asked you a question
22 yet.

23 A. I thought you stopped. I apologize.

24 Q. Let me start again.

25 Are you aware of any cases that have said that one

1 African-American soul is enough to make a district a black
2 opportunity district?

3 A. No, I'm not. But by the definition that Dr. Handley
4 provided in terms of her effectiveness scores, given the
5 hypothetical that you've put up there, that looks like the
6 African-American candidate, assuming there is one, maybe
7 it's that .001 person, would have a reasonable chance of
8 victory based on the information you provided me.

9 Q. Is it your testimony that Dr. Handley would consider
10 this district with one black person in it a black
11 opportunity district?

12 A. No.

13 Q. I didn't think so. I don't know -- do you know of
14 anyone who would consider that a black opportunity
15 district other than you?

16 A. I haven't made a survey of people, no.

17 Q. How about the Bullock and Dunn article that you cited
18 earlier? Is there anything in that article that would
19 suggest that a district with one person in it -- one black
20 soul could constitute a minority opportunity district?

21 A. I don't recall from their article whether they even
22 address that.

23 Q. Wouldn't you be laughed out of a political science
24 conference if you tried to make that argument, Professor
25 Lockerbie?

1 A. Political scientists argue a wide variety of things.
2 I would assume that they would look at it and say that
3 black voters aren't a substantial component of that
4 district, but given the effectiveness score, that
5 hypothetical for lieutenant gubernatorial candidate Bland
6 would indicate that there is something about that district
7 that favors black candidates.

8 Q. Isn't it true that what it says is that district has
9 a lot of white voters or Hispanic voters or Asian voters
10 or other nonblack voters who are willing to vote for a
11 black candidate?

12 A. Yes.

13 Q. All right. What does that say about black voting
14 power in that district?

15 A. Blacks as isolated would have very little because
16 there are very few people, but that other groups tend to
17 support black candidates.

18 Q. How about that district, black voting age population
19 of .000 and effectiveness score of .5; is that an
20 opportunity district?

21 A. We wouldn't know what the black population wanted
22 because there isn't one.

23 Q. How would you be able to tell what the one black soul
24 wanted in the previous district?

25 A. We don't have surveys of the voters there.

1 Q. Right. So how could you do an analysis to determine
2 who was the black preferred candidate?

3 A. You could try to do the ecological inference, but I
4 would imagine with a sample size that small in a district,
5 it would not be terribly reliable. And that is why with
6 ecological inference one would try to make use of
7 confidence intervals to try to establish a band around
8 one's forecast.

9 Q. So finally we found a district that is too extreme
10 for Professor Lockerbie, right? This one. You don't
11 know?

12 A. I don't know how one would assess it if there is no
13 black citizenry in the district how there could be a black
14 choice.

15 Q. How would you it assess it if there was one black
16 soul in the district? Do you know of a statistical method
17 that can determine the voting preferences of a single
18 person in a district of 30,000 people?

19 A. Not off the top of my head, unless you did
20 enumeration or that one African-American was pulled up in
21 your survey by chance.

22 Q. We would like to marked this as an exhibit for the
23 Court. I don't know if it should be Court's exhibit or
24 plaintiffs, however the Court prefers.

25 THE COURT: Any objection?

1 MR. SELLS: We should probably mark the other
2 one as well.

3 THE COURT: Any objection?

4 MR. STEINBERG: No.

5 THE COURT: We can admit them both as
6 plaintiffs' whatever the appropriate number would be.

7 MR. SELLS: Thank you Your Honor. We'll figure
8 out what that is.

9 (Plaintiffs' Exhibits 71 and 72 admitted into evidence.)

10 THE COURT: When I say appropriate number, I
11 guess what I think you should probably do is, whatever
12 your last number is of things you already have marked, you
13 just add it sequentially as the last number.

14 MR. SELLS: If I could have just a moment to
15 confer.

16 THE COURT: Sure.

17 MR. SELLS: For the record, these will be marked
18 as Plaintiffs' Exhibit 71 and 72. I'll pass them to
19 Ms. Clark.

20 THE COURT: Yes.

21 MR. SELLS: And I pass the witness.

22 THE COURT: Before you do that, just hang out up
23 there, Mr. Sells, if you would.

24 Dr. Lockerbie, one thing I've been struggling with as
25 you've been testifying is, I'm trying to understand how

1 your expertise links up to the testimony you've given.
2 Meaning, it's very clear you have -- at least to me it's
3 very clear you have expertise in political science. In
4 terms of the testimony, a lot of the testimony strikes me
5 more at sort of pointing out number problems or
6 consequences of numbers, at least from your perspective,
7 with Dr. Handley's testimony.

8 In a way, in some sense anybody could do. I mean,
9 I'm not a political science expert, but I could look at
10 the numbers and say, you know, I think this means this, I
11 think there should be a little bit of bump on the
12 effectiveness score because of how these elections
13 actually came out.

14 I'm struggling to understand how your expertise has
15 affected or informed your testimony. Could you help me
16 with that a little bit?

17 THE WITNESS: I'll do my best with it, sir.

18 I think my knowledge of election outcomes and being
19 able to look at a previous election and say, here is by
20 how much over these two elections we should adjust the
21 numbers. Is it a simple mathematical mechanical thing?
22 Yes, but I have the knowledge of looking at the other
23 elections to say, it's not just how the gubernatorial or
24 lieutenant gubernatorial candidate did, but we should look
25 at other factors beyond that when it's presented to us.

1 I have a knowledge of statistics that are used within
2 political science that inform my decisions there. For
3 example, Dr. Handley made note of the confidence intervals
4 for her -- or at least that they could be calculated,
5 although she did not provide them. I did not provide
6 confidence intervals for her work because I didn't have
7 the data. But I do know from my reading of the political
8 science literature, including I think -- I can't remember
9 if he is a coauthor of hers or not, but Gary King, the
10 creator, basically, of ecological inference, said it was
11 necessary to have confidence intervals in his book looking
12 at ecological inference.

13 THE COURT: I appreciate that.

14 I don't know if that brought anything else up for
15 you, Mr. Sells, but that's the one question I had.

16 MR. SELLS: No. I don't have any follow-up on
17 that.

18 THE COURT: Redirect.

19 MR. STEINBERG: I have nothing further. And so
20 you can get to your flight, I would like to --

21 THE COURT: Dr. Lockerbie, thank you for your
22 testimony.

23 We're going to take a 15-minute break. Plaintiffs,
24 what's next after this?

25 MR. SELLS: We start with our lay witnesses, and

1 the first one will be Shelby Johnson.

2 THE COURT: We're going to take a 15-minute
3 break and then we'll get back together.

4 (A recess was taken at 4:19 p.m. until 4:37 p.m.)

5 THE COURT: Mr. Sells or whoever is next.

6 MR. SELLS: Your Honor, the plaintiffs call
7 Shelby Johnson to the stand. Your Honor, while he's
8 coming in, I want to ask permission to ask leading
9 questions because Mr. Johnson is identified with an
10 adverse party.

11 THE COURT: Plaintiffs?

12 MR. SELLS: Defendants.

13 THE COURT: That's true. That is a terrible
14 habit.

15 Defendants?

16 MS. MERRITT: I'm not sure -- I mean, he's a
17 State employee. Everyone associated with the State is
18 going to be considered an adverse party, I don't know that
19 that's appropriate. I think until he's hostile, I think
20 we should conduct or examination according to the rules.

21 MR. SELLS: I think it is according to rule.

22 THE COURT: I got it. I'm going to allow you to
23 treat him as an adverse witness and ask leading questions.

24 MR. SELLS: I may not need to, but I wanted to
25 ask permission up front.

1 THE COURT: I appreciate that.

2 SHELBY JOHNSON, PLAINTIFFS' WITNESS, DULY SWORN

3 DIRECT EXAMINATION

4 BY MR. SELLS:

5 Q. Good afternoon, Mr. Johnson. I'm Bryan Sells, one of
6 the attorneys for the plaintiffs in this action. And I
7 met you this morning out in the hallway. Just wanted to
8 say hello again.

9 Would you please state your name for the record?

10 A. Shelby Johnson.

11 Q. What's your educational background, Mr. Johnson?

12 A. High school in Arkansas and then one year University
13 of central Arkansas and then I completed my degree in
14 geography with specialization in geographic information
15 systems at the University of Arkansas at Fayetteville.

16 Q. What do you do for a living?

17 A. I serve as the state geographic information officer
18 in the Arkansas Geographic Information Systems office here
19 in Little Rock.

20 Q. How long have you done that?

21 A. I began my career with state government here in
22 Little Rock in 1999 and I've fulfilled roughly the same
23 role since 1999.

24 Q. What did you do before 1999?

25 A. I was a research specialist at the Center for Advance

1 Spatial Technologies at the University of Arkansas in
2 Fayetteville. I worked there for about seven years
3 specializing in geographic information system research.

4 Q. Did you have any experience with redistricting before
5 this past year's redistricting process?

6 A. Yes.

7 Q. What was that experience?

8 A. In the 2000 era cycle, we provided various technical
9 support, access to data, assisting local government with
10 understanding census data. Same thing in 2010. In 2010
11 cycle, assisted the Board of Apportionment with various
12 technical issues associated with the census data, assisted
13 local government, school districts, counties, cities, et
14 cetera, with drawing up new wards, school board zones, or
15 justice of the peace districts.

16 Q. What is the Arkansas GIS office where you are the
17 director?

18 A. The office coordinates geographic information data
19 for the entire state. Our central goal is to collect,
20 archive, curate, and then publish that data in order to
21 reduce duplication of effort. We work with local
22 government, state government, various branches of state
23 government, and then also federal government to share and
24 exchange geographic information about Arkansas.

25 Q. About how many staff in the Arkansas GIS office?

1 A. We have a staff of 12. Three of those staff are part
2 of our division of land surveys, and the remainder of
3 staff, one is administrative and the rest are geographic
4 information systems analysts or senior analysts.

5 Q. What's your approximate annual budget in the Arkansas
6 GIS office?

7 A. Oh, tough question. I'm going to -- I don't know the
8 exact figure, but I'm going to say that our salary budget
9 is around 760, \$770,000 annually.

10 Q. What are the major job functions of the GIS analysts
11 that you talked about?

12 A. We operate several different programs that perform
13 different functions for state government that are mostly
14 associated with organizing local data, pulling that local
15 data up to the state level, and then organizing it onto a
16 common map database and then publishing it.

17 Good example of that is our road file. Our statewide
18 road file primarily comes from the various county 911
19 offices. We organize that into a single statewide file
20 and then publish for others to use. We do that for roads,
21 addresses, parcels, boundaries. And then we publish that
22 so that other entities of state government can take
23 advantage of that data and be able to use it.

24 Q. What sort of experience do your GIS analysts have to
25 get that kind of a position?

1 A. Most of our staff come from other disciplines like
2 geography, forestry, biology. Some of them come from just
3 a career path where they've been in some other work that
4 afforded them the opportunity to use the technology and
5 software. Most of our analysts -- the entry that we
6 require two years of experience. Most of that is related
7 to the software, knowing the software, knowing data. Some
8 on my team are -- they now have upwards of ten, 12 years
9 of experience.

10 Q. You mentioned software. What software does your
11 office use or what software did the GIS analysts use
12 specifically?

13 A. Our primary tool that we use is made by a company
14 called ESRI, and software is called ArcMap. And then we
15 use another software called ArcPro, and then we have some
16 other software such as feature manipulation engine, and
17 then, of course, database processing software that's used
18 to manipulate the databases and care take over the data.

19 Q. And I heard you say ESRI. And is that the same
20 company as is often calls Esri?

21 A. Yes.

22 Q. Just wanted to make sure that we were talking about
23 the same company.

24 What is your role, generally speaking, within the
25 office? You supervise all of them?

1 A. I supervise staff and then I also am in various
2 projects, assist in day-to-day activity. There are
3 sometimes -- we're a fairly small staff given the scope of
4 our assignment, which is working with the 75 counties, 500
5 cities, 234 school districts. So from time to time, I
6 actually am involved in project work myself in addition to
7 supervisory activity, administrative activity, budget, et
8 cetera.

9 Q. Given your background, sounds like you have 20, 30
10 years of working with this software, this ArcMap, ArcPro,
11 those kind of things?

12 A. I think I'm approaching something on the order of 28
13 years, I think.

14 Q. Yeah. You're not just an overseer or a supervisor,
15 you know how to actually do the work of the office,
16 correct?

17 A. Yes, I do.

18 Q. I want to turn now to the redistricting process from
19 this cycle and I want to ask first, what was your personal
20 role in the redistricting process?

21 A. The work began in 2016 actually. We started working
22 very heavily on preparing data from Arkansas that would
23 eventually be incorporated into the 2020 census geography
24 files. A lot of that work included boundary work, a lot
25 of our boundary work, municipal boundaries, couple of

1 instances, county boundaries. And then, of course, our
2 road and address file which are partnership files which
3 are shared with the Census Bureau and then our work on
4 election precincts and making sure that that geography is
5 incorporated into the 2020 census data.

6 So we organize in the couple of different programs
7 that we focus on. A lot of focus with county clerks.

8 In addition to that, as the cycle approached --

9 Q. Let me stop you there just to ask a follow-up
10 question on what you just said.

11 In terms of working with the census starting back in
12 2016, we heard from another witness earlier in the week
13 about that, that there is a program whereby states upload
14 boundary files for things like precincts to the census so
15 that, when the census data come out, it actually reflects
16 something that's real on the ground.

17 Is that what you're talking about?

18 A. Yes, that's correct. It's called the Boundary and
19 Annexation Survey program. And we're the -- my office is
20 the state steward for that program for Arkansas.

21 Q. And another little digression here because I forgot
22 to ask this when I was talking about your office. But do
23 other states have a similar GIS office to the one that
24 Arkansas has?

25 A. A lot of states do. There are not -- not every state

1 does, but a lot of states do. We maintain contact with
2 our counterparts and are aware of several of the states
3 that do.

4 Q. Well, speaking as a Georgian, we have nothing like
5 what you guys have here in Arkansas, so I hope folks
6 appreciate that.

7 Getting back to your personal role in this year's
8 redistricting process. What besides this data sharing
9 with the Census Bureau did you particularly do? I'm not
10 so much talking about your office, but I'm talking about
11 Shelby Johnson.

12 A. I have the number of different exchanges with James
13 Whitehorne. He's is the chief of the redistricting data
14 office for the Census Bureau. We served as the -- what's
15 called the technical point of contact for the
16 redistricting data file. That included really just
17 receiving, interpreting the data.

18 And then we also played a role in supporting the
19 Board of Apportionment that I would characterize as a
20 technical role, a technical advisory role; for example,
21 assisting them with software, getting the data into the
22 software, assisting them with printing large exhibits for
23 public meetings, attending public meetings. So I played a
24 part in all of those activities. And then just answering
25 a lot of questions, helping them understand the data and

1 so forth.

2 Q. You actually attended a number of the Board of
3 Apportionment's public hearings, correct?

4 A. I attended all of them.

5 Q. Did you attend nonpublic meetings of the Board of
6 Apportionment or any other meetings with the board during
7 the process?

8 A. Not the principles themselves, but their staff, their
9 redistricting staff that they assigned. I attended
10 several meetings with them.

11 Q. Okay. I want to talk about the role that your whole
12 office had. I think you started to get into that. You
13 mentioned technical support. But I want to drill down on
14 some of that.

15 First, could you give us the overview of what the
16 Arkansas GIS office did in the redistricting process?

17 A. One of the things that we did was training. We had
18 to develop proficiency with the software that the board
19 used. We developed that proficiency, learned how to use
20 it, how to build reports, how to drive that software. And
21 then in turn, we trained the board staff and assisted them
22 with various different aspects of beginning the
23 redistricting process.

24 One of the things that we recommended to them was to
25 begin using the American Community Survey Data as a way to

1 help them get started so that they could build
2 proficiency. We assisted them with getting that data into
3 place.

4 Another thing that we assisted with was a lot of
5 printing the exhibits for the public meetings. We've
6 prepared analysis that attempted to forecast the variants
7 for the House and Senate district, the current -- the
8 previous ones so that the board and the public could begin
9 to understand the impact of change that would be necessary
10 in Arkansas. We did other kinds of analysis like county
11 population change from 2010 to 2019. Those are some
12 examples.

13 Q. You mentioned the board software. Did they use a
14 different software than the ArcMap that you told us about
15 earlier?

16 A. Yes. They used a software called autoBoundEDGE.

17 Q. And so that's different than what you all use day to
18 day, correct?

19 A. That's correct.

20 Q. Was there any other aspect of your office's role in
21 the redistricting process that you want to mention? Did
22 we forget anything?

23 A. We spun up the public commenting tool. There was
24 public comment being received via the board's website, but
25 it became an urgent need for the board to be able to

1 display those maps, their draft plans, in an interactive
2 online map. So we were responsible for spinning that up
3 and then developing the commenting tool. So we played
4 that role and then furnished those comments, those reports
5 back to the board. That was another fairly significant
6 activity. And then we also assisted the board with
7 preparing the final exhibits for their final meeting. And
8 then in addition to that, our service work to our
9 colleagues in the counties, we prepared 35 Senate --
10 individual Senate district maps and 100 individual House
11 district maps.

12 Q. So I heard you say that you provided training, you
13 built reports, you recommended the ACS, and helped them
14 create exhibits about population variants and other
15 matters, and you did the public comment and prepared the
16 final exhibits.

17 Did we miss anything that your office did during the
18 process?

19 A. I can't think of anything else, but we had a lot of
20 odd jobs during that time because it was compressed.

21 Q. Did your office provide the data that the Board of
22 Apportionment used in their autoBoundEDGE software?

23 A. We did the incumbent mapping, which would be mapping
24 the existing incumbents, and we furnished that data.

25 However, the census data, the actual 2020 PL94171, the

1 official file, was processed and ingested by the software
2 provider and then we just merely made the staff aware that
3 that data had been processed and was ready to be used.

4 Q. So as far as you know, the board staff who were
5 responsible for drawing the maps used data from the vendor
6 of autoBoundEDGE?

7 A. Yes.

8 Q. Your office didn't provide the Board of Apportionment
9 with any political data?

10 A. No.

11 Q. Your office didn't provide the board with any racial
12 bloc voting analysis?

13 A. No.

14 Q. Your office didn't review any draft plans for
15 compliance with Section 2 of the Voting Rights Act?

16 A. No.

17 Q. Your office wasn't asked to analyze any plans
18 submitted to the board during the public comment period?

19 A. We did do that.

20 Q. Okay. Can you tell me more about that?

21 A. There were some plans that I think came through
22 public comment, and we effectively -- for lack of a better
23 term, we translated those so they could be pulled into the
24 board's software so that they could be able to view it in
25 their software. So we performed the translation service

1 for them and then produced reports.

2 So, for example, a compactness report or a variance
3 analysis report, those are -- would be common things that
4 are easy -- easily done that you could furnish to the
5 board.

6 Q. You mentioned building reports earlier. What other
7 reports did you prepare for the Board of Apportionment?

8 A. We did compactness reports on draft plans. We also
9 ran a error checking process that checks for -- the phrase
10 this software manufacture uses is discontiguities. That
11 would be a bloc that was assigned in an earlier draft as,
12 for example, District 1 and then the drafter came back and
13 assigned all of that area as District 3 but left out that
14 particular bloc, so it was a bloc of District 1 completely
15 surrounded by District 3. That happens from time to time
16 in software, so we would run those error reports to
17 identify if there were errors like that. So there were
18 two reports discontiguities, which I just described, and
19 then unassigned areas which would be a bloc that
20 accidentally got missed and wasn't assigned to any
21 district. So we would run those reports and check for
22 those kind of errors.

23 And then we would run -- we built the -- ran the
24 final report that the board used for adopting, which is a
25 very large report that included the bloc level listing for

1 every bloc assignment for each district, ETD assignment,
2 county assignment.

3 Q. On your compactness report, what measures of
4 compactness did you use?

5 A. The software, it bundles the report. And so it would
6 run Polsby-Popper, ReArc, three or four that it would all
7 run all at once. I really only paid attention to
8 Polsby-Popper, which was the first one, but it would run
9 all of them.

10 Q. Did your office provide reports that analyze things
11 like precinct splits or county splits?

12 A. Yes.

13 Q. Did your office analyze draft plans for compliance
14 with the Board of Apportionment's redistricting criteria?

15 A. Yes, to the extent that we were looking at things
16 like contiguity, the discontiguity, unassigned, things
17 like that. We would look at those kinds of reports to
18 make sure that they didn't leave something unassigned.

19 Q. Did you analyze communities of interest for the
20 board?

21 A. I guess in a way we did inasmuch as the final reports
22 or the final draft. We had an opportunity -- the board
23 charged us at their -- I guess it was their second-to-last
24 meeting, the board charged us with conducting a technical
25 review of the draft. They gave us about five or six days,

1 I think. And we looked at the board's draft plans against
2 numerous other levels of election geography and identified
3 places where, without moving the spirit of their intent,
4 we could move a block here or a few blocks there or
5 several blocks and keep a geography whole. We did that
6 technical review. We part of our technical review looked
7 at communities of interest.

8 So there were several places where we found that by
9 moving just a few blocks one direction or another, from
10 one district to another, we could potentially keep
11 communities whole or potentially keep school districts
12 from being split up. We did that sort of analysis against
13 the final drafts, produced that report, and it became a
14 part of the public record that was on the Board of
15 Apportionment's website.

16 THE COURT: Mr. Sells, hold on one second.

17 When you specifically and what you just testified to,
18 when you say "communities of interest," what do you mean?

19 THE WITNESS: Cities. Mostly cities, but also
20 school districts.

21 BY MR. SELLS:

22 Q. Did you provide any advice to the board on how to use
23 multiple race respondents in the PL94171 census data?

24 A. No.

25 Q. But you understand my question, right, that there is

1 multiple race data, individuals who selected more than one
2 race?

3 A. Yes.

4 Q. Okay. So just to be clear, your office has a copy
5 autoBoundEDGE as well as the Board of Apportionment staff?

6 A. Yes. Yeah.

7 Q. You needed to learn how to use it in order to train
8 Board of Apportionment staff, right?

9 A. That's correct.

10 Q. And so your office has the software necessary to
11 manipulate districts if it were tasked with doing so,
12 correct?

13 A. Yes. We -- in addition to supporting the board, of
14 course, I think -- I mentioned it, but we're also
15 supporting cities, counties, school districts as well. So
16 we possess the software to support those other levels of
17 geography that are in the redistricting process.

18 Q. Could a city call your office up and say, help us
19 draw some new wards?

20 A. Yes.

21 Q. And you all would do that?

22 A. We have helped several city. In addition to that, we
23 did redistricting for school districts that were under
24 State control. We did the Little Rock School District,
25 Earl, Pine Bluff, and Lee County and Nevada School

1 District.

2 Q. But your office didn't draw the House map for the
3 Board of Apportionment?

4 A. No, sir.

5 Q. That was done by Board of Apportionment staff?

6 A. Correct.

7 Q. And who on the Board of Apportionment staff drew the
8 House map?

9 A. Well, I don't know. I don't know for sure. I know
10 the staff that were participating in the drafting, but the
11 final plan I really don't know who drew it.

12 Q. How is it that you don't know when your office
13 trained all the Board of Apportionment staff?

14 A. Well, they had three staff that were involved. There
15 was -- Andy Davis for the Attorney General's office was
16 involved, the staff of the Governor's office, and then of
17 course staff in the Secretary of State's office, but I
18 don't know exactly specifically which one drew the final
19 version of the final plan.

20 Q. Who would the Attorney General's office and Secretary
21 of State's office would have been the person who might
22 have drawn it?

23 A. Andy Davis in the Attorney General's office, and he
24 forwarded -- when they completed their work, he forwarded
25 it to our office so we could load it up to do our part to

1 begin doing our work. So we received the final plan from
2 Mr. Davis.

3 Q. That final form was in the form of a black
4 equivalency file or shape file?

5 A. Shape files.

6 Q. Shape files?

7 A. Yes, sir.

8 Q. Mr. Davis underwent the training with you earlier in
9 the process?

10 A. Mm-hmm.

11 Q. I want to ask you a little bit about split precincts.
12 I know you've spoken a little bit about that at one or
13 more of the Board of Apportionment's hearings, but can you
14 -- for the benefit of the Court, can you explain why it's
15 important to split as few precincts as possible?

16 A. Well, the objective for splitting as few precincts as
17 possible is to limit the damage or limit the harm to
18 county election administration. After the redistricting
19 process, counties are carved up in multiple different
20 ways. And to the extent that you can avoid splitting
21 precincts limits the amount of work that was going to be
22 incurred by the county clerks and the county board of
23 election commissions. If you can keep a precinct whole,
24 that would allow the county then to reassign that precinct
25 with all of its new voters into whatever new district

1 might be drawn up. When the precincts are split it, of
2 course, causes additional work on the county clerks and
3 election commissioners because they're assigning those
4 voters to that split geography, one district versus
5 another.

6 Part of the challenge that we were aware of was our
7 compressed timeline, the compressed time frame that we
8 were under statewide because of the delay in the delivery
9 of the 2020 file. So in order to give them the best
10 benefit of having a maximum amount of time to do their
11 work, the best way to do that was to avoid splitting
12 precincts.

13 Q. Gotcha. Do you recall offhand how many precincts the
14 Board of Apportionment's House plan splits?

15 A. I do not. No.

16 Q. How many precincts are there approximately in the
17 state of Arkansas?

18 A. 2,740-ish.

19 Q. How many hours did your office spend on the technical
20 review process that you just described?

21 A. I don't remember for sure.

22 Q. Ballpark. I don't need an exact figure.

23 A. What we did, we divided the state into groups and so
24 I had four of us working on it. It was probably four of
25 us working on it for probably about four or five days, and

1 it included a weekend that we were trying to get our
2 report produced as quickly as we could so that the board
3 could then react to that report. I would say a team of
4 four, probably about five days with a couple of those days
5 being pretty long hours.

6 Q. And would it be fair to say that that technical
7 review process was going over the board's plan with a fine
8 tooth comb?

9 A. That's exactly what we were doing.

10 Q. Would your staff or yourself personally have the
11 experience and training necessary to make adjustments to
12 the Board of Apportionment's House plan if it were
13 directed to do so?

14 A. Yes.

15 Q. Would you agree with me that making adjustments to an
16 existing plan is less time consuming than drafting one
17 from the beginning?

18 A. In our work, we were guided by a one percent
19 guideline. So what we were trying to do was to limit
20 ourselves to not impacting the variants beyond one
21 percent. So for that part of work like that, yes, I would
22 agree. If you're within a bounds -- or the bounds that we
23 were operating within was to not harm the plan greater
24 than one percent one way or another. We were able to step
25 through that reasonably quickly. But I would say, if you

1 were looking at outside of that -- greater boundary of
2 variance outside of that, I would say it would take
3 longer.

4 Q. Let me ask the question this way. If you were
5 instructed to change the board's plan as little as
6 possible but only as much as necessary to create an
7 additional number of majority minority districts, could
8 your office do that?

9 A. Technically we could. Philosophically, politically
10 it's not within our role. That would be the Board of
11 Apportionment's role.

12 Q. Do you have an estimate of how much time it would
13 take your staff if you put, say, four or five people on it
14 to do that kind of thing?

15 MS. MERRITT: Objection. Calls for speculation.

16 THE COURT: Overruled.

17 THE WITNESS: I don't know for sure because we
18 would want to look at the other common criteria. So we
19 would look at, essentially, all of the other factors
20 communities of interest, variants, you know, other
21 elements of election geography, incumbents, et cetera. I
22 really don't know for sure how long that might take.

23 Q. Do you think it could be done in roughly the same
24 time period as your technical review which was a fine
25 tooth comb kind of exercise?

1 A. I don't know. I would say no. And the reason that I
2 would say no is because you're designing new. What we
3 were doing was avoiding -- mostly avoiding ballot splits,
4 which was simply layering up all of that other level of
5 election geography and then looking for places where, if
6 we move two blocks here, we make Prairie Grove School
7 District whole inside this House district. That's a
8 little easier than trying to assigned -- in my mind at
9 least, a little easier than trying to assign or design new
10 districts where you're trying to look at all of those
11 other factors plus demographic composition.

12 Q. Your office really doesn't have the expertise or the
13 judgment necessary to make those kinds of calls. Is that
14 what I'm hearing you say?

15 A. We have the expertise. In my opinion, what we don't
16 have is the -- under the circumstances that we're under
17 now, we don't have the time. It's -- time is the real
18 factor now.

19 Q. Well, if you say you don't have enough time, how many
20 hours do you think it would take?

21 A. I think if you had a team that worked
22 collaboratively, maybe two weeks.

23 Q. Let me ask the question this way. If you were asked
24 to change House District 34 in the northeast corner of the
25 state from a 46 percent black district into a majority

1 black district, how long would that make?

2 A. Probably several hours.

3 Q. And if you were tasked with converting House District
4 98, which is in southwest Arkansas, from a 44 percent
5 black district approximately into a majority black
6 district, how long would that make?

7 MS. MERRITT: Objection, Your Honor. This calls
8 for speculation because one change to one district is
9 going to affect the whole state. I don't think that's a
10 fair question for this witness.

11 THE COURT: I appreciate your point. I'm going
12 to overrule it. If the witness can answer it, he can
13 answer it. If he says he can't answer it, then he can't
14 answer it.

15 THE WITNESS: I would say several hours. But I
16 would also say that it's -- one district can't operate
17 independent of all of the 99 others. So a change in
18 geography in one place might necessitate changes
19 everywhere because it cascades -- it tends to cascade.
20 That's part of what the board's challenge was. We had
21 tremendous population decline in eastern Arkansas,
22 tremendous population growth in northwest Arkansas. So
23 all of those changes, when you look at making a change to
24 one district, it cascades to another. You can't change
25 one sometimes without changing four.

1 BY MR. SELLS:

2 Q. Fair enough. But changing four districts doesn't
3 take two weeks, does it?

4 A. Changing four might not take two weeks, but to
5 balance everything across the whole state I think it would
6 take two weeks.

7 Q. To make one change of one district from 45 percent
8 black to majority black, it's your testimony here today
9 that that would take your office of 12 people two weeks?

10 MS. MERRITT: Objection. Misstates testimony.

11 THE COURT: Overruled.

12 THE WITNESS: One change would take a few hours,
13 as I mentioned earlier. But one change to District 34,
14 wherever that might be, would likely affect District 35
15 and District 36. So then District 35 and District 36
16 might need to be adjusted again, which then creates an
17 adjustment to District 38 and 39 and 40. As I mentioned
18 earlier, these things tend to cascade.

19 Unless by some magical reason you already had one or
20 another districts that were already out of balance or
21 their variants was very low or very high, by making a swap
22 you could bring those more into alignment. But my
23 experience has been, is that that is not very often the
24 case.

25 Q. Have you tried doing that in this cycle, making

1 changes to any districts of that nature?

2 A. No. As I mentioned, our technical review, we
3 operated within a boundary of not affect the variants one
4 percent. So, for example, on the Senate, we could in
5 theory have a population of 800 that you could move from
6 one to another and that would not go above or below that
7 one percent guardrail that we had in place for our review.
8 Similarly, on the House, you could move a fairly sizable
9 amount of population. Most of our population, the
10 recommended changes that we recommended didn't move that
11 much population though.

12 Q. Let me ask you. Do you know if Alabama has a GIS
13 office?

14 A. They do.

15 Q. And is Alabama's GIS office better than yours?

16 A. I don't know. There is a national report card that
17 was recently released last -- sometime last year, but I
18 haven't compared our grade to Alabama, so I really don't
19 know.

20 Q. Is there any reason why Arkansas' GIS office would be
21 slower than other places in the ability to redraw
22 redistricting plans to satisfy the law?

23 A. I don't think so.

24 MR. SELLS: I pass the witness.

25 THE COURT: Thank you, Mr. Sells.

1 Defendants.

2 CROSS-EXAMINATION

3 BY MS. MERRITT:

4 Q. Good afternoon, Mr. Johnson. My name is Jennifer
5 Merritt. I'm a senior assistant attorney general. And
6 you have met before today, is that right?

7 And you've helped me understand a few of these
8 concepts before. I have a few follow-up questions.

9 On your direct examination you testified that -- with
10 regard to the compactness scores that you looked at during
11 your technical review of the board's plan, that you paid
12 particular attention to which one?

13 A. Polsby-Popper.

14 Q. Why is that, if you don't mind explaining?

15 A. Well, it's the first one in the list from that
16 software.

17 Q. Okay.

18 A. Rather simple reason.

19 Q. Okay. All right. And did you find that to be the
20 most reliable or was it just so happened that it was the
21 first one on the list?

22 A. It's the first one on the list and relatively easy to
23 understand.

24 Q. Okay. All right. I'd like -- the Court has seen a
25 few of these maps. Defendants have identified or marked

1 for identification Defendants' Exhibit 1 are a number of
2 maps. And you helped prepare those maps. I would like to
3 go over those with you if we could. I guess we could look
4 at the ELMO.

5 MR. SELLS: Your Honor, I would want to object
6 because I didn't talk about those maps. This is going
7 beyond the scope of my direct. If she would like to
8 recall Mr. Johnson in her case in chief, that's -- that I
9 believe would be the appropriate time, although she hasn't
10 identified Mr. Johnson as a defendants' witness. If the
11 defendants are going to be putting on their case in chief
12 with our witnesses, then we're not going to finish the
13 plaintiffs' case tonight. So I think the proper thing to
14 do would be to confine Ms. Merritt to the scope of direct
15 which had nothing to do with Defendants' Exhibit 1.

16 THE COURT: I'm going to overrule that
17 objection.

18 Go ahead. Given where we are with the preliminary
19 injunction stage and that, quite frankly, I prefer this
20 not take, you know, three weeks, I think it's in
21 everybody's interest, I'm happy with broadening the scope
22 more than just what was asked on direct.

23 I understand your objection, Mr. Sells, but I'm going
24 to overrule it.

25 Go ahead.

1 MS. MERRITT: Thank you, Your Honor.

2 BY MS. MERRITT:

3 Q. Mr. Johnson, do you recognize the document that's on
4 this screen and marked for identification as Defendants'
5 Exhibit 1?

6 A. Yes.

7 Q. What is that document?

8 A. This is a map that illustrates the -- in blue -- the
9 blue overlay is the House illustrated plan that was
10 prepared by the -- I believe it was someone that worked
11 for the ACLU, and then underneath that are the election
12 precincts of Arkansas, and then they're colored shaded in.
13 The color shading is representative of the percent of
14 voting age population that's any part black in that
15 particular election precinct that's in the -- in the 2020
16 census file.

17 Q. Okay. And so we called your office and asked for
18 some help to prepare some demonstrative aids to assist the
19 Court this week. Isn't that right?

20 A. Yes.

21 Q. So what we asked you to do is, if it was possible, to
22 overlay race data from the 2020 census on top of the
23 plaintiffs' proposed illustrative plan. Is that fair?

24 A. Yes.

25 Q. Is that what Exhibit 1 shows?

1 A. Yes.

2 Q. So in this -- correct me if I'm wrong. So the
3 greener the shading is, is that -- so red is zero percent
4 African-American population. Is that right, Mr. Johnson?

5 A. Well, it's a range of zero to ten.

6 Q. Zero to ten?

7 THE COURT: Ms. Merritt, sorry. Let me
8 interrupt you all.

9 One thing, Ms. Merritt, if this is more in the nature
10 of a direct, which it may be, let's not try to lead the
11 witness on that part. Let's ask more direct related
12 questions.

13 MS. MERRITT: Yes, Your Honor. Thank you.

14 BY MS. MERRITT:

15 Q. What is the orange shading show, Mr. Johnson?

16 A. That's just the graduation in the classes that shows
17 a higher concentration of any part black voting age in
18 that precinct.

19 One of the things that I wanted to mention, there are
20 a lot of precincts that you see in Arkansas that are red.
21 And that might lead you to conclude that there is zero
22 black population there, but that's not the case. There
23 might be -- in fact, I know that in Benton and Washington
24 county, for example, there would be some election
25 precincts that have a small percentage of any part black.

1 They're just not shown because of the limited number of
2 classes. Classes being the shade of color.

3 Then as you move up the scale, you have greater
4 concentrations of any part black population. And at the
5 top end, of course, is the green on that scale, which in
6 the inset you can see there in El Dorado an example of an
7 election precinct that has a higher concentration of any
8 part black population.

9 Q. Okay. Thank you for that explanation.

10 And so these insets that you can see on the large map
11 of the entire State of Arkansas, do you see those black
12 lines and the little squares there at the bottom?

13 A. Yes.

14 Q. What is that?

15 A. That's just a cartographic means of showing
16 additional detail by providing an inset map to show more
17 detail because you can't detect the detail at the lower
18 statewide scale. You can prove the scale with an inset to
19 take advantage of being able to see additional detail.

20 Q. And is that what we see here over to the right? Is
21 that what's pulled out?

22 A. Yes.

23 Q. Can you describe for the Court what are we seeing
24 here in this upper right detail inset of the city of
25 Magnolia?

1 A. So that's just an overlay of the various House
2 districts that are in the illustrative plan and then the
3 election precincts underneath shaded by the same color
4 scale and then the same thing --

5 Q. -- blue lines?

6 A. The blue lines are the -- would be the district
7 lines, those House district lines that were drawn.

8 Q. And those would have been the House district lines
9 that were picked by the plaintiff's expert?

10 A. Yes.

11 Q. Okay. And then the green -- so the color there is a
12 voting age any part black population in our state. Is
13 that right?

14 A. Yes.

15 Q. And then if we look down to the second inset there,
16 what do we see there, Mr. Johnson?

17 A. That one is focused on Camden. And it's presenting
18 essentially the same information just in the Camden area,
19 showing the city of Camden and the districts that come in
20 and take in part of the city of Camden and the election
21 precincts that are underneath there.

22 Q. Again, on this inset of Camden, the blue lines are
23 where the plaintiffs' expert chose to draw the district
24 lines for his illustrative plans for District 5. Is that
25 right?

1 A. Yes.

2 Q. Then the next one for Districts 5, 6, and 7, what are
3 we seeing there?

4 A. This is just showing the city of El Dorado and the
5 election precincts there and then the districts that are
6 coming in and grabbing that part of that population in
7 El Dorado.

8 Q. Okay. And the green shading there is the -- between
9 76.1 and 100 percent African-American population there in
10 the southern part of that inset?

11 A. Yes.

12 Q. Okay. And then what are we seeing there in
13 Blytheville?

14 A. Same data, same circumstance: Election precincts
15 shaded based on the percentage of any part black voting
16 age and then the illustrative district lines on top in
17 blue.

18 Q. Okay. Thank you.

19 I would like to show you a second page of Defendants'
20 Exhibit 1. Does this look familiar to you, Mr. Johnson?

21 A. Yeah.

22 Q. Tell me, what is this?

23 A. That's Pine Bluff and showing the same thing,
24 effectively, the election precincts in the Pine Bluff
25 community and then the illustrative plan districts in blue

1 overlaid on top.

2 Q. Okay. Thank you.

3 And let me show you the third page of Defendants'
4 Exhibit 1. What is this document, sir?

5 A. Pulaski county. And it shows the same data with the
6 any part black election precincts highlighted and then the
7 blue line showing the districts on top of that.

8 Q. The district lines as drawn by the plaintiffs' expert
9 in this case?

10 A. Yes.

11 Q. Thank you.

12 MS. MERRITT: I move to admit Defendants'
13 Exhibit 1.

14 THE COURT: Any objection?

15 MR. SELLS: Yes, Your Honor. Lack of
16 foundation.

17 THE COURT: You want to spin that out for me a
18 little bit?

19 MR. SELLS: Yeah. We don't know how Mr. Johnson
20 got the plaintiffs' illustrative plan, how he loaded it
21 in. As far as I'm aware, Mr. Fairfax didn't give it to
22 him. So I think we at least have to have those questions
23 answered. So we don't -- yeah.

24 THE COURT: Okay. Ms. Merritt, I think that's a
25 fair point. Why don't we ask the witness in a little more

1 detail the steps that sort of lead us from you all getting
2 the illustrative plan to him overlaying this on the map.

3 MS. MERRITT: Absolutely. I would be glad to
4 clear that up.

5 BY MS. MERRITT:

6 Q. Mr. Johnson, how did you come to acquire a copy of
7 the plaintiffs' proposed illustrative plan?

8 A. I received a copy of it from Mr. Brad Nye in the
9 Attorney General's office.

10 Q. And who was Mr. Brad Nye and what was his connection
11 with the redistricting process?

12 A. Brad was part of the Attorney General's team that
13 staffed the redistricting work. And, of course, he also
14 was involved in the entire process, attending the public
15 hearings, the comment -- receiving comments, et cetera.

16 Anyway, Brad forwarded it to me in email. The
17 attachment came as a series of shape files. We brought
18 those shape files into our ArcMap software and then did
19 the overlays and did the analysis of the precincts that I
20 described earlier.

21 Q. And the source of the race data that you overlaid on
22 top of the plaintiffs' proposed plan, where did that come
23 from?

24 A. United States Census Bureau.

25 Q. Is that data typically relied upon by experts in

1 fields like yours?

2 A. It's the same data that the board used for designing
3 its plan. It would be the same data that anyone doing
4 redistricting is using.

5 Q. Do you think these are fair demonstrative aids that
6 would help the Court in understanding the information
7 depicted on these maps?

8 A. Yes.

9 MS. MERRITT: I move to admit Defendants'
10 Exhibit 1.

11 THE COURT: Mr. Sells, any further objection?

12 MR. SELLS: Yes. We still have lack of
13 foundation because we don't have Mr. Nye here. And I'm
14 not just getting up here to make fun. We have in the
15 record that the -- I believe we have in the record that
16 the plaintiffs -- that the ACLU delivered a map in
17 November to the Board of Apportionment, and Andres Rhodes
18 from the Attorney General's office who picked it up --

19 MS. MERRITT: That's incorrect.

20 THE COURT: Hold on, Ms. Merritt. Let Mr. Sells
21 finish speaking and then you can have a chance to speak.

22 MR. SELLS: Anyway, it's in the record that a
23 plan was given to the Board of Apportionment in November.
24 We don't -- which is not the plaintiffs' illustrative
25 plan. And so we -- I don't think it has been clarified

1 that this in Exhibit 1 is plaintiffs' illustrative plan or
2 the November plan. So I think Mr. Nye needs to get here
3 and explain where he got the shape files that he gave to
4 Mr. Johnson.

5 And I'm perplexed because I don't think the
6 plaintiffs have given the shape files of the illustrative
7 plan to the defendants because the defendants have never
8 asked for them.

9 THE COURT: Ms. Merritt, before you go on --
10 first of all, I think I see one of your friends here
11 chomping at the bit. Hold on.

12 Secondly, what is your response?

13 MS. MERRITT: Well, Mr. Nye is an attorney at
14 the Attorney General's office and he was also on the Board
15 of Apportionment staff. And my colleagues tell me that
16 Mr. Sells emailed the shape files to my other colleague
17 Asher Steinberg. So I'm not sure, but this witness has
18 testified under oath that a Board of Apportionment staff
19 member provided the illustrative plan to him. That's a
20 sufficient foundation for these maps which are
21 demonstrative aids.

22 THE COURT: First of all, we're going to go off
23 the record for a second.

24 (A discussion was held off the record.)

25 THE COURT: Mr. Sells, after looking at the

1 email, did you send an email with the shape files?

2 MR. SELLS: I did, Your Honor.

3 THE COURT: So do you still have an objection?

4 MR. SELLS: I think we need to link -- it's not
5 clear to me that what we seeing here are the ones I sent
6 or the earlier illustrative plan.

7 THE COURT: I thought I heard the witness say
8 that he was given the illustrative plan. Did you not hear
9 that testimony or do you just don't think that testimony
10 is reliable enough to give us a foundation?

11 MR. SELLS: I don't think it's reliable enough
12 to create the foundation for the admission of Defendants'
13 Exhibit 1.

14 THE COURT: Overruled. They're admitted.

15 (Defendants' Exhibit 1 admitted into evidence.)

16 BY MS. MERRITT:

17 Q. Mr. Johnson, I'd like to show you a couple of other
18 -- you talked a bit about precincts and precinct splits
19 with Mr. Sells. Do you remember that testimony?

20 A. Yes.

21 Q. There were just a couple of -- two other exhibits I'd
22 like to show you real quick.

23 I'm showing you what's been marked for identification
24 as Defendants' Exhibit 3. It's -- I don't know. I can't
25 seem to get this to go up anymore.

1 Do you recognize this exhibit?

2 A. Yes.

3 Q. What is this?

4 A. That's House District 34 primarily in the Mississippi
5 county area, and then it's overlaid on top of the election
6 precincts. And the election precincts that are split by
7 House District 34 are highlighted in blue. We were asked
8 to show election precincts that are split by House
9 District 34. That's what this illustration shows.

10 Q. What is the significance of Defendants' Exhibit 3?
11 Why were you asked to do this?

12 A. I believe it has to do with the concept that the --
13 one of the experts performed an analytic called
14 disaggregation where they disaggregated votes -- or
15 election results, rather, from a previous election, then
16 reaggregated them to the 2020 election precincts and then
17 forecasted an election result. This just shows that these
18 are a good number -- I don't know how many there are that
19 -- I don't have them counted, but a good number of the
20 election precincts that are split. So in order to perform
21 that reaggregation process, they would have had to
22 allocate population on either side of that split precinct.

23 Q. Okay. And just so that we're clear for the record,
24 the blue lines are showing the current House District 34?

25 A. The brown line shows current House 34 adopted by the

1 Board of Apportionment. The blue highlighted polygons are
2 election precincts that are split by that House district.

3 Q. Okay. Thank you.

4 MS. MERRITT: I move to admit Defendants'
5 Exhibit 3.

6 THE COURT: Plaintiffs, any objection?

7 MS. MERRITT: I got a similar --

8 THE COURT: Hold on. Plaintiffs, any objection?

9 MR. SELLS: I said no objection. Sorry, Your
10 Honor.

11 THE COURT: It's admitted.

12 (Defendants' Exhibit 3 admitted into evidence.)

13 BY MS. MERRITT:

14 Q. I've got a similar map that's been marked for
15 identification as Defendants' Exhibit 4.

16 Do you recognize this document, Mr. Johnson?

17 A. Yeah.

18 Q. Can you tell us what this is?

19 A. This is showing similar illustration but for a
20 different district. This is House District 98, which is
21 shown in the brown lines. And then the blue polygons
22 represent the election precincts that are split by House
23 District 98.

24 Q. Why is this important? Help us understand why this
25 matters.

1 A. Well, it is showing the same thing that I mentioned
2 earlier in the taking election results from 2018,
3 disaggregating them from 2018 election precincts to 2020,
4 reaggregating them to 2020. There would be an allocation
5 process that would have to be performed on these split
6 precincts to allocate vote results on either side of that
7 line. I don't know how many are there, but seems to be a
8 pretty good number -- pretty good number in Nevada county,
9 Lafayette county. And then in Magnolia and Columbia
10 county there, looks like several precincts were split in
11 the Magnolia vicinity.

12 Q. In layman's terms for those of us that aren't GIS
13 officers, is it kind of like comparing apples and oranges
14 in your mind if there are all of these precinct changes?

15 A. Yeah, a little bit for sure.

16 The 2018 election precincts would be configured one
17 way. And then between 2018 and before 2020, we would have
18 had submitted in precinct changes into the Census Bureau
19 that would have made changes. We made some kind of change
20 in almost every county in Arkansas. So those changes
21 would then have to -- you would disaggregate on the 2018
22 election precincts down to the block level, which,
23 incidentally, would have been the 2010 block. Then you
24 would reaggregate up to the 2020 election precincts and
25 then assign or forecast a result.

1 Q. Does it make you question the reliability of any
2 analysis that you --

3 MR. SELLS: Objection.

4 THE COURT: Sustained.

5 You can rephrase if you can.

6 MS. MERRITT: I'll move on. Thank you,

7 Mr. Johnson.

8 I move to admit Defendants' Exhibit 4.

9 MR. SELLS: No objection.

10 THE COURT: It's admitted.

11 (Defendants' Exhibit 4 admitted into evidence.)

12 BY MS. MERRITT:

13 Q. Now, one of the issues in this case is whether
14 Arkansas' African-American population is sufficiently
15 large and geographically compact. Do you understand that
16 to be one of the issues here?

17 A. Yeah.

18 Q. I believe you talked about it a little bit in your
19 direct testimony, but have you had an opportunity to study
20 shifts in the African-American population in Arkansas
21 between 2010 and 2020?

22 A. Yes. I've done a little bit of research, not a great
23 deal, but a little bit. What I found in my examination of
24 the summary at the county level is that, as we saw with
25 the 2020 results coming out and what was published by a

1 lot of demographers and journalists in the news, that is,
2 just like elsewhere in America, our rural population is
3 moving to be more urban. And then here in Arkansas, our
4 population is transitioning or shifting toward northwest
5 Arkansas. That's not just white population, but black
6 population as well. So when I look at that, I can see
7 that our black population in Arkansas is following
8 opportunity just like just like everyone else.

9 Population tends to follow economic opportunity. So
10 when we look at black population increase, you see that
11 black population increase in Pulaski county, but we also
12 see it in Craighead county, Green county to a lesser
13 extent, and then also in northwest Arkansas, Benton and
14 Washington county.

15 Q. Is there anything that declining population numbers
16 can tell us that might inform the Court in this matter?

17 A. Well, of course, as it relates to redistricting,
18 declining population means that any particular district
19 has to get geographically larger in order to gain enough
20 population to become unbalanced or within the target, but
21 it also -- with regard to our state's black population, I
22 -- when I look at that result of that analysis, it's not
23 as compact as it used to be.

24 Traditionally, Arkansas' black population was in
25 southeastern, south central Arkansas situated in the very

1 heavily industrial agricultural areas of Arkansas. That
2 work force historically supported a lot of the work there.
3 But as time has marched on, that population has sought out
4 opportunities to go to college, university. So you see
5 that -- I think of Arkansas State in Jonesboro, seeing
6 that population increase in Craighead county.

7 And then the same with northwest Arkansas. When you
8 have global corporations like Tyson, Walmart, JB Hunt that
9 are recruiting for diversity, and we see population
10 increases there in the black population.

11 Q. How did the population shifts that you've just
12 described affect the Board of Apportionment's work and
13 their ability to draw majority minority date?

14 MR. SELLS: Objection. Lack of foundation.
15 He's not on the Board of Apportionment.

16 THE COURT: You can ask him if he knows.

17 MS. MERRITT: Thank you, Judge. I'll rephrase
18 the question.

19 BY MS. MERRITT:

20 Q. Do you know, Mr. Johnson, in your work assisting the
21 board, whether these population shifts affected their work
22 and the ability to draw those districts?

23 A. Well, of course, in general terms in just population
24 in general --

25 THE COURT: Hold on a second. This is important

1 because there is a part of the foundation objection that
2 is well made.

3 Do you know is the question on the table about
4 whether or not this affected what the board did, not sort
5 of, do you think it did, do you suspect it did, but do you
6 know that?

7 THE WITNESS: I can't say that I know that.

8 BY MS. MERRITT:

9 Q. Okay. How does the Board of Apportionment's work
10 affect local election precincts and why is it important?

11 A. Well, this might be long-winded. In a normal
12 redistricting cycle, we would advise down ballot
13 geography, don't do anything wait, wait until the higher
14 levels of geography are redistricted. So traditionally,
15 Congressional district should be done first, then your
16 State House and Senate, and then local levels of
17 jurisdiction would begin to draw theirs.

18 The reason they would do that is so they would have
19 the opportunity to attempt to nest their JP lines or
20 potentially their school board zones to become coincident
21 with the House or Senate lines. The reason you do that is
22 to limit the number of precinct splits which limits the
23 number of ballot splits. The more ballot splits that
24 there are in a county, the harder, more challenging, more
25 expensive it is to administer the local election. So to

1 the degree that you can, you know, limit that stuff, is a
2 positive thing for a local election administration.

3 Q. And in your work as state geographic information
4 officer, are you seeing that the local election officials
5 are still making precincts changes now based on the
6 board's proposals?

7 A. Yeah. Yeah. In fact, one of the things that is
8 fairly common to happen is that counties -- county
9 election commissions will look at how they've been carved
10 up, how that county has been carved up by potentially
11 Congressional, potentially State House, State Senate, but
12 also the JP districts, the quorum court districts, and
13 say, look, if we make this change so that all of these
14 nest together, that can become our new election precincts.

15 So we've already had several counties that have
16 recorded updated election precincts with us from since the
17 beginning of the year: Madison county, Pulaski county, a
18 couple more. I can't remember them all, but we'll start
19 seeing that those changes being recorded as they update
20 their election precincts to more or less match new
21 election geography that's drawn.

22 Q. So if The court in this matter ordered the Board of
23 Apportionment to go back to the drawing table and redraw
24 the maps, do you have concerns as state geographic
25 information officer whether that's even possible in a time

1 frame where it could be --

2 MR. SELLS: Objection. Leading.

3 THE COURT: Overruled.

4 BY MS. MERRITT:

5 Q. Did you hear my question, Mr. Johnson?

6 A. The time frame is -- it would be a challenge, and
7 it's because of the whole -- at least in my view, at least
8 in my mind, the whole county process, the county processes
9 for the outfit of the outcomes of redistricting.

10 The county clerks, county boards of elections
11 commissions, they're dealing with city wards, county JPs,
12 school boards, and State House and Senate. Those
13 processes are done. We just published the updated school
14 boards of Arkansas. County JPs will be next. Wards will
15 come after.

16 This leaves the clerks between now and roughly the
17 end of February to do voter assignment to reassign voters
18 to all of those new piece of election geography. So for
19 their sake, the clock is ticking. I mean, the -- that
20 time has -- is getting scarce by the day.

21 There is also another aspect which is, candidates
22 that might want to collect signatures from their friends
23 or supporters that might want to run in a certain area,
24 and that whole process is going on as well. So it's not
25 just the -- that you couldn't draw new districts; it's

1 could you do that and then have everything else that has
2 to be done get done.

3 Q. And so are you concerned as to whether that could
4 actually happen by before the primaries?

5 A. I would be concerned. One of the things that I think
6 is important to remember is that we have some county
7 clerks that have a staff of three, the clerk and then two
8 other staff, particularly in our rural counties.

9 Now, one might assume that they can drop everything
10 else that they're doing and do voter assignment, but
11 that's not the case. They have a constitutional duty at
12 the local level. So they're handling all of their other
13 constitutional duties, staffing the quorum court, probate,
14 all of those kinds of things that they do. Then they're
15 short staffed because of the rule already. And then on
16 top of that, they may be a new clerk. This may be their
17 first cycle of redistricting and so they're going through
18 that process of reassigning voters for the first time.

19 Q. Are you aware that there are some first-time clerks
20 that are going through this for the first time?

21 A. Yes.

22 Q. Was there -- and I'm sorry. I didn't mean to cut you
23 off, but is there more you want to say on that?

24 A. I think when you stack all of those things together,
25 it creates a very -- it's a compressed time frame already

1 just because of the pandemic and the delay running an
2 election. If you -- if you make changes late -- this late
3 in the entire process, it's a -- it will be very
4 concerning.

5 MS. MERRITT: I have no further questions.
6 Thank you. I appreciate your time.

7 THE COURT: Thank you, Ms. Merritt.
8 Mr. Sells.

9 REDIRECT EXAMINATION

10 BY MR. SELLS:

11 Q. I want to start with your last point, Mr. Johnson,
12 about the time crunch. The time crunch, as I understand
13 your testimony, is related to the date of the primary,
14 correct?

15 A. (Nods head).

16 Q. Is there any reason --

17 THE COURT: You need to answer.

18 THE WITNESS: Yes. I'm sorry.

19 BY MR. SELLS:

20 Q. Is there any reason why the date of the primary
21 couldn't be moved that you're aware of?

22 MS. MERRITT: Objection. That calls for a legal
23 opinion.

24 THE COURT: Overruled. He asked that he's aware
25 of.

1 THE WITNESS: I think it would take an act of
2 the legislature. I'm not positive, but I think the
3 legislature would have to act to do that.

4 BY MR. SELLS:

5 Q. Or a federal court perhaps?

6 A. Or a federal court.

7 Q. If the date of the primary were adjusted, that would
8 alleviate the time crunch that you're aware of, right?

9 A. I think it would. But I'm not aware of the entire
10 election calendar. We're mainly only focused at this
11 front end date that I mentioned earlier.

12 Q. And let me ask you. If it were determined that the
13 board's map discriminates against black voters in
14 Arkansas, would you think that elections should be held
15 under discriminatory map?

16 A. That's not a judgment call I'm qualified to make,
17 sir.

18 Q. Do you think that the rights of black voters should
19 take a backseat to the convenience of county clerks in
20 rural Arkansas?

21 A. No. Of course not.

22 Q. Ms. Merritt asked you a number of questions about the
23 change in Arkansas' black population. Do you remember
24 those questions?

25 A. Yes.

1 Q. Did you look at the change in Arkansas' white
2 population?

3 A. Yeah. We looked at all of the major demographics,
4 white, Hispanic, black. Asian was an interesting one.
5 But, yes -- yeah. We -- we didn't look at every -- we
6 didn't do precinct-by-precinct analysis, but county level,
7 state level numbers. We looked at other races.

8 Q. Did you notice that Arkansas' white population has
9 decreased by about 110,000 since the last census?

10 A. Yes.

11 Q. Did you notice that Arkansas' black population has
12 increased since the last census?

13 A. I did.

14 Q. I think about by 30,000. Does that sound about right
15 to you?

16 A. I don't know that number because my focus was on
17 black alone in the data. I didn't look at the other
18 subcategories, but I am aware that the biracial categories
19 did increase significantly.

20 Q. Are you aware that, despite the decline in white
21 population, the Board of Apportionment's House map draws
22 three -- draws additional majority white districts?

23 A. Yes.

24 Q. I would like to take a look at Defendants' Exhibit 3
25 first, so we'll need to switch over to our computer.

1 Now, when you prepared this, did you do any analysis
2 of the voting patterns in these precincts that are split?

3 A. No. We just looked at the precincts themselves to
4 figure out which ones were split.

5 Q. Okay. Do you have any reason to believe that the
6 voters on one side of the precinct split vote differently
7 than voters on the other side of the precinct split in the
8 top-most precinct? Let's focus on that one first.

9 A. In Gosnell?

10 Q. That top precinct. Do you see that one?

11 A. Mm-hmm.

12 Q. Yeah. Do you have any reason to believe that voters
13 on one side of the split vote differently than voters on
14 the other side?

15 A. I have no way to know.

16 Q. Let's focus on the next one down. Do you have any
17 reason to believe that voters on one side of the split
18 vote differently than voters on the other side of the
19 split?

20 A. I have no way to know.

21 Q. How about the one below that; voters on one side of
22 the split vote differently from the voters on the other
23 side of the split? Do you have any reason --

24 A. I don't. There's no way for me to know.

25 Q. You didn't do any racial analysis of these precincts

1 splits, did you?

2 A. No.

3 Q. And if there was no appreciable difference in the
4 voting patterns of voters on one side of the precinct
5 split versus the other, then the allocation of votes would
6 have no affect, correct?

7 MS. MERRITT: Objection. This is really outside
8 of Mr. Johnson's expertise in terms of allocation. This
9 is for political science.

10 THE COURT: Overruled. If he can answer it, he
11 can answer it. If he can't, he can't. And I'll take his
12 answer for what it's worth.

13 THE WITNESS: Well, the -- there is -- this will
14 be very challenging because your -- as I understand, the
15 election results were from 2018 election. I can't say for
16 certain, but I feel like that, due to annexation or some
17 other change, we probably made election precinct changes
18 between 2018 and 2020.

19 So you have data that was disaggregated down to the
20 bloc level from 2018 and then assigned to a 2020 election
21 precinct. Then somehow you would allocate population --
22 or rather votes on one side or another of that. And the
23 only way you would be able to do that would be to run it
24 against the voting at age 18 and then run percentages.
25 But I don't know how you would know that one side or the

1 other of that line would vote one way or another because
2 the precinct was whole this way in '18 and it might have
3 become whole this way in 2020.

4 BY MR. SELLS:

5 Q. Would it be fair to say you don't have in experience
6 in reconstituted election analysis?

7 A. Correct.

8 Q. Or in the disaggregation of political data to census
9 blocs?

10 A. That's correct.

11 MR. SELLS: Those are all my questions.

12 THE COURT: Thank you, Mr. Sells.

13 I guess given that we've done sort of a direct,
14 direct, if you all want another chance, you can have one.

15 MS. MERRITT: I would appreciate that, Judge,
16 but I don't have anything further.

17 THE COURT: I appreciate that.

18 Thank you very much for your testimony.

19 THE WITNESS: Thank you.

20 MR. SELLS: Your Honor, before we move on, I
21 understand your earlier ruling, but I want to state for
22 the record that Mr. Johnson was not on the defendants'
23 witness list. He was not disclosed to us pursuant to our
24 professional agreement to disclose witnesses that one side
25 is putting on on the following day, and so we are

1 unprepared to cross-examine Mr. Johnson. And it's a
2 little unfair, I think under the circumstances, to allow
3 the defendants to amend their witness list on the fly at
4 the last minute without any notice to the defendants.

5 It's also unfair to the other witnesses, some of whom
6 have been here since noon. And if we had known that they
7 were going to take an extra hour with Mr. Johnson, we
8 could have told them that they could do something else
9 with their Saturday.

10 THE COURT: If you would like another shot at
11 cross-examining the witness, I am happy to arrange it. We
12 can have the witness come back on one of the other days if
13 you're telling me that you think there is more ground you
14 can cover on your cross-examination that you weren't
15 prepared to do today.

16 Is that what you're telling me?

17 MR. SELLS: Not for this witness in particular,
18 but there may be others.

19 THE COURT: So wait a second, Mr. Sells. You
20 just told me that you were unprepared to do
21 cross-examination, and, obviously, you are not
22 particularly happy about it. I'm now giving you a chance
23 to prepare to do cross-examination and bring him back, but
24 you're telling me, don't worry about it. Is that right?

25 MR. SELLS: Well, I want to confer with my

1 co-counsel about Mr. Johnson.

2 THE COURT: So why don't you do that and let's
3 see about Mr. Johnson if you have anything more for
4 cross-examination. I've said I'm happy to give you a
5 chance if you need it. So why don't you confer and then
6 tell me.

7 MR. SELLS: Okay.

8 We don't have anything more for Johnson. Our concern
9 remains, however, for Justice Dickey, Rick Bearden, and
10 Doug House.

11 THE COURT: Plaintiffs -- defendants on this
12 side, do you all intend to call any of those witnesses
13 when -- by that what I mean is, do you intend to ask them
14 direct examination questions that are outside the scope of
15 whatever cross you would do for the plaintiffs' direct?

16 MS. MERRITT: I don't intend to. I have no idea
17 what the plaintiffs are going to ask, but, no, Your Honor,
18 I don't.

19 THE COURT: Here's the things, Ms. Merritt. In
20 one sense, Mr. Sells is correct. Some of what you did
21 with this witness was essentially direct examination,
22 which, quite frankly, contrary to Mr. Sells' argument,
23 given the preliminary injunction stage, given that they
24 decided to call this witness, I don't actually have a huge
25 problem with. I understand Mr. Sells is upset that the

1 witness wasn't also named on your sheet and that they
2 didn't therefore know you were going to do a sort of
3 direct plus cross, which is why I've offered him more time
4 if he wants it.

5 What I want to know is, do you intend to do a more
6 direct plus cross with the other witnesses? If you tell
7 me no, then I'm going to hold you on the other witnesses
8 to -- hold on. Let's talk first and then you can go to
9 Mr. Bronni.

10 If you tell me no, then I am going to hold you to
11 within the scope of cross-examination on those other
12 witnesses. If you tell me yes, we can then have a further
13 conversation about whether that's appropriate or
14 inappropriate. I'm sure Mr. Sells has a view on that and
15 then we can talk about it.

16 So why don't you confer with Mr. Bronni.

17 MS. MERRITT: So for today, Your Honor, we
18 didn't name these witnesses on our witness list because
19 this was a preliminary injunction hearing. We thought we
20 would be able to follow up. We have no idea what the
21 plaintiffs intend to do with the witnesses.

22 For today, I don't intend to go outside the scope of
23 what the plaintiffs ask, but we would like to reserve
24 right to call them back depending on what they do during
25 our case if we needed to, but I don't intend to do that

1 because we don't have burden of proof in this case.
2 They're not our witnesses. We don't -- I don't intend to
3 call them. I just --

4 THE COURT: Okay. So if under that position
5 then, I am going to for -- purposes of the
6 cross-examination of these witnesses, I am going to hold
7 you then to the scope of the direct. If you want to call
8 them in your case in chief for some reason, we will then
9 have to have a further discussion in which I'm sure
10 Mr. Sells is going to say they're not on your witness
11 list, and you all will explain to me why regardless of
12 that I should still allow them, and I will have to make a
13 ruling on that. But for now, given what you've said, for
14 the remainder of the witnesses I am going to hold you to
15 the scope of direct.

16 MS. MERRITT: Understood. Thank you, Your
17 Honor.

18 THE COURT: Mr. Sells, anything more than that
19 point?

20 MR. SELLS: No. Thank you, Your Honor.

21 THE COURT: For the next -- first of all, the
22 next witness, how long do you think it will take?

23 MR. SELLS: 20 minutes, Your Honor.

24 THE COURT: Defendants, how long do you all
25 think it will take?

1 MS. MERRITT: You're asking me how long I might
2 take?

3 THE COURT: Yeah, on cross.

4 MS. MERRITT: Five minutes. I have no idea what
5 he's going to ask.

6 THE COURT: You can tell me five minutes you can
7 tell me an hour. Do you have a sense?

8 MS. MERRITT: Five, ten minutes. I don't think
9 it will be long as all, depending on -- if it's a short
10 direct, it will be a very short cross, Your Honor.

11 THE COURT: We're going to go off the record for
12 a second.

13 MS. MERRITT: May Mr. Johnson be excused, Your
14 Honor?

15 THE COURT: Mr. Johnson, I apologize for that.
16 You may be excused.

17 (A discussion was held off the record.)

18 THE COURT: We are going to take break for ten
19 minutes and then we're going to do this one witness and
20 then we're done for the night.

21 (A recess was taken at 6:07 p.m. until 6:18 p.m.)

22 THE COURT: Plaintiffs, I'm ready when you are.

23 MR. TOPAZ: I make the same request as Mr. Sells
24 regarding allowing to ask the witness leading questions.

25 THE COURT: Defendants?

1 MS. MERRITT: Same objection as before, but I
2 believe it will be overruled.

3 THE COURT: Same decision as before. Yes, it's
4 fine.

5 RICHARD BEARDEN, PLAINTIFFS' WITNESS, DULY SWORN
6 DIRECT EXAMINATION

7 BY MR. TOPAZ:

8 Q. Mr. Bearden, my name is Jonathan Topaz. I represent
9 plaintiffs. Thank you so much for joining us on snowy
10 Saturday and apologies for the wait.

11 A. That's okay.

12 Q. Would you mind stating and spelling your name for the
13 record please, sir?

14 A. Richard Bearden, B-e-a-r-d-e-n.

15 Q. Mr. Bearden, were you were the former executive
16 director of the Arkansas Republican party. Is that right?

17 A. That's correct.

18 Q. When you served as the executive director for the
19 Arkansas Republican party, Asa Hutchinson was the
20 chairman. Is that correct?

21 A. That is correct. He and Sheffield Nelson. They were
22 cochairman for a period of time.

23 Q. Understood. Thank you.

24 You served as chief of staff to Republican
25 Congressman Jay Dickey from 1983 to 1995. Is that

1 correct?

2 A. That's correct.

3 Q. You served as Arkansas state director for the George
4 W. Bush - Dick Cheney campaign for president in 2000. Is
5 that right?

6 A. That's correct.

7 Q. You served in the George W. Bush administration,
8 correct?

9 A. I was an appointee, yes, sir.

10 Q. Mr. Bearden, you're a registered lobbyist. Is that
11 right?

12 A. That is correct.

13 Q. And you're one of the founding partners of impact
14 Management Group or IMG. Is that right?

15 A. Right.

16 Q. And IMG is a lobbying firm?

17 A. Yes.

18 Q. IMG has consulted on a number of state legislative
19 races in Arkansas. Is that right?

20 A. Over the years, yes.

21 Q. I might ask you about a couple.

22 A. Sure.

23 Q. IMG consulted on Bruce Coleman's 2018 State House
24 race?

25 A. Yes.

1 Q. IMG consulted on Ken Bragg's 2018 State House race.
2 Is that correct?

3 A. Yes.

4 Q. IMG consulted on Spencer Hawk's 2018 State House
5 race. Is that right?

6 A. Correct.

7 Q. IMG consulted on Austin McCollum's 2018 State House
8 race. Is that correct?

9 A. Correct.

10 Q. IMG consulted on Jasen Kelly's 2018 State House race.
11 Is that right?

12 A. That's correct.

13 Q. IMG consulted on Kelly Pierce's 2018 State House
14 race. Is that right?

15 A. In Fort Smith, yes, sir.

16 Q. And IMG consulted on Mark Lowery's 2018 and 2020
17 State House race. Is that right?

18 A. I believe that's correct, yes.

19 Q. Those candidates are all Republicans. Is that right?

20 A. That's correct.

21 Q. The Arkansas Board of Apportionment led the state
22 legislative redistricting process, right?

23 A. Yes.

24 Q. If I call them the board or BOA, will you know what I
25 mean?

1 A. Yes, sir.

2 Q. So beginning in 2021 you were retained by the
3 Secretary of State's office to assist the board in the
4 state legislative redistricting process. Is that right?

5 A. Correct.

6 Q. Show you what's been marked as P34. At your leisure,
7 sir, once you have time to review it.

8 Have you seen this document before?

9 A. Not in this format, but, yes, I'm familiar with it.

10 Q. So these are the nine criterion the board used for
11 purposes of state legislative redistricting. Is that
12 right?

13 A. I believe that's correct, yes.

14 Q. And you abide by these criteria -- excuse me.

15 You abide by this criterion in connection with your
16 contract work with the board. Is that right?

17 A. Yes.

18 Q. You can take that down.

19 You were retained by the board in large part for
20 legislative outreach?

21 A. By the Secretary of State specifically. Yes, sir.

22 Q. Thank you. My apologies. By the Secretary of
23 State's office.

24 As part of your responsibilities, you met with
25 members of the Arkansas House. Is that right?

1 A. The House and the Senate. Yes, sir.

2 Q. And you listened to the issues raised by these House
3 members in these meetings, right?

4 A. Yes, sir.

5 Q. And sometimes during these meetings, you would
6 discuss the competitiveness of certain districts, correct?

7 A. The competitiveness of district meaning --

8 Q. The --

9 A. Like politically?

10 Q. Exactly, sir.

11 A. I mean, specifically with the members or?

12 Q. Yes, sir. Did you discuss the competitiveness of
13 certain districts with the members in your meetings with
14 them?

15 A. It may have come up. I don't remember a specific
16 instance that it came up.

17 Q. You can't recall a specific instance in which you
18 discussed the political --

19 A. But it may have well been brought up by a member, so
20 it could have been.

21 Q. Sometimes during these meetings you discussed the
22 political leanings of certain districts. Is that right?

23 A. Well, I think it was -- I would say it was known that
24 some districts were more Republican than Democrat. So I
25 don't remember specifics about that being discussed.

1 Q. So you don't remember speaking about the political
2 leanings of a specific district with any these members?

3 A. I guess I would say I knew how most districts lean
4 because they were either represented by a Republican or a
5 Democrat.

6 Q. Would you discuss that with the members in your
7 meetings with them?

8 A. That was not the specific purpose of the meeting. It
9 could have come up. I don't recall.

10 Q. Sometimes during these meetings, you discussed the
11 racial makeup of certain districts. Is that right?

12 A. It could have come up. Again, some districts were
13 known to be majority minority district; other were not.

14 Q. I'm not sure I fully understand the answer. Is the
15 answer that you don't recall whether you spoke to these
16 members about the racial composition of their districts?

17 A. Well, I don't recall specifics, no, sir.

18 Q. So you collect information at these meeting with the
19 members and you relay that information to the board. Is
20 that right?

21 A. Specifically to the Secretary, who sat in most of the
22 meetings. I arranged the meetings. The Secretary of
23 State sat in on a lot of the meetings.

24 Q. I understand. So these meetings would be you, the
25 Secretary of State, and the member of that particular

1 district?

2 A. Kevin Niehaus from the Secretary of State's office
3 was often there. Sometimes the chief of staff for
4 Secretary of State was there.

5 Q. Was Secretary Thurston involved in these meetings?

6 A. Yes, sir. He was at most of the meetings, the
7 majority.

8 Q. Let's talk about just a couple of districts if you
9 don't mind.

10 A. Sure.

11 Q. Can we -- I'm going to show you P65. If we could
12 zero in on Pulaski.

13 Mr. Bearden, this is the Pulaski county from the 2011
14 State House map. Is that right?

15 Should we zoom it back out for a sec?

16 A. From the 2011 if you -- I mean, if you say it is,
17 I'll -- sure. Okay. Yes. It says 2011 plan.

18 Q. Thank you. Shouldn't have zoomed in so fast.

19 A. That's okay.

20 Q. I want to talk to you about District 38. Can you
21 identify that on the map?

22 A. 38, yes, in North Little Rock.

23 Q. So this is a district that covers Levy and other
24 parts of North Little Rock in Pulaski county. Is that
25 right?

1 A. Yes. That's correct.

2 Q. And this district was won by Carlton Wing in 2020,
3 correct?

4 A. I believe that's correct. Yep.

5 Q. And Representative Wing is a Republican?

6 A. That is correct.

7 Q. And this district is the most democratic-leaning
8 district in the state held by a Republican member. Is
9 that right?

10 A. It could -- I don't know. I don't know if it is the
11 most. I don't know.

12 Q. Is it one of the most democratic-leaning districts in
13 Arkansas held by a Republican member?

14 A. It could be. It is a very competitive district, I
15 would say.

16 Q. By "competitive district," you mean that it's --
17 there are close margins between a Republican and a
18 Democrat candidate. Is that what you mean?

19 A. Well, I would say it's competitive in that it was a
20 Democrat-held seat that was won by a Republican and it was
21 a very close race in the last contested election.

22 Q. That's right. Representative Wing won this district
23 by just 16 votes in 2020. Is that right?

24 A. It was close. I don't know the exact number.

25 Q. You had conversation with Representative Wing about

1 this district. Is that right?

2 A. Yes. Representative Wing met with the Secretary,
3 along with I believe Representative Lowery and Senator
4 English all met at once.

5 Q. Was Secretary Thurston involved in that conversation?

6 A. Yes.

7 Q. Could we put up P65 with P1?

8 Could we actually zoom in on P1 just for a second so
9 Mr. Bearden has the benefit of seeing what that exhibit
10 is? With the header if you don't mind, Stephen. Thank
11 you.

12 So Mr. Bearden, does this look like the 2011 Board of
13 Apportionment map --

14 A. Yes 2021.

15 Q. -- for the State House?

16 A. Yes, sir.

17 Q. Why don't we do a side-by-side of 2011 Pulaski and
18 then 2021 Pulaski?

19 So the equivalent of District 38 in the new map is
20 District 70. Is that right?

21 A. That might -- yes. I assume.

22 Q. So for the new District 70, you -- when you're
23 comparing those two districts, the board, it looks like
24 they expanded the old District 38 at the core of Little
25 Rock and picked up some suburban areas up north. Is that

1 right?

2 A. To the north of the county. I believe that's
3 correct.

4 Q. These suburban areas that they picked up are mostly
5 white. Is that right?

6 A. I don't think it extends to Jacksonville, so it could
7 well be. I'm not familiar with the -- where what the part
8 of that -- part of the county is, if it's white or black.

9 Q. Is it your testimony that the counties north where
10 District 70 has extended are whiter or less white than the
11 areas in North Little Rock where district -- where the old
12 District 38 is?

13 A. It could be.

14 Q. The old District 38 has a BVAP of about 22 percent.
15 Is that right?

16 A. I don't know. I'm not sure what a BVAP is.

17 Q. BVAP refers to black voting age population, so the
18 percentage of -- percentage of folks who are 18 and over
19 based on race.

20 So that old District 38 had a black voting age
21 population of 22 percent or about. Is that right?

22 A. I don't know.

23 Q. Can we call up 8A?

24 And do you see that, Mr. Bearden, District 38?

25 A. Mm-hmm.

1 Q. So that district had black voting age population of
2 about 22 percent, 21.7. Is that right?

3 A. Yes.

4 Q. And if I told you that the new District 70 has a BVAP
5 of about 18 percent in the 2021 plan, does that sound
6 right?

7 A. It could be. I don't know specifically.

8 Q. Could we go to Page 6, Stephen?

9 See where it says, District 70?

10 A. Yes, sir. Yes, sir.

11 Q. So looks like District 70 in the new plan has a BVAP
12 of 17.7 or we can round it up to 18. Is that right?

13 A. Yes.

14 Q. That's about a four percent drop in BVAP in the new
15 District 70 from the old District 38. Is that right?

16 A. Yes.

17 Q. That came directly after an election which
18 Representative Wing won by 16 votes. Is that right?

19 A. That -- yes. Correct.

20 Q. I want to talk now a little bit about the lower delta
21 region.

22 A. Okay.

23 Q. Before I move on to lower delta, did you -- in that
24 meeting with Representative Wing, did you discuss the
25 political makeup of the old District 38 and the fact that

1 he won by such a narrow margin?

2 MS. MERRITT: Objection. Hearsay.

3 THE COURT: Overruled.

4 THE WITNESS: I don't recall the specifics of
5 the -- I mean, it well could have been. I don't recall
6 the specifics of the meeting. It was over a year ago.

7 MR. TOPAZ: Can we call what will be known as
8 Exhibit 110?

9 Your Honor, if I could approach the witness I can
10 provide --

11 THE COURT: Defendants, any objection?

12 MS. MERRITT: I'm sorry. I didn't hear. Could
13 I hear --

14 THE COURT: He just wants to approach the
15 witness and give this to him. I just want to make sure
16 there is no objection to this.

17 MS. MERRITT: No objection.

18 THE COURT: Then, yes.

19 MR. TOPAZ: Thank you, Your Honor.

20 BY MR. TOPAZ:

21 Q. Mr. Bearden, have you taken a look at the exhibit in
22 front of you?

23 A. Yes.

24 Q. So these are your handwritten notes, correct?

25 A. Unfortunately, bad handwriting, but, yes.

1 Q. Mine's not much better.

2 You took these notes contemporaneously during
3 meetings with State House members as part of your work in
4 conjunction with the 2021 redistricting process, right?

5 A. That is correct, yes.

6 Q. So if we go to Page 2 in the top right quadrant. So
7 at the top of that note, Mr. Bearden, it looks like it
8 says, District 38 Wing. Is that right?

9 A. That is correct.

10 Q. So that refers to the old District 38 from the 2011
11 map and Representative Wing, correct?

12 A. That would be correct.

13 Q. So these are notes that you took during a meeting
14 with Representative Wing?

15 A. Yes.

16 Q. And so underneath that says, Levy, most dem-leaning
17 district held by GOP. Is that right?

18 A. That is correct. That's what I wrote.

19 Q. So this is the conversation that you had with
20 Representative Wing about the fact that he won by such a
21 narrow margin in 2020. Is that right?

22 A. Yes. I would say that's what that would be referring
23 to.

24 Q. So it's safe to say that in this meeting with
25 Representative Wing and Secretary Thurston that you

1 discussed the fact that Representative Wing was
2 representing the most democratic-leaning district held by
3 a Republican member. Is that right?

4 A. According to those notes, yes, sir.

5 Q. We can take that down.

6 So now let's talk about the lower delta region.

7 If we can call up P65 again.

8 So again, Mr. Bearden, we're looking at the 2011
9 State House map. Is that right?

10 A. Yes.

11 Q. So I want to talk about those three districts in the
12 bottom right. So that would be Districts 12, 9, and 11.

13 A. Okay.

14 Q. Do you see those?

15 A. Yes, sir.

16 THE COURT: I don't see them. Hold on. Okay
17 I'm with you.

18 MR. TOPAZ: Thank you, Your Honor.

19 BY MR. TOPAZ:

20 Q. District 12 in the current in the 2011 map is a
21 majority black district. Is that right?

22 A. I believe that's correct, yes.

23 Q. District 9 is a heavily white district. Is that
24 right?

25 A. I believe that's correct, yes.

1 Q. And District 11 is something of a swing district. Is
2 that right?

3 A. Yes. It may have a fairly heavy minority population.

4 Q. Why don't we pull up 7C, Page 13? We could pull up
5 the statistics for District 11. Could we include the
6 headers?

7 I'll try to decode to the extent necessary,
8 Mr. Bearden.

9 A. Thank you.

10 Q. If we look at the percent NH 18 plus white.

11 A. Yes.

12 Q. Does that look like it has a white voting age
13 population of about 46 percent?

14 A. Yes.

15 Q. And right next to it, we see percentage 18 plus
16 black. And that has a -- similarly a 46 percent black
17 population. Is that right?

18 A. Yes.

19 Q. And then if we look to the left of the white voting
20 age population, that would be Hispanic voting age
21 population. So that looks like 5.25 percent Hispanic
22 voting age population. Is that right?

23 A. Yes, sir.

24 Q. So return back to those three districts. So we have
25 one majority black district, one majority white district,

1 and one majority minority district that still has a 46
2 percent white voting age population. Is that right?

3 A. Yes.

4 Q. During your time working on redistricting, you had a
5 conversation about District 11. Is that right?

6 A. Meaning did we met with the state representative?
7 Yes.

8 Q. Why don't we go back to Exhibit 110, page 4? If we
9 could pull up the bottom left corner.

10 So that says District 11 there, right?

11 A. Rick McClure. That's not the state representative
12 down there.

13 Q. He's not. It looks like you might have had a
14 conversation with Representative McClure about District
15 11. Is that right?

16 A. Maybe.

17 Q. Do you recall this conversation?

18 A. I don't.

19 Q. So "District 11" is written there, you agree with me,
20 right?

21 THE COURT: Can I stop you for a second? For
22 the record, can you tell us who Rick McClure is?

23 THE WITNESS: Well, he's a state representative,
24 but I'm trying to think. He's not in that part of the
25 state.

1 THE COURT: Okay.

2 BY MR. TOPAZ:

3 Q. Mr. Bearden, I asked you whether that says "District
4 11" on that note. Is that right?

5 A. I believe it does. Yes, sir.

6 Q. In fact, if we look down to about two-thirds of the
7 way down that note, that says "52 vote margin," right?

8 A. Yes, sir.

9 Q. So you were referring to the fact that in 2020, Mark
10 McElroy, a white Republican, beat Don Glover, a black
11 Democrat, by 52 votes. Is that right?

12 A. It could be, yes.

13 Q. Why don't we call up Exhibit 111?

14 MR. TOPAZ: Ask permission to approach again,
15 Your Honor.

16 THE COURT: Without objection?

17 MS. MERRITT: No, Your Honor.

18 BY MR. TOPAZ:

19 Q. If we could highlight that margin.

20 So Mr. Bearden, these are the election results for
21 District 11 in 2020. Is that right?

22 A. Yes.

23 Q. And so looks like Mark McElroy received 4,854 votes,
24 right?

25 A. Yes.

1 Q. And Democrat Don Glover, African-American, received
2 4,802. Is that right?

3 A. Yes.

4 Q. So it looks like in 2020, McElroy won by a 52 vote
5 margin, right?

6 A. Yes.

7 Q. That's what you wrote in your notes, right?

8 A. Yes.

9 Q. Return to Exhibit 110.

10 Then right below 52 vote margin, you wrote the word
11 "minority majority district." Is that right?

12 A. Yes.

13 Q. And it looks like you had that one right because we
14 just determined that District 11 from the 2011 map is 46
15 percent black and more than five percent Hispanic. Is
16 that right?

17 A. Yes.

18 Q. So here you're referring to the fact that District
19 11, the white Republican won by 52 votes over a black
20 Democrat and that it is a minority majority district. Is
21 that right?

22 A. Yes. I was aware of that.

23 Q. Looks like in your notes, you note that there is some
24 population loss in the district maybe --

25 A. I think it looks like --

1 Q. -- 3,000 people loss. Is that right?

2 A. Correct.

3 Q. And then right underneath that you write, "grow
4 west." Is that right?

5 A. Yes.

6 Q. Then you write that the district could take in Star
7 City.

8 A. Correct.

9 Q. At the very bottom you suggest that the district
10 could take in Hamburg. Is that right?

11 A. That's Hamburg with a question mark, yes.

12 Q. Star City has about 1500 white residents and about
13 400 black residents. Is that right?

14 A. I'm not aware of an exact number.

15 Q. Is Star City a heavily white area?

16 A. I haven't been to Star City in 20 years, so I don't
17 know if I could tell you if it is or isn't.

18 Q. I show you Exhibit 112.

19 MR. TOPAZ: Permission to approach, Your Honor.

20 THE COURT: Granted.

21 BY MR. TOPAZ:

22 Q. So if we look at the first page of that exhibit,
23 Mr. Bearden, looks like the Census Bureau data on Star
24 City, Arkansas. Is that right?

25 A. Yes.

1 Q. Then if we go to the data tab, which I believe would
2 be Page 2 of your exhibit, looks like there are 1,561
3 people who identify as white alone in Star City. Is that
4 right?

5 A. Correct.

6 Q. And looks like there are 402 folks in Star City who
7 identify as black or African-American alone. Is that
8 right?

9 A. Correct.

10 Q. You can take that down.

11 Is that Star City which you reference in your note,
12 right?

13 A. Yes.

14 Q. You also reference ham Hamburg, correct?

15 A. Yes.

16 Q. Hamburg has about 1500 white residents and 600 black
17 residents?

18 A. Again, I don't know the racial breakdown of the city
19 of Hamburg either.

20 Q. Let's do it quickly together.

21 MR. TOPAZ: I would approach, Your Honor, with
22 Exhibit 113.

23 THE COURT: Okay.

24 BY MR. TOPAZ:

25 Q. Similarly looking exhibit. Got the census data here

1 for Hamburg in Arkansas. Is that right?

2 A. Yes.

3 Q. And then if we go to second tab, looks like we've got
4 more than 1500 folks who identify as white alone on the
5 census data in Hamburg. Is that right?

6 A. Yes.

7 Q. Then we got 630 black folks?

8 A. Yes.

9 Q. We can take that down.

10 So as it pertains to the old District 11 --

11 Can we call up 65 side-by-side 1?

12 So again, Mr. Bearden, we've got the 2011 map on the
13 left and the 2021 map on the right. Does that make sense?

14 A. Yes.

15 Q. So maybe we can zoom in on same region 9, 11, 12 in
16 2011 and -- there we go.

17 A. Yep.

18 Q. So you see the district -- old District 11 in 2011
19 map corresponds to that district at the bottom there on
20 the right, District 94, correct? Excuse me. District 95
21 on the right.

22 A. Yeah I see.

23 Q. You were catching my mistake.

24 A. That's okay.

25 THE COURT: Counsel, can I ask you on the map on

1 the left to move it down a little bit?

2 That's perfect.

3 BY MR. TOPAZ:

4 Q. So you did in fact -- well, strike that.

5 As it pertains to the old District 11, which is the
6 new District 95, you -- the Board of Apportionment did in
7 fact move that district west, correct?

8 A. That's correct. They moved it west into more of
9 Ashley county.

10 Q. That was consistent with what you wrote in your note
11 that they should move the district west. Is that right?

12 A. Yeah. What I don't know is if Hamburg wasn't already
13 in there. It may not have been, but it's hard to tell on
14 the two maps. They're two different maps. It did come
15 west, yes, sir, but I think what it may have taken in is
16 Crossett actually.

17 Q. Now, the new District 95 has a BVAP, black voting age
18 population, of less than 35 percent. Is that right?

19 A. I don't know.

20 Q. Can we show 7C, Page 11? Can we zoom on 94 and 95?

21 So you see the header where it says, "percentage 18
22 plus black," Mr. Bearden?

23 A. Yes.

24 Q. So looks like 95 has a BVAP of 34 percent. Is that
25 right?

1 A. Correct.

2 Q. And it's got a -- and that is down from 46 percent in
3 the old District 11. Is that right?

4 A. If you show me that before and that's what it said,
5 yes. I don't remember.

6 Q. Now the old -- now the new District 95 has a white
7 voting age population of more than 59 percent. Is that
8 right?

9 A. Yes.

10 Q. So by moving west, the old District 11 went from
11 majority minority swing district to a solidly majority
12 white district with the new District 95. Is that right?

13 A. Yes. I believed it would have had to come west to
14 pick up population.

15 Q. So in this region, we went from a majority black,
16 majority minority swing district and a majority white
17 district to two majority white districts and one majority
18 black district. Is that right?

19 A. I believe that's correct.

20 MR. TOPAZ: Pass the witness, Your Honor.

21 THE COURT: Thank you, Mr. Topaz.

22 Defendants.

23 CROSS-EXAMINATION

24 BY MS. MERRITT:

25 Q. Good evening, Mr. Bearden. My name is Jennifer

1 Merritt. I'm from the Attorney General's office. I just
2 have a few follow-up questions.

3 On your direct examination you were shown a copy of
4 the board's redistricting criteria that were listed on the
5 website.

6 Do you remember that?

7 A. Yes, ma'am.

8 Q. Do you know and can you tell the Court whether any of
9 the redistricting criteria that were listed on the website
10 were any more important to the Secretary of State than any
11 of the others when he was evaluating the plan?

12 A. I don't know that one was more important than the
13 other. I would say there was -- from the previous
14 redistricting, there was a huge disparity [sic] in
15 districts in northwest Arkansas which had rapid growth
16 which very quickly outgrew the district. So there was
17 some thought to trying to rebalance and make districts as
18 even as possible with population.

19 Q. So population -- equalizing the population?

20 A. Yes.

21 Q. Was that of primary importance then to the Secretary?

22 A. It was important to the Secretary.

23 Q. And in terms of the geographic considerations, was
24 communities of interest and maintaining communities of
25 interest of concern to the Secretary?

1 A. Yes. Many of the state representatives we visited
2 with talked about what was important in their community.
3 Perhaps maybe one town had a Walmart the other didn't have
4 a Walmart. So you know there was a connection because
5 folks from their area went to another part of the district
6 to shop at Walmart, things like that.

7 Q. Was balancing the various goals and criteria a
8 delicate exercise?

9 A. Yes.

10 MR. TOPAZ: Objection. Leading.

11 THE COURT: Overruled, but let's try not to
12 lead.

13 MS. MERRITT: Yes, Your Honor.

14 BY MS. MERRITT:

15 Q. How did the board and how did the Secretary -- you
16 worked for the Secretary, right?

17 A. Yes, ma'am.

18 Q. And how did the Secretary and the Secretary's staff
19 attempt to balance those difference criterion goals?

20 A. Again, we met with I think 130 of the 135 members of
21 the General Assembly in the Secretary's office, including
22 all the members of the Democratic Party. There were four
23 or five Republicans that I think did not come to the
24 meeting for various reasons. He wanted to take their
25 thoughts into play. He also had staff that attended all

1 of eight of the public meetings to take input from the
2 various communities around the state.

3 Q. And how did the Secretary feel about the plan that
4 was adopted? Is he happy with it?

5 A. Yes.

6 Q. You talked a lot with my friend across the table here
7 about District 11. Are you familiar with what happened
8 with Mr. McElroy's district and the fact that his district
9 is now actually majority black, 53 percent under the
10 board's plan?

11 A. His district was consolidated with the representative
12 from Helena and Representative Murdock. They were merged
13 into one district, two Republicans and one Democrat
14 member.

15 Q. Right. So the Republican winner of that district is
16 now actually in a majority black district under the
17 board's plan. Is that right?

18 A. Both of the incumbent Republicans are now in majority
19 black district, yes.

20 MS. MERRITT: Thank you. I don't have anymore
21 questions. Have a good evening.

22 THE COURT: Any redirect?

23 MR. TOPAZ: No redirect, Your Honor.

24 THE COURT: Thank you, sir, for testifying. I
25 appreciate it. I'm sure I speak for both parties when I

1 say we're sorry you had to do this on a Saturday, but we
2 appreciate you doing it.

3 THE WITNESS: Thank you, Judge. Am I dismissed?

4 THE COURT: You're out of here.

5 Okay. I think we are going to adjourn for the night.
6 I will obviously give everybody a chance to talk about any
7 administrative issues they would like to, but the plan
8 will be to restart at 9 a.m. Monday morning.

9 Plaintiffs, you all have anything you want to talk
10 about administratively?

11 MR. SELLS: Just scheduling-wise, Your Honor.
12 It would be helpful to have some idea of what you're
13 thinking for Monday and for closing.

14 THE COURT: So I guess the question becomes, how
15 many witnesses do you all have left? I have -- I don't
16 have the witness sheet in front of me. So are you all
17 almost done or how many do you have left?

18 MR. SELLS: Three witnesses, Your Honor. I
19 think we'll probably finish with them by 11 a.m. Monday
20 morning.

21 THE COURT: Defendants, what do you all have in
22 terms of witnesses?

23 MS. MERRITT: We have two and they -- maybe two
24 hours maybe. So that's my best guess, Judge.

25 THE COURT: So I take it both parties think that

1 we can finish the witnesses on Monday.

2 Is that accurate, Mr. Sells?

3 MR. SELLS: Absolutely.

4 THE COURT: Defendants?

5 MS. MERRITT: I think we could, Judge, yes.

6 THE COURT: Now, I guess then Mr. Sells brings
7 up a good question about closing/legal argument.

8 Part of this I'd like to know how you all feel. I
9 will tell you that I am going to have on a wide range of
10 topics a large number of questions for both parties when
11 we get into legal argument. We could do this in one of
12 two ways, and quite frankly I'm happy to do it either way.

13 We could have a sort of formal closing argument on
14 Monday in the sense of you all could go over your evidence
15 -- evidence just like you would with a jury and, you know,
16 tell me why that means you win, and the defendants can do
17 the same. And then on Tuesday I can start asking
18 questions I have and you all can give me legal argument.

19 On the other hand, we can combine sort of closings
20 into legal argument, the difference being I'm going to
21 interrupt you a whole lot to ask questions.

22 Let me ask Mr. Sells for the plaintiffs, what would
23 you all prefer? Do you want a sort of shot at just a full
24 closing like you would give in a trial and then after that
25 we'll do legal argument the next day, or do you want to

1 wrap the closing into legal argument with the caveat being
2 that I'm going to interrupt your train of thought a bunch?

3 MR. SELLS: We haven't thought about it in those
4 terms, Your Honor. I would like to check with my
5 co-counsel.

6 THE COURT: You may. For sure.

7 MR. SELLS: And let me interject another
8 question because this may be related. We were going to
9 ask whether it's okay with you if we split up parts of the
10 closing, in particular we have in mind splitting off the
11 private right of action piece of it. So if that would
12 be --

13 THE COURT: Not only may you, but I will tell
14 you that in terms of whenever we decide to do legal
15 argument, I am going to want to do this section by
16 section. I'm going to want to do a standing/private right
17 of action legal argument and then a merits legal argument.
18 It's just going to be easier in my head for me to sort of
19 cabin things that way in a way that let's me think about
20 it. So that you can certainly divide it and you can do
21 it, quite frankly, in your closing and/or during legal
22 argument.

23 MR. SELLS: Thank you for that. And with that,
24 we'll confer for a moment. I'm sure the defendants will.

25 THE COURT: Why don't you all take -- each of

1 you, why don't you take five minutes and confer?

2 I will tell you this. If any side wants a formal
3 closing before legal argument, I'm going to allow it. So
4 that's sort of, you know, if you guys want it, I'm going
5 to say, okay, let's do it that way. If you all want it,
6 I'm going to say, okay, let's do it that way. But if both
7 of you just want to go into the legal arguments, then we
8 can just do that.

9 Go ahead.

10 (Discussion held off the record.)

11 THE COURT: Mr. Sells, what have you got for me?

12 MR. SELLS: Having conferred with my co-counsel,
13 we would indeed like to do a formal close, a more
14 traditional close, however you described it, and then do
15 the legal argument thereafter.

16 THE COURT: I think that makes sense. My
17 inclination then is to have the formal close on Monday
18 afternoon and do argument on Tuesday.

19 Is there any concerns with that, Mr. Sells?

20 MR. SELLS: No.

21 THE COURT: Okay. Defendants, do you all have
22 any concerns with that schedule?

23 MR JACOBS: No, Your Honor.

24 THE COURT: Then that's what we'll do.

25 Mr. Sells, anything else administratively?

1 MR. SELLS: No, Your Honor.

2 THE COURT: Defendants, anything else
3 administratively?

4 MS. MERRITT: No, Your Honor.

5 THE COURT: We're adjourned.

6 Let me, by the way, say one thing, which is that I am
7 in awe of the plaintiffs' technology guy. If you would
8 like to just sort of stay here with us afterwards, you're
9 more than welcome to.

10 (Proceedings recessed at 7:12 p.m.)

11 * * * * *

12 REPORTER'S CERTIFICATE

13 I, Valarie D., Flora, CCR, certify that the foregoing
14 is a correct transcript of proceedings in the
15 above-entitled matter.

16 Dated this the 7th day of February, 2022.

17

18 /s/ Valarie D. Flora, CCR

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20 United States Court Reporter

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